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Federal Register

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

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

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 271 and 278

[Amdt. 391]

RIN 0584–AB90

Food Stamp Program: Revisions to the Retail Food Store Definition and Program Authorization Guidance

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule implements provisions of the Food Stamp Program Improvements Act of 1994 to revise the criteria for eligibility of firms to participate in the Food Stamp Program as retail food stores, and to provide for notification to such firms of eligibility criteria for participation in the Food Stamp Program. The intended effect of this rule is to ensure that food stamp recipients continue to have adequate access to retail food stores where they can purchase a wide variety of nutritious food items, intended for home preparation and consumption, that meet their daily food needs, and to clarify procedures and eligibility requirements for authorizing firms to participate in the Food Stamp Program as retail food stores.

This rule also reinserts part of a sentence inadvertently removed from the regulations by an earlier rule, and replaces references to the Secretary of Health and Human Services with references to the Commissioner of the Social Security Administration. In addition, a technical, non-substantive correction is being made to three citations in this final rule.

DATES: Provisions in this rule are effective and will be implemented February 12, 2001.

FOR FURTHER INFORMATION CONTACT: Questions regarding this final rule should be addressed to Karen Walker, Chief, Redemption Management Branch, Benefit Redemption Division, Food and Nutrition Service, 3101 Park Center Drive, Alexandria, Virginia 22302–1594, or by telephone to (703) 305–2418. A regulatory impact analysis has been prepared for this rule. You may request a copy of the analysis by contacting us at the above address.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This final rule has been determined to be significant and therefore was reviewed by the Office of Management and Budget under Executive Order 12866.

Executive Order 12372

The Food Stamp Program is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the final rule and related Notice to 7 CFR part 3015 subpart V (48 FR 29115, June 24, 1983), this Program is excluded from the scope of the Executive Order 12372 which requires inter-governmental consultation with State and local officials.

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612). Shirley R. Watkins, the Administrator of the Food and Nutrition Service (FNS), has certified that this rule will not have a significant economic impact on a substantial number of small businesses. Based on FNS data, less than 92,000 of the 157,000 (58%) firms not corporately owned or operated that are participating in the Food Stamp Program are estimated to be small businesses based on the Small Business Administration's (SBA) guidelines. Just over 13,400 (8.5%) are considered to be specialty stores that have self declared annual gross sales of $5 million or less. Slightly more than 78,000 are grocery stores and convenience stores that have self declared annual gross sales of $20 million or less. In applying the requisite SBA definition of these small stores, it is apparent that a large number of small businesses will be affected by this regulation. Although a large number of small businesses will be affected, the agency does not anticipate that the impact will be significant for reasons explained below. Throughout the development of this rule special consideration was given to its impact on small businesses; primarily small and medium grocery stores, convenience type stores, farmers' markets, rolling stores, and specialty stores. A requirement in the proposed rule that a firm have a minimum amount of wholesale purchases was not included in this final rule, because it might have unfairly impacted small rural businesses.

The final rule will allow the vast majority of small businesses interested in participating in the Food Stamp Program (FSP) to do so. It may, however, have a negative impact on a small number of firms that do not effectuate the purposes of the FSP or that do not meet the eligibility requirements. The final rule fully implements the statutory eligibility requirements. Criterion A requires that a firm must offer for sale on a continuous basis a variety of food items in each of four statutorily defined staple food groups, with perishable foods in at least two of those food groups. The rule defines several terms included in the statute—''continuous basis'', ''perishable'' and ''variety''. The rule defines ''continuous basis'' as ''* * * on any given day of operation''. It defines ''perishable'' as the term was described in the House Report accompanying the statute, except that it allows frozen foods to qualify as a perishable item specifically to help small businesses meet that requirement. And, although FNS initially considered requiring a number greater than three, the final rule defines ''variety'' as only three different types of food items in each of the four staple food categories. The rule implements Criterion B as the statute defines it.

The law has been in effect since late 1994. Firms may fail to be eligible to participate in the FSP for a variety of reasons. Some firms fail to be reauthorized because they are no longer open for business or have changed the nature of their business; it is not always due to failure to meet one part of the eligibility criteria. FSP authorization data covering Fiscal Years 1994–1998, illustrates that only 2,866 firms of the 168,078 firms evaluated, or 1.7%, failed to be eligible for program participation

under Criterion A or B. During Fiscal Year 2000, only 166 or 0.7% of the 23,088 firms being reauthorized failed to meet either Criterion A or B. Moreover, once the final regulations go into effect, the number of firms that fail to be authorized or reauthorized may decline further since FNS field reviewers may have applied the current standards somewhat inconsistently. That is, some field reviewers may have interpreted the requirements for ''variety of foods'' in different ways than the regulation proposed here.

Before firms will be denied authorization under this rule for failing to meet the eligibility criteria, they will have the opportunity to provide documentation to prove they are eligible. Firms that are denied authorization by FNS have the right to appeal that determination through an administrative review and a judicial review. Authorized firms are allowed to continue participating in the FSP throughout the appeals process. A new store that is denied authorization by FNS also has the right to appeal, and should the appeals process overturn FNS' eligibility determination, the store is authorized immediately.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions, or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless so specified in the **EFFECTIVE DATE** paragraph of this preamble. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted. In the FSP, the administrative procedures are as follows: (1) For Program benefit recipients—State administrative procedures issued under to 7 U.S.C. 2020(e)(1) and 7 CFR 273.15; (2) for State agencies—administrative procedures issued pursuant to 7 U.S.C. 2023 set out at 7 CFR 276.7 for rules related to non-quality control (QC) liabilities or 7 CFR part 283 for rules related to QC liabilities; (3) for Program retailers and wholesalers—administrative procedures issued pursuant to 7 U.S.C. 2023 set out at 7 CFR 278.8.

Unfunded Mandate Reform Act of 1995

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA), Pub.L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and tribal governments and the private sector. Under section 202 of the UMRA, FNS 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 or tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates under the regulatory provision of Title II of the UMRA for State, local and tribal governments or the private sector of $100 million or more in any one year. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 13132

FNS has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. As such, FNS has determined that the rule does not contain policies that have federalism implications as defined in the order and, consequently, a federalism summary impact statement is not required.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, this final rule includes information collection burdens imposed on retailers applying for participation in the FSP.

There are currently 3 forms approved under OMB No. 0584–0008. Together these forms are used by retailers, wholesalers, meal services, certain types of group homes, shelters, and state-contracted restaurants, to apply to FNS for authorization to accept and redeem food stamp benefits. Form FNS–252, Food Stamp application For Stores; Form FNS–252–2, Application to Participate in the Food Stamp Program for Communal Dining Facility/Others; and, Form FNS–252R, Food Stamp Program Application For Stores-Reauthorization. Section 9(c) of the Food Stamp Act of 1977 (FSA), as amended, 7 U.S.C. 2011–2036, provides the necessary authorization(s) to collect the information contained in these forms. (7 U.S.C. 2018(c)).

A provision in § 278.1(b)(1)(ii) of the proposed rule requiring certain stores to have at least $30,000 in annual staple food wholesale purchases in order to qualify for participation in the program is not included in the final rule. This requirement was intended to help measure whether or not a store offered a variety of staple foods on a continuous basis, as required by law, and would have been captured through a Yes/No check-box on the application. Under the proposed rule, most applicants would have simply checked the appropriate box which would not have increased burden time. However, a few stores would need to check their records to document sales or wholesale purchase information if their eligibility was not clear, and this would increase the hour burden estimates approved under OMB No. 0584–0008. Even though the $30,000 wholesale threshold requirement is not included in this final rule, a small number of stores will still need to document their sales or wholesale purchases in order to prove their eligibility. The burden estimates for this that were included in the proposed rule and approved by the Office of Management and Budget under OMB No. 0584–008, have not been changed in the final rule.

An estimated 5% of stores using Form FNS–252 and FNS–252R will incur an additional 10 minutes of completion time if required to provide documentation. Thus, it is estimated that the average completion time for the affected stores using Form FNS–252 will increase from 12 to 12.5 minutes. The average completion time for affected stores using Form FNS–252R will increase from 7 to 7.5 minutes. We estimated that the total burden for this will be an additional 766 hours annually. Interested parties should refer to the preamble of the proposed rule for details on the methodologies used to determine the averages.

The amount of the net decrease as approved by OMB is less than was proposed in the June 30 notice because the June 30 estimates were based on 1997 data. The estimates approved by OMB through June 30, 2002 are based on 1999 data and reflect a net decrease in overall burden hours from 15,777 to 14,812 hours; a decrease of 965 hours annually.

Comments were solicited for 60 days on the proposed decrease in burden hours. No comments were received on the information collection proposal and the estimates were submitted to OMB for approval. The burden estimates as currently approved by OMB under OMB No. 0584–0008 through June 30, 2002 are shown on the following chart:

Affected Public: Food Retail and Wholesale Firms, Meal Services Programs, certain types of Group

Homes, Shelters, and state-contracted Restaurants.

Estimated Number of Respondents: 62,621.

Estimated Number of Responses per respondent: 1.

Estimated Time per Response: .236536.

Estimated Total Annual Burden: 14,812.

Title	Number of respondents	Responses per respondent	Total annual responses	Burden hours per response	Total annual burden hours
Form FNS–252	20,580	1	20,580	.4,583	9,432
Form FNS–252–2	1,673	1	1,673	.2,000	334
Form FNS–252R	40,368	1	40,368	.1,250	5,046
Totals	62,621		62,621		14,812

Background

On June 30, 1999, the Department published a proposed rule (64 FR 35082) to implement sections 201 and 202 of the Food Stamp Program Improvements Act of 1994, Pub. L. 103–225, (hereinafter Pub. L. 103–225), enacted on March 25, 1994. We proposed to revise the eligibility requirements in sections 3(k)(1) and (u)(1) of the FSA for retail food store participation in the FSP. (7 U.S.C. 2012(k)(1) and 2012(u)(1)).

Under current regulations found at 7 CFR 271.2, a ''retail food store'' is defined as having more than 50 percent of its total eligible food sales in staple foods intended for home preparation and consumption. Provisions of Pub. L. 103–225 require that establishments: (1) Sell food intended for home preparation and consumption; and (2) meet one of two eligibility criteria (Criterion A or B) in order to participate in the FSP as a retail food store. A firm that meets the eligibility requirements of Criterion A (assuming compliance with other restrictions) is not required to also meet those of Criterion B, and vice versa.

This rule revises the definition of ''retail food store'' and ''staple foods'' to conform to the statutory changes. It also defines three new terms—''continuous basis,'' ''perishable,'' and ''variety of foods,'' as well as clarifies the meaning of the term ''total retail sales volume''—used in the revised statutory definition of a ''retail food store.''

Technical Amendments

This rule reinserts language to 278.1(q) that was inadvertently dropped in a regulation published in the **Federal Register** at 61 FR 68119 on December 27, 1996, titled ''Revisions in Use and Disclosure Rules Involving the Sharing of Information Provided by Retail and Wholesale Concerns with Other Federal and State Agencies.'' It also makes technical changes, replacing two references to the Secretary of Health and Human Services in 278.1(q)(3)(iii) with references to the Commissioner of the Social Security Administration.

In addition, in §278.6, a change is being made to correct a technical error in current regulations that does not result in a substantive program change. The amendment made here corrects two incomplete citations in §278.6(a) and, correspondingly, §278.6(g)(3).

The Department encouraged all interested parties to comment on the provisions set forth in the proposed rule published. Comments were received from two retail trade/interest groups, one State government agency, and one Federal government agency. The major concerns raised by the commentors are discussed below. Revisions in Definitions and Eligibility Criteria Involving Retail Food Stores (7 CFR 271.2 and 7 CFR 278.1)

Eligibility Requirements Under Criterion A

Section 3(k)(1)(A) of the FSA requires that to be eligible to accept food stamp benefits, an establishment or house-to-house trade route must sell food intended for home preparation and consumption and offer for sale on a continuous basis, a variety of staple foods in each of the four staple food categories, as specified in section 3(u)(1) of the FSA, including perishable foods in at least two of the four categories. The four staple food categories are: (1) Meat, poultry, or fish; (2) bread or cereals; (3) vegetables or fruits; and (4) dairy products. To implement this requirement, the proposed rule defined three new terms not defined by statute—''continuous basis,'' ''perishable'' and ''variety of foods''—that are used in the revised statutory definition of a retail food store under Criterion A. Comments were received on all three of these proposed definitions.

Continuous Basis

The law requires stores authorized to participate in the FSP under Criterion A to offer staple foods in the four required categories on a continuous basis. Because the Department cannot be expected to visit each authorized store on a regular basis to enforce this provision, an alternative way of measuring this, based on a store's annual wholesale purchases, was developed. The proposed rule established a minimum threshold of $30,000 in annual wholesale purchases which could be used to determine that a store offered a variety of staple foods on a continuous basis.

Comments were received from all four commentors on this provision, one in support of it, one recommending a much larger minimum requirement, and two in opposition to it. The commentor supporting this provision said the proposed threshold of $30,000 would ensure that participating stores have a sufficient depth of stock to achieve the goals of the FSP without eliminating legitimate grocers from program participation. However, this commentor did not believe all firms participating or applying to participate in the FSP should be routinely required to document annual wholesale purchases.

Another commentor suggested the threshold be increased to a minimum of $100,000 in annual wholesale purchases. The Department considered requiring a higher threshold and concluded that increasing the minimum threshold by such a large amount would have a negative impact on some small stores that provide food stamp recipients access to nutritious foods.

Two commentors opposed the proposed definition of ''continuous basis.'' One commentor said recipients might be hurt if stores are forced out of the FSP, and said Congress changed the law to expand the accessibility of food supplies. This commentor also said that ''continuous basis'' should be defined simply as uninterrupted or constant. The Department agrees that ''continuous basis'' should mean constant or uninterrupted. Accordingly, we have changed the proposal to require stores to have the required amount of staple foods ''on any given day.''

The other commentor opposing the new threshold said the Department did

not adequately address the impact of this threshold on small stores in the proposed rule and expressed concern that some small convenience-type stores would not be able to meet this requirement. The Department did analyze the impact of the proposed rule, and referred to the impact in the preamble of the proposed rule.

The law allows store eligibility determinations to be based on a variety of measures, including a review of sales and purchase records when necessary. Determining whether or not a store is able to offer the required foods on a continuous basis can be based on this information as well as on store visits. Meeting a minimum threshold is not an accurate measure of continuous basis. Therefore, the requirement under Criterion A that authorized stores have a minimum of $30,000 in annual wholesale purchases was removed from the final rule.

Perishable Foods

The statute requires stores eligible to participate in the FSP under Criterion A to stock perishable foods in at least two defined staple food categories. The Department did not establish a minimum number of perishable foods required. We proposed to define ''perishable foods'' as frozen, refrigerated or fresh foods that will spoil or deteriorate in quality within two to three weeks. This definition was based on language in H. Rep. No. 103–352, in the section titled ''Purpose and Need'' that stated ''* * * most fresh foods spoil or suffer a significant deterioration in quality within two to three weeks.'' The Department included frozen foods in its definition of perishable foods, even though they are typically not considered to be fresh, because some small stores with limited customers may not be able to afford to offer fresh or refrigerated foods that will spoil within a few days or weeks.

One comment opposing the definition of ''perishable foods'' was received by the Department. The commentor generally opposed the definitions of all new statutory terms that were not defined in the statute. The Department believes minimum regulatory standards are necessary to ensure that stores understand the program eligibility requirements and that eligibility determinations are evaluated in a uniform manner throughout the country. The Department believes the definition set forth in the rule is fair and reasonable; therefore, the proposed definition of perishable foods was not changed.

Variety of Foods

To be eligible to participate in the FSP under Criterion A, the law requires stores to have a variety of food items in each of the four staple food categories. H. Rep. No. 103–352 in the section titled ''Purpose and Need'' stated that authorized stores should ''carry an ample supply of items in each category'' to ensure that food stamp recipients can purchase an ''ample selection of foods in each of the four (staple food) categories.'' The rule defines ''variety of foods'' in such a way that will ensure that stores offer for sale a minimum selection of foods. The definition stipulates that a minimum of three different varieties of foods in each of the four defined staple food categories would be required to meet FSP eligibility guidelines under Criterion A.

One commentor opposed this minimum requirement because the proposed rule did not appear to explain or was unclear with regard to how it was derived. Another commentor opposing this requirement said it was arbitrary and will ''* * * lead to bizarre and most likely unintended results.'' The Department proposed the lowest number that could reasonably be considered to meet the requirement that a ''variety'' of food items be available to FSP recipients. The Department believes this reflects the intent of the law which is to ensure that food stamp recipients continue to have adequate access to an supply of nutritious foods.

The definition of ''variety'' also includes two additional clarifications to ensure that food stamp recipients would be able to select from an ample variety of staple foods. One clarification would not allow similar type foods to be counted as different varieties. For example, skim milk, whole milk and chocolate milk would not meet the definition of ''variety'' under the dairy category; however, milk, cheese and butter would meet the proposed definition of variety. The Department received three comments on this provision, one supporting and two opposing it. The commentor supporting this clarification noted that the proposed rule provides examples of what would not be considered ''variety,'' but did not provide examples of what ''variety'' would be and suggested the final rule include such examples. The Department agrees with this and has included examples of variety under this provision in the final rule.

The Department received two comments opposing this clarification of ''variety.'' One of the commentors suggested that ''variety'' should simply mean ''having different forms or types.'' The Department is concerned that such a definition would not allow FNS to make uniform eligibility determinations throughout the country, and would not provide stores a clear understanding of FSP eligibility requirements. The Department believes this clarification is reasonable and should not be difficult for stores to meet; therefore, the definition was not changed.

The rule also clarifies that different brands and packaging cannot be considered ''variety'' for the same reasons stated above. The Department received one comment opposing this provision. The Department believes this clarification is necessary because, without it, a store could, for example, meet the fruit or vegetable category requirements with canned peaches, frozen peaches, and fresh peaches, or it could satisfy the dairy category with three different brands of ice cream. The Department believes that judging variety based on packaging and brands could limit the selection of food stamp households to only one type of food item in each category, and that would not constitute an ample variety as envisioned in the law.

The Department proposed to further clarify that processed food items with multi-ingredients cannot qualify in more than one staple food category. Such foods will generally be counted in a staple food category based on their main ingredient. For example, when determining store eligibility, the Department will consider macaroni and cheese to be a pasta and, as such, will be included in the bread or cereals category; it will not be also counted in the dairy category.

One comment opposing this provision was received by the Department, which expressed the view that this clarification was a misinterpretation of the statute. The commentor suggested that it should be possible for a pepperoni pizza to count toward meeting all four staple food categories. The Department believes that without this clarification, a store having only three different food items could qualify under Criterion A, and such a small number of food items would not provide an ample variety as envisioned in the law. Therefore, the proposed clarifications were not changed.

Eligibility Requirements Under Criterion B

The eligibility requirements under this criterion are found in section 3(k)(1)(B) of the FSA and require a store to sell food for home preparation and consumption and have more than 50 percent of its total sales volume in

staple food sales. This is similar to current rules. However, rather than requiring a firm to have more than 50 percent of its *total eligible food sales* in staple foods, the new statutory provision requires that more than 50 percent of the firm's *total sales* be in staple food sales. The proposed rule made this change clear by defining total sales as ''total gross retail sales,'' which means all retail sales of the firm, including food and non-food merchandise, as well as services such as rental fees and entertainment income.

Two comments were received on this provision. Both commentors opposed the change from ''total eligible food sales'' to ''total gross retail sales.'' The Department believes the commentors are confused about the total sales requirement under Criterion B. This was a statutory change, not a regulatory change; therefore, this provision in the rule was not changed.

List of Subjects

7 CFR Part 271

Administrative practice and procedure, Food stamps, Grant programs—social programs.

7 CFR Part 278

Administrative practice and procedure, Banks, Banking, Claims, Food stamps, Groceries—retail, Groceries, General line—wholesaler, Penalties.

Accordingly, 7 CFR parts 271 and 278 are amended as follows:

1. The authority citation for parts 271 and 278 continues to read as follows:

Authority: 7 U.S.C. 2011–2036.

PART 271—GENERAL INFORMATION AND DEFINITIONS

2. In § 271.2:

a. Paragraph (1) of the definition of ''Retail food store'' and the definition of ''Staple food'' are revised to read as follows:

§ 271.2 Definitions.

* * * * *

Retail food store means: (1) An establishment or house-to-house trade route that sells food for home preparation and consumption normally displayed in a public area, and either offers for sale, on a continuous basis, a variety of foods in sufficient quantities in each of the four categories of staple foods including perishable foods in at least two such categories (Criterion A) as set forth in §278.1(b)(1) of this chapter, or has more than 50 percent of its total gross retail sales in staple foods (Criterion B) as set forth in §278.1(b)(1) of this chapter as determined by visual inspection, marketing structure, business licenses, accessibility of food items offered for sale, purchase and sales records, counting of stockkeeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in §278.1(b)(1) of this chapter. Entities that have more than 50 percent of their total gross retail sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on-premises consumption, and require no additional preparation, are not eligible for FSP participation as retail food stores under §278.1(b)(1) of this chapter.

* * * * *

Staple food means those food items intended for home preparation and consumption in each of the following food categories: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products. Commercially processed foods and prepared mixtures with multiple ingredients shall only be counted in one staple food category. For example, foods such as cold pizza, macaroni and cheese, multi-ingredient soup, or frozen dinners, shall only be counted as one staple food item and will normally be included in the staple food category of the main ingredient as determined by FNS. Hot foods are not eligible for purchase with food stamps and, therefore, do not qualify as staple foods for the purpose of determining eligibility under §278.1(b)(1) of this chapter. Accessory food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices shall not be considered staple foods for the purpose of determining eligibility of any firm. However, accessory foods that are offered for sale in authorized retail food stores are eligible food items which may be purchased with food stamp benefits.

* * * * *

PART 278—PARTICIPATION OF RETAIL FOOD STORES, WHOLESALE FOOD CONCERNS AND INSURED FINANCIAL INSTITUTIONS

3. In § 278.1:

a. Paragraphs (b)(1)(i) and (b)(1)(ii) are revised;

b. Paragraph (b)(1)(iii) is redesignated as paragraph (b)(1)(v) and revised;

c. Paragraph (b)(1)(iv) is redesignated as paragraph (b)(1)(vi) and a heading is added;

d. New paragraphs (b)(1)(iii) and (b)(1)(iv) are added;

e. The first sentence of paragraph (q)introductory text is revised and a new sentence is added after the first sentence.

f. Paragraph (q)(3)(iii) is amended by removing the words ''Secretary of Health and Human Services'' wherever they appear, and adding in their place the words ''Commissioner of the Social Security Administration''; and,

g. A new paragraph (t) is added.

The revisions and additions read as follows:

§ 278.1 Approval of retail food stores and wholesale food concerns.

* * * * *

(b) * * *

(1) * * * (i) *Retail food store.* (A) An establishment or house-to-house trade route shall normally be considered to have food business of a nature and extent that will effectuate the purposes of the program if it sells food for home preparation and consumption and meets one of the following criteria: Offer for sale, on a continuous basis, a variety of qualifying foods in each of the four categories of staple foods as defined in §271.2 of this chapter, including perishable foods in at least two of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment or route in staple foods (Criterion B).

(B) A retail food store must meet eligibility determination factors which may be based on, but not limited to, visual inspection, sales records, purchase records, counting of stockkeeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry. In determining eligibility, such information may be requested for verification purposes, and failure to provide such documentation may result in denial or withdrawal from the program.

(ii) *Application of Criterion A.* In order to qualify under this criterion, firms shall:

(A) Offer for sale and normally display in a public area, qualifying staple food items on a continuous basis, evidenced by having, on any given day of operation, no fewer than three different varieties of food items in each of the four staple food categories. Documentation to determine if a firm stocks a sufficient amount of required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the requirement has been met. Such documentation can be achieved through store visits and/or verifying information when requested. Failure to provide verifying information when requested or

to cooperate with store visits shall result in the denial or withdrawal of authorization.

(B) Offer for sale perishable staple food items in at least two staple food categories. Perishable foods are items which are either frozen staple food items or fresh, unrefrigerated or refrigerated staple food items that will spoil or suffer significant deterioration in quality within 2–3 weeks; and

(C) Offer a variety of staple foods which means different types of foods, such as apples, cabbage, tomatoes, and squash in the fruit or vegetable staple food category, or milk, cheese, butter and yogurt in the dairy category. Variety of foods is not to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes. Similar processed food items with varying ingredients such as, but not limited to, sausages, breakfast cereals, milk, sliced breads, and cheeses, and similar unprocessed food items, such as, but not limited to, different varieties of apples, cabbage, tomatoes, or squash shall not each be considered as more than one staple food variety for the purpose of determining variety. Multiple ingredient food items intended for home preparation and consumption, such as, but not limited to, cold pizza, macaroni and cheese, soup, or frozen dinners, shall only be counted as one staple food variety each and will normally be included in the staple food category of the main ingredient as determined by the FNS.

(iii) *Application of Criterion B.* In order to qualify under this criterion, firms must have more than 50 percent of their total gross retail sales in staple food sales. Total gross retail sales must include all retail sales of a firm, including food and non-food merchandise, as well as services, such as rental fees, professional fees, and entertainment/sports/games income. However, a fee directly connected to the processing of staple foods, such as raw meat, poultry, or fish by the service provider, may be calculated as staple food sales under Criterion B.

(iv) *Ineligible firms.* Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the Food Stamp Program shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization to participate in the program, and authorized retail food stores found to be ineligible will be withdrawn from program participation. Ineligible firms under this paragraph include, but are not limited to, stores selling only accessory foods, including spices, candy, soft drinks, tea, or coffee; ice cream vendors selling solely ice cream; and specialty doughnut shops or bakeries not selling bread. In addition, firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross retail sales in hot and/or cold prepared foods not intended for home preparation and consumption, shall not qualify for participation as retail food stores under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout. Such firms may qualify, however, under the special restaurant programs that serve the elderly, disabled, and homeless populations, as set forth in paragraph (d) of this section.

(v) *Wholesale food concerns.* Wholesale food concerns, the primary business of which is the sale of eligible food at wholesale, and which meet the staple food requirements in paragraph (b) of this section, shall normally be considered to have adequate food business for the purposes of the program, provided such concerns meet the criteria specified in paragraph (c) of this section.

(vi) *Co-located wholesale food concerns.* * * *

* * * * *

(q) * * * With the exception of EINs and SSNs, any information collected from retail food stores and wholesale food concerns, such as ownership information and sales and redemption data, may be disclosed for purposes directly connected with the administration and enforcement of the Food Stamp Act and these regulations, and can be disclosed to and used by State agencies that administer the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). Such information may also be disclosed to and used by Federal and State law enforcement and investigative agencies for the purpose of administering or enforcing other Federal or State law, and the regulations issued under such other law.* * *

* * * * *

(t) *Periodic notification.* The FNS will issue periodic notification to participating retail stores and wholesale food concerns to clarify program eligibility criteria, including the definitions of ''Retail food store'', ''Staple foods'', ''Eligible foods'', and ''Perishable foods''. At a minimum, such information will be provided to stores at the time of authorization, reauthorization and upon request.

§ 278.6 [Amended]

4. In § 278.6:

a. Paragraph (a) is amended by removing the reference to ''$10,000'' and adding in its place the words ''an amount specified in §3.91(b)(3)(i) of this title'' and removing the reference to ''$20,000'' and adding in its place the words ''an amount specified in §3.91(b)(3)(ii) of this title''; and

b. Paragraph (g)(3) is amended by removing the reference to ''$10,000'' in the last sentence and adding in its place the words ''an amount specified in §3.91(b)(3)(i) of this title''.

Dated: January 5, 2001.

Shirley R. Watkins,

Under Secretary, Food, Nutrition and Consumer Services.

[FR Doc. 01–957 Filed 1–11–01; 8:45 am]

BILLING CODE 3410–30–U

DEPARTMENT OF AGRICULTURE

Farm Service Agency

7 CFR Part 760

RIN 0560–AG 39

Dairy Indemnity Payment Program

AGENCY: Farm Service Agency, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends the authority citation for the Dairy Indemnity Payment Program (DIPP) regulations to cover the expenditure of additional funds appropriated under the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001. The DIPP indemnifies dairy farmers and manufacturers for losses suffered with respect to milk and milk products, through no fault of their own.

EFFECTIVE DATE: January 12, 2001.

FOR FURTHER INFORMATION CONTACT: Elizabeth Hill, Agricultural Program Specialist, Price Support Division, FSA, USDA, STOP 0512, 1400 Independence Avenue, SW, Washington, DC 20250–0512; telephone (202) 720–9888; e-mail address is Elizabeth_Hill@wdc.fsa.usda.gov.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule has been determined to be not significant for purposes of Executive Order 12866 and therefore has not been reviewed by the Office of Management and Budget (OMB).

Federal Assistance Program

The title and number of the Federal Assistance Program, as found in the Catalog of Federal Domestic Assistance,

to which this rule applies are Dairy Indemnity Payments, Number 10.053.

Regulatory Flexibility Act

It has been determined that the Regulatory Flexibility Act is not applicable to this final rule because the Farm Service Agency is not required by 5 U.S.C. 533 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of these determinations.

Environmental Evaluation

It has been determined by an environmental evaluation that this action will have no significant impact on the quality of the human environment. Therefore, neither an environmental assessment nor an Environmental Impact Statement is needed.

Executive Order 12372

This program is not subject to the provisions of Executive Order 12372, which require intergovernmental consultation with State and local officials. See the Notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115 (June 24, 1983).

Executive Order 12988

This rule has been reviewed pursuant to Executive Order 12988. To the extent State and local laws are in conflict with these regulatory provisions, it is the intent of Commodity Credit Corporation that the terms of the regulations prevail. The provisions of this rule are not retroactive. Prior to any judicial action in a court of competent jurisdiction, administrative review under 7 CFR part 780 must be exhausted.

Unfunded Mandates Reform Act of 1995

This rule contains no Federal mandates under the regulatory provision of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) for State, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Paperwork Reduction Act

The amendment to 7 CFR part 760 set forth in this final rule does not contain additional information collections that require clearance by the Office of Management and Budget under the provisions of 44 U.S.C. chapter 35. Existing information collections were approved by OMB and assigned OMB Control Number 0560–0116.

Background

The DIPP was originally authorized by section 331 of the Economic Opportunity Act of 1964. The statutory authority for the program was extended several times. Funds were appropriated for DIPP by the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Act, 1999, (the 1999 Act), Pub. L. 105–277, 112 Stat. 2681, and, more recently, the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2000 (the 2000 Act), Pub. L. 106–78, 113 Stat. 1135, both of which authorized the program to be carried out until the funds appropriated were expended. Most recently, the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001 (the 2001 Act), Pub. L. 106–387, 114 Stat 1549 also appropriated funds and authorized the program to be carried out until the funds are expended. Not all the funds appropriated under the previous Acts have been expended and the remaining funds are still available in addition to the funds appropriated under the 2001 Act.

The objective of DIPP is to indemnify dairy farmers and manufacturers of dairy products who, through no fault of their own, suffer income losses with respect to milk or milk products removed from commercial markets because such milk or milk products contain certain harmful residues. In addition, dairy farmers can also be indemnified for income losses with respect to milk required to be removed from commercial markets due to residues of chemicals or toxic substances or contamination by nuclear radiation or fallout.

The regulations governing the program are set forth at 7 CFR Part 760. This rule makes no changes in the provisions of the regulations. Since the only purpose of this final rule is to revise the authority citation pursuant to the 2001 Act, it has been determined that no further public rulemaking is required. Therefore, this final rule shall become effective upon the date of publication in the **Federal Register**.

List of Subjects in 7 CFR Part 760

Dairy products, Indemnity payments, Pesticides and pests.

Accordingly, 7 CFR part 760 is amended as follows:

PART 760—INDEMNITY PAYMENT PROGRAMS

Subpart—Dairy Indemnity Payment Program

The authority citation for Subpart—Dairy Indemnity Payment Program is revised to read as follows:

Authority: Pub. L. 105–277, 112 Stat. 2681, and Pub. L. 106–78, 113 Stat. 1135, and Pub. L. 106–387, 114 Stat. 1549.

Dated: January 4, 2001.

Keith Kelly,

Administrator, Farm Service Agency.

[FR Doc. 01–1017 Filed 1–11–01; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 00–AEA–04FR]

Amend Class E Airspace: Westminster, MD

AGENCY: Federal Aviation Administration [FAA], DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E airspace at Clearview Airpark (2W2), Westminster, MD. This action is made necessary by the development of a Standard Instrument Approach Procedure (SIAP) based on the Global Positioning System (GPS) at Clearview Airpark. Sufficient controlled airspace is needed to accommodate the SIAP and for Instrument Flight Rules (IFR) operations at the airport. The area would be depicted on aeronautical charts for pilot reference.

EFFECTIVE DATE: 0901 UTC December 27, 2000.

FOR FURTHER INFORMATION CONTACT: Mr. Francis Jordan, Airspace Specialist, Airspace Branch, AEA–520, Air Traffic Division, Eastern Region, Federal Aviation Administration, 1 Aviation Plaza, Jamaica, New York 11434–4809, telephone: (718) 553–4521.

SUPPLEMENTARY INFORMATION:

History

On September 11, 2000 a notice proposing to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) by establishing Class E airspace extending upward from 700 feet Above Ground Level (AGL) at Clearview Airpark, Westminster, MD was published in the **Federal Register** (65 FR 54825). Interested parties were invited to participate in this rulemaking

proceeding by submitting written comments on the proposal to the FAA. No comments to the proposal were received. The rule is adopted as proposed. The coordinates for this airspace docket are based on North American Datum 83. Class E airspace areas designations for airspace extending upward from the surface are published in paragraph 6005 of FAA Order 7400.9H, dated September 1, 2000 and effective September 16, 2000, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be amended in the order.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations (14 CFR Part 71) provides controlled Class E airspace extending upward from 700 ft above the surface for aircraft conducting IFR operations at Clearview Airpark, Westminster, MD.

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 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

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

PART 71—[AMENDED]

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

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

§ 71.1 [Amended]

The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9H, Airspace Designations and Reporting Points, dated September 1, 2000, and effective September 16, 2000, is amended as follows:

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

* * * * *

AEA MD E5 Westminster Clearview Airpark, MD (Revised)

Clearview Airpark, Westminster, MD
(Lat. 39°28′01″N/long. 77°1′.03″W)

Within a 6.2 mile radius of Clearview Airpark and within 1.9 miles each side of the 136° bearing to the airport extending from the 6.2 mile radius to 8.7 miles northwest of the airport. This Class E airspace is effective from sunrise to sunset, daily.

* * * * *

Issued in Jamaica, New York on December 18, 2000.

Franklin D. Hatfield,

Manager, Air Traffic Division, Eastern Region.

[FR Doc. 01–1090 Filed 1–11–01; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 30224; Amdt. No. 2030]

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: An effective date for each SIAP is specified in the amendatory provisions.

Incorporation by reference-approved by the Director of the Federal Register on December 31, 1980, and reapproved as of January 1, 1982.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located; or

3. The Flight Inspection Area Office which originated the SIAP.

For Purchase—Individual SIAP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

By Subscription—Copies of all SIAPs, mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

FOR FURTHER INFORMATION CONTACT: Donald P. Pate, Flight Procedure Standards Branch (AMCAFS–420), Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd. Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082 Oklahoma City, OK 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This amendment to part 97 of the Federal Aviation Regulations (14 CFR part 97) establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs). The complete regulatory description of each SIAP is contained in official FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of the Federal Aviation Regulations (FAR). The applicable FAA Forms are identified as FAA Forms 8260–3, 8260–4, and 8260–5. Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. The provisions of this amendment state the

affected CFR (and FAR) sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

The Rule

This amendment to part 97 is effective upon publication of each separate SIAP as contained in the transmittal. Some SIAP amendments may have been previously issued by the FAA in a National Flight Data Center (NFDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP amendments may require making them effective in less than 30 days. For the remaining SIAPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs, the TERPs criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs effective in less than 30 days.

Conclusion

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. It, therefore—(1) is not a ''significant rule'' 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. For the same reason, the FAA certifies that this amendment 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 97

Air Traffic Control, Airports, Navigation (air).

Issued in Washington, DC on January 5, 2001.

L. Nicholas Lacey,

Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, part 97 of the Federal Aviation Regulations (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

1. The authority citation for part 97 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120, 44701; and 14 CFR 11.49(b)(2).

2. Part 97 is amended to read as follows:

§§ 97.23, 97.25, 97.27, 97.29, 97.31, 97.33, 97.35 [Amended]

By amending § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, ISMLS, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, identified as follows:

January 25, 2001

White Plains, NY, Westchester County, VOR/DME–A, Amdt 4
White Plains, NY, Westchester County, NDB RWY 16, Amdt 21
White Plains, NY, Westchester County, RNAV (GPS) RWY 16, Orig
White Plains, NY, Westchester County, RNAV (GPS) RWY 34, Orig
White Plains, NY, Westchester County, VOR/DME RNAV OR GPS RWY 34, Amdt 6A, CANCELLED

March 22, 2001

Ruidoso, NM, Sierra Blanca Regional, LOC/DME RWY 24, Orig-B
Victoria, TX, Victoria Regional, VOR OR GPS RWY 12L, Amdt 15

[FR Doc. 01–1091 Filed 1–11–01; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 30225; Amdt. No. 2031]

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: An effective date for each SIAP is specified in the amendatory provisions.

Incorporation by reference-approved by the Director of the Federal Register on December 31, 1980, and reapproved as of January 1, 1982.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which affected airport is located; or

3. The Flight Inspection Area Office which originated the SIAP.

For Purchase—Individual SIAP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

By Subscription—Copies of all SIAPs, mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

FOR FURTHER INFORMATION CONTACT: Donald P. Pate, Flight Procedure Standards Branch (AMCAFS–420), Flight Technologies and Programs

Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd. Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This amendment to part 97 of the Federal Aviation Regulations (14 CFR part 97) establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs). The complete regulatory description on each SIAP is contained in the appropriate FAA Form 8260 and the National Flight Data Center (FDC)/Permanent (P) Notices to Airmen (NOTAM) which are incorporated by reference in the amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of the Federal Aviation's Regulations (FAR). Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction of charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. The provisions of this amendment state the affected CFR (and FAR) sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

The Rule

This amendment to part 97 of the Federal Aviation Regulations (14 CFR part 97) establishes, amends, suspends, or revokes SIAPs. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained in the content of the following FDC/P NOTAMs for each SIAP. The SIAP information in some previously designated FDC/Temporary (FDC/T) NOTAMs is of such duration as to be permanent. With conversion to FDC/P NOTAMs, the respective FDC/T NOTAMs have been canceled.

The FCD/P NOTAMs for the SIAPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these chart changes to SIAPs by FDC/P NOTAMs, the TERPS criteria were applied to only these specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a National Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for all these SIAP amendments requires making them effective in less than 30 days.

Further, the SIAPs contained in this amendment are based on the criteria contained in the TERPS. Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making these SIAPs effective in less than 30 days.

Conclusion

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. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment 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 97

Air Traffic Control, Airports, Navigation (Air).

Issued in Washington, DC on January 5, 2001.

L. Nicholas Lacey,

Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, part 97 of the Federal Aviation Regulations (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

1. The authority citation for part 97 is revised to read as follows:

Authority: 49 U.S.C. 40103, 40113, 40120, 44701; 49 U.S.C. 106(g); and 14 CFR 11.49(b)(2).

2. Part 97 is amended to read as follows:

§§ 97.23, 97.25, 97.27, 97.29, 97.31, 97.33. [Amended]

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, ISMLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § COPTER SIAPS, Identified as follows:

** * * Effective Upon Publication*

FDC date	State	City	Airport	FDC number	SIAP
12/25/00	NJ	Newark	Newark Intl	FDC 0/5494	ILS/DME RWY 22L ORIG
12/29/00	TX	Brownfield	Terry County	FDC 0/5625	GPS RWY 2 AMDIT 1
12/29/00	TX	Brownfield	Terry County	FDC 0/5624	NDB RWY 2 AMDT 2
12/29/00	TX	Carrizo Springs	Dimmit County	FDC 0/5628	NDB RWY 31 AMDT 3
12/28/00	WI	Rice Lake	Rice Lake Regional-Carl's Field	FDC 0/5594	VOR RWY 1 ORIG
12/28/00	WI	Rice Lake	Rice Lake Regional-Carl's Field	FDC 0/5593	VOR/DME RWY 19 ORIG
12/28/00	WI	Wautoma	Wautoma Muni	FDC 0/5590	GPS RWY 31 ORIG
12/27/00	IN	Portland	Portland Muni	FDC 0/5575	GPS RWY 27 ORIG
12/27/00	IN	Portland	Portland Muni	FDC 0/5573	NDB RWY 27 AMDT 7
12/27/00	IN	Portland	Portland Muni	FDC 0/5572	NDB OR GPS RWY 9 AMDT 2
12/20/00	OH	Columbus	Rickenbacker Intl	FDC 0/5434	ILS RWY 23L ORIG-B
12/20/00	IL	Dekalb	Dekalb Taylor Muni	FDC 0/5425	LOC/DME RWY 2 ORIG
12/20/00	IL	Dekalb	Dekalb Taylor Muni	FDC 0/5424	VOR/DME OR GPS RWY 27 AMDT 5A
12/20/00	IL	Dekalb	Dekalb Taylor Muni	FDC 0/5423	GPS RWY 9 AMDT 5A

FDC date	State	City	Airport	FDC number	SIAP
12/20/00	IL	Dekalb	Dekalb Taylor Muni	FDC 0/5422	NDB RWY 27 AMDT 1
12/28/00	TN	Memphis	Memphis Intl	FDC 0/5584	ILS RWY 18R AMDT 12B
12/21/00	FL	Fort Lauderdale	Fort Lauderdale-Hollywood Intl	FDC 0/5471	ILS RWY 27R AMDT 6
12/21/00	FL	Fort Lauderdale	Fort Lauderdale-Hollywood Intl	FDC 0/5470	LOC RWY 94 AMDT 4
12/21/00	NC	Fayetteville	Fayetteville Rgnl/Grannis Field	FDC 0/5456	ILS RWY 4 AMDT 14A
12/21/00	NC	Fayetteville	Fayeteville Rgnl/Grannis Field	FDC 0/5452	NDB OR GPS RWY 4 AMDT 14A
12/21/00	NC	Fayetteville	Fayeteville Rgnl/Grannis Field	FDC 0/5451	VOR RWY 4 AMDT 15A
12/21/00	NC	Fayetteville	Fayetteville Rgnl/Grannis Field	FDC 0/5450	VOR OR GPS RWY 28 AMDT 7A
12/21/00	NC	Fayetteville	Fayetteville Rgnl/Grannis Field	FDC 0/5449	LOC BC RWY 22 AMDT 5B
12/20/00	WA	Renton	Renton Muni	FDC 0/5407	GPS RWY 15 ORIG
12/20/00	WA	Arlington	Arlington Muni	FDC 0/5409	LOC RWY 34 AMDT 4A
12/20/00	WA	Arlington	Arlington Muni	FDC 0/5408	NDB OR GPS RWY 34 AMDT 3

[FR Doc. 01–1092 Filed 1–11–01; 8:45 am]

BILLING CODE 4910–13–M

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 401, 402 and 403

RIN 0960–AE95

Testimony by Employees and the Production of Records and Information in Legal Proceedings

AGENCY: Social Security Administration.

ACTION: Final rule.

SUMMARY: The Social Security Administration (SSA) is implementing procedures governing testimony by SSA employees and the production of official records and information in legal proceedings to which SSA is not a party. This rule provides procedures, requirements, and information on how SSA will handle these matters and expressly prohibits any production or testimony except as approved by the Commissioner of Social Security or as Federal law otherwise provides. This rule conserves and ensures more efficient use of SSA's resources in meeting the Agency's mission, promotes consistency in decisionmaking, minimizes the possibility of involving SSA in issues not related to its mission, maintains SSA's impartiality, protects sensitive and confidential information and the deliberative processes of SSA, and enhances SSA's ability to respond efficiently to requests for records, information, or testimony in a legal proceeding.

EFFECTIVE DATE: February 12, 2001.

FOR FURTHER INFORMATION CONTACT: Brad Howard, Attorney, Office of General Law, Office of the General Counsel, Room 617 Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 966–1817, for information about this rule. For information on eligibility or claiming benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778.

SUPPLEMENTARY INFORMATION:

Background

On May 10, 2000, SSA published in the **Federal Register** a notice of proposed rulemaking proposing to establish procedures governing testimony by SSA employees and the production of official records and information in legal proceedings to which SSA is not a party (65 FR 30037–30043). Prior to March 31, 1995, SSA was part of the Department of Health and Human Services (DHHS) and followed the DHHS regulations at 45 CFR part 2 regarding these matters. The Social Security Independence and Program Improvements Act of 1994 (SSIPIA), Pub. L. 103–296, established SSA as an independent agency in the executive branch of the Federal Government effective March 31, 1995, and vested general regulatory authority in the Commissioner of Social Security (the Commissioner). Under sec. 106(b) of the SSIPIA, DHHS regulations in effect immediately before March 31, 1995, that relate to functions vested in the Commissioner by reason of SSA's independence, continue to apply to SSA until the Commissioner modifies, suspends, terminates, or repeals them. This rule establishes a new Part 403 of our regulations, which sets forth the SSA rules for responding to requests for information, records, or testimony in legal proceedings. The DHHS regulations at 45 CFR part 2 will no longer apply to SSA.

This rule, issued under the authority of 5 U.S.C. 301, is similar to rules issued by numerous Government agencies and departments. Section 301 of Title 5, the ''housekeeping statute,'' authorizes the head of an executive agency to issue ''regulations for the government of his department, the conduct of its employees, the distribution and performance of its business and the custody, use, and preservation of its records, papers, and property.'' In *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951), the Supreme Court upheld the authority of Federal agencies to establish procedures pursuant to § 301 similar to those established here. Federal courts have consistently held that a person seeking testimony or records from an agency must comply with the agency's ''Touhy regulation'' before seeking judicial enforcement of a subpoena. In addition, under § 702(a)(5) of the Social Security Act, 42 U.S.C. § 902(a)(5), the Commissioner has authority to promulgate regulations necessary to the efficient administration of SSA functions.

In the notice of proposed rulemaking published in the **Federal Register** on May 10, 2000, SSA requested comments by July 10, 2000. SSA received three comments on the proposed rule.

One commenter raised several issues concerning health and safety in Social Security offices. He essentially recommended that we revise the rule to allow testimony from employees in every case involving the health and safety of our employees. We share the commenter's general concerns about the importance of workplace safety. However, we are not adopting his recommendation because we believe that the rule addresses his concerns.

The commenter first noted that United States Attorneys' Offices may decline prosecution in situations where an employee is threatened or assaulted at work. In such situations, the employee often files charges with the local police and the matter proceeds in state court. He recommended that we clarify that testimony of the employee and employee-witnesses requires no prior approval in such cases. However, section 403.115(b)(7) renders the procedural requirements established in this rule inapplicable to state or local law enforcement proceedings related to threats or acts against SSA or its

employees. In such circumstances, our employees may be released to testify without requiring the prosecutor to make a request pursuant to this rule.

The commenter's next concern involves the situation where an employee is injured outside of work. In this situation, the employee's own testimony would be based on matters unrelated to his or her actual work activities; therefore, no request pursuant to this rule would be necessary for that employee's testimony. However, this rule is intended precisely for the situation where one of the parties to this private lawsuit seeks the testimony of another Social Security employee. If the testimony of the other employee depends on information obtained in the course of Social Security business, we believe it is appropriate for the party requesting such testimony to proceed under this rule.

The commenter also suggested that in situations where an employee is injured and required to go through a Federal workers compensation proceeding, we should routinely allow employee testimony. We believe that this concern is addressed by section 403.115(b)(7), which renders the procedural requirements established in this rule inapplicable in cases where Federal law or regulations require employees to provide testimony. In such cases, our employees can be released to testify without requiring the individual seeking such testimony to make a request pursuant to this rule.

The commenter's final concern was that employees should be allowed to provide testimony in a product liability lawsuit involving equipment used on the job for Social Security. We believe that it is particularly appropriate to apply the procedures established in these regulations to this kind of case. The Commissioner must consider the various factors articulated in this rule and the particular facts surrounding a request for testimony in a case such as this. Whether to provide testimony and the form of that testimony should be left to the Commissioner to decide on a case-by-case basis.

Another commenter, concerned about fraud and misinformation in domestic support cases, suggested that it would always be in SSA's interests to provide records and testimony in legal proceedings where doing so could prevent improper payments of public benefits or improper support payments. SSA places a high premium on preventing program fraud and safeguarding the trust funds. However, as noted in the preamble to the proposed rule, SSA must balance other important interests with the need for program integrity when assessing a request for testimony or records. Among these interests are minimizing the possibility of involving SSA in issues not related to its mission, maintaining SSA's impartiality, and protecting sensitive and confidential information and the deliberative processes of SSA. To the extent that the commenter is suggesting that SSA should consider fraud prevention and program integrity when it determines whether to release records or authorize testimony, we agree. Current disclosure regulations permit disclosures to law enforcement officials when necessary to investigate or prosecute fraud or other criminal activity involving the social security program. See 20 CFR 401.155(c). Moreover, this final rule already includes among the items the Commissioner will consider when evaluating whether to grant a request for testimony, ''Whether you need the testimony to prevent fraud or similar misconduct.'' 20 CFR 403.130(k). However, if the commenter is suggesting that a general exclusion from these rules should apply to all requests arising out of domestic support cases or any other cases where a party alleges fraud, we disagree. Such an exclusion could harm other important SSA interests, including those listed above. We, therefore, have not made any changes in the regulations to address this comment.

The third commenter noted that§ 403.110 includes State agency employees and consultative examiners (CEs) as persons subject to SSA jurisdiction and control and, therefore, covered by this rule. She expressed concern that the rule does not explain the procedures these individuals must follow when they receive a direct request for testimony and suggested that we include provisions directing State agency employees and CEs to forward all requests to SSA. As a general matter, we will provide procedures applicable to various parties affected by this rule through internal program instructions. However, we also note that, while all employees (including State agency personnel and CEs) will be forwarding applications submitted under this rule to SSA headquarters for a decision on whether to permit the testimony, neither SSA nor the Department of Justice can provide State or private personnel with legal representation.

Explanation of Final Rule

SSA administers a wide variety of programs that affect almost 50 million beneficiaries and the general public. SSA maintains records on virtually every individual in the United States. The documents that SSA obtains or generates and our employees' expertise frequently are sought for use in legal proceedings in which SSA is neither involved nor has an interest. Each year, SSA receives thousands of requests for records and testimony. This rule establishes SSA policies and procedures applicable to requests for official Agency information, records, or testimony in legal proceedings.

Scope

With some limited exceptions, this rule applies to all requests arising out of a legal proceeding for:

(1) SSA information or records; or

(2) Testimony from SSA employees concerning information acquired while performing official duties or because of the employees' official capacity.

A request for both testimony and records or other information is treated as two separate requests—one for testimony and one for records or other information—because some procedures apply only to requests for testimony.

This rule applies to a broad range of legal proceedings. It adopts the definition of ''record'' found in SSA disclosure regulations; clarifies that ''testimony'' encompasses all types of sworn statements; and expands the definition of SSA ''employee'' to include past employees, persons acting on the Agency's behalf, and persons subject to the Agency's disclosure regulations.

Note: These definitions do not expand the Federal Government's obligation to provide legal representation.

This rule explains that SSA employees may disclose records or other information only as permitted under the Agency's disclosure regulations and explains that SSA employees may provide testimony (even testimony related to records that the Agency may disclose) only with the Commissioner's explicit approval. The Commissioner may delegate this authority.

This rule does not apply to requests for testimony:

- In an SSA administrative proceeding;
- Related to a case to which SSA is a party;
- From the United States Department of Justice;
- In a criminal proceeding to which the United States is a party;
- In a legal proceeding initiated by state or local authorities arising from an investigation or audit initiated by, or conducted in cooperation with, SSA's Office of the Inspector General;
- From either house of Congress;
- In a law enforcement proceeding related to threats or acts against SSA, its employees, or its operations; or

• Where Federal law or regulations expressly require a Federal employee to provide testimony.

These exceptions refine those listed in the DHHS regulations to focus more on specific SSA goals. For example, instead of the broad exceptions related to criminal or civil proceedings where the United States or any Federal agency is a party (45 CFR § 2.1(d)(1)), we provide more specific exceptions related to cases where SSA is a party, requests from the Department of Justice, and criminal proceedings to which the United States is a party. These changes address SSA's goals of full participation in cases when it is a party, and full cooperation and comity with the Agency's legal representatives (the Department of Justice). At the same time, the more narrowly tailored exceptions advance SSA goals of: (1) Not providing any unfair advantage to private litigants related to SSA testimony, and (2) making a full and fair evaluation of each applicant's need for testimony. Similarly, we have not included the exceptions found in the DHHS regulations that concern DHHS agencies and employees, and we have clarified the relationship between this rule and SSA's disclosure regulations (20 CFR parts 401 and 402) and added exceptions to enhance our ability to assist those protecting and furthering the interests of SSA.

Certification

Because we can certify copies of records in SSA's possession, the Commissioner generally will not authorize testimony intended only to authenticate those records. We have adopted certification rules different from those in the DHHS regulations to explain that SSA will not certify copies of records that have been released previously or have been otherwise outside SSA's control.

Fees

We charge a fee for production of records or information and certification. The fee schedules for these services are established in 20 CFR §§ 401.95, 402.155–185, as appropriate. We will also charge for testimony. These fees will be calculated to reimburse the Federal Government for the full cost of providing testimony, such as, but not limited to, salary or wages of the witness for time needed to prepare for testimony, any necessary travel time, and the cost of travel and attendance at the legal proceeding.

Relation to SSA Disclosure Regulations (20 CFR parts 401 and 402)

The DHHS regulations at 45 CFR part 2 do not apply to matters covered in the SSA disclosure regulations at 20 CFR part 401. See 45 CFR § 2.1(d)(6). Part 403 applies to such matters to the extent necessary to ensure that requests for testimony related to records receive the same treatment as other requests for testimony and to provide notice to requesters or courts when current law prohibits the disclosure of a requested record.

Nothing in this rule affects the application of the rules in SSA's disclosure regulations. As provided in § 403.105, if you request records or information in any legal proceeding covered by this rule, SSA employees will not disclose the requested records or information unless authorized by SSA disclosure regulations. If the disclosure is not authorized, the decision to deny the request would be made by the appropriate SSA official under the SSA disclosure regulations. However, if disclosure is not authorized and your request states that a response is due on a particular date, we will make every reasonable effort to provide you with the written notification described in § 403.145 on or before the specified date. We will also send you any notices required by part 401 or 402. If disclosure of records or information is authorized by the disclosure regulations but you request testimony concerning those matters, your request will be subject to the process for applying for testimony described in §§ 403.120 through 403.140. By focusing a requestor on the disclosure regulations (which usually require the consent of the individual to whom the requested record pertains) and the procedures for obtaining the Commissioner's permission for testimony, this rule emphasizes the most efficient means for obtaining information, records, or testimony.

Subpoenas Duces Tecum

Under the DHHS regulations, subpoenas *duces tecum* were deemed to be requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552, and were to be processed under the DHHS FOIA regulations. See 45 CFR 2.5. SSA has concluded that a more useful approach given the nature of SSA's records and operations is to treat subpoenas *duces tecum* as requests for records within the scope of this rule. Accordingly, SSA will apply the procedures in this rule in responding to such subpoenas *duces tecum.* We are deleting the last sentence of the definition of ''request'' in 20 CFR 402.30 to clarify that subpoenas will not be treated as FOIA requests.

Procedures for Requesting Testimony

In § 403.120, we explain the process for requesting testimony. We have changed the procedures used under the DHHS regulations for requesting testimony from an SSA employee to standardize the procedures and to make them more administratively efficient.

To obtain the testimony of an SSA employee in a legal proceeding, you must file a written application. As in the DHHS regulations, this rule requires that the application set out the nature of the testimony sought, explain why the information is not available by other means, and explain why it is in SSA's interest to provide the testimony. In addition, this rule requires you to explain in the application the relevance of the testimony to the issues involved in the legal proceeding and state the date and time when you need the testimony and the location where the testimony would be presented. Another change from the DHHS regulations is that this rule requires you to submit the application for testimony to us at least 30 days in advance of the date when you need the testimony, or explain in your application why your application is not timely and why it is in SSA's interest to review the untimely application. Failure to submit a complete and timely application could result in the denial of the application or could delay the decision on the application.

Unlike the DHHS regulations, this rule establishes a central address for all applications for testimony by SSA employees for use in legal proceedings. This rule requires that all applications (except applications involving the Office of the Inspector General) be sent to our Office of the General Counsel in Baltimore, Maryland. By using a central location, we can issue quicker responses and handle applications more efficiently and consistently.

Deciding Whether To Approve an Application for Testimony—Factors We Consider

Once we receive a complete application for testimony under this rule, the Commissioner will consider whether to approve it. The Office of the General Counsel or another component of SSA may review your application. In consultation with these offices, the Commissioner will make a final decision on your application and notify you of that decision. See § 403.135. To decide whether to approve the application, and therefore to authorize

an SSA employee to provide testimony, the Commissioner will consider a number of factors, such as:

- Whether providing the testimony would violate a statute, Executive Order, or regulation;
- Whether providing the testimony will put confidential, sensitive, or privileged information at risk;
- Whether providing the testimony would unduly expend for private purposes the resources of the United States (including the time of SSA employees otherwise needed for official duties);
- Whether the testimony is available in a less burdensome form or from another source;
- Whether the testimony sought is limited to the purpose of the request;
- Whether you previously have requested the same testimony in the same or a related proceeding;
- Whether providing the testimony is in SSA's interest;
- Whether providing the testimony is consistent with SSA's policy of impartiality among private litigants;
- Whether another government agency is involved in the proceeding;
- Whether you need the testimony to prevent fraud or similar misconduct; and
- Whether providing the testimony sought is necessary to prevent a miscarriage of justice or to preserve the rights of an accused individual to due process in a criminal proceeding.

See § 403.130.

Under this rule, if the Commissioner approves your application, the Commissioner decides the form by which SSA will provide the testimony. For example, if the Commissioner decides that SSA can meet your needs satisfactorily with a sworn written statement, he or she will not authorize oral testimony.

Procedures When the Commissioner Has Not Approved the Application for Testimony or When Disclosure Is Not Authorized

Under the DHHS regulations, if the Agency head denied approval for an employee to comply with a subpoena for testimony, or did not act by the return date in the subpoena, the employee was to appear at the stated time and place unless advised by the Office of the General Counsel that responding to the subpoena would be inappropriate. The only actions the employee was authorized to take at this appearance were to provide a copy of the regulations and to respectfully decline to testify or produce any documents. See 45 CFR § 2.4(b). Our experience suggests that under the prior procedures, SSA incurred the substantial cost of sending individuals to hearings, and that these appearances did not provide any significant service or information to the tribunal or the parties involved.

Section 403.145 provides that, in cases where the Commissioner has not authorized testimony or SSA cannot respond to a request by the date specified in the application, SSA will make every reasonable effort to provide a statement to the requesting party and/or the court or other tribunal conducting the proceeding by the specified date. The statement will explain the following: compliance with the request is not authorized without the Commissioner's approval and approval has not yet been given; the requirements for obtaining approval; and, if the request complies with § 403.120, the estimated time necessary for reaching a decision.

If 20 CFR part 401 or 402 does not authorize disclosure of the requested records or information, the statement will explain the requirements for disclosure. Generally, if a response to a request for information, records, or testimony is due before the conditions of this Part or 20 CFR part 401 or 402 are met, no SSA employee will appear before the tribunal or the parties involved in the proceeding.

Waiving the Requirements of This Rule

Under certain circumstances, this rule permits the Commissioner to grant an exception from any requirement related to your application for testimony. For example, § 403.120(b) provides that if you apply for testimony by an SSA employee, you must submit the application at least 30 days before the date the testimony is needed. If, however, the Commissioner believes that a waiver of this requirement would be in SSA's interests or would be necessary to prevent a miscarriage of justice, he or she may grant an exception. In addition, SSA employees may resolve requests for information informally (as they currently do in the ordinary course of business) by writing letters to claimants or other members of the public explaining procedures or other matters encompassed by the Social Security Act. Such letters may include information about an individual, if that person has provided written consent to disclosure as required in 20 CFR part 401. Such informal activity is not a waiver of the procedures described in this rule since it does not involve a sworn statement by an SSA employee, but is an alternative means of assisting a person without providing employee testimony.

Requests Involving the Office of the Inspector General

This rule provides that if you seek records or information of the Office of the Inspector General or the testimony of an employee of the Office of the Inspector General, the regulations in Part 403 apply with two exceptions. The Inspector General or his or her designee will make any determination that the Commissioner would make. A separate address is provided for requests for Office of the Inspector General records or information or applications for the testimony of an employee of the Office of the Inspector General.

Procedural Nature of the Regulations

This rule is procedural, not substantive. Nevertheless, failure to comply with the procedures may be a basis for denying a request. This rule does not create a right to obtain information, records, or the testimony of an SSA employee nor does it create any additional right or privilege not already available to SSA to deny such a request. Furthermore, this rule creates no independent right of action against SSA or any of its employees.

Changes to 20 CFR Part 401

We are adding a new paragraph (c) to 20 CFR 401.180. That regulation contains SSA's rules on disclosure of information about individuals under court order or subpoena. New paragraph (c) contains a cross-reference to the new regulations contained in Part 403.

Regulatory Procedures

Executive Order 12866

We have consulted with the Office of Management and Budget (OMB) and determined that this rule does not meet the criteria for a significant regulatory action under Executive Order 12866. Thus, it was not subject to OMB review. We have also determined that this rule meets the plain language requirement of Executive Order 12866 and the President's Memorandum of June 1, 1998.

Regulatory Flexibility Act

We certify that this rule will not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

These regulations contain reporting requirements in section 403.120(a), (b), and (c), which establish the requirements for applying for the

testimony of an SSA employee. We have the clearance from the Office of Management and Budget (OMB) under the requirements of 44 U.S.C. 3507, as amended by section 2 of the Paperwork Reduction Act of 1995, to collect this information. The OMB clearance number is 0960–0619. The clearance expires on September 30, 2003.

(Catalog of Federal Domestic Assistance Program Nos. 93.773 Medicare-Hospital Insurance; 93.774 Medicare-Supplementary Medical Insurance; 96.001 Social Security-Disability Insurance; 96.002 Social Security-Retirement Insurance; 96.003 Special Benefits for Persons Aged 72 and Over; 96.004 Social Security-Survivors Insurance; 96.005 Special Benefits for Disabled Coal Miners; and 96.006 Supplemental Security Income)

List of Subjects

20 CFR Part 401

Administrative practice and procedure, Freedom of information, Privacy

20 CFR Part 402

Administrative practice and procedure, Freedom of information

20 CFR Part 403

Courts, Government employees

Dated: January 4, 2001.

Kenneth S. Apfel,

Commissioner of Social Security.

For reasons set out in the preamble, Chapter III of Title 20 of the Code of Federal Regulations is amended as follows:

PART 401—PRIVACY AND DISCLOSURE OF OFFICIAL RECORDS AND INFORMATION

1. The authority citation for Part 401 continues to read as follows:

Authority: Secs. 205, 702(a)(5), 1106, and 1141 of the Social Security Act (42 U.S.C. 405, 902(a)(5), 1306, and 1320b—11); 5 U.S.C. 552 and 552a; 8 U.S.C. 1360; 26 U.S.C. 6103; 30 U.S.C. 923.

2. Section 401.180 is amended by adding paragraph (c) to read as follows:

§ 401.180 Courts.

* * * * *

(c) *Other regulations on testimony and production of records in legal proceedings.* See Part 403 of this chapter for additional rules covering disclosure of information and records governed by this part and requested in connection with legal proceedings.

PART 402—AVAILABILITY OF INFORMATION AND RECORDS TO THE PUBLIC

3. The authority citation for Part 402 continues to read as follows:

Authority: Secs. 205, 702(a)(5), and 1106 of the Social Security Act (42 U.S.C. 405, 902(a)(5), 1306); 5 U.S.C. 552 and 552a; 8 U.S.C. 1360; 18 U.S.C. 1905; 26 U.S.C. 6103; 30 U.S.C. 923b; 31 U.S.C. 9701; E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235.

4. Section 402.30 is amended by revising the definition of request to read as follows:

§ 402.30 [Amended]

Request means asking for records, whether or not you refer specifically to the FOIA. Requests from Federal agencies and court orders for documents are not included within this definition.

* * * * *

5. A new part 403 is added to read as follows:

PART 403—TESTIMONY BY EMPLOYEES AND THE PRODUCTION OF RECORDS AND INFORMATION IN LEGAL PROCEEDINGS

Sec.

403.100 When can an SSA employee testify or produce information or records in legal proceedings?
403.105 What is the relationship between this part and 20 CFR parts 401 and 402?
403.110 What special definitions apply to this part?
403.115 When does this part apply?
403.120 How do you request testimony?
403.125 How will we handle requests for records, information, or testimony involving SSA's Office of the Inspector General?
403.130 What factors may the Commissioner consider in determining whether SSA will grant your application for testimony?
403.135 What happens to your application for testimony?
403.140 If the Commissioner authorizes testimony, what will be the scope and form of that testimony?
403.145 What will SSA do if you have not satisfied the conditions in this part or in 20 CFR part 401 or 402?
403.150 Is there a fee for our services?
403.155 Does SSA certify records?

Authority: Secs. 702(a)(5) and 1106 of the Act, (42 U.S.C. 902(a)(5) and 1306); 5 U.S.C. 301; 31 U.S.C. 9701.

§ 403.100 When can an SSA employee testify or produce information or records in legal proceedings?

An SSA employee can testify concerning any function of SSA or any information or record created or acquired by SSA as a result of the discharge of its official duties in any legal proceeding covered by this part only with the prior authorization of the Commissioner. An SSA employee can provide records or other information in a legal proceeding covered by this part only to the extent that doing so is consistent with 20 CFR parts 401 and 402. A request for both testimony and records or other information is considered two separate requests—one for testimony and one for records or other information. SSA maintains a policy of strict impartiality with respect to private litigants and seeks to minimize the disruption of official duties.

§ 403.105 What is the relationship between this part and 20 CFR parts 401 and 402?

(a) *General.* Disclosure of SSA's records and information contained in those records is governed by the regulations at 20 CFR parts 401 and 402. SSA employees will not disclose records or information in any legal proceeding covered by this part except as permitted by 20 CFR parts 401 and 402.

(b) *Requests for information or records that do not include testimony.*

(1) If you do not request testimony, §§ 403.120–403.140 do not apply.

(2) If 20 CFR part 401 or 402 permits disclosure to you of any requested record or information, we will make every reasonable effort to provide the disclosable information or record to you on or before the date specified in your request.

(3) If neither 20 CFR part 401 nor 402 permits disclosure of information or a record you request, we will notify you as provided in § 403.145. We will also send you any notices required by part 401 or 402.

§ 403.110 What special definitions apply to this part?

The following definitions apply:

(a) *Application* means a written request for testimony that conforms to the requirements of § 403.120.

(b)(1) *Employee* includes—

(i) Any person employed in any capacity by SSA, currently or in the past;

(ii) Any person appointed by, or subject to the supervision, jurisdiction, or control of SSA, the Commissioner of Social Security, or any other SSA official, currently or in the past; and

(iii) Any person who is not described elsewhere in this definition but whose disclosure of information is subject to the regulations at 20 CFR part 401, currently or in the past.

(2) For purposes of this paragraph (b), a person subject to SSA's jurisdiction or control includes any person hired as a contractor by SSA, any person

performing services for SSA under an agreement (such as an officer or employee of a State agency involved in determining disability for SSA), and any consultant (including medical or vocational experts or medical services or consultative examination providers), contractor, or subcontractor of such person. Such a person would also include any person who has served or is serving in any advisory capacity, formal or informal.

(3) For purposes of this paragraph (b), a person employed by SSA in the past is considered an employee only when the matter about which the person would testify is one in which he or she was personally involved while at SSA; where the matter concerns official information that the employee acquired while working, such as sensitive or confidential agency information; where the person purports to speak for SSA; or where significant SSA resources would be required to prepare the person to testify. Such a person would not be considered an employee when the person will rely only on expertise or general knowledge he or she acquired while working at SSA.

(c) *Commissioner* means the Commissioner of Social Security or his or her designee(s).

(d) *Legal proceeding* includes any pretrial, trial, and post-trial stage of any existing or reasonably anticipated judicial or administrative action, hearing, investigation, or similar proceeding before a court, commission, board, agency, or other tribunal, authority or entity, foreign or domestic. *Legal proceeding* also includes any deposition or other pretrial proceeding, including a formal or informal request for testimony by an attorney or any other person.

(e) *Record* has the same meaning as ''record'' in 20 CFR 402.30.

(f) *Request* means any attempt to obtain the production, disclosure, or release of information, records, or the testimony of an SSA employee, including any order, subpoena, or other command issued in a legal proceeding as well as any informal or other attempt (by any method) by a party or a party's representative.

(g) *SSA* means the Social Security Administration.

(h) *Testimony* includes any sworn statement (oral or written), including (but not limited to)—

(1) Any statement provided through personal appearance; deposition; or recorded interview; or provided by telephone, television, or videotape;

(2) Any response during discovery or other similar proceedings that would involve more than the mere physical production of records; and

(3) Any declaration made under penalty of perjury or any affidavit.

(i) *We* or *our* means the Social Security Administration.

(j) *You* or *your* means an individual or entity that submits a request for records, information or testimony.

§ 403.115 When does this part apply?

(a) Except as specified in paragraph (b) of this section, this part applies to any request in connection with any legal proceeding for SSA records or other information or for testimony from SSA or its employees. This part applies to requests for testimony related to SSA's functions or to any information or record created or acquired by SSA as a result of the discharge of its official duties.

(b) This part does not apply to requests for testimony—

(1) In an SSA administrative proceeding;

(2) In a legal proceeding to which SSA is a party (''SSA'' here includes the Commissioner and any employee acting in his or her official capacity);

(3) From the United States Department of Justice;

(4) In a criminal proceeding in which the United States is a party;

(5) In a legal proceeding initiated by state or local authorities arising from an investigation or audit initiated by, or conducted in cooperation with, SSA's Office of the Inspector General;

(6) From either house of Congress;

(7) In a law enforcement proceeding related to threats or acts against SSA, its employees, or its operations (''SSA'' here includes the Commissioner and any employee acting in his or her official capacity); or

(8) Where Federal law or regulations expressly require a Federal employee to provide testimony.

§ 403.120 How do you request testimony?

(a) You must submit a written application for testimony of an SSA employee. Your application must-

(1) Describe in detail the nature and relevance of the testimony sought in the legal proceeding;

(2) Include a detailed explanation as to why you need the testimony, why you cannot obtain the information you need from an alternative source, and why providing it to you would be in SSA's interest; and

(3) Provide the date and time that you need the testimony and the place where SSA would present it.

(b) You must submit a complete application to SSA at least 30 days in advance of the date that you need the testimony. If your application is submitted fewer than 30 days before that date, you must provide, in addition to the requirements set out above, a detailed explanation as to why—

(1) You did not apply in a timely fashion; and

(2) It is in SSA's interest to review the untimely application.

(c) You must send your application for testimony to: Office of the General Counsel, Social Security Administration, Post Office Box 17706, Baltimore, MD 21235–7760, Attn: Touhy Officer. (If you are requesting testimony of an employee of the Office of the Inspector General, send your application to the address in § 403.125.)

(d) The Commissioner has the sole discretion to waive any requirement in this section.

(e) If your application does not include each of the items required by paragraph (a) of this section, we may return it to you for additional information. Unless the Commissioner waives one or more requirements, we will not process an incomplete or untimely application.

§ 403.125 How will we handle requests for records, information, or testimony involving SSA's Office of the Inspector General?

A request for records or information of the Office of the Inspector General or the testimony of an employee of the Office of the Inspector General will be handled in accordance with the provisions of this part, except that the Inspector General or the Inspector General's designee will make those determinations that the Commissioner otherwise would make. Send your request for records or information pertaining to the Office of the Inspector General or your application for testimony of an employee of the Office of the Inspector General to: Office of the Inspector General, Social Security Administration, 300 Altmeyer Building, 6401 Security Blvd., Baltimore, MD 21235–6401.

§ 403.130 What factors may the Commissioner consider in determining whether SSA will grant your application for testimony?

In deciding whether to authorize the testimony of an SSA employee, the Commissioner will consider applicable law and factors relating to your need and the burden to SSA. The considerations include, but are not limited to, the following:

(a) *Risk of law violation or compromise of Government privilege.*

(1) Would providing the testimony violate a statute (such as 26 U.S.C. 6103 or section 1106 of the Social Security

Act, 42 U.S.C. 1306), Executive Order, or regulation (such as 20 CFR part 401)?

(2) Would providing the testimony put confidential, sensitive, or privileged information at risk?

(b) *Burden on SSA.* (1) Would granting the application unduly expend for private purposes the resources of the United States (including the time of SSA employees needed for official duties)?

(2) Would the testimony be available in a less burdensome form or from another source?

(3) Would the testimony be limited to the purpose of the request?

(4) Did you previously request the same testimony in the same or a related proceeding?

(c) *Interests served by allowing testimony.* (1) Would providing the testimony serve SSA's interest?

(2) Would providing the testimony maintain SSA's policy of impartiality among private litigants?

(3) Is another government agency involved in the proceeding?

(4) Do you need the testimony to prevent fraud or similar misconduct?

(5) Would providing the testimony be necessary to prevent a miscarriage of justice or to preserve the rights of an accused individual to due process in a criminal proceeding?

§ 403.135 What happens to your application for testimony?

(a) If 20 CFR part 401 or 402 does not permit disclosure of information about which you seek testimony from an SSA employee, we will notify you under § 403.145.

(b) If 20 CFR part 401 or 402 permits disclosure of the information about which you seek testimony,

(1) The Commissioner makes the final decision on your application;

(2) All final decisions are in the sole discretion of the Commissioner; and

(3) We will notify you of the final decision on your application.

§ 403.140 If the Commissioner authorizes testimony, what will be the scope and form of that testimony?

The employee's testimony must be limited to matters that were specifically approved. We will provide testimony in the form that is least burdensome to SSA unless you provide sufficient information in your application for SSA to justify a different form. For example, we will provide an affidavit or declaration rather than a deposition and a deposition rather than trial testimony.

§ 403.145 What will SSA do if you have not satisfied the conditions in this part or in 20 CFR part 401 or 402?

(a) We will provide the following information, as appropriate, to you or the court or other tribunal conducting the legal proceeding if your request states that a response is due on a particular date and the conditions prescribed in this part, or the conditions for disclosure in 20 CFR part 401 or 402, are not satisfied or we anticipate that they will not be satisfied by that date:

(1) A statement that compliance with the request is not authorized under 20 CFR part 401 or 402, or is prohibited without the Commissioner's approval;

(2) The requirements for obtaining the approval of the Commissioner for testimony or for obtaining information, records, or testimony under 20 CFR part 401 or 402; and

(3) If the request complies with § 403.120, the estimated time necessary for a decision. We will make every reasonable effort to provide this information in writing on or before the date specified in your request.

(b) Generally, if a response to a request for information, records, or testimony is due before the conditions of this Part or the conditions for disclosure in 20 CFR part 401 or 402 are met, no SSA employee will appear.

(c) SSA will seek the advice and assistance of the Department of Justice when appropriate.

§ 403.150 Is there a fee for our services?

(a) *General.* Unless the Commissioner grants a waiver, you must pay fees for our services in providing information, records, or testimony. You must pay the fees as prescribed by the Commissioner. In addition, the Commissioner may require that you pay the fees in advance as a condition of providing the information, records, or testimony. Make fees payable to the Social Security Administration by check or money order.

(b) *Records or information.* Unless the Commissioner grants a waiver, you must pay the fees for production of records or information prescribed in 20 CFR § § 401.95 and 402.155 through 402.185, as appropriate.

(c) *Testimony.* Unless the Commissioner grants a waiver, you must pay fees calculated to reimburse the United States Government for the full cost of providing the testimony. Those costs include, but are not limited to—

(1) The salary or wages of the witness and related costs for the time necessary to prepare for and provide the testimony and any travel time, and

(2) Other travel costs.

(d) *Waiver or reduction of fees.* The Commissioner may waive or reduce fees for providing information, records, or testimony under this Part. The rules in 20 CFR § 402.185 apply in determining whether to waive fees for the production of records. In deciding whether to waive or reduce fees for testimony or for production of information that does not constitute a record, the Commissioner may consider other factors, including but not limited to—

(1) The ability of the party responsible for the application to pay the full amount of the chargeable fees;

(2) The public interest, as described in 20 CFR § 402.185, affected by complying with the application;

(3) The need for the testimony or information in order to prevent a miscarriage of justice;

(4) The extent to which providing the testimony or information serves SSA's interest; and

(5) The burden on SSA's resources required to provide the information or testimony.

§ 403.155 Does SSA certify records?

We can certify the authenticity of copies of records we disclose pursuant to 20 CFR parts 401 and 402, and this part. We will provide this service only in response to your written request. If we certify, we will do so at the time of the disclosure and will not certify copies of records that have left our custody. A request for certified copies of records previously released is considered a new request for records. Fees for this certification are set forth in 20 CFR 402.165(e).

[FR Doc. 01–838 Filed 1–11–01; 8:45 am]

BILLING CODE 4191–02–U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 8934]

RIN 1545–AX60

Reopenings of Treasury Securities and Other Debt Instruments; Original Issue Discount

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the federal income tax treatment of debt instruments issued in certain reopenings. The final regulations provide guidance to holders and issuers of these debt instruments .

DATES: *Effective Date:* These regulations are effective March 13, 2001.

Applicability Dates: For dates of applicability, see §§ 1.163–7(f), 1.1275–1(f), 1.1275–2(d), and 1.1275–2(k)(5).

FOR FURTHER INFORMATION CONTACT: William E. Blanchard, (202) 622–3950 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On November 5, 1999, temporary regulations were published in the **Federal Register** (64 FR 60342) that revised the rules for when a reopening of Treasury securities is a qualified reopening. The temporary regulations eliminated the acute, protracted shortage requirement that was in § 1.1275–2(d). See § 1.1275–2T(d) of the temporary Income Tax Regulations. As a result, additional Treasury securities issued in a reopening are part of the same issue as the original Treasury securities if (1) The additional Treasury securities have the same terms as the original Treasury securities, and (2) the additional Treasury securities are issued not more than one year after the original Treasury securities were first issued to the public.

On November 5, 1999, proposed regulations (REG–115932–99) also were published in the **Federal Register** (64 FR 60395) that, for the first time, provided rules for reopenings of debt instruments other than Treasury securities. See § 1.1275–2(k) of the proposed Income Tax Regulations.

Although a public hearing on the proposed regulations was held on March 22, 2000, no one testified at the hearing. Eight comment letters, however, were received on the proposed regulations. The proposed regulations, with certain changes to respond to the comments, are adopted as final regulations.

Explanation of Provisions

Reopenings

A. General Description

In certain circumstances, an issuer would like to reopen an existing issue of debt instruments (that is, sell additional amounts of debt instruments with terms that are identical to the terms of the original debt instruments and with the same CUSIP number and tax characteristics as the original debt instruments). In most cases, the purpose of the reopening is to create a large, liquid issue of debt instruments. However, during periods of rising market interest rates, the original issue discount (OID) provisions of the Code can effectively prohibit reopenings, especially if the additional debt instruments are not considered part of the same issue as the original debt instruments.

If the debt instruments sold in the reopening are considered part of the original issue, they have OID only to the extent the debt instruments in the original issue have OID. Thus, if the original debt instruments were issued without OID, the subsequently sold debt instruments also do not have OID. In this case, any discount on the subsequently sold debt instruments generally is market discount, not OID. Conversely, if the subsequently sold debt instruments are a separate issue for tax purposes, any discount that arises as part of their issuance is OID if it equals or exceeds the OID de minimis amount for the debt instruments.

The holder and issuer have different consequences depending upon whether the discount is characterized as OID or market discount. For a holder, the primary difference is whether the holder has to include the discount in income on a current basis as it accrues. If it is OID, the holder must include the accruals in income currently; if it is market discount, the holder generally does not have to include discount in income until the debt instrument is disposed of or redeemed. In general, an issuer's interest deduction does not depend on whether the discount is OID or market discount. However, the issuer's reporting obligations depend on whether the discount is OID or market discount. If the subsequently sold debt instruments are part of a separate issue and if the discount is OID, the issuer (or a broker or middleman) generally is required under section 6049 to make OID information reports for these debt instruments. To comply with this reporting obligation, the issuer must be able to distinguish the subsequently sold debt instruments (which require OID information reports) from the originally sold debt instruments. As a practical matter, the only way the subsequently sold debt instruments can be distinguished is if they are assigned new CUSIP numbers. The different tax treatment and the assignment of new CUSIP numbers prevents the debt instruments from being fungible and, thereby, defeats the purpose of the reopening.

B. Proposed Regulations

In an attempt to strike a balance between the tax policy concern about the conversion of OID into market discount and the need to have the tax rules reflect current capital market practices, the proposed regulations specified when debt instruments issued in a reopening are considered part of the same issue as the original debt instruments (a qualified reopening). (As noted above, § 1.1275–2T(d) provides rules to determine when a reopening of Treasury securities is a qualified reopening.)

Under § 1.1275–2(k) of the proposed regulations, a reopening of debt instruments is a qualified reopening if: (1) The original debt instruments are publicly traded; (2) the issue date of the additional debt instruments (treated as if they were a separate issue) is not more than six months after the issue date of the original debt instruments; (3) seven days before the date on which the price of the additional debt instruments is established, the yield of the original debt instruments (based on their fair market value) is not more than 107.5 percent of the yield of the original debt instruments on their issue date; and (4) the yield of the additional debt instruments (based on the sales price of the additional debt instruments) is no more than 115 percent of the yield of the original debt instruments on their issue date. For purposes of the yield tests, if the original debt instruments were issued with no more than a de minimis amount of OID, the coupon rate of the original debt instruments is used rather than the yield. A qualified reopening also includes a reopening of original debt instruments if the first two conditions described above are met and the additional debt instruments (treated as a separate issue) are issued with no more than a de minimis amount of OID. A qualified reopening, however, does not include a reopening of tax-exempt obligations or contingent payment debt instruments.

The 107.5 percent test was designed to give some relief to the reopening of relatively short-term issues (that is, issues with a remaining term of ten years or less), which tend to be the most impacted by the OID de minimis rules. In addition, the 107.5 percent test, which is tested seven days before the anticipated pricing date, would give the issuer an indication as to whether the reopening would be a qualified reopening. The 115 percent test was designed to prevent, in a situation in which interest rates were to move sharply upward in the period between the announcement date and the issue date, a conversion of a significant amount of OID into market discount.

C. Final Regulations

(1) Fixed Reopening Period

Commentators suggested that the final regulations extend the one-year rule for reopenings of Treasury securities to other issuers. In support of this change, commentators stated that different rules will impede the ability of U.S. issuers to compete with foreign issuers for investors' funds and will affect the

ability of non-Treasury issuers to make their dollar-denominated issues attractive alternatives to U.S. Treasury securities as benchmarks for prevailing market interest rates. They also stated that an extended period (from six to twelve months) is often required in order to aggregate sufficient debt issuances to create a large liquid issue and that many holders of reopened debt instruments are tax-indifferent parties.

If the one-year rule is not adopted in the final regulations, some commentators suggested that the final regulations provide a fixed period of less than one year in which there would be no restrictions on reopenings (for example, a period of six months for non-Treasury securities with an original maturity of less than ten years and nine months for non-Treasury securities with an original maturity of at least ten years). In addition, other commentators suggested that the final regulations extend the one-year rule to reopenings of issuers whose securities are treated as government securities for U.S. securities law purposes.

After careful consideration of these comments, the IRS and the Treasury Department have decided not to adopt these suggestions. Congress adopted different statutory regimes for OID and market discount. The IRS and the Treasury Department believe that adopting the commentators' suggestions would not strike the appropriate balance between the statutory scheme and providing some flexibility for issuers. Additionally, the reopening of Treasury securities does not produce a potential mismatch between the issuer's interest deductions and the holder's income inclusions.

(2) Yield Test

Commentators suggested that the two-part yield test be replaced with a single yield test. According to the commentators, by the time a reopening is priced, dealers, traders, and investors have arranged their affairs in reliance on the issue coming to market, and the issuer has earmarked the proceeds for use in its business. In addition, many of the participants have arranged hedges and other transactions around the reopening. In those cases in which the second-yield test would not be met (which would be caused by unexpected market volatility), a cancelled reopening could generate lost economic costs for these capital market participants. In addition, the second test would create marketing and credibility concerns for issuers.

Most of the commentators suggested that any yield test should be applied either on the pricing date or the announcement date. According to one commentator, the yield test should be applied by an issuer on a single date that is the announcement date for the reopening transaction, provided the pricing date for the transaction occurs thereafter within a period consistent with customary commercial practice. Although customary commercial practice may vary somewhat by issuer and market, the period between the announcement date and the pricing date is usually five business days or less. The yield test should allow issuers to presume that a transaction is consistent with customary commercial practice if the period between the announcement date and the pricing date is five business days or less.

For public transactions, the commentators suggested that the announcement date can be defined as the date that the reopening transaction is publicly announced through one or more media, including a press release, a news item posted on a public messaging service such as Reuters, Telerate, or Bloomberg, or a posting on the issuer's public web site. (Because the transaction is a reopening, the payment terms of the securities to be issued will be known in advance based on the prior issue.) A test based on a public announcement date would be fairly easy to administer for both issuers and the government. Moreover, if an announced reopening transaction is not priced within a customary commercial time frame, it is likely that the transaction will be re-evaluated and subsequently re-announced on a later date that could serve as the appropriate announcement date for the yield test.

According to another commentator, each reopening should be tested on the earlier of the pricing date or the announcement date of a reopening. The term *announcement date* could be defined as the later of seven days before pricing or the date on which an issuer's intent to reopen a security is reported on the standard electronic news services used by security broker-dealers. This rule would accommodate issuers who announce and price reopenings on the same day as well as Treasury and non-Treasury issuers who announce reopenings up to 7 days before pricing.

According to a third commentator, an issuer should be permitted to satisfy any yield test by demonstrating that the test was satisfied on any one of the seven days prior to the date on which the price of the additional debt instruments was established.

Based on historical evidence, the commentators stated that the 107.5 pecent test in the proposed regulations would not have been met in a number of cases in which a reopening would be economically desirable. Therefore, the commentators suggested that any yield test should be based on 115 percent of the yield rather than 107.5 percent of the yield. While a 115 percent test also would not be met in a number of cases, the commentators stated that the 115 percent figure used in the proposed regulations represents an acceptable middle ground. (However, some commentators stated that a 115 percent test would be too low to qualify many reopenings of sovereign debt issued by emerging market governments.)

In response to the comments, the final regulations adopt a single yield test to determine if the reopening is a qualified reopening. Under the final regulations, the yield test is satisfied if, on the date on which the price of the additional debt instruments is established (or, if earlier, the announcement date), the yield of the original debt instruments (based on their fair market value) is not more than 110 percent of the yield of the original debt instruments on their issue date (or, if the original debt instruments were issued with no more than a de minimis amount of OID, the coupon rate). For purposes of the yield test, the announcement date is the later of seven days before the date on which the price of the additional debt instruments is established or the date on which the issuer's intent to reopen a security is publicly announced through one or more media, including an announcement reported on the standard electronic news services used by security broker-dealers (for example, Reuters, Telerate, or Bloomberg). The test rate of 110 percent in the final regulations reflects a compromise between the 107.5 percent test rate in the proposed regulations and the 115 percent test rate suggested by the commentators.

(3) Six-Month Period

Some of the commentators suggested that the six-month period be extended to one year. According to the commentators, many issuers have specific funding needs that arise sporadically over the course of a year or, in the case of foreign sovereign issuers, are often fiscally constrained from reopening issues within a six-month period. Therefore, an extended period (from six to twelve months) is required in order to aggregate sufficient debt issuances to create a large, liquid issue. Because the extension of the six-month period would increase the likelihood of the conversion of OID into market discount, the final regulations do not adopt this suggestion.

(4) De Minimis Test

Some of the commentators suggested that the final regulations clarify the treatment of reopened debt instruments that are issued with no more than a de minimis amount of OID after the expiration of the six-month period (a *de facto* qualified reopening). According to the commentators, the proposed regulations apparently are stricter than current law in limiting a *de facto* qualified reopening to one in which the reopened securities are issued within six months after the issue date of the original debt instruments. As a result, there is uncertainty in the debt markets where none existed for these securities.

The final regulations provide that a reopening (including a reopening of Treasury securities) is a qualified reopening if the original debt instruments are publicly traded and the additional debt instruments are issued with no more than a *de minimis* amount of OID (determined without the application of § 1.1275–2(k)). As a result, the *de minimis* test is no longer limited to the six-month period after the issue date of the original debt instruments.

(5) Reopenings After the Six-Month Period

Some of the commentators suggested that the final regulations allow a reopening occurring after the expiration of the fixed reopening period to be a qualified reopening if the reopening satisfies a yield test that would limit the amount of OID converted into market discount. In the experience of the commentators, as longer-term debt securities progress in age, they become less liquid as compared with shorter-term debt securities of equal remaining life. (For example, a thirty-year debt issue with five years of remaining life generally can be expected to be less liquid than an otherwise identical new five-year issue.) The ability to reopen a security throughout its life would help issuers increase the liquidity of their longer-term issues as needed to address such competitive concerns. This ability would be highly valuable to private sector and government-sponsored enterprise issuers; therefore, it would be appropriate to allow it so long as a yield test ultimately limits the amount of OID that can be converted into market discount. For example, the final regulations could permit an issuer (including the Treasury Department) to reopen a security after the fixed reopening period if a 10 percent yield-change test is met.

The final regulations do not adopt this suggestion. The IRS and the Treasury Department believe that the changes to the *de minimis* test described above provide the appropriate relief for debt instruments reopened after the six-month period.

D. Treasury Securities

The final regulations concerning reopenings of Treasury securities are generally the same as the temporary regulations. See § 1.1275–2(d)(2). In addition, under the final regulations, if a reopening of Treasury securities is not a qualified reopening under § 1.1275–2(d)(2) (for example, because the reopening date is more than one year after the issue date of the original Treasury securities), the reopening is a qualified reopening under § 1.1275–2(k) if the additional Treasury securities are issued with no more than a *de minimis* amount of OID (determined without the application of § 1.1275–2(k)).

E. Issuer's Treatment

The proposed regulations require the issuer to take into account, as an adjustment to its interest expense, any difference between the amounts paid by the holders to acquire the additional debt instruments issued in a qualified reopening and the adjusted issue price of the original debt instruments. This difference would either increase or decrease the adjusted issue prices of all of the debt instruments in the issue (both original and additional) with respect to the issuer (but not the holder). The issuer would then, as of the reopening date, recompute the yield of the debt instruments in the issue based on this aggregate adjusted issue price and the remaining payment schedule of the debt instruments. The issuer would use this recomputed yield for purposes of applying the constant yield method to determine its accruals of interest expense over the remaining term of the debt instruments in the issue.

One commentator suggested that the adjusted issue price of the combined debt instruments simply should be the sum of the issuer's adjusted issue price in the original debt instruments on the reopening date and the issue price of the additional debt instruments determined as if they were a separate issue. The final regulations do not adopt this suggestion; the rule in the proposed regulations is more accurate than the rule suggested by the commentator. The same commentator also suggested that the final regulations state that, for purposes of determining the adjusted issue price of the combined debt instruments, pre-issuance accrued interest on the additional debt instruments for which the issuer is compensated at issuance is not treated as part of the issue price of the additional debt instruments. In effect, this suggestion would make the rule in § 1.1273–2(m) mandatory for debt instruments issued in a qualified reopening. Under § 1.1273–2(m), a taxpayer can choose to determine the issue price of a debt instrument by excluding pre-issuance accrued interest. There does not seem to be a compelling reason to make this rule mandatory for debt instruments issued in a qualified reopening when it is not mandatory for other debt instruments. As a result, the final regulations do not adopt this suggestion.

F. Effective Date

The rules in the final regulations for qualified reopenings (other than for Treasury reopenings subject to § 1.1275–2(d)) apply to debt instruments that are part of a reopening where the reopening date is on or after March 13, 2001.

Definition of Issue

The proposed regulations define the term issue as two or more debt instruments that (1) have the same credit and payment terms, (2) are issued either pursuant to a common plan or as part of a single transaction or a series of related transactions, and (3) are issued within a period of 13 days beginning with the date on which the first debt instrument that would be part of the issue is issued to a person other than a bond house, broker, or similar person acting in the capacity of an underwriter, placement agent, or wholesaler. The final regulations generally are the same as the proposed regulations but for the additional requirement that the debt instruments be issued on or after March 13, 2001. The final regulations also provide certain transition rules if the debt instruments are issued prior to March 13, 2001.

Issue Price of Treasury Securities

Under § 1.1275–2T(d)(1), the issue price of an issue of Treasury securities auctioned before November 2, 1998, is the average price of the securities sold, and the issue price of an issue of Treasury securities auctioned on or after November 2, 1998, is the price of the securities sold at auction. The change to the definition of issue price for Treasury securities in the temporary regulations reflected the Treasury Department's switch on November 2, 1998, from an average price auction to a single price auction for selling Treasury securities. However, in order to accommodate all types of auction techniques and because the rule for an average price auction, when applied to a single price auction, produces the same result as the rule for

a single price auction, the final regulations provide that the issue price of an issue of Treasury securities is the average price of the securities sold.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 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 regulations do 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 Code, the notice of proposed rulemaking preceding these regulations was 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 the regulations is William E. Blanchard, Office of the Associate Chief Counsel (Financial Institutions and Products). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by removing the entry for § 1.1275–2T to read in part as follows:

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

Par. 2. Section 1.163–7 is amended by:

1. Revising paragraph (e).
2. Adding a new paragraph (f).

The revision and addition read as follows:

§ 1.163–7 Deduction for OID on certain debt instruments.

* * * * *

(e) *Qualified reopening*—(1) *In general.* In a qualified reopening of an issue of debt instruments, if a holder pays more or less than the adjusted issue price of the original debt instruments to acquire an additional debt instrument, the issuer treats this difference as an adjustment to the issuer's interest expense for the original and additional debt instruments. As provided by paragraphs (e)(2) through (5) of this section, the adjustment is taken into account over the term of the instrument using constant yield principles.

(2) *Positive adjustment.* If the difference is positive (that is, the holder pays more than the adjusted issue price of the original debt instrument), then, with respect to the issuer but not the holder, the difference increases the aggregate adjusted issue prices of all of the debt instruments in the issue, both original and additional.

(3) *Negative adjustment.* If the difference is negative (that is, the holder pays less than the adjusted issue price of the original debt instrument), then, with respect to the issuer but not the holder, the difference reduces the aggregate adjusted issue prices of all of the debt instruments in the issue, both original and additional.

(4) *Determination of issuer's interest accruals.* As of the reopening date, the issuer must redetermine the yield of the debt instruments in the issue for purposes of applying the constant yield method described in § 1.1272–1(b) to determine the issuer's accruals of interest expense over the remaining term of the debt instruments in the issue. This redetermined yield is based on the aggregate adjusted issue prices of the debt instruments in the issue (as determined under this paragraph (e)) and the remaining payment schedule of the debt instruments in the issue. If the aggregate adjusted issue prices of the debt instruments in the issue (as determined under this paragraph (e)) are less than the aggregate stated redemption price at maturity of the instruments (determined as of the reopening date) by a *de minimis* amount (within the meaning of § 1.1273–1(d)), the issuer may use the rules in paragraph (b) of this section to determine the issuer's accruals of interest expense.

(5) *Effect of adjustments on issuer's adjusted issue price.* The adjustments made under this paragraph (e) are taken into account for purposes of determining the issuer's adjusted issue price under § 1.1275–1(b).

(6) *Definitions.* The terms *additional debt instrument, original debt instrument, qualified reopening,* and *reopening date* have the same meanings as in § 1.1275–2(k).

(f) *Effective dates.* This section (other than paragraph (e) of this section) applies to debt instruments issued on or after April 4, 1994. Taxpayers, however, may rely on this section (other than paragraph (e) of this section) for debt instruments issued after December 21, 1992, and before April 4, 1994. Paragraph (e) of this section applies to qualified reopenings where the reopening date is on or after March 13, 2001.

Par. 3. In § 1.1271–0, paragraph (b) is amended by:

1. Adding entries for paragraphs (f)(1), (f)(2), (f)(3), and (f)(4) of § 1.1275–1.
2. Removing the language ''[Reserved]'' from the entry for paragraph (d) and adding entries for paragraph (d) of § 1.1275–2.
3. Adding entries for paragraph (k) of § 1.1275–2.
4. Removing the entries for § 1.1275–2T.
5. Removing the language ''[Reserved]'' from the entry for paragraph (g) and adding an entry for paragraph (g) of § 1.1275–7.

The revisions and additions read as follows:

§ 1.1271–0 Original issue discount; effective date; table of contents.

* * * * *

(b) * * *

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§ 1.1275–1 Definitions.

* * * * *

(f) *Issue.*

(1) *Debt instruments issued on or after March 13, 2001.*

(2) *Debt instruments issued before March 13, 2001.*

(3) *Transition rule.*

(4) *Cross-references for reopening and aggregation rules.*

* * * * *

§ 1.1275–2 Special rules relating to debt instruments.

* * * * *

(d) *Special rules for Treasury securities.*

(1) *Issue price and issue date.*

(2) *Reopenings of Treasury securities.*

* * * * *

(k) *Reopenings.*

(1) *In general.*

(2) *Definitions.*

(3) *Qualified reopening.*

(4) *Issuer's treatment of a qualified reopening.*

(5) *Effective date.*

* * * * *

§ 1.1275–7 Inflation-indexed debt instruments.

* * * * *

(g) *Reopenings.*

* * * * *

Par. 4. In § 1.1275–1, paragraph (f) is revised to read as follows:

§ 1.1275–1 Definitions.

* * * * *

(f) *Issue*—(1) *Debt instruments issued on or after March 13, 2001.* Except as provided in paragraph (f)(3) of this section, two or more debt instruments are part of the same issue if the debt instruments—

(i) Have the same credit and payment terms;

(ii) Are issued either pursuant to a common plan or as part of a single transaction or a series of related transactions;

(iii) Are issued within a period of thirteen days beginning with the date on which the first debt instrument that would be part of the issue is issued to a person other than a bond house, broker, or similar person or organization acting in the capacity of an underwriter, placement agent, or wholesaler; and

(iv) Are issued on or after March 13, 2001.

(2) *Debt instruments issued before March 13, 2001.* Except as provided in paragraph (f)(3) of this section, two or more debt instruments are part of the same issue if the debt instruments—

(i) Have the same credit and payment terms;

(ii) Are sold reasonably close in time either pursuant to a common plan or as part of a single transaction or a series of related transactions; and

(iii) Are issued on or after April 4, 1994, and before March 13, 2001.

(3) *Transition rule.* If the issue date of any of the debt instruments that would be part of the same issue (determined as if each debt instrument were part of a separate issue) is on or after March 13, 2001, then the definition of the term *issue* in paragraph (f)(1) of this section applies rather than the definition in paragraph (f)(2) of this section to determine if the debt instruments are part of the same issue.

(4) *Cross-references for reopening and aggregation rules.* See § 1.1275–2(d) and (k) for rules that treat debt instruments issued in certain reopenings as part of an issue of original (outstanding) debt instruments. See § 1.1275–2(c) for rules that treat two or more debt instruments as a single debt instrument.

* * * * *

Par. 5. In § 1.1275–2, paragraph (d) is revised and paragraph (k) is added to read as follows:

§ 1.1275–2 Special rules relating to debt instruments.

* * * * *

(d) *Special rules for Treasury securities*—(1) *Issue price and issue date.* The issue price of an issue of Treasury securities is the average price of the securities sold. The issue date of an issue of Treasury securities is the first settlement date on which a substantial amount of the securities in the issue is sold. For an issue of Treasury securities sold from November 1, 1998, to March 13, 2001, the issue price of the issue is the price of the securities sold at auction.

(2) *Reopenings of Treasury securities*—(i) *Treatment of additional Treasury securities.* Notwithstanding § 1.1275–1(f), additional Treasury securities issued in a qualified reopening are part of the same issue as the original Treasury securities. As a result, the additional Treasury securities have the same issue price, issue date, and (with respect to holders) the same adjusted issue price as the original Treasury securities. This paragraph (d)(2) applies to qualified reopenings that occur on or after March 25, 1992.

(ii) *Definitions*—(A) *Additional Treasury securities.* Additional Treasury securities are Treasury securities with terms that are in all respects identical to the terms of the original Treasury securities.

(B) *Original Treasury securities.* Original Treasury securities are securities comprising any issue of outstanding Treasury securities.

(C) *Qualified reopening—reopenings on or after March 13, 2001.* For a reopening of Treasury securities that occurs on or after March 13, 2001, a qualified reopening is a reopening that occurs not more than one year after the original Treasury securities were first issued to the public or, under paragraph (k)(3)(iii) of this section, a reopening in which the additional Treasury securities are issued with no more than a de minimis amount of OID.

(D) *Qualified reopening—reopenings before March 13, 2001.* For a reopening of Treasury securities that occurs before March 13, 2001, a qualified reopening is a reopening that occurs not more than one year after the original Treasury securities were first issued to the public. However, for a reopening of Treasury securities (other than Treasury Inflation-Indexed Securities) that occurred prior to November 5, 1999, a qualified reopening is a reopening of Treasury securities that satisfied the preceding sentence and that was intended to alleviate an acute, protracted shortage of the original Treasury securities.

* * * * *

(k) *Reopenings*—(1) *In general.* Notwithstanding § 1.1275–1(f), additional debt instruments issued in a qualified reopening are part of the same issue as the original debt instruments. As a result, the additional debt instruments have the same issue date, the same issue price, and (with respect to holders) the same adjusted issue price as the original debt instruments.

(2) *Definitions*—(i) *Original debt instruments.* Original debt instruments are debt instruments comprising any single issue of outstanding debt instruments. For purposes of determining whether a particular reopening is a qualified reopening, debt instruments issued in prior qualified reopenings are treated as original debt instruments and debt instruments issued in the particular reopening are not so treated.

(ii) *Additional debt instruments.* Additional debt instruments are debt instruments that, without the application of this paragraph (k)—

(A) Are part of a single issue of debt instruments;

(B) Are not part of the same issue as the original debt instruments; and

(C) Have terms that are in all respects identical to the terms of the original debt instruments as of the reopening date.

(iii) *Reopening date.* The reopening date is the issue date of the additional debt instruments (determined without the application of this paragraph (k)).

(iv) *Announcement date.* The announcement date is the later of seven days before the date on which the price of the additional debt instruments is established or the date on which the issuer's intent to reopen a security is publicly announced through one or more media, including an announcement reported on the standard electronic news services used by security broker-dealers (for example, Reuters, Telerate, or Bloomberg).

(3) *Qualified reopening*—(i) *Definition.* A qualified reopening is a reopening of original debt instruments that is described in paragraph (k)(3)(ii) or (iii) of this section. In addition, see paragraph (d)(2) of this section to determine if a reopening of Treasury securities is a qualified reopening.

(ii) *Reopening within six months.* A reopening is described in this paragraph (k)(3)(ii) if—

(A) The original debt instruments are publicly traded (within the meaning of § 1.1273–2(f));

(B) The reopening date of the additional debt instruments is not more than six months after the issue date of the original debt instruments; and

(C) On the date on which the price of the additional debt instruments is established (or, if earlier, the announcement date), the yield of the original debt instruments (based on their fair market value) is not more than 110 percent of the yield of the original debt instruments on their issue date (or, if the original debt instruments were issued with no more than a de minimis amount of OID, the coupon rate).

(iii) *Reopening with de minimis OID.* A reopening (including a reopening of Treasury securities) is described in this paragraph (k)(3)(iii) if—

(A) The original debt instruments are publicly traded (within the meaning of § 1.1273–2(f)); and

(B) The additional debt instruments are issued with no more than a de minimis amount of OID (determined without the application of this paragraph (k)).

(iv) *Exceptions.* This paragraph (k)(3) does not apply to a reopening of tax-exempt obligations (as defined in section 1275(a)(3)) or contingent payment debt instruments (within the meaning of § 1.1275–4).

(4) *Issuer's treatment of a qualified reopening.* See § 1.163–7(e) for the issuer's treatment of the debt instruments that are part of a qualified reopening.

(5) *Effective date.* This paragraph (k) applies to debt instruments that are part of a reopening where the reopening date is on or after March 13, 2001.

§ 1.1275–2T [Removed]

Par. 6. Section 1.1275–2T is removed.

Par. 7. In § 1.1275–7, paragraph (g) is added to read as follows:

§ 1.1275–7 Inflation-indexed debt instruments.

* * * * *

(g) *Reopenings.* For rules concerning a reopening of Treasury Inflation-Indexed Securities, see paragraphs (d)(2) and (k)(3)(iii) of § 1.1275–2.

* * * * *

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

Approved: December 29, 2000.

Jonathan Talisman,

Assistant Secretary of the Treasury.

[FR Doc. 01–622 Filed 1–11–01; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[TD 8939]

RIN 1545–AX13

Definition of Last Known Address

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final regulations defining *last known address* in relation to the mailing of notices of deficiency and other notices, statements, and documents sent to a taxpayer's last known address. The final regulations affect taxpayers who receive notices of deficiency and other notices, statements, and documents sent to taxpayers' last known addresses.

DATES: *Effective date:* These regulations are effective January 12, 2001.

Applicability date: For dates of applicability, see § 301.6212–2(d).

FOR FURTHER INFORMATION CONTACT: Charles A. Hall, (202) 622–4940 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Regulations on Procedure and Administration (26 CFR part 301) under section 6212(b) relating to the sufficiency of a notice of deficiency if it is mailed to the last known address of a taxpayer. This document also contains amendments to the Income Tax Regulations (26 CFR part 1) and the Regulations on Procedure and Administration (26 CFR part 301) to provide cross-references to the last known address rules under section 6212(b) in order to apply those rules to other notices, statements, and documents required to be sent to the last known address of a taxpayer.

A notice of proposed rulemaking (REG–104939–99) was published in the **Federal Register** (64 FR 63768) on November 22, 1999. No public hearing was requested or held. Three written comments were received. After consideration of the comments, the proposed regulations are adopted as modified by this Treasury decision. The comments are discussed below.

Explanation of Revisions

Under the proposed regulations, the IRS would have accessed the United States Postal Service (USPS) National Change of Address database (NCOA database) annually to update all taxpayer address records maintained in the IRS's automated masterfile for purposes of updating the IRS's mailing list. The IRS's mailing list contains the last known address for each taxpayer. In addition, prior to mailing correspondence to any particular taxpayer from an IRS Service Center, the IRS would have accessed the NCOA database to update the taxpayer's last known address. Employees mailing correspondence from one of the district offices would have accessed an updated address by virtue of the annual update of the entire masterfile. Except in the case of certain joint filers, the annual update was scheduled to occur in May 2000, November 2000, and every November thereafter. The update based on correspondence mailed from an IRS Service Center was scheduled to begin May 2000. All steps necessary to implement the proposed regulations were not completed by May 2000. Therefore, the IRS delayed use of the NCOA database to update a taxpayer's last known address. See Announcement 2000–49 (2000–19 I.R.B. 998 (May 8, 2000)).

The procedures for updating taxpayer address records maintained in the IRS's automated masterfile are modified by these regulations. Implementing the proposed procedures for updating a taxpayer's last known address upon the mailing of correspondence from a Service Center required complicated programming that resulted in the delay in finalizing the proposed regulations. In addition, one commentator on the proposed regulations noted that the difference in treatment for Service Center mailings and district office mailings might cause confusion for taxpayers. The IRS, in conjunction with the USPS, has developed an improved system for updating taxpayer addresses that is intended to be easier to implement and operate and minimize confusion.

To gain access to the NCOA database, the IRS has become a limited licensee of the NCOA database. The NCOA database is a computerized record of changes of address maintained by the USPS. This database retains address changes for a thirty-six month period. As a limited licensee, the IRS will receive from the USPS a copy of the entire thirty-six month NCOA database. The IRS's copy of the NCOA database will be retained at the Martinsburg Computing Center (MCC) in Martinsburg, West Virginia. Additionally, the IRS will receive weekly updates to the NCOA database. The updates will contain the most recent changes of address submitted to the USPS. The IRS will update its copy of the full NCOA database with the most recent changes of address in the weekly update.

Beginning in January 2001, the IRS will access the NCOA database to update taxpayer address records maintained in the IRS's automated masterfile for purposes of updating the IRS's mailing list. The IRS plans to undertake two different procedures in order to assure the most comprehensive update of taxpayer addresses.

First, the IRS will compare taxpayer addresses in IRS's records to the most recent changes of address contained in the weekly updates to the NCOA

database received from the USPS. To accomplish this, the IRS will use the USPS's FASTCheck system. The FASTCheck System works by comparing key elements of existing taxpayer address information maintained in IRS records to an extract of the same elements from the weekly updates to the NCOA. The key address elements used by IRS to detect possible matches include primary house number, secondary number, secondary designator, and nine digit zip code. If there is a match between the key address elements from IRS records and the key address elements from the weekly update to the NCOA database, the IRS will then compare the taxpayer's complete address information in IRS records to the full NCOA database to determine if there is a change of address for a taxpayer. If the taxpayer's name and last known address in IRS records match the taxpayer's name and old mailing address contained in the NCOA database, the new address in the NCOA database is the taxpayer's last known address, unless the IRS is given clear and concise notification of a different address. A match will only be made if the taxpayer's name in IRS records is the same, within certain tolerances, as is found in the NCOA database. There may be a delay of up to two to three weeks from the date a taxpayer notifies the USPS that his or her change of address is effective and the time the new address is posted to the IRS's automated masterfile.

In addition, the IRS plans to annually compare all taxpayer address records maintained in the IRS's automated masterfile with the full thirty-six month NCOA database for purposes of updating the IRS's mailing list. The IRS will begin comparing all taxpayer address records with the full NCOA database for the first time in January 2001. If the taxpayer's name and last known address in IRS records match the taxpayer's name and old mailing address contained in the NCOA database, the new address in the NCOA database is the taxpayer's last known address, unless the IRS is given clear and concise notification of a different address. As with the weekly updates, the names must be the same, within certain tolerances, in both the IRS's records and the NCOA database. Matching all taxpayer address records to the full NCOA database will take several months. The next annual update will be completed by September 30, 2002, and every September 30th thereafter if the IRS determines that subsequent annual updates are necessary in addition to the weekly updates.

For taxpayers who file joint income tax returns under section 6013, the IRS's automated masterfile is currently only able to retain one address. Beginning with the processing of tax year 2000 joint income tax returns, the IRS's automated masterfile will be able to retain a second address. Therefore, if the NCOA database contains change of address information for only one spouse from a joint return, the rules of this regulation will not apply to notices, statements, and other documents mailed before the processing of the taxpayers' tax year 2000 joint income tax return.

Summary of Comments

Commentators also suggested that these regulations refer to section 6672(b)(1) and section 4103. Because section 6672(b)(1) requires that the IRS mail notices to the taxpayer's last known address, a cross-reference under § 301.6672–1 has been added to these regulations. However, because section 4103 does not require the IRS to mail notices to the taxpayer's last known address, no cross-reference is necessary.

A third commentator suggested that the IRS coordinate these regulations with Rev. Proc. 90–18 (1990–1 C.B. 491). Rev. Proc. 90–18 will be updated to incorporate changes made by these final regulations and to provide rules for oral notification of a change of address, additional tax forms from which taxpayer addresses will be updated, and additional Internal Revenue Code sections that require a notice be sent to a taxpayer's last known address.

The commentator also asked what is the most recently filed return for purposes of § 301.6212–2(a) of the regulations, *i.e.,* whether different returns filed by the same taxpayer will update the taxpayer's last known address. The rules provided in these regulations do not in any way alter the existing rules for updating a taxpayer's last known address from a filed return. Section 5.01 of Rev. Proc. 90–18 provides which returns will update a taxpayer's last known address under a social security number or an employer identification number. Therefore, an amended return filed on a Form 1040X with a different address from that which appeared on the taxpayer's previously filed Form 1040 will update the taxpayer's last known address of record with the IRS. However, a Form 941 filed by a Schedule C business would not update the address for the taxpayer's individual income tax account as the Form 941 is filed with an employer identification number and the individual income tax account is associated with the taxpayer's social security number.

Finally, as mentioned above, the commentator noted that accessing the NCOA database for IRS Service Center mailings but not for district office mailings might cause confusion for taxpayers. As the procedures for updating taxpayer addresses are modified by these final regulations, there is no longer any difference between Service Center and other field or area office mailings.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 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 these regulations do 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, the notice of proposed rulemaking preceding these regulations was 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 regulations is Charles A. Hall of the Office of Associate Chief Counsel, Procedure and Administration (Administrative Provisions and Judicial Practice Division). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

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 parts 1 and 301 are amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. In § 1.468A–5, paragraph (c)(1)(ii) is amended by adding a

sentence at the end of the paragraph to read as follows:

§ 1.468A–5 Nuclear decommissioning fund qualification requirements; prohibitions against self-dealing; disqualification of nuclear decommissioning fund; termination of fund upon substantial completion of decommissioning.

* * * * *

(c) * * *

(1) * * *

(ii) * * * For further guidance regarding the definition of last known address, see § 301.6212–2 of this chapter.

* * * * *

Par. 3. In § 1.503(a)–1, paragraph (c) concluding text is amended by adding a sentence at the end of the paragraph to read as follows:

§ 1.503(a)–1 Denial of exemption to certain organizations engaged in prohibited transactions.

* * * * *

(c) * * *

* * * For further guidance regarding the definition of last known address, see § 301.6212–2 of this chapter.

* * * * *

Par. 4. In § 1.547–2, paragraph (b)(1)(v) is amended by adding a sentence after the third sentence of the paragraph to read as follows:

§ 1.547–2 Requirements for deficiency dividends.

* * * * *

(b) * * *

(1) * * *

(v) * * * For further guidance regarding the definition of last known address, see § 301.6212–2 of this chapter. * * *

* * * * *

Par. 5. In § 1.856–6, paragraph (g)(5) is amended by adding a sentence after the first sentence of the paragraph to read as follows:

§ 1.856–6 Foreclosure property.

* * * * *

(g) * * *

(5) * * * For further guidance regarding the definition of last known address, see § 301.6212–2 of this chapter. * * *

* * * * *

Par. 6. In § 1.860–2, paragraph (b)(1)(ii) is amended by adding a sentence after the fourth sentence of the paragraph to read as follows:

§ 1.860–2 Requirements for deficiency dividends.

* * * * *

(b) * * *

(1) * * *

(ii) * * * For further guidance regarding the definition of last known address, see § 301.6212–2 of this chapter. * * *

* * * * *

Par. 7. In § 1.963–6, paragraph (c)(5) is amended by adding a sentence after the second sentence of the paragraph to read as follows:

§ 1.963–6 Deficiency distribution.

* * * * *

(c) * * *

(5) * * * For further guidance regarding the definition of last known address, see § 301.6212–2 of this chapter. * * *

* * * * *

Par. 8. In § 1.992–3, paragraph (c)(3)(iv) is amended by adding a sentence after the third sentence of the paragraph to read as follows:

§ 1.992–3 Deficiency distributions to meet qualification requirements.

* * * * *

(c) * * *

(3) * * *

(iv) * * * For further guidance regarding the definition of last known address, see § 301.6212–2 of this chapter. * * *

* * * * *

Par. 9. In § 1.6081–2, paragraph (f) is amended by adding a sentence at the end of the paragraph to read as follows:

§ 1.6081–2 Automatic extension of time to file partnership return of income.

* * * * *

(f) * * * For further guidance regarding the definition of last known address, see § 301.6212–2 of this chapter.

* * * * *

Par. 10. In § 1.6081–3, paragraph (d) is amended by adding a sentence at the end of the paragraph to read as follows:

§ 1.6081–3 Automatic extension of time for filing corporation income tax returns.

* * * * *

(d) * * * For further guidance regarding the definition of last known address, see § 301.6212–2 of this chapter.

* * * * *

Par. 11. In § 1.6081–4, paragraph (c) is amended by adding a sentence at the end of the paragraph to read as follows:

§ 1.6081–4 Automatic extension of time for filing individual income tax returns.

* * * * *

(c) * * * For further guidance regarding the definition of last known address, see § 301.6212–2 of this chapter.

* * * * *

Par. 12. In § 1.6081–6, paragraph (d) is amended by adding a sentence at the end of the paragraph to read as follows:

§ 1.6081–6 Automatic extension of time to file trust income tax return.

* * * * *

(d) * * * For further guidance regarding the definition of last known address, see § 301.6212–2 of this chapter.

* * * * *

Par. 13. In § 1.6081–7, paragraph (d) is amended by adding a sentence at the end of the paragraph to read as follows:

§ 1.6081–7 Automatic extension of time to file Real Estate Mortgage Investment Conduit (REMIC) income tax return.

* * * * *

(d) * * * For further guidance regarding the definition of last known address, see § 301.6212–2 of this chapter.

* * * * *

PART 301—PROCEDURE AND ADMINISTRATION

Par. 14. The authority citation for part 301 continues to read in part as follows:

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

Par. 15. In § 301.6110–4, paragraph (c)(3) is amended by adding a sentence at the end of the paragraph to read as follows:

§ 301.6110–4 Communications from third parties.

* * * * *

(c) * * *

(3) * * * For further guidance regarding the definition of last known address, see § 301.6212–2.

* * * * *

Par. 16. In § 301.6110–5, paragraph (b)(4) is amended by adding a sentence at the end of the paragraph to read as follows:

§ 301.6110–5 Notice and time requirements; actions to restrain disclosure; actions to obtain additional disclosure.

* * * * *

(b) * * *

(4) * * * For further guidance regarding the definition of last known address, see § 301.6212–2.

* * * * *

Par. 17. In § 301.6110–6, paragraph (b)(2)(v) is amended by adding a sentence at the end of the paragraph to read as follows:

§ 301.6110–6 Written determinations issued in response to requests submitted before November 1, 1976.

* * * * *

(b) * * *

(2) * * *

(v) * * * For further guidance regarding the definition of last known address, see § 301.6212–2.

* * * * *

Par. 18. Section 301.6212–2 is added to read as follows:

§ 301.6212–2 Definition of last known address.

(a) *General rule.* Except as provided in paragraph (b)(2) of this section, a taxpayer's last known address is the address that appears on the taxpayer's most recently filed and properly processed Federal tax return, unless the Internal Revenue Service (IRS) is given clear and concise notification of a different address. Further information on what constitutes clear and concise notification of a different address and a properly processed Federal tax return can be found in Rev. Proc. 90–18 (1990–1 C.B. 491) or in procedures subsequently prescribed by the Commissioner.

(b) *Address obtained from third party*—(1) *In general.* Except as provided in paragraph (b)(2) of this section, change of address information that a taxpayer provides to a third party, such as a payor or another government agency, is not clear and concise notification of a different address for purposes of determining a last known address under this section.

(2) *Exception for address obtained from the United States Postal Service*—(i) *Updating taxpayer addresses.* The IRS will update taxpayer addresses maintained in IRS records by referring to data accumulated and maintained in the United States Postal Service (USPS) National Change of Address database that retains change of address information for thirty-six months (NCOA database). Except as provided in paragraph (b)(2)(ii) of this section, if the taxpayer's name and last known address in IRS records match the taxpayer's name and old mailing address contained in the NCOA database, the new address in the NCOA database is the taxpayer's last known address, unless the IRS is given clear and concise notification of a different address.

(ii) *Duration of address obtained from NCOA database.* The address obtained from the NCOA database under paragraph (b)(2)(i) of this section is the taxpayer's last known address until one of the following events occurs—

(A) The taxpayer files and the IRS properly processes a Federal tax return with an address different from the address obtained from the NCOA database; or

(B) The taxpayer provides the Internal Revenue Service with clear and concise notification of a change of address, as defined in procedures prescribed by the Commissioner, that is different from the address obtained from the NCOA database.

(3) *Examples.* The following examples illustrate the rules of paragraph (b)(2) of this section:

Example 1. (i) A is an unmarried taxpayer. The address on A's 1999 Form 1040, U.S. Individual Income Tax Return, filed on April 14, 2000, and 2000 Form 1040 filed on April 13, 2001, is 1234 Anyplace Street, Anytown, USA 43210. On May 15, 2001, A informs the USPS of a new permanent address (9876 Newplace Street, Newtown, USA 12345) using the USPS Form 3575, ''Official Mail Forwarding Change of Address Form.'' The change of address is included in the weekly update of the USPS NCOA database. On May 29, 2001, A's address maintained in IRS records is changed to 9876 Newplace Street, Newtown, USA 12345.

(ii) In June 2001 the IRS determines a deficiency for A's 1999 tax year and prepares to issue a notice of deficiency. The IRS obtains A's address for the notice of deficiency from IRS records. On June 15, 2001, the Internal Revenue Service mails the notice of deficiency to A at 9876 Newplace Street, Newtown, USA 12345. For purposes of section 6212(b), the notice of deficiency mailed on June 15, 2001, is mailed to A's last known address.

Example 2. (i) The facts are the same as in *Example 1*, except that instead of determining a deficiency for A's 1999 tax year in June 2001, the IRS determines a deficiency for A's 1999 tax year in May 2001.

(ii) On May 21, 2001, the IRS prepares a notice of deficiency for A and obtains A's address from IRS records. Because A did not inform the USPS of the change of address in sufficient time for the IRS to process and post the new address in Internal Revenue Service's records by May 21, 2001, the notice of deficiency is mailed to 1234 Anyplace Street, Anytown, USA 43210. For purposes of section 6212(b), the notice of deficiency mailed on May 21, 2001, is mailed to A's last known address.

Example 3. (i) C and D are married taxpayers. The address on C and D's 2000 Form 1040, U.S. Individual Income Tax Return, filed on April 13, 2001, and 2001 Form 1040 filed on April 15, 2002, is 2468 Spring Street, Little City, USA 97531. On August 15, 2002, D informs the USPS of a new permanent address (8642 Peachtree Street, Big City, USA 13579) using the USPS Form 3575, ''Official Mail Forwarding Change of Address Form.'' The change of address is included in the weekly update of the USPS NCOA database. On August 29, 2002, D's address maintained in IRS records is changed to 8642 Peachtree Street, Big City, USA 13579.

(ii) In October 2002 the IRS determines a deficiency for C and D's 2000 tax year and prepares to issue a notice of deficiency. The Internal Revenue Service obtains C's address and D's address for the notice of deficiency from IRS records. On October 15, 2002, the IRS mails a copy of the notice of deficiency to C at 2468 Spring Street, Little City, USA 97531, and to D at 8642 Peachtree Street, Big City, USA 13579. For purposes of section 6212(b), the notices of deficiency mailed on October 15, 2002, are mailed to C and D's respective last known addresses.

(c) *Last known address for all notices, statements, and documents.* The rules in paragraphs (a) and (b) of this section apply for purposes of determining whether all notices, statements, or other documents are mailed to a taxpayer's last known address whenever the term *last known address* is used in the Internal Revenue Code or the regulations thereunder.

(d) *Effective Date*—(1) *In general.* Except as provided in paragraph (d)(2) of this section, this section is effective on January 29, 2001.

(2) *Individual moves in the case of joint filers.* In the case of taxpayers who file joint returns under section 6013, if the NCOA database contains change of address information for only one spouse, paragraphs (b)(2) and (3) of this section will not apply to notices, statements, and other documents mailed before the processing of the taxpayers' 2000 joint return.

Par. 19. In § 301.6303–1, paragraph (a) is amended by adding a sentence at the end of the paragraph to read as follows:

§ 301.6303–1 Notice and demand for tax.

* * * * *

(a) * * * For further guidance regarding the definition of last known address, see § 301.6212–2.

* * * * *

Par. 20. In § 301.6305–1, paragraph (b)(2)(ii) is revised to read as follows:

§ 301.6305–1 Assessment and collection of certain liability.

* * * * *

(b) * * *

(2) * * *

(ii) The name, social security number, and last known address of the individual owing the assessed amount. For further guidance regarding the definition of last known address, see § 301.6212–2;

* * * * *

Par. 21. In § 301.6320–1T, paragraph (a)(1) is amended by adding a sentence at the end of the paragraph to read as follows:

§ 301.6320–1T Notice and opportunity for hearing upon filing of notice of Federal tax lien (temporary).

(a) * * *

(1) * * * For further guidance regarding the definition of last known address, see § 301.6212–2.

* * * * *

Par. 22. In § 301.6325–1, paragraph (f)(2)(ii)(*a*) is revised to read as follows:

§ 301.6325–1 Release of lien or discharge of property.

* * * * *

(f) * * *

(2) * * *

(ii) * * *

(*a*) Mailing notice of the revocation to the taxpayer at his last known address (see § 301.6212–2 for further guidance regarding the definition of last known address); and

* * * * *

Par. 23. In § 301.6330–1T, paragraph (a)(1) is amended by adding a sentence at the end of the paragraph to read as follows:

§ 301.6330–1T Notice and opportunity for hearing prior to levy (temporary).

(a) * * *

(1) * * * For further guidance regarding the definition of last known address, see § 301.6212–2.

* * * * *

Par. 24. In § 301.6331–2, paragraph (a)(1) is amended by adding a sentence after the second sentence of the paragraph to read as follows:

§ 301.6331–2 Procedures and restrictions on levies.

(a) * * *

(1) * * * For further guidance regarding the definition of last known address, see § 301.6212–2. * * *

* * * * *

Par. 25. Section 301.6332–2 is amended as follows:

1. Paragraphs (b)(1) introductory text, (b)(1)(i), and (b)(1)(ii) are redesignated as paragraphs (b)(1)(i) introductory text, (b)(1)(i)(A), and (b)(1)(i)(B), respectively.

2. In newly designated paragraph (b)(1)(i)(B), the text beginning with the second sentence is redesignated as paragraph (b)(1)(ii).

3. Newly designated paragraph (b)(1)(ii) is amended by adding a sentence after the second sentence of the paragraph.

The addition reads as follows:

§ 301.6332–2 Surrender of property subject to levy in the case of life insurance and endowment contracts.

* * * * *

(b) * * *

(1) In general.

(ii) * * * For further guidance regarding the definition of last known address, see § 301.6212–2. * * *

* * * * *

Par. 26. In § 301.6335–1, paragraph (b)(1) is amended by adding a sentence after the third sentence of the paragraph to read as follows:

§ 301.6335–1 Sale of seized property.

* * * * *

(b) * * *

(1) * * * For further guidance regarding the definition of last known address, see § 301.6212–2. * * *

* * * * *

Par. 27. In § 301.6503(c)–1, paragraph (a) is amended by adding a sentence at the end of the paragraph to read as follows:

§ 301.6503(c)–1 Suspension of running of period of limitation; location of property outside the United States or removal of property from the United States; taxpayer outside of United States.

(a) * * * For further guidance regarding the definition of last known address, see § 301.6212–2.

* * * * *

Par. 28. Section 301.6672–1 is amended by adding a sentence at the end of the section to read as follows:

§ 301.6672–1 Failure to collect and pay over tax, or attempt to evade or defeat tax.

* * * For further guidance regarding the determination of the proper address for mailing the notice required under section 6672(b)(1), see § 301.6212–2.

Par. 29. In § 301.6903–1, paragraph (c) is amended by adding a sentence after the first sentence of the paragraph to read as follows:

§ 301.6903–1 Notice of fiduciary relationship.

* * * * *

(c) * * * For further guidance regarding the definition of last known address, see § 301.6212–2. * * *

* * * * *

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

Approved: December 11, 2000.

Jonathan Talisman,

Acting Assistant Secretary of the Treasury.

[FR Doc. 01–623 Filed 1–11–01; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 7

[TD 8938]

Requirements Relating to Certain Exchanges Involving a Foreign Corporation

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Removal of temporary regulations.

SUMMARY: This document removes temporary regulations under section 367(c) that are no longer necessary and, as a result, may be misleading.

DATES: *Effective Date:* January 12, 2001.

FOR FURTHER INFORMATION CONTACT: Mark D. Harris at (202) 622–3860 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On December 30, 1977, the IRS and Treasury published in the **Federal Register** proposed regulations (42 FR 65204) and temporary regulations (42 FR 65152) under section 367(c) of the Internal Revenue Code. The principal purpose of these regulations, §§ 7.367(c)–1 and 7.367(c)–2, was to distinguish between the treatment of transfers described in section 367(c) before and after the enactment of the Tax Reform Act of 1976 (the Act) (90 Stat. 1634). Before enactment of the Act, transfers described in section 367(c) were subject to a ruling requirement. After enactment of the Act, transfers described in section 367(c) were within the scope of §§ 7.367(b)–1 through 7.367(b)–12. In light of the substantial time that has passed since enactment of the Act and, moreover, in light of the fact that §§ 1.367(b)–1 through 1.367(b)–6 have substantially superceded §§ 7.367(b)–1 through 7.367(b)–12, §§ 7.367(c)–1 and 7.367(c)–2 are no longer necessary and may be misleading.

Accordingly, this document removes §§ 7.367(c)–1 and 7.367(c)–2.

List of Subjects in 26 CFR Part 7

Income taxes, Reporting and recordkeeping requirements.

Removal of Temporary Regulations

Accordingly, under the authority of 26 U.S.C. 7805, 26 CFR part 7 is amended as follows:

PART 7—TEMPORARY INCOME TAX REGULATIONS UNDER THE TAX REFORM ACT OF 1976

Paragraph 1. The authority citation for part 7 continues to read in part as follows:

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

§§ 7.367(c)–1 and 7.367(c)–2 [Amended]

Par. 2. Sections 7.367(c)–1 and 7.367(c)–2 are removed.

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

Approved: December 28, 2000.

Jonathan Talisman,

Assistant Secretary of the Treasury.

[FR Doc. 01–489 Filed 1–11–01; 8:45 am]

BILLING CODE 4830–01–U

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4022 and 4044

Benefits Payable in Terminated Single-Employer Plans; Allocation of Assets in Single-Employer Plans; Interest Assumptions for Valuing and Paying Benefits

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: The Pension Benefit Guaranty Corporation's regulations on Benefits Payable in Terminated Single-Employer Plans and Allocation of Assets in Single-Employer Plans prescribe interest assumptions for valuing and paying benefits under terminating single-employer plans. This final rule amends the regulations to adopt interest assumptions for plans with valuation dates in February 2001. Interest assumptions are also published on the PBGC's web site (http://www.pbgc.gov).

EFFECTIVE DATE: February 1, 2001.

FOR FURTHER INFORMATION CONTACT: Harold J. Ashner, Assistant General Counsel, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202–326–4024. (For TTY/TDD users, call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: The PBGC's regulations prescribe actuarial assumptions—including interest assumptions—for valuing and paying plan benefits of terminating single-employer plans covered by title IV of the Employee Retirement Income Security Act of 1974. The interest assumptions are intended to reflect current conditions in the financial and annuity markets.

Three sets of interest assumptions are prescribed: (1) A set for the valuation of benefits for allocation purposes under section 4044 (found in appendix B to part 4044), (2) a set for the PBGC to use to determine whether a benefit is payable as a lump sum and to determine lump-sum amounts to be paid by the PBGC (found in appendix B to part 4022), and (3) a set for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using the PBGC's historical methodology (found in appendix C to part 4022).

Accordingly, this amendment (1) adds to appendix B to part 4044 the interest assumptions for valuing benefits for allocation purposes in plans with valuation dates during February 2001, (2) adds to appendix B to part 4022 the interest assumptions for the PBGC to use for its own lump-sum payments in plans with valuation dates during February 2001, and (3) adds to appendix C to part 4022 the interest assumptions for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using the PBGC's historical methodology for valuation dates during February 2001.

For valuation of benefits for allocation purposes, the interest assumptions that the PBGC will use (set forth in appendix B to part 4044) will be 6.50 percent for the first 20 years following the valuation date and 6.25 percent thereafter. These interest assumptions represent a decrease (from those in effect for January 2001) of 0.20 percent for the first 20 years following the valuation date and are otherwise unchanged.

The interest assumptions that the PBGC will use for its own lump-sum payments (set forth in appendix B to part 4022) will be 4.75 percent for the period during which a benefit is in pay status, and 4.00 percent during any years preceding the benefit's placement in pay status. These interest assumptions represent a decrease (from those in effect for January 2001) of 0.25 percent for the period during which a benefit is in pay status and the seven-year period directly preceding the benefit's placement in pay status; they are otherwise unchanged.

For private-sector payments, the interest assumptions (set forth in appendix C to part 4022) will be the same as those used by the PBGC for determining and paying lump sums (set forth in appendix B to part 4022).

The PBGC has determined that notice and public comment on this amendment are impracticable and contrary to the public interest. This finding is based on the need to determine and issue new interest assumptions promptly so that the assumptions can reflect, as accurately as possible, current market conditions.

Because of the need to provide immediate guidance for the valuation and payment of benefits in plans with valuation dates during February 2001, the PBGC finds that good cause exists for making the assumptions set forth in this amendment effective less than 30 days after publication.

The PBGC has determined that this action is not a ''significant regulatory action'' under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

List of Subjects

29 CFR Part 4022

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 4044

Employee benefit plans, Pension insurance, Pensions.

In consideration of the foregoing, 29 CFR parts 4022 and 4044 are amended as follows:

PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS

1. The authority citation for part 4022 continues to read as follows:

Authority: 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

2. In appendix B to part 4022, Rate Set 88, as set forth below, is added to the table. (The introductory text of the table is omitted.)

Appendix B to Part 4022—Lump Sum Interest Rates for PBGC Payments

* * * * * * *

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
*	*		*	*	*	*		*
88	2–1–01	3–1–01	4.75	4.00	4.00	4.00	7	8

3. In appendix C to part 4022, Rate Set 88, as set forth below, is added to the table. (The introductory text of the table is omitted.)

Appendix C to Part 4022—Lump Sum Interest Rates for Private-Sector Payments

* * * * * * *

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
*	*		*	*	*	*		*
88	2–1–01	3–1–01	4.75	4.00	4.00	4.00	7	8

PART 4044—ALLOCATION OF ASSETS IN SINGLE-EMPLOYER PLANS

4. The authority citation for part 4044 continues to read as follows:

Authority: 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, 1362.

5. In appendix B to part 4044, a new entry, as set forth below, is added to the table. (The introductory text of the table is omitted.)

Appendix B to Part 4044—Interest Rates Used to Value Benefits

* * * * * * *

For valuation dates occurring in the month—	The values of i_t are:					
	i_t	for t =	i_t	for t =	i_t	for t =
*	*	*	*	*	*	*
February 2001	.0650	1–20	.0625	>20	N/A	N/A

Issued in Washington, DC, on this 5th day of January 2001.

David M. Strauss,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 01–1023 Filed 1–11–01; 8:45 am]

BILLING CODE 7708–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 35

[FRL–6931–8]

RIN 2040–AD20

Drinking Water State Revolving Funds Rule

AGENCY: Environmental Protection Agency.

ACTION: Adoption of interim final rule as final rule.

SUMMARY: The Environmental Protection Agency (EPA) promulgated an interim final rule on August 7, 2000 (65 FR 48286) which codified and implemented requirements for the Drinking Water State Revolving Fund (DWSRF) program. The interim final rule was effective on the date of publication in the **Federal Register**, but included a 60-day comment period to give interested parties an opportunity to comment. EPA indicated that comments would be considered and, if necessary, the Agency would issue a revised final rule changing the interim final rule to respond to comments. After careful consideration of the comments received on the interim final rule, EPA has determined that it will not make changes to the interim final rule.

DATES: The interim final rule became effective on August 7, 2000.

ADDRESSES: Public comments and the comment response document on the interim final rule have been established under Docket W–00–11, which includes supporting documentation, and is available for review at the Water Docket, U.S. Environmental Protection Agency, 401 M Street, SW, East Tower Basement, Room EB57, Washington, DC 20460. For access to the Docket materials, please call (202) 260–3027 between 9 a.m. and 3:30 p.m. (Eastern Time), Monday through Friday, for an appointment and reference Docket W–00–11.

FOR FURTHER INFORMATION CONTACT: For technical inquiries, contact Kimberley Roy, Drinking Water Protection Division, Office of Ground Water and Drinking Water (MC–4606), U.S. Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue, NW, Washington, DC 20460. The telephone number is (202) 260–2794 and the e-mail address is roy.kimberley@epa.gov. For general information, contact the Safe Drinking Water Hotline, toll free at (800) 426–4791. The Safe Drinking Water Hotline is open Monday through Friday, excluding Federal holidays, from 9:00 a.m. to 5:30 p.m. (Eastern Time). DWSRF program information, including

a copy of the interim final rule, are available on EPA's Office of Ground Water and Drinking Water website at *http://www.epa.gov/safewater/dwsrf.html.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 1452 of the Safe Drinking Water Act (SDWA), 42 U.S.C. 300j–12, establishes a national DWSRF program to assist public water systems in financing the cost of drinking water infrastructure projects needed to achieve or maintain compliance with SDWA requirements and to further the public health objectives of the Act. Section 1452(g)(3) of the SDWA states that ''the Administrator shall publish guidance and promulgate regulations as may be necessary to carry out the provisions of this section.''

On August 7, 2000, the EPA promulgated an interim final rule (65 FR 48286) which codified the DWSRF Program Final Guidelines (EPA–816-R–97–005) published on February 28, 1997. The interim final rule establishes: what States must do to receive a capitalization grant; what States may do with capitalization grant funds intended for infrastructure projects; what States may do with funds intended for set-aside activities; and the roles of both the States and EPA in managing and administering the program. Both the DWSRF Program Final Guidelines and the interim final rule were the result of a thorough stakeholder consultation process.

The interim final rule was effective on the date of publication in the **Federal Register**, but included a 60-day comment period to give interested parties an opportunity to comment. EPA indicated that comments would be considered and, if necessary, the Agency would issue a revised final rule changing the interim final rule to respond to comments. EPA received comments from 15 parties by the close of the comment period on October 6, 2000. After careful consideration of the comments received on the interim final rule, EPA has determined that it will not make changes to the interim final rule. Accordingly, the interim final rule is adopted as a final rule without change.

II. Comments on Interim Final Rule

EPA received comments on the interim final rule from 15 parties representing a variety of interests. The majority of commentors represented State government and finance agencies that administer State DWSRF programs (10 commentors). Other commentors included trade associations (2 commentors); environmental/citizen groups (2 commentors); and a State association (one commentor). Commenters raised several key issues which are discussed below. The complete response to comments document has been established under Docket W–00–11 and is available for review.

Many of the comments that EPA received addressed issues that go beyond the scope of the interim final rule because they would involve changes to requirements found in the SDWA. Several commentors stated that the requirement that four percent of the allotment can be set aside for administration of the DWSRF program is insufficient for program administration oversight by States. This restriction on the amount of allotment that can be set aside for administration of the program is a requirement in section 1452(g)(2) of the SDWA. Several commentors stated that EPA should support extending the deadline for appropriations for the DWSRF program beyond fiscal year 2003 because of the success of the program. The preamble to the interim final rule reflects the language in section 1452(m) of the SDWA whereby Congress authorized appropriations for the DWSRF program through fiscal year 2003. One commentor stated that refinancing should be allowed for privately-owned systems and that the deadline for transfer of funds between the DWSRF and Clean Water SRF programs should be removed. The interim final rule reflects the provision in section 1452(f)(2) the SDWA which allows refinancing only for publicly-owned systems and the provision in section 302 of the SDWA that funds may not be transferred between the two SRF programs after September 30, 2001.

Several of the comments that EPA received asked for modifications to provisions that were discussed during development of the DWSRF Program Final Guidelines and which EPA indicated would not change as part of the rule development process. Specifically, five commentors disagreed with EPA's decision to include the requirement in the interim final rule that certain types of infrastructure projects are ineligible for assistance from the DWSRF program. One commentor agreed with EPA's decision. EPA maintains the position established during the development of the DWSRF Program Final Guidelines and reflected in the interim final rule that certain types of projects are ineligible for DWSRF program assistance because they do not further the objectives Congress set out in the SDWA to the same extent as other projects that are eligible.

EPA received mixed comments on the level of public involvement that the interim final rule should require for States to have in their DWSRF programs. Several commentors stated that the rule should have more stringent requirements for public review and comment on State DWSRF programs. For instance, one commentor indicated that the rule should require a State to do more proactive outreach and education to small and disadvantaged communities and that the rule should require a State to use a percentage of its State program management set-aside for public outreach during the development of its Intended Use Plan (IUP). Other commentors indicated that the rule requires too much public review and comment as part of the IUP process. For instance, one commentor indicated that the rule should not require State decisions on the use of the set-aside funds to go through public comment as part of the IUP process because public input is already received as part of the State budget process. EPA believes that the public involvement requirements in the interim final rule allow for a balance between the need for the public to have sufficient opportunities to provide input on State DWSRF programs and the need for States to implement their programs in an efficient manner.

Several of the comments EPA received reflected a misunderstanding of the provisions in the interim final rule. One commentor stated that the rule should not require a State to include in its Biennial Report a demonstration of how it is complying with operator certification and capacity development provisions to avoid withholding of funds. In actuality, the rule does not require a State to demonstrate in its Biennial Report how it is complying with the withholding requirements. The rule only requires a State to agree as part of its capitalization grant agreement that it will provide the annual program submittals that are required in the capacity development and operator certification programs. Several commentors stated that the provision to allow set-aside funds to be used for planning and design costs associated with infrastructure projects for small systems is too narrow and that it precludes a State from funding the development of comprehensive water system plans for systems of all sizes. In actuality, the language in the rule does not preclude a State from providing funds for the development of comprehensive water system plans as part of capacity development assistance since these would not be considered

planning and design costs. Thus, a State could use the State program management set-aside to fund water system plans for systems of all sizes, not just small systems.

EPA received mixed comments on the level of stakeholder involvement provided for during the rule development process. Several commentors commended EPA for the level of stakeholder input on many policy matters in the rule and for the Agency's responsiveness to comments received on the rule. Other commentors stated that stakeholder involvement in the rule should have been broader and more inclusive. EPA believes that the interim final rule gives States a high degree of flexibility to operate their programs and is the result of a thorough stakeholder consultation process that went beyond what is required under the Administrative Procedures Act. The rule is primarily a codification of the DWSRF Program Final Guidelines which went through an extensive public comment and review process. Any additions or modifications to the Final Guidelines that are reflected in the rule went through rounds of public comment and revisions in memoranda, guidance documents, or were published in the **Federal Register** for comment. Stakeholders were also given multiple opportunities to provide comments during the rule development process and all comments received were carefully considered.

III. Administrative Requirements

Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule, for purposes of 5 U.S.C. 804(3).

List of Subjects in 40 CFR Part 35

Drinking water, Environmental protection, Grant programs—environmental protection, Public health, Safe drinking water act, State revolving funds, Water supply.

Dated: December 27, 2000.

J. Charles Fox,

Assistant Administrator, Office of Water.

Accordingly, the interim final rule is adopted as a final rule without change.

[FR Doc. 01–693 Filed 1–11–01; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 64

[Docket No. FEMA–7753]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, FEMA.

ACTION: Final rule.

SUMMARY: This rule identifies communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are suspended on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will be withdrawn by publication in the **Federal Register**.

DATES: The effective date of each community's suspension is the third date (''Susp.'') listed in the third column of the following tables.

ADDRESSES: If you wish to determine whether a particular community was suspended on the suspension date, contact the appropriate FEMA Regional Office or the NFIP servicing contractor.

FOR FURTHER INFORMATION CONTACT: Donna M. Dannels, Branch Chief, Policy, Assessment and Outreach Division, Mitigation Directorate, 500 C Street, SW., Room 411, Washington, DC 20472, (202) 646–3098.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase flood insurance which is generally not otherwise available. In return, communities agree to adopt and administer local floodplain management aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage as authorized under the National Flood Insurance Program, 42 U.S.C. 4001 *et seq.*, unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59 *et seq.* Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register**.

In addition, the Federal Emergency Management Agency has identified the special flood hazard areas in these communities by publishing a Flood Insurance Rate Map (FIRM). The date of the FIRM if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may legally be provided for construction or acquisition of buildings in the identified special flood hazard area of communities not participating in the NFIP and identified for more than a year, on the Federal Emergency Management Agency's initial flood insurance map of the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Associate Director finds that notice and public comment under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives a 6-month, 90-day, and 30-day notification addressed to the Chief Executive Officer that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications have been made, this final rule may take effect within less than 30 days.

National Environmental Policy Act. This rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Considerations. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Associate Director has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts

adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless they take remedial action.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Paperwork Reduction Act. This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

Executive Order 12612, Federalism. This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, October 26, 1987, 3 CFR, 1987 Comp., p. 252.

Executive Order 12778, Civil Justice Reform. This rule meets the applicable standards of section 2(b)(2) of Executive Order 12778, October 25, 1991, 56 FR 55195, 3 CFR, 1991 Comp., p. 309.

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

Accordingly, 44 CFR part 64 is amended as follows:

PART 64—[AMENDED]

1. The authority citation for part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 64.6 [Amended]

2. The tables published under the authority of § 64.6 are amended as follows:

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in special flood hazard areas
Region III				
Pennsylvania: Gilpin, township of, Armstrong County.	421306	July 25, 1975, Emerg., May 4, 1988, Reg. January 5, 2001.	Aug. 23, 2000 ...	Jan. 5, 2001.
Virginia: Monterey, town of, Highland County.	510379	May 9, 1997, Emerg., January 5, 2001, Reg. January 5, 2001.	Dec. 20, 2000 ...	Do.
Region V				
Illinois:				
Golf, village of, Cook County	170098	January 17, 1975, Emerg., November 15, 1979, Reg. January 5, 2001.	Nov. 6, 2000	Do.
La Grange, village of, Cook County	170114	March 30, 1973, Emerg., November 9, 1979, Reg. January 5, 2001.	.....do	Do.
Lincolnwood, village of, Cook County.	171001	April 24, 1979, Emerg., April 24, 1979, Reg. January 5, 2001.	.....do	Do.
North Riverside, village of, Cook County.	170135	March 24, 1975, Emerg., December 16, 1980, Reg. January 5, 2001.	.....do	Do.
Orland Park, village of, Cook County.	170140	April 15, 1974, Emerg., February 4, 1981, Reg. January 5, 2001.	.....do	Do.
Palos Heights, city of, Cook County	170142	July 27, 1973, Emerg., July 16, 1980, Reg. January 5, 2001.	.....do	Do.
Region III				
Pennsylvania:				
Blooming Grove, township of, Pike County.	421962	December 2, 1976, Emerg.; October 18, 1988, Reg.; January 19, 2001.	Oct. 6, 2000	Jan. 19, 2001.
Delaware, township of, Pike County.	421963	September 10, 1975, Emerg.; December 4, 1985; Reg. January 19, 2001.	.....do	Do.
Greene, township of, Pike County	421965	August 6, 1975, Emerg.; October 18, 1988, Reg. January 19, 2001.	.....do	Do.
Lackawaxen, township of, Pike County.	421966	July 7, 1975, Emerg.; August 4, 1988; Reg. January 19, 2001.	.....do	Do.
Lehman, township of, Pike County	421967	February 3, 1976, Emerg.; June 19, 1989; Reg. January 19, 2001.	.....do	Do.
Milford, borough of, Pike County ...	420759	July 23, 1975, Emerg.; June 1, 1989; Reg. January 19, 2001.	.....do	Do.
Milford, township of, Pike County ..	422642	March 11, 1976, Emerg.; December 4, 1985; Reg. January 19, 2001.	.....do	Do.
Porter, township of, Pike County ...	422500	August 17, 1979, Emerg.; October 15, 1985; Reg. January 19, 2001.	.....do	Do.
Shohola, township of, Pike County	421969	August 7, 1975, Emerg.; July 15, 1988; Reg. January 19, 2001.	.....do	Do.
Westfall, township of, Pike County	421970	July 30, 1975, Emerg.; February 2, 1989; Reg. January 19, 2001.	.....do	Do.
Virginia: Hardy County, unincorporated areas.	540051	May 16, 1978, Emerg., June 19, 1985, Reg. January 19, 2001.	.....do	Do.
West Virginia: Moorefield, town of, Hardy County.	540052	May 12, 1975, Emerg., July 1, 1987, Reg. January 19, 2001.	.....do	Do.

Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Dated: January 5, 2001.

Michael J. Armstrong,

Associate Director for Mitigation.

[FR Doc. 01–1026 Filed 1–11–01; 8:45 am]

BILLING CODE 6718–05–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 1

[OST Docket No. OST–1999 6189; Amendment–#303].

Organization and Delegation of Powers and Duties; Delegation to the Administrator, Federal Highway Administration

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: The Secretary of Transportation (Secretary) delegates to the Federal Highway Administrator his authority to implement the Transportation Infrastructure Finance and Innovation Act of 1998 (TIFIA), codified at 23 U.S.C. 181–189. The TIFIA authorizes the Department of Transportation (''Department of Transportation'') to provide secured direct loans, lines of credit, and loan guarantees to public and private sponsors of eligible surface transportation projects. The Federal Highway Administrator is delegated authority with respect to coordination and management of the day-to-day activities associated with implementing the TIFIA program. The Federal Highway Administrator may further delegate this authority. The Secretary reserves the authority to evaluate and select individual projects to receive TIFIA assistance and reserves authority to provide overall policy direction and key program decisions for the TIFIA program.

EFFECTIVE DATE: This rule is effective on January 12, 2001.

FOR FURTHER INFORMATION CONTACT: Gloria Hardiman-Tobin, Office of the Chief Counsel, HCC–40, (202) 366–1397, Department of Transportation, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590. Blane Workie, Office of the General Counsel, (202) 366–9314, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

ELECTRONIC ACCESS: You can view and download this document by going to the web page of the Department's Docket Management System (*http://dms.dot.gov/*). On that page, click on ''search.'' On the next page, type in the last four digits of the docket number shown on the first page of this document. Then click on ''search.'' An electronic copy of this document also may be downloaded by using a computer, modem, and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512–1661. Internet users may reach the Office of the Federal Register's home page at: *http://www.nara.gov/fedreg* and the Government Printing Office's database at: *http://www.access.gpo.gov/nara.*

SUPPLEMENTARY INFORMATION: The Transportation Equity Act for the 21st Century (TEA–21), Pub. L. 105–178, 112 Stat. 241 (1998), created the Transportation Infrastructure Finance and Innovation Act of 1998 (TIFIA). The TIFIA establishes a new Federal credit program to provide credit assistance to surface transportation projects. The TIFIA authorizes the Secretary to provide secured (direct) loans, lines of credit, and loan guarantees to private and public sponsors of eligible transportation projects.

Funding for TIFIA is limited; therefore, the projects to receive financial assistance will be selected on a competitive basis. In fiscal years 1999 through 2003, TIFIA authorizes $530 million to be appropriated from the Highway Trust Fund (other than the Mass Transit Account) for the Secretary to provide up to $10.6 billion of credit assistance to major surface transportation projects. The TIFIA authorizes the Secretary to select the recipients of credit assistance and to use up to $2 million of the budget authority provided each fiscal year for program administration.

The TEA–21 Conference Report stated, ''To ensure the financial and programmatic success of TIFIA, the conference strongly encourages the Secretary to establish an organizational structure within the Department in which financial activities and programs can be closely coordinated and monitored.'' In June 1999, consistent with the Conference Report language, the Secretary and the Administrators of the Federal Highway Administration (''FHWA''), the Federal Railroad Administration (''FRA''), and the Federal Transit Administration (''FTA'') entered into a Memorandum of Understanding (''MOU'') to manage the TIFIA program on an interim basis through the creation of a TIFIA Working Group.

In December 2000, the Secretary and the Administrators of FHWA, FRA, and FTA entered into an MOU, which amended and superseded the June 1999 MOU, to establish a TIFIA Joint Program Office (''TIFIA JPO'') to coordinate and manage the day-to-day activities associated with implementing the TIFIA statutory provisions. According to the 2000 MOU, the TIFIA JPO will organizationally be located within FWHA and will have a dual reporting structure. The TIFIA JPO will report to the Secretary for overall policy direction and key program decisions. The TIFIA JPO will report to the Federal Highway Administrator for coordination and management of day-to-day operations and funding matters.

In accordance with the December 2000 MOU, the Secretary is delegating his authority to operate and manage the financial assistance program under TIFIA to the Federal Highway Administrator. Operation and management of the program consists of the initial evaluation of each project, the negotiation and preparation of the legal documents necessary to consummate the transaction, and the continuing oversight of the project.

For instance, the Federal Highway Administrator will act as the Executive Agent for the TIFIA Program and will be responsible for managing the TIFIA funds, which are authorized to be appropriated from the Highway Trust Fund (other than the Mass Transit Account), with assistance from the other modal agencies and the TIFIA JPO. The Federal Highway Administrator will also manage specific accounting and budgeting activities to include: recording credit agreement obligations into the accounting system; preparing requests for and entering into loan agreements with the U.S. Treasury to borrow funds; receiving borrower requests (original documents) for fund disbursements; disbursing funds to borrowers; collecting and depositing payments from borrowers; making interest payments to the U.S. Treasury for borrowed funds; and satisfying other necessary budgetary and reporting requirements in accordance with the Federal Credit Reform Act (FCRA) and other relevant laws, regulations, and OMB guidelines.

Further, the Federal Highway Administrator will procure any necessary financial, legal, or other technical support services to assist in implementing and administering the TIFIA program and will execute all TIFIA credit instruments, including, but not limited to, term sheets, loan agreements, line of credit agreements, and loan guarantee agreements under delegated authority from the Secretary to the Federal Highway Administrator.

This delegation to the Federal Highway Administrator does not affect the authority or responsibility of the Secretary to develop credit policy and make the final selection of the projects receiving assistance. The Secretary and the Administrators of FHWA, FRA, and FTA intend to create a TIFIA Credit Council that will assist the Secretary in establishing overall policy direction and key program decisions for the TIFIA Program. The TIFIA Credit Council, with the approval of the Secretary, will select individual projects to receive TIFIA assistance, based on the analyses and recommendations of the TIFIA JPO. Formal membership of the TIFIA Credit Council will include the following: Assistant Secretary for Budget and Programs; Assistant Secretary for Transportation Policy; Director of the Office of Intermodalism; General Counsel; and, Administrators of FHWA, FRA and FTA. The TIFIA Credit Council will be chaired by the Assistant Secretary for Budget and Programs.

Since this amendment relates to Departmental organization, procedure, and practice, notice and comment on it are unnecessary under 5 U.S.C. 553(b). Efficient execution of the TIFIA JPO is instrumental to ensuring the financial and programmatic success of TIFIA. This delegation of authority assists the Federal Highway Administrator in establishing an organizational structure within the FHWA in which financial activities and programs can be closely coordinated and monitored. Further, since the amendment expedites the Department of Transportation's ability to meet the statutory intent of the Transportation Infrastructure Finance and Innovation Act of 1998, the Secretary finds good cause under 5 U.S.C. 553(d)(3) for the final rule to be effective on the date of publication in the **Federal Register**.

List of Subjects in 49 CFR Part 1

Authority delegations (Government agencies), Organization and functions (Government agencies).

In consideration of the foregoing, Part 1 of Title 49, Code of Federal Regulations, is amended, effective upon publication, to read as follows:

PART 1—[AMENDED]

1. The authority citation for Part 1 continues to read as follows: Authority: 49 U.S.C. 322; 46 U.S.C. 2104(a); 28 U.S.C. 2672; 31 U.S.C. 3711 (a) (2); Pub. L. 101–552, 104 Stat.2736; Pub. L. No. 106–159, 113 Stat. 1748

2. In § 1.48, add paragraph (nn) to read as follows:

§ 1.48 Delegations to Federal Highway Administrator.

* * * * *

(nn) Carry out the functions and exercise the authority vested in the Secretary by sections 1501–1504 of Public Law 105–178, 112 Stat. 241, titled Transportation Infrastructure Finance and Innovation Act of 1998 (TIFIA), to manage the day-to-day activities associated with implementation of the TIFIA program. The Federal Highway Administrator may further delegate this authority.

Issued on: January 5, 2001.

Rodney E. Slater,

Secretary of Transportation.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AH73

Endangered and Threatened Wildlife and Plants; Notice of Reopening of Comment Period on the Threatened Status of the Sacramento splittail (Pogonichthys macrolepidotus)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule; reopening of comment period.

SUMMARY: The Fish and Wildlife Service (Service), in response to the order of the District Court, Eastern District of California, in the cases *San Luis & Delta-Mendota Water Authority* v. *Anne Badgley, et al.* (Case No. CIV–F–99–5658 OWW) and *State Water Contractors, et al.* v. *Michael Spear, et al.* (Case No. CIV–R–99–5667 OWW) and pursuant to the Endangered Species Act of 1973, as amended (Act), provides notice of the opening of a comment period regarding the threatened status for the Sacramento splittail *(Pogonichthys macrolepidotus)*. This comment period has been opened to acquire information regarding issues identified by the court in the above cases and additional information on the status, abundance and distribution of the Sacramento splittail in the Central Valley of California. Upon the close of the comment period, the Service will make its determination whether the splittail warrants the continued protection of the Act.

DATES: The comment period for this rule closes on February 12, 2001. Any comments received by the closing date will be considered in the final decision on this rule.

ADDRESSES: Comments and materials concerning this proposal should be sent to the Field Supervisor, Sacramento Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2800 Cottage Way, Suite W–2605, Sacramento, California 95825. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Michael Thabault or Stephanie Brady, at the above address, phone 916–414–6600, facsimile 916–414–6710.

SUPPLEMENTARY INFORMATION:

Background

The Sacramento splittail *(Pogonichthys macrolepidotus)*, is the only large cyprinid that is endemic to California's Central Valley, where they were once widely distributed (Moyle 1976). Historically, splittail were found as far north as Redding on the Sacramento River, as far south as the present-day site of Friant Dam on the San Joaquin River, and as far upstream as the current Oroville Dam site on the Feather River and Folsom Dam site on the American River (Rutter 1908).

In recent times, dams and diversions have increasingly prevented upstream access to large rivers, and the species is now apparently restricted to a small portion of its former range (Moyle and Yoshiyama 1992). Splittail enter the lower reaches of the Feather (Jones and Stokes 1993) and American rivers (Charles Hanson, State Water Contractors, *in litt.*, 1993) on occasion; however, the species now is largely confined to the delta, Suisun Bay, Suisun Marsh, and Napa Marsh. The ''Delta'' refers to all tidal waters contained within the legal definition of the San Francisco Bay-Sacramento-San Joaquin River Delta, as delineated by section 12220 of the State of California's Water Code of 1969. Generally, the Delta is contained within a triangular area that extends south from the City of Sacramento to the confluence of the Stanislaus and San Joaquin rivers at the southeast corner and Chipps Island in Suisun Bay.

In recent years, splittail have been found most often in slow moving sections of rivers and sloughs and dead-end sloughs (Moyle *et al.* 1982, Daniels and Moyle 1983). Reports from the 1950s, however, mention Sacramento River spawning migrations and catches of splittail during fast tides in Suisun Bay (Caywood 1974). California Department of Fish and Game survey

data indicate that the highest catches occurred in shallow areas subject to flooding. Historically, major flood basins, distributed throughout the Sacramento and San Joaquin valleys, provided spawning and rearing habitat. These flood basins have all been reclaimed or modified into flood control structures (bypasses). Although primarily a freshwater species, splittail can tolerate salinities as high as 10 to 18 parts per thousand (Moyle and Yoshiyama 1992).

On January 6, 1994, the Service published a proposed rule to list the splittail as a threatened species and requested public comment for 60 days (59 FR 862). The proposed rule constituted a 12-month finding that the petitioned action was warranted, in accordance with section 4(b)(3)(B) of the Act. The data in the proposed rule were based on a status report prepared for the Service by Meng in 1993. This status review used the same methodology as the peer-reviewed article published in the Journal of the American Fisheries Society.

On January 10, 1995, a second comment period was opened for 45 days, and a 6-month extension added to the final rulemaking time frame, in accordance with section 4(b)(6)(B)(I) of the Act. A moratorium on listing actions, imposed on April 10, 1995 (Pub. L. 104–6), was lifted on April 26, 1996. Severe funding constraints imposed by a number of continuing resolutions between November 1995 and April 1996 were followed by passage of the Omnibus Budget Reconciliation Act on April 26, 1996, allowing work to continue on various listing actions in accordance with fiscal year guidance that assigned priorities in a multi-tiered approach in accordance with section 4 of the Act (61 FR 64479). The guidance stated that handling emergency situations was the highest priority (Tier 1), and resolving the listing status of outstanding proposed rules was second highest priority (Tier 2). Processing of this proposed rule fell under Tier 2.

On May 18, 1998, a third comment period was opened for 60 days. This comment period was opened in response to requests by the California Department of Water Resources and the State Water Contractors. The basis of the requests concerned the collection of substantial data in the intervening period since 1995, regarding the abundance and distribution of the splittail. During this third comment period, the California Department of Fish and Game (CDFG) and the Department of Water Resources (DWR) objected to the proposed designation of the splittail as threatened, stating that the geographic distribution of the splittail was broader than previously believed and was being shown to expand as data continued to be gathered.

On May 29, 1998, Southwest Center for Biological Diversity filed a citizen suit alleging that the Service had failed to timely make a final determination on the listing and critical habitat designation of the splittail, consistent with the timeframes set forth in section 4 of the Endangered Species Act 4. By Order dated December 23, 1998, the court (Judge Gonzalez of the Southern District of California) ordered the Service to comply with section 4 listing requirements by February 1, 1999, after determining that the Service violated the Act's time limits for making a final listing determination (Order Granting Plaintiffs' Motion for Summary Judgment; Denying Defendants' Request for Stay, *Southwest Center for Biological Diversity etc.* v. *Babbitt*).

On Monday, February 8, 1999, the Service published a final rule, listing the splittail as threatened under the Act. At that time, the Service determined that the splittail had declined by 50 percent; and was primarily threatened by changes in water flow and water quality resulting from the export of water from the Sacramento and San Joaquin rivers, periodic prolonged drought, loss of shallow-water habitat, introduced aquatic species, and agricultural and industrial pollutants.

Subsequent to the publication of the final rule, plaintiffs in the cases *San Luis & Delta-Mendota Water Authority* v. *Anne Badgley, et al.* and *State Water Contractors, et al.* v. *Michael Spear, et al.* commenced action in federal district court, challenging the listing of the splittail as threatened, alleging various violations of the Act and of the Administrative Procedure Act (5 U.S.C 551 *et seq.*), specifically that the Service failed to use the best scientific and commercial data available; that the Service ignored all pre-1980 and post-1992 data available and that it used only selected data from the 1980–1992 period; that the Service did not publish a summary of the available data, which data the Service considered, and the relationship between the data and the Service's decision on the final rule; and that the final rule was promulgated by the Service in a manner that was arbitrary, capricious, and not in accordance with law, in that the splittail did not meet the definition of a threatened species as set forth in the Act.

On June 23, 2000, the court rendered summary judgment in the two cases in favor of the plaintiffs, finding that the Service's promulgation of the final rule listing the splittail as threatened was unlawful. On September 22, 2000, the court remanded the determination of whether or not the splittail is a threatened or endangered species to the Service. The court ordered the determination be completed within six months of the date of the remand order, and kept the rule in effect during that period.

By this notice, the Service is seeking information regarding the splittail's status, abundance and distribution, as well as information regarding issues identified by the court in its June 23, 2000, judgment.

Abundance Analysis

The following text discusses the analysis the Service completed in the final rule, with additional analysis using 1998 and 1999 data, an updated threats analysis and how these threats may impact the splittail.

At the time of the final rule, the Service considered data made available to it up to and through the third commenting period. This included all the information that the Service received from the various agencies during the open comment periods and the additional data that were collected between 1993 to 1997. The Service based its analysis for the final rule on the 1995 Meng and Moyle paper entitled ''Status of Splittail in the Sacramento-San Joaquin Estuary'', published in the Transactions of the American Fisheries Society, a peer reviewed journal. When an author submits a paper to a professional scientific journal, there are experts in the scientific community that anonymously review the submittals. Therefore, to be accepted in a professional journal, the paper is subjected to several reviews by an anonymous panel and the reviewers do not know who authored the paper. This, therefore, eliminates any bias or subjectivity that may occur in review and ensures papers submitted to professional journals are unbiased and scientifically sound.

The Meng and Moyle paper clearly explains the methodology which the Service used to determine splittail declines in abundance. They state:

> We determined percent declines in splittail for the fall midwater trawl, bay survey, Suisun Marsh and Chipps Island studies by comparing point estimates with the Mann-Whitney U-test. We used a common core data set of 1980–1992 yearly abundances from each survey and divided them into pre- and post decline periods. We chose 1985 as the beginning of the decline because evidence from plots of splittail abundance against

years and because environmental and water management changes occurred in the estuary at about that time. The years preceding 1985 had highly variable water regimes that included drought and flooding. After 1984, winter and spring flows were diverted at higher rates, resulting in reverse flows in the San Joaquin River for about 50% of the spring spawning season (Moyle *et al.* 1992). Pre and post decline periods are approximate because the splittail probably declined over a multiyear period and surveys used in this study took place in different habitats in different parts of the estuary, where different rates and timing of the decline would be expected.

At the time the final rule was written, this was the best scientific method available to the Service. No other methodology had nor has been presented before or since the publication of the final rule. The Meng and Moyle paper had been peer reviewed and accepted for publication in the Transactions of the American Fisheries Society, after rigorous scientific review by fisheries experts. Based on available information to date, the Service continues to believe that this methodology is the best scientific method to determine decline in abundance.

When determining whether splittail abundance indices had decreased over time, the Service considered data from (1) the fall mid-water trawl (FMWT), (2) Bay Study, (3) Suisun Marsh survey, and (4) Chipps Island survey. The FMWT survey is conducted in the upper Estuary by CDFG. It is one of the most comprehensive surveys for surveying fish in the Delta. The data have been collected from 1967 to the current time; with the exception of two years of data (1974 and 1979). The monthly midwater and otter trawl in the lower Estuary is conducted by CDFG (Bay study). Data for this survey have been collected from 1980 to the current time. The Service combined the midwater and otter trawl for the Bay study because the mid-water trawl samples juveniles and the otter trawl targets adults. By combining the data generated from the two sampling methods, any bias inherent in this sampling method for each life stage is evened out. The monthly otter trawl survey of Suisun Marsh is conducted by the University of California at Davis (Suisun Marsh survey). Data have been collected from 1979. The midwater trawl survey is conducted by the Service at Chipps Island in Suisun Bay (Chipps Island). This survey has been ongoing since 1976.

The summer townet and beach seine data were also available to the Service. However, neither of these surveys were used in the abundance decline analysis because the Service believes that the summer townet is inefficient in sampling splittail. It is inefficient because it is selective for a certain age class of splittail. The beach seine data were not used because several years of data are missing and the sample sites have changed over time; therefore this survey represents an inconsistent data set to be used to analyze abundance. However, both of these aforementioned data sets were used in the distribution analysis for this species.

The fish salvage data collected by CDFG and by the Bureau of Reclamation at the State and Federal pumping facilities located in the South Delta (fish salvage data) were used on an individual basis to determine if there were trends, and the directions of those trends, within these data collected. However, these salvage data were not used for overall decline analysis because collection of fish salvage data is not a survey method. It is not a survey method because take of this species is based on the location of the fish. In addition, it is highly selective to juveniles. Therefore, this method does not represent the population as a whole. There is also high variability of the number of fish taken based on project operations. For instance, if most of the population of splittail is temporarily in or centered around the San Joaquin River, then more is susceptible to take at the export facilities. However, splittail are not always found at the export facilities. When splittail are more evenly distributed, the export facilities do not give a good indication of the population as a whole.

In addition, the Service conducted an abundance analysis for each survey set which fit within the Services' abundance data criteria for splittail. These abundance criteria serve to ensure that data from specific surveys were scientifically and statistically reliable. To fit within these abundance data criteria, (1) data had to be collected for at least ten consecutive years, and (2) had to be relatively constant or (3) a core data set had to be available to extract for analysis. These criteria were identified in published literature and adopted by the Service in it rulemaking. In addition, data sets were chosen based on consistency in sampling method. For instance, the FMWT data prior to 1980 were excluded because this survey is missing data for two years prior to 1980 (1974, and 1979). The summer townet was not used for the abundance analysis due to the inefficiency in sampling splittail and because the sampling sites changed over time. The beach seine data were not used for the abundance analysis because several years of data are missing and the sample sites changed over time, rendering it an inconsistent data base.

Based on this methodology, the 1995 Meng and Moyle article calculated population trends for the splittail over 13 years, from 1980 to 1992. The Service then updated this analysis using the same methodology as Meng and Moyle, but including the data sets from 1993 through 1997. The 1998 data were not used in the final rule because at the time the final rule was prepared for surname, and even until the time of publication in February 1999, not all data for the four surveys (FMWT, Chipps Island, Suisun Marsh, and Bay study) had been compiled and/or submitted to the Service. Likewise for this notice, not all 2000 data have yet been compiled and/or submitted to the Service, hence the data that have been received are not incorporated into Table 1 (see below). Since the publication of the final rule in February 1999, the Service has analyzed and incorporated the 1998 and 1999 data in its abundance analysis (Table 1). The following is a breakdown of the abundance analysis, for all life stages, by survey method, as completed by Meng and Moyle, the Service in the final listing determination, and the Service with the addition of 1998 and 1999 data (Table 1).

TABLE 1.—ABUNDANCE ANALYSIS[1] CONDUCTED BY THE SERVICE FOR ALL LIFE STAGES OF SACRAMENTO SPLITTAIL, ON FOUR SURVEY METHODS

Survey	Meng and Moyle (1980–1992)	Service's updated analysis (1980–1997)	Service's updated analysis (1980–1998)	Service's updated analysis (1980–1999)
FMWT	70% decline	60% decline	40% decline	40% decline.
Bay study	20% decline	6% decline	27% increase	33% increase.
Chipps Isl.	80% decline	43% decline	42% decline	44% decline.
Suisun Marsh	73% decline	74% decline	72% decline	83% decline.

TABLE 1.—ABUNDANCE ANALYSIS[1] CONDUCTED BY THE SERVICE FOR ALL LIFE STAGES OF SACRAMENTO SPLITTAIL, ON FOUR SURVEY METHODS—Continued

Survey	Meng and Moyle (1980–1992)	Service's updated analysis (1980–1997)	Service's updated analysis (1980–1998)	Service's updated analysis (1980–1999)
OVERALL	62% decline	48% decline	32% decline	33% decline.

[1] To obtain the data in the preceding table, the Service used the following formula: (1) pre-decline (a)—post-decline (b) = decline (x); (2) decline (x)/pre-decline (a) = percent decline. This calculation was used for each survey by summarizing the data per year, starting in 1980. This formula of calculation is the same method presented by Meng and Moyle in its peer-review article published in 1995.

The results of this abundance analysis are revealing. Between 1980 and 1992, splittail had experienced an overall decline of 62 percent. Based upon the updated data sets that include data through 1997, the splittail had experienced a significant overall decline in abundance by 48 percent. The results using the 1998 and 1999 data still demonstrate an overall decline of 32 percent and 33 percent, respectively. Based upon historical data, over the most lengthy study period (1980–1999), and based upon methodology critiqued by experts, the splittail still face an overall abundance decline of 33 percent.

To date, the Service has only received 2000 data on the fall mid-water trawl and these data are preliminary. However, the FMWT indices for splittail are as follows: September is zero and October is four. Based on historic fall midwater trawl data, these numbers appear to be at the low-end of the spectrum. However, all of the FMWT data are not available yet. The Service is not incorporating these data at this time into any analysis nor is the Service speculating on what these low numbers may mean for splittail abundance indices because these data are incomplete.

In addition to the abundance analysis, the Service conducted an analysis using CVP and SWP export facility data, commonly known as salvage data, depicted below (Table 2). As noted, there was an increase of splittail taken at the CVP and SWP export facilities using 1995 and 1998 data. It is the opinion of the Service that this increase in take was due to the exceptionally wet water years that occurred in 1995 and 1998, which resulted in a higher number of splittail. Take at the export facilities was exceptionally high during both years because in general, there are more fish in an aquatic system in wet years. The Service believes the high take for 1995 was related to the following factors: (1) It was the first extremely wet water year in several years; (2) the spawning distribution of splittail was located primarily in the San Joaquin River, exposing more fish to the export facilities; and (3) CVP and SWP exports were unusually high to take advantage of the high water flows. For 1998, the Service believes that take was high due to the location of splittail again in the San Joaquin River and the increased export operations of the export facilities associated with wet year hydrologies. Salvage data are not used in overall abundance analysis because salvaging is not a survey method.

TABLE 2.—CVP AND SWP SALVAGE ANALYSIS

Life stage	Meng and Moyle (1980–1992)	Service's analysis (1980–1997)	Service's analysis (1980–1998)	Service's analysis (1980–1999)
YOY[1]	64% decline	92% increase[2]	167% increase	150% increase.
All life stages	N/A[3]	80% increase	150% increase	134% increase.

[1] YOY is young-of-the-year.
[2] In the final rule, the Meng and Moyle data reflect young-of-the-year data whereas updated data reflect all life stages for salvage data calculations. Therefore, we present both YOY data as well as all life stage data. Discrepancies in numbers between the final rule and the table above are due to a re-calculation of the raw numbers by the Department of Water Resources.
[3] Meng and Moyle did not publish a salvage data calculation for all life stages.

It is erroneous to conclude that because more splittail were taken at the projects as reflected by the above later year analysis, that more splittial are present in the system. To reach such a conclusion discounts results of the studies conducted to determine actual abundance and the analysis which results from them (see Table 1). In addition to abundance decline, the Service conducted a ''wet year'' analysis using the Chipps Island survey data from 1980 to 1999. The Chipps Island survey was chosen because it surveys the area at the center of the historic distribution of the splittail. The Service believes that this survey is the most representative of splittail abundance. A decline in splittail in this area of historic distribution was evident through the wet years of 1993. In 1995, an extreme wet water year, the decline in wet water year abundance evident in those years through 1993, was no longer evident. However, since 1995, the wet water year indices for this survey are again low. Wet water years (such as 1995) are assumed to provide essential habitat for splittail by inundating the floodplain and allowing populations to rebound from dry water years, when there is less or no suitable spawning habitat. Successful reproduction in splittail is often highly correlated with wet water years. Large pulses of young fish were observed in wet water years 1982, 1983, 1986, and 1995. In 1995, one of the wettest years in recent history, an increase in the Chipps Island index, indeed in all indices was recorded, as in 1986, another wet water year following a dry water year. However, young of the year taken per unit effort (for example, either the number of fish per net that is towed or the number of fish per volume of water sampled) has actually declined steadily in wet water years, from a high of 12.3 in 1978 to 0.3 in 1993. The updated data (1998 and 1999) from CDFG demonstrate a similar decline in wet years, from 37.3 in 1978 to 0.6 in 1993. The abundance index of splittail calculated using Chipps Island survey data during the years of 1995, 1996, 1997, 1998, and 1999 were 44.5, 2.1, 2.6, 6.5, and 2.05 respectively. 1995 was an extreme wet year and splittail abundances were high (44.5). However, 1998 was another extreme wet year and

the Chipps Island survey data indicate only a slight increase (from 2.6 to 6.5) as a result. For the wet water years 1996, 1997, and 1999, the abundance indices remained low (2.1 to 2.05). The Service agrees that in certain wet water years, splittail may have higher reproduction. However, outside of 1995, the indices in wet water years remain low.

In summary, the Service used an analytical method, indeed the only method presented to it, to determine splittail abundance. This method incorporated the four indices previously discussed and an overall analysis, the Chipps Island wet year analysis and salvage data. This method was peer-reviewed and published after rigorous scientific scrutiny by fishery biologists, in the Journal of the American Fisheries Society. The analysis utilizing this method demonstrates a decline in the overall abundance of splittail as well as a decline in three of the four surveys analyzed. In addition to the overall abundance analysis based upon the four independent surveys that demonstrate decline, the Chipps Island survey also demonstrates decline, even in wet water years. Since the decline continues, the Service is of the opinion that splittail are continuing a downward trend. This conclusion is reached using the same methodology and data (now updated through 1999), that were used and explained in the rule making process.

Threats Analysis

In addition to the abundance analysis, the Service conducted a threats analysis for the splittail. In the final rule we determined that the splittail was a threatened species due to a combination of the five factors that are described in the ''Summary of Factors Affecting the Species'' of the final rule (64 FR 5963) pursuant to section 4(a)(1) of the Act. An endangered species is a species which is in danger of extinction throughout all or a significant portion of its range. A threatened species is a species which is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. Pursuant to section 4(a)(1) of the Act, the Secretary is required to list a species that he determines to be threatened or endangered because of one or more of the following five factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

At the time of the final rule, splittail were determined to be under threat by actions listed under all factors, except Factor B, and that the scope and magnitude of these threats were sufficient to warrant listing of the species as threatened. The final rule's analysis of the five threat factors is summarized below.

Threats to splittail were identified under Factor A, which refers to the present or threatened destruction, modification, or curtailment of a species habitat or range. Specifically, the Service determined that, at that time, the present operation of Federal, State, and private water development projects—entailing water storage, diversions and re-diversions, releases, export and agricultural return flows—destroyed splittail habitat.

Regarding Factor B, the Service determined that overutilization (*i.e.,* recreational and commercial harvest) was not known to be a factor affecting the splittail. Factor B was thus not considered in the final rule's determination of threatened status for the splittail.

The final rule identified the threats under Factor C, which refers to the risk presented by disease or predation, as significant. Disease was considered significant because of high incidences of adult splittail in poor health being captured in the State and Federal water project facilities in the south Delta. The south Delta is dominated by water from the San Joaquin River, where pesticides (*e.g.,* chlorpyrifos, carbofuran, and diazinon), salts (*e.g.,* sodium sulfates), trace elements (boron and selenium), and total dissolved solids are prevalent in agricultural runoff. In the final rule, threats of predation were considered minor because striped bass (*Morone saxatilis*) had coexisted with splittail for decades and because CDFG had forgone hatchery rearing and release of striped bass.

Factor D refers to the inadequacy of existing regulatory mechanisms. In the final rule, the suite of regulatory mechanisms were not considered to be adequate to protect the splittail. Implementation of ecosystem restoration-based programs (*e.g.,* Central Valley Project Improvement Act (CVPIA), CALFED Bay-Delta Program), while having beneficial elements, would not solely be sufficient to prevent the decline of the species. The splittail was without protection under the California Fish and Game Code.

Other natural or manmade factors affecting a species' continued existence were evaluated under Factor E. In the final rule, the Service evaluated the risk of drought, the lack of screened water diversions, poor water quality (contaminants), detrimental flood bypass operations, and invasive species and found that these factors were contributing to the decline of the splittail.

Based on the analysis of all five listing factors, threats to habitat and destruction of habitat, disease, the lack of protection, drought, water diversions, contaminants, project operations in concert with a clearly declining abundance, the Service determined that the splittail was likely to become endangered in the foreseeable future if those threats and current population trends continued. The species was thus listed as threatened.

Numerous threats under Factor A were discussed in the final rule and continue to remain. In addition, there have been numerous recent projects which have resulted in habitat loss due to construction of bank protection involving rock revetment, or riprap. Riprapping typically removes riparian and natural bank habitat features of a naturally functioning stream channel. Riparian and natural bank habitats are features that historically provided natural function to the stream banks and flood plains for splittail by providing spawning substrate, organic material, food supply, and cover from predators. Before the splittail was listed as a threatened species, vast stretches of the Sacramento and San Joaquin Rivers, their tributaries, and distributary sloughs in the Delta had been channelized and covered with rock revetment. This historic channelization and rock revetment precluded access to the historic flood plain that the splittail could otherwise utilize during periods of higher flow as spawning and rearing habitat.

Environmental restoration as a component of the CALFED Program would benefit the splittail, though some protection would not necessarily be ensured were the species not listed. For example, some protections provided by the Environmental Water Account would not be available for unlisted species. The Sacramento-San Joaquin Comprehensive Study, under joint development by DWR and the U.S. Army Corps of Engineers (USACE), may address restoration efforts but is also projected to include a substantial bank protection component. Further, the Comprehensive Study is only now engaged in early planning efforts and no specific projects have been identified as feasible.

Prior to the final rule and in the time since the final rule, USACE has placed

or is proposing to place, rock revetment on a total of 130.6 acres of splittail habitat, and an additional 70.8 miles of suitable splittail habitat. To offset these negative effects, the USACE has restored, or is proposing to restore, up to 61.5 acres and 13.1 miles of suitable splittail habitat. These activities will result in a net loss of 69.1 acres and 57.7 miles of suitable splittail habitat. It is not known to what extent this will affect splittail abundance.

Projections of the current and future degree of riprapping within the range of the splittail do not include estimates of non-Federal riprap projects. The effect of this non-federally applied bank protection is addressed under Factor D, as it is related to the inadequacy of existing regulatory mechanisms.

A present threat may exist under Factor B. The Service is concerned that the recreational splittail fishery may be targeting gravid female splittail from within spawning areas and that the continued lack of protection in the State's Fish and Game Code will allow this fishery to expand such that it becomes significant. At this writing, however, recreational fishing is not considered by the Service to be a significant factor in the decline of the species.

Regarding Factor C, the Service has determined that predation remains a minor factor in the decline of the splittail. In the June 16, 2000, biological opinion on the issuance of a section 10(a)(1)(B) permit for the CDFG Striped Bass Management Program, the Service concluded that this activity would not jeopardize splittail if the conditions in the Habitat Conservation Plan were adhered to. The permit expires in 10 years, at which time the effects to listed species will be reexamined. Should other factors in the decline of the splittail, such as prolonged drought, occur during the permit period, the species could suffer predation beyond the level anticipated in the biological opinion. This could also require a reexamination of the permit.

Disease, considered under Factor C, is likely a more significant factor in the decline of the splittail than was known at the time of the final rule. The reason for the increased scope and magnitude of the threat posed by disease is the current understanding regarding the prevalence and effects of environmental contaminants on the splittail. The presence of environmental contaminants can weaken splittail to the point that they suffer from reduced disease resistance. Of specific concern are the threats posed by metals, mercury, selenium, and pesticides. The current status of information regarding the threat posed by environmental contaminants is addressed in detail under Factor E.

Threats to splittail described under Factor D, beyond those analyzed in the final rule remain. Since the publication of the final rule, regulatory mechanisms continue to remain inadequate to protect the species or its habitat. Splittail remain unprotected by the State of California under the Fish and Game Code.

The Service has determined that the CVPIA may benefit the splittail, but may not adequately protect the species. The Service also has determined that because of the multiple purposes of the CVPIA, flows provided by the CVPIA may occur at times of the year that might not benefit splittail, such as flows in the fall for salmon. Further, CVPIA implementation may involve retention of some water within reservoirs during the spring/early summer for cold water pool conservation and its subsequent release for meeting salmonid water temperature criteria. The retention of flows during the spring negatively affects splittail by reducing the frequency and duration of floodplain inundation, which is key for spawning and rearing success. Delta smelt protection offers little benefit because smelt occur in low frequencies or are absent in part of the splittail's range (*i.e.,* outside of the legally-defined Delta).

Though the CALFED Ecosystem Restoration Program Plan (ERPP) will have beneficial effects to splittail, provided the ERPP secures long-term funding, as currently described, it cannot be relied upon to ameliorate all threats to the splittail. The CALFED Program, though containing broad standards for covered activities, is also not a regulatory mechanism and does not necessarily preclude the implementation of non-CALFED Program actions harmful to splittail. The Environmental Water Account (EWA) does provide a mechanism for providing for improved Delta conditions for splittail. However, EWA benefits to splittail would be reduced should the species lose the protection afforded by the Endangered Species Act because Tier 3 protections apply only to listed species.

In addition, numerous, small scale bank protection projects have been implemented without section 404 permits throughout the range of the Sacramento splittail. Implementation of these unpermitted projects has effects similar to those described under Factor A, but given the inadequate enforcement of the Clean Water Act, they typically include no mitigative features. The result, when unauthorized activities including unpermitted bank protection projects, and sand and gravel extraction projects occur in streams within the splittail's range, is lost and/or degraded habitat for the species.

There also exists a risk to the splittail from the continued issuance of a number of Nationwide General Permits (NWPs), authorized under Section 404(e) of the CWA, by the USACE. Certain NWPs allow implementation of their permitted activities with the only regulatory oversight being provided through notification by the regulated entity to the USACE. The Service is especially concerned that NWP General Condition 11, which addresses take of listed species and identifies requirements for consultation with the Service, is not being implemented by applicants and that USACE enforcement of the condition is lacking.

Under Factor E, environmental contaminants (addressed briefly under Factor C, above) are a threat to the continued survival of splittail. Metals such as copper, zinc, and cadmium can be directly toxic to splittail, especially in their sensitive larval stages. These metals damage gills and alter liver and nervous system functions causing death, behavioral changes, and reduced growth and reproduction. These metals can have the same effects on food items of the splittail, reducing their prey base and placing additional stress on the splittail.

Literature exists which documents the existence of methylated mercury (primarily monomethyl mercury) in the Sacramento River and the estuary. Research by the USGS indicates that elevated levels of mercury in water, sediment, and biota are found throughout the Sacramento River, its tributaries, the Delta, and San Francisco Bay. The primary source of this contamination is from mercury mines in the Coast Range and from gold mines in the Sierra Nevada range.

Human health advisories have been issued for mercury in certain waterfowl and fish species from the Delta and San Francisco Bay. The levels at which human health advisories are issued are also levels at which deleterious effects on fish and wildlife can be expected. Splittail are relatively long-lived fish, five to seven years, making them more susceptible to mercury bioaccumulation than shorter-lived fish. Mercury accumulated in a female fish is transferred to the embryo where it causes reduced hatching, developmental abnormalities, reduced growth, and behavioral changes. Suchanek *et al.* (2000) investigated the role of wetland

restoration involving re-flooding of mercury-contaminated soils.

There is concern that reestablished wetlands could become effective pathways for the introduction of toxic methyl mercury in the Delta. Ecosystem restorations at Clear Lake, a watershed which includes runoff from the Sulphur Bank Mercury Mine, threaten to introduce methyl mercury to Cache Creek and thus, to the Sacramento River. The Clear Lake splittail (*Pogonichthys ciscoides*), endemic to Clear Lake, is now extinct (64 FR 5963), though the role of mercury contamination in its decline is not known.

The Yuba River, a tributary to the Sacramento River via the Feather River, is the site of extensive deposition of historic hydraulic mining debris. Historic mining often involved the use of elemental mercury to amalgamate gold, and much was lost downstream. Current operations within the goldfields, whereby the sediments are dredged for gold, can liberate waste mercury back into the river system.

Continued operation of sand and gravel mines and dredging operations in these and other mercury-contaminated tributary streams threatens to liberate mercury presently stored in the alluvium and release it to the ecosystem, where it adversely affects the splittail.

Also regarding Factor E, and not previously analyzed, is the threat to the splittail posed by the synergistic interaction between introduced species and other environmental contaminants. Selenium concentrations in water from the lower San Joaquin River system are at levels that can cause bio-accumulation in fish species, which result in reproductive impacts. In 1998, in a rare occurrence, splittail were found in Mud Slough and Salt Slough (tributaries to the lower San Joaquin River). Composite samples of these fish from four sites were analyzed for selenium. At Mud Slough upstream of the San Luis Drain discharge, a composite sample of four splittail had a selenium concentration of 4.95 parts per million (ppm). At Mud Slough below the discharge, selenium in a composite of seven fish was 7.08 ppm while at a third Mud Slough site further downstream a two fish composite had 5.2 ppm. At Salt Slough, ten splittail were composited and had selenium at 3.19 ppm. The Service has determined, based on studies of its effects on salmonids, that negative effects of selenium on splittail begin to be seen at a level ranging from 3 to 9 ppm.

Selenium is readily bioaccumulated in the introduced Asiatic clam (*Potamocorbula amurensis*), the most common bivalve in the Delta. These clams have selenium concentrations ranging from 6 to 20 ppm, dietary concentrations known to cause severe reproductive problems in fish. These clams are, in turn, consumed by Sacramento splittail (Stewart *et al.* 2000). When splittail are exposed to this level of selenium a reduction in reproductive performance occurs, which results in poor post-hatch survivorship. This means that less splittail young are able to recruit to adulthood. The 1998 splittail data confirm that these fish are being exposed to harmful levels of selenium in their range along the San Joaquin River. Data presented by the U.S. Geological Survey and Stewart *et al.* (2000) at the CALFED Science Conference in October 2000 indicated selenium concentrations in the composite liver samples of splittail in Suisun Marsh at or nearing levels associated with adverse reproductive effects in fish.

The relationship between the bio-accumulation of selenium in the clam and its predation by splittail is synergistically worsened because the clam, via its predation on typical splittail prey items such as estuarine copepods (*Eurytemora affinis,* and *Acartia* sp.) (Wimmerer and Pealva 2000), is emerging as an alternate food source for Delta fishes (Feyrer and Matern 2000).

The Chinese mitten crab (*Eriocheir sinensis*), initially addressed in the final rule, remains present within the Delta. Although the interaction between this species and the splittail remain largely unknown, it is still considered a threat. Crabs will continue to interfere with salvage operations at the Central Valley Project (CVP) and State Water Project (SWP). Further, the burrowing activities of the crab can weaken levees. Splittail habitat would be lost if the weakened levees were repaired and armored with traditional riprap. Nonnative, invasive, and harmful species likely will continue to be introduced to the splittail's range and may have adverse effects as described above.

Pesticides are also prevalent within the Delta and its tributaries due to runoff from agricultural lands and remain a threat. As with mercury and selenium, the long-lived, predatory splittail is highly susceptible to bioaccumulation of contaminants within the aquatic ecosystem. Over time, the splittail will exhibit reduced reproductive success, developmental abnormalities, reduced growth, and behavioral changes associated with the long-term exposure of the species to toxic chemical elements in the various streams throughout its range in the Central Valley.

The Service believes that the splittail may remain vulnerable to natural events such as drought, because of the consistent, overall decline in population indices and severely constricted range and distribution. Since the publication of the final rule, several large water diversions have been screened to prevent entrainment of splittail. Still, numerous, smaller diversions remain unscreened and/or operated in a manner that does not minimize the threat to splittail. Though the CALFED Program has identified screening as a priority, funding has not been secured, nor has any definitive implementation schedule or plan been formulated.

The variability of California's Mediterranean climate exacerbates the threats discussed above. Since the proposal to list the splittail, California has had relatively wet hydrologic conditions that benefit fish species. Because the splittail is a floodplain adapted species, a dramatic decline in abundance was demonstrated during the 1987–92 drought. When another drought occurs splittail indices will again invariably drop.

As the Service stated in the final rule, in the wet water year of 1993, splittail should have been able to exploit flood plain habitat for spawning and rearing. However, since the reservoirs were relatively empty in that year, the rainfall filled the reservoirs instead of inundating habitat for splittail. As a result, the improvements in splittail abundance typical of wet water years were not evident in any of the splittail indices for 1993. This reservoir operation scenario could be repeated and may be exacerbated by reservoir operations intended to retain cold water pools for salmonids.

Flood bypasses continue to be operated in a manner that harms splittail and their habitat. It has been documented that splittail use the Yolo and Sutter bypasses for spawning under certain hydrologic conditions. As recognized in the final rule, however, the bypasses are flood control facilities and are operated as such. The flood bypasses are only flooded when flows in the Sacramento River (Yolo Bypass) and Feather River (Sutter Bypass) reach a certain level. This inundation of the flood bypasses can occur at the wrong time of the year for splittail to take advantage of the spawning habitat. In addition, flooding of the bypasses may not occur for a long enough period of time to ensure successful splittail spawning. This constitutes a threat in that adult fish, having migrated to suitable spawning habitats in the

bypass, could be denied the opportunity to spawn. In those cases where adult splittail have successfully spawned, the resulting progeny could become trapped and killed. There also exists an unquantified threat to developing splittail from agricultural pesticides applied to crops within the bypass.

In addition, the flood bypasses are not sufficiently contoured to ensure that fish can, as the water recedes, escape to the natural riverine and estuarine environment. As an example, in May 2000, up to 1,000 juvenile splittail were trapped in a less than 2-acre borrow pit pond within the bypass. This artificial, temporary pond, with egress originally intended to be constructed, serves as evidence that the various existing borrow pits, agricultural facilities, and other natural sinks are and can be expected to continue to be a source of splittail mortality.

In order for the bypasses to be considered a beneficial splittail spawning habitat, their threats to the species would need to be reduced substantially. Flood bypasses would need to be inundated for at least 30 continuous days between March and April, pesticide use would have to be assessed and possibly, regulated, and entrainment hazards would need to be reduced.

Also in regard to Factor E, and not addressed in the past, is the potential that interspecific competition is a threat to the splittail. Nonnative cyprinids and centrarchids, introduced into the splittail's range as bait and game fish, respectively, may occupy similar ecological niches, thus increasing competition for finite food resources. This threat is apart from the predatory pressure addressed under Factor C.

The splittail is on a downward trend as shown by the abundance analysis. The species is facing threats to its habitat including loss of spawning habitat due to rock revetment, loss of habitat due to poor water quality and water diversions, as well as other threats mentioned above. The Service is seeking comment on the relationship between the data available and the listing of the species as threatened. We are also taking comments on the threats and/or measures which reduce those threats to determine whether continued listing is warranted. Finally, we seek comment regarding abundance of the splittail.

Comments from the Resources Agency

The court requested that the Service provide a more thorough response to the California Resources Agency comments, specifically comments submitted by CDFG and DWR. The court also requested that the Service address other factors including the species population, range, abundance, and distribution. In addition, the court requested that the Service formally respond to the California Resources Agencies (CDFG and DWR) before making a final decision regarding the status of the splittail per section 4(I) of the Endangered Species Act. Section 4(I) states that when a state agency opposes a listing of a species by the Act, then the Federal agency shall write a letter to that state agency stating its decision. The Service shall respond to the state agencies if the Service determines that continued listing is warranted.

(1) The CDFG comments submitted in July 1998 discussed a long-term and medium-term abundance trend. The long-term trend was based on summer townet and fall mid-water trawl survey data. CDFG states that these long-term trend data are consistent in showing no long-term trend in splittail abundance. The medium-term trend was based on surveys that started in the mid-1970s or later. CDFG divided the data sets into ''small'' geographic areas and ''broad'' geographic areas. The data sets that were considered ''small'' were the CVP and SWP salvage data, Chipps Island Trawl, and the Suisun Marsh Survey data. The data sets that were considered ''broad'' were the Beach Seine, the Bay Study Otter and Midwater Trawl, and the FMWT.

The Service cannot determine what method the CDFG used to calculate its results, nor define its terminology. For instance, the Service cannot determine from the comment if there was an overall trend with the medium-term data. The Service cannot determine if the methods used in the paper submitted by the CDFG were peer-reviewed or if the method used by CDFG has been subjected to a statistical test. The Service seeks further information from CDFG explaining and defining its trend theory, and its calculations and methodology.

(2) The CDFG and DWR discuss the increased range of the splittail in the past years and speculate that splittail may remain upstream in the Sacramento River over the summer. These data are based on the capture of two (2) splittail in August of 1997, one at the Red Bluff Division Dam and one at the Glenn-Colusa Irrigation District. In addition, the CDFG cite sporadic and small numbers of splittail captured on the Sacramento River. CDFG states that this information constitutes an expansion of range. CDFG discusses splittial in the lower San Joaquin, Petaluma River, Napa Marsh, and Coyote Creek.

The Service acknowledges the presence of splittail in these areas during wet years and concurs that the splittail may use these areas during wet years. However, a few fish captured in these extreme areas does not constitute a viable population. These are questions relating to distribution for which the Service is seeking comments.

(3) DWR stated its belief that the 1998 data would prove to be an exceptional year for the splittail, without providing or referring to complete 1998 data (i.e., through December 1998). It then speculated on how 1998 would be a good year for splittail, based on numbers of take at the export facilities.

The Service determined that it would be unwise to speculate on data that were not complete at the time of the listing. However, now that we have the complete data sets for 1998, we re-analyzed the data and there is still an overall decline (using the four surveys) in abundance of splittail. In addition, the Resources Agency stated that the Service should withdraw the proposal to list the splittail, based on the preliminary results from 1998.

(4) DWR also commented on the resiliency of the splittail. The Service addressed the resiliency issue in the final rule. The term resilience is a relative term. Due to the larger body size, splittail may be more resilient than delta smelt to entrainment or impingement, for example, but they are less resilient than larger fish such as salmon. We agree with the statement that more than one year class of splittail may spawn at one time. However, spawning is not always successful. Spawning success is correlated with several factors, including wet water years, high Delta outflow, and the presence of flooded vegetation. If these parameters are not present, then the splittail may not successfully spawn and exhibit low recruitment to the population during later years.

(5) DWR and the State Water Contractors submitted additional comments by the CDFG in January 1999, six months after the close of the third comment period (July 1998), and after the final rule had been sent to Washington, D.C. for surname by the Directorate of the Service. A final rule is sent to Washington, D.C. only after it has been reviewed and revised as necessary by the Solicitor's Office and the California-Nevada Operations Manager. In any regard, the CDFG paper stated that 1998 resulted in record or near record age-0 splittail abundance for the summer townet, the FMWT, and the Bay study. These data could not be used for the Service's analysis because we used four data sets to complete the overall abundance decline and in July 1998 only two were available. We have

subsequently used the complete 1998 data sets to perform an additional analysis, and our analysis shows a decline still present in the overall abundance of splittail. In addition, the CDFG re-iterated the expansion of the range of splittail, as it did in its July 1998 submittal. We responded to this comment in the final rule and previously in this document.

Other Court Requests

The court has also requested that we provide an estimate of the current population size of splittail; determine whether or why the current population size is inadequate to prevent extinction in the near future; determine the rate of population decline of splittail; and to identify the minimum viable population size.

The Service appropriately did not ''calculate the risk of extinction'' because there is no methodology of which we are aware for making such a calculation suitable for the splittail. Instead, the Service determined that the splittail was likely to become in danger of extinction within the foreseeable future. After evaluation of population status (abundance), the Service made the determination that the species would likely become endangered within the foreseeable future based upon an analysis of threats to the species. As the abundance information indicates, the species is in decline. There is no scientific formula for determining extinction. However, the threats analysis, which consists of an evaluation of the five listing factors, coupled with abundance decline led the Service to reach its professional conclusion that although not endangered, because extinction is not imminent, the species was threatened. The species habitat and health is continuously being and has been permanently impacted as a result of the threats identified herein.

Hanson Declaration

On behalf of plaintiffs, Dr. Charles Hanson submitted a declaration to the court (Hanson Declaration) making several assertions regarding methods for estimating population size, population viability, minimum habitat requirements, and calculated rates of extinction for the splittail. The Service is familiar with each of these methods in general and would agree that these types of analyses may be appropriate for certain species. However, it is the Services's opinion that none of these methods are scientifically supportable for evaluating splittail, and therefore, would not provide useful indicators of splittail population health. The Hanson Declaration discusses the need for utilizing several analytical methodologies to evaluate the risk of extinction. Models such as those to which the Hanson Declaration may be referring are developed over time and, if using recognized modeling protocols, need validation and verification, and in addition, are species specific. Also, a critical assumption that must be developed to utilize analytical methods such as those to which the Hanson declaration may be referring is an absolute value of population size. Best available information indicates there is no absolute value of population size for this species. The Service is not aware of a model that now exists for this species, nor was such a model identified during the comment periods. No specific alternative methodology was described or presented during the comment period nor did the Hanson Declaration identify any model or methodology that could be used or modified to conduct such an analysis. As such, it is our opinion, the use of such a methodology is not scientifically justified for this species. The Service requests comment on the methods and models suggested by the Hanson Declaration.

Contrary to the Hanson Declaration, we do not believe that an analysis regarding population estimates would be appropriate for splittail. To develop a population estimate, one must be able to count individuals of the species and have confidence in the methodology, one must know how many are born; and how many may recruit to the population the next year. We are not aware of any scientifically supportable methods developed to date to count all individuals of splittail.

Additionally, the sampling methods utilized to capture splittail have not been refined enough to take a subset of individuals and extrapolate that number to the entire population range wide. As noted in both the Hanson Declaration and the Service's analysis, the population of splittail is represented in the form of an index. By definition an index is a representation of population levels, not an absolute number. This is the state of the science for splittail at this time.

Splittail do not effectively use the fish ladders that are in place for salmon, and whereas adult salmon can be counted during their upstream migration, adult splittail cannot be counted in this manner. The species has a low stock recruitment because of the environmental variation found throughout the Central Valley of California, and one cannot predict with any statistical significance, what will be a good year for splittail. In addition, splittail have a very poor stock recruitment relationship. That is to say one can not predict with any scientific certainty what the population of a species is by the number of juveniles produced in a given year. Nor can one predict with any certainty what the juvenile population in a given year would be, even if the adult spawning population was known. As such it is pure speculation to conduct a population viability analysis for this species.

There have been attempts to calculate a given population size during a specific snapshot in time. This kind of analysis is generally based on monitoring data that are very near term and thereby more reliable for developing a general indication of population size at that given time. Such an analysis can not be carried further as a predictor of overall population size or viability at some unknown time in the future because one can not predict the environmental variables which appear to control the reproductive success of this species.

The Hanson Declaration refers to the need to quantify the minimum habitat area required to avoid extinction. The Service prepared and finalized the Recovery Plan for the Sacramento/San Joaquin Delta Native Fishes in 1996, which specifically included splittail that was a proposed species at the time. There was substantial discussion of habitat requirements for splittail and, although the plan does not specifically quantify the minimum habitat area necessary, in part because it can not be scientifically determined, it does specifically quantify abundance criteria that would be necessary to consider delisting the species. In developing the recovery plan for the Delta native fishes the Service convened a recovery team. If sufficient scientific support were available to quantify the minimum habitat needs for the species, that information would have almost certainly been provided by the recovery team, of which Dr. Hanson was a member. The splittail is dependant on a highly variable ecosystem, both temporally and spatially. Habitat is but one component of that very complex ecological system that would lead the species to abundance levels necessary for such a consideration. An additional component to be considered to delist the splittail would be if the threats that lead to listing in the first place were no longer evident.

In the court order dated June 2000, it states that the Service has not shown a relationship between the data and the listing of the splittail, because we did not estimate a minimum viable population nor estimate a population

size for the splittail. As previously indicated, the methods stated in the Hanson Declaration are not applicable to this species. There is no stock-recruitment relationship identified for this species. Therefore, such a biological measure cannot be used for splittail.

The Service is soliciting comment on the current population size of splittail, and how one could calculate that with statistical rigor; how the Service could determine whether the current population size is adequate or inadequate to prevent extinction in the near future; how it can determine the rate of population decline of splittail; and how it can identify the minimum viable population of the splittail.

CALFED and Other Environmental Processes

The Service is also seeking comment on the relevance of a final CALFED decision in the context of how the implementation of the CALFED program will address, and the extent to which it will address, the threats to splittail. In addition, we are also seeking comment on any other environmental program, such as CVPIA, and how it may address the threats to the splittail.

The threats to the splittail could be affected by implementation of the CALFED Bay-Delta Program (CALFED Program). The Record of Decision (ROD) for the CALFED Program was signed in August 2000. The CALFED Program is a long-term comprehensive plan to restore ecosystems and improve water management for beneficial uses of the San Francisco Bay and Sacramento-San Joaquin River Delta (Bay-Delta). The CALFED Program was developed by 14 Federal and State agencies with management responsibilities in the San Francisco Bay and Sacramento-San Joaquin River Delta (Bay-Delta). These agencies seek to address issues in four problem areas—ecosystem quality, water quality, water supply, and levee system integrity.

Several components of the CALFED Program will influence the status of the splittail, including the Ecosystem Restoration Program Plan (ERPP), the Multi-Species Conservation Strategy (MSCS), the Water Quality Program Plan, and an Environmental Water Account. The ERPP and MSCS identify recovery goals for 44 species in the Bay-Delta region, including a goal to ''Recover'' the splittail. In the context of the CALFED Program the term ''recover'' means the program will implement all necessary measures, within its discretion, to recover the splittail, including implementation of Service recovery plans. The current agreements to provide assets for the EWA and $150 million annually for the ERPP extend only 4 years from the date the ROD was signed. Therefore, the programs and agreements embodied in the ROD for the CALFED Program have great potential to aid the recovery of the splittail.

The likelihood the CALFED Program will achieve its recovery objectives is influenced by available funding and the continuing agreement among the parties involved to fully implement the program. Agreements to fund the ERPP and provide assets for the EWA extend only four years from the date the ROD was signed, after which the CALFED program will need to be reevaluated. Full implementation of the 30-year program will require both State and Federal funding and is expected to require both annual appropriations by Congress and continued funding by the State of California. To date, Congress has not appropriated funding for Federal responsibilities under the CALFED Program for fiscal year 2001. Therefore, the program will be funded solely by State funding sources (including, but not limited to propositions 204, 12, and 13).

In addition, the Service it seeking comment on Implementation of the Central Valley Project Improvement Act (CVPIA). CVPIA provisions potentially can affect threats to the splittail. The CVPIA amends previous authorizations of the California Central Valley Project (CVP) to include fish and wildlife protection, restoration, and mitigation as project purposes having equal priority with irrigation and domestic water supply, and fish and wildlife enhancement having equal priority with power generation. Provisions of the CVPIA to benefit fish and wildlife habitat include protection and restoration of natural channel, riparian, and wetland habitats [sections 3406(b)(1) and 3406(d)], dedication and management of 800,000 acre-feet of CVP yield [section 3406(b)(2)], acquisition of additional water supplies to supplement the amount dedicated [section 3406(b)(3)], modification of CVP operations [sections 3406(b)(1) and 3406 (b)(19)], removal of fish migration barriers [sections 3406(b)(10) and 3406(b)(17)], screening of water diversions [section 3406(b)(21)], and acquisition of land and associated water rights [section 3408(h)], among others.

None of the CVPIA provisions specifically target splittail and, to date, no actions have been implemented under the CVPIA specifically to benefit this species. Because major portions of the CVPIA target anadromous fish, most of the benefits to splittail would be incidental to actions taken to benefit anadromous fish. Splittail can benefit from shaded streamside habitat and wetlands resulting from stream channel, riparian, and wetland habitat improvements within the splittail's spawning range. Management of dedicated, supplemental, and reoperated CVP yield can benefit splittail if water releases are made at times and locations that coincide with splittail spawning and rearing, and if the releases are adequate to flood vegetated areas adjacent to stream channels. Removal of migration barriers can provide additional splittail habitat where potential habitat is blocked, and entrainment of splittail at diversions can be reduced if fish screens are installed in splittail habitat areas.

All CVPIA mitigation and restoration actions are contingent on available funding. Funding sources include the CVPIA Restoration Fund, state funds provided to meet CVPIA cost share requirements, and additional Federal funds appropriated by Congress. The total annual funding projected for the CVPIA's preferred alternative was about $90 million, but these funds are not guaranteed and will require appropriation by pertinent state and Federal governments.

The Service is taking comments on the CALFED, CVPIA, and any other environmental process and how they may or may not alleviate some of the threats that are facing the species.

Written comments on all of the above issues may be submitted until February 12, 2001 to the Service office in the **ADDRESSES** section.

Author: The primary authors of this notice are Stephanie Brady and Jason Douglas (see **ADDRESSES** section).

References

A complete list of all references cited in this notice is available upon request from the Sacramento Fish and Wildlife Office (see **ADDRESSES** section).

Authority

The authority for this action is the Endangered Species Act of 1973 (16 U.S.C.1531 *et seq.*)

Dated: January 2, 2001.

Rowan W. Gould,

Manager—California/Nevada Operations Office.

[FR Doc. 01–970 Filed 1–11–01; 8:45 am]

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Proposed Rules

Federal Register
Vol. 66, No. 9
Friday, January 12, 2001

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 929

[Docket No. FV00–929–7 PR]

Cranberries Grown in the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington and Long Island in the State of New York; Reformulation of Sales History Calculations for the 2001–2002 Crop Year

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule invites comments on revisions to the sales history calculations currently prescribed under the producer allotment provisions under the cranberry marketing order (order). The order regulates the handling of cranberries produced in 10 States, and is administered locally by the Cranberry Marketing Committee (Committee). This rule would modify the current sales history formula in order to apportion in the most equitable manner among producers cranberries made available for disposition by handlers in the event volume regulations are recommended for the 2001–2002 season. This rule would also clarify the exemption provisions under the volume regulation provisions for fresh cranberries, modify the outlets for excess cranberries and reinstate the dates for the Committee to notify growers and handlers of their allotments.

DATES: Comments must be received by February 12, 2001.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525–S, P.O. Box 96456, Washington, DC 20090–6456; Fax: (202) 720–5698, or E-mail: moab.docketclerk@usda.gov. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.ams.usda.gov/fv/moab.html*.

FOR FURTHER INFORMATION CONTACT: Kathleen M. Finn or Anne M. Dec, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525–S, P.O. Box 96456, Washington, DC 20090–6456; telephone: (202) 720–2491, Fax: (202) 720–5698.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 96456, room 2525–S, Washington, DC 20090–6456; telephone: (202) 720–2491, Fax: (202) 720–5698, or E-mail: Jay.Guerber@usda.gov.

SUPPLEMENTARY INFORMATION: This proposal is issued under Marketing Order No. 929, as amended (7 CFR part 929), regulating the handling of cranberries grown in Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington and Long Island in the State of New York, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

Question and Answer Overview

What Is the Intent of This Proposal?

Concerns were raised during the 2000–2001 producer allotment volume regulation period that growers with newer acreage (acreage planted within the last 5 years) could experience a larger crop reduction than the average allotment restricted percentage. Existing allotment percentage calculations are based on averaging growers' sales histories. Calculation of the sales histories does not factor in variables and does not provide any adjustment for new acres as they rapidly increase production during the first several harvests. Therefore, growers can be impacted differently depending on their particular situation.

The proposed method in this rule would provide additional sales history for growers with newer acreage to account for increasing yields for each year up to the fifth year. A Committee meeting is scheduled for February 5, 2001, to discuss volume regulation for the 2001–2002 season.

Who Would Be Impacted by This Proposed Rule?

All cranberry growers in the production area who planted acreage in 1995 or later would be impacted by this proposal. In addition to their actual sales histories, these growers would receive additional sales history for the newer acreage to account for increasing yields of that acreage.

For example, a grower with one acre planted in 1998 would have an actual sales history assigned to that acreage based on average sales off that acreage. In addition to the actual sales history, the acreage would be assigned an additional 183 barrels to account for increased production. A table appears in this document which shows additional sales history assigned to acreage planted in 1995 or later.

How Were the Additional Sales History Numbers Developed?

The additional sales histories were assigned by using a formula based on average yields per acre for acreage planted and harvested over the past 5 years. USDA conducted a survey to determine what average yields per acre have been.

Using these average yields, an average sales history was calculated for acreage planted in a specific year. Subtracting the average sales history from the expected yield from that acreage results in the additional barrels assigned to that acreage.

What Would Change With the Fresh Fruit Exemption?

The intent of the fresh fruit exemption in the 2000–2001 volume regulation was to only exempt cranberries going to retail outlets as fresh cranberries. Questions arose as to what constitutes ''fresh'' cranberries under the regulations.

The Committee developed and recommended a more specific definition of fresh cranberries so that the intent would be clear for future volume regulations if fresh cranberries are again recommended for exemption. This

proposed rule clarifies that sales of packed-out cranberries intended for sale to consumers in fresh form would be exempt from volume regulations. The proposal further clarifies the definition by stating that fresh cranberries are also sold dry (either dry picked or dried after water picking) in bulk boxes, generally weighing 30 pounds. If fresh cranberries are diverted into processing outlets, the exemption does not apply.

The proposal also recommends that sales histories be calculated separately for fresh and processed cranberries. Under this proposal, if fresh fruit is exempt from volume regulation, fresh sales would be subtracted from a grower's sales history. Whether to exempt fresh cranberries from a 2001–2002 volume regulation would be discussed and recommended at the February 5, 2001, Committee meeting if volume regulations are recommended.

Executive Orders 12866 and 12998

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

This proposal has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This proposal will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

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

Introduction

This proposal invites comments on revisions to the formula for calculating sales histories under the producer allotment program currently prescribed under the order. This rule would modify the current sales history formula to be more equitable to growers in the event volume regulations are recommended for the 2001–2002 season. This rule would also clarify the exemption provisions under the volume regulation provisions for fresh cranberries, modify the outlets for excess cranberries by broadening the scope of research and development projects that could be classified as exempt outlets and reinstate the dates for the Committee to notify growers and handlers of the allotments. The rule was unanimously recommended by the Committee at a meeting on August 28, 2000.

The U.S. cranberry industry is experiencing an oversupply situation. Recent increases in acreage and yields have resulted in greater supplies, while demand has remained fairly constant. The result has been increasing inventories and reduced grower returns.

In considering ways to cope with the oversupply, the Committee recommended using volume controls (in the form of producer allotments) for the 2000–2001 crop year. A final rule establishing a marketable quantity and allotment percentage was issued on July 3, 2000, and published in the July 11, 2000, issue of the **Federal Register** (65 FR 42598) to apply to the 2000–2001 crop year. The final rule also revised procedures for calculating growers' sales histories, exempted fresh and organically-grown cranberries from the volume regulation, defined State average yield per acre, increased the barrels per acre for determining a commercial crop, revised the Committee review procedures for re-determination of sales histories, and suspended the date by which the Committee notifies growers of their annual allotment. These actions were based primarily upon the recommendations of the Committee and comments received in response to the proposed rule.

This was the first time the sales history method of the producer allotment provisions of the order have been used since these provisions were added to the order in 1992. Many growers, particularly those with acreage 4 years old or less, have indicated that the current method of sales history calculation resulted in a much larger crop reduction from their acreage than the 15 percent reduction established by the July 11, 2000, final rule because of more production on their acreage than their sales histories indicated.

The order provides that after a year of volume regulation, a new sales history shall be calculated for each grower using a formula determined by the Committee (and approved by the Secretary). The Committee recommendation to revise the formula discussed in this proposal specifically addresses growers' concerns regarding the most equitable manner of apportioning among producers the quantities of cranberries made available for disposition by handlers. This method would provide additional sales history for growers with newer acreage to account for increasing yields for each growing year up to the fifth year.

History of the Marketing Order

The cranberry industry has operated under a Federal marketing order since 1962. The order's primary regulatory authority is volume regulation. At that time, production was trending sharply upward, due primarily to improving yields, and demand was not keeping pace. The intent of the program was to limit the volume of cranberries available for marketing in fresh market outlets in the United States and Canada, and in all processing outlets, to a quantity reasonably in balance with the demand in such outlets. This method of controlling volume was the ''withholding'' provisions whereby ''free'' and ''restricted'' percentages would be established. Growers deliver all contracted cranberries to their respective handlers. Free cranberries could be marketed by handlers in any outlet, while restricted berries would have to be withheld from handling and, if possible, diverted by handlers to noncompetitive markets. The withholding program has not been used since 1971.

The order was amended in 1968 to authorize another form of volume regulation—producer allotments. The intent was to discourage new plantings and allow growers to remove surplus berries in a more economical manner, by reducing their production to approximate the marketable quantity or by leaving excess berries unharvested. Production had continued to increase, and the industry was reluctant to recommend a sufficient restricted percentage under the withholding regulations. Under the producer allotment program, growers were issued base quantities. Base quantity was the quantity of cranberries equal to a grower's established cranberry acreage multiplied by such grower's average per acre sales made from the acreage during a representative period. If the allotment base program were activated, each handler would be allowed to acquire for normal marketing only a certain percentage of each grower's base quantity. This authority was used to establish a regulation for the 1977–78 season, but that regulation was subsequently rescinded.

In 1992, the producer allotment provisions were amended to change the

method of calculating growers' annual allotments from the base quantity method to a sales history method. Under this amendment, a grower's sales history is calculated based on a grower's actual sales, expressed as an average of the best 4 of the previous 6 years of sales. There were concerns that base quantities did not accurately reflect actual levels of sales because as growers' acreage increased or decreased, the base quantity did not change. It was concluded that basing allotments on actual sales off acreage would be a more realistic and practical way to determine annual allotments. These provisions were never used until the 2000–2001 season.

Producer Allotment Order Provisions

Section 929.49 of the order currently provides that if the Secretary finds from the recommendation of the Committee or from other available information, that limiting the quantity of cranberries purchased from or handled on behalf of growers during a crop year would tend to effectuate the declared policy of the Act, the Secretary shall determine and establish a marketable quantity for that year. In addition, the Secretary would establish an allotment percentage, which shall equal the marketable quantity divided by the total of all growers' sales histories. Handlers cannot handle cranberries unless they are covered by a grower's annual allotment.

Section 929.48 of the order provides for computing growers' sales histories to be used in calculating allotment percentages under § 929.49. Sales history is defined in § 929.13 as the number of barrels of cranberries established for a grower by the Committee. The Committee updates growers' sales histories each season. The Committee accomplishes this by using information submitted by the grower on a production and eligibility report filed with the Committee. The order sets forth that a grower's sales history is established by computing an average of the best 4 years' sales out of the last 6 years' sales for those growers with existing acreage. For growers with 4 years or less of commercial sales history, the sales history would be calculated (prior to the 2000–01 volume regulation) by averaging all available years of such grower's sales. A new sales history for a grower with no sales history is calculated by using the State average yield per acre or the total estimated commercial sales, whichever is greater. This section also provides the authority for calculating new sales histories for growers after each crop year where a volume regulation was established using a formula established by the Committee (and approved by the Secretary).

Section 929.46 of the order requires the Committee to develop a marketing policy each year prior to May 1. In its marketing policy, the Committee projects expected supply and market conditions for the upcoming season, including an estimate of the marketable quantity (defined as the number of pounds of cranberries needed to meet total market demand and to provide for an adequate carryover into the next season).

Section 929.59 defines excess cranberries as cranberries withheld by handlers after all unused allotment has been allocated. This provision also provides for handlers to notify the Committee by January 1 of a written plan to dispose of excess cranberries and to dispose of them by March 1. Section 929.61 of the order provides the authority for establishing outlets for excess cranberries.

Section 929.58 of the order provides for relieving from any or all requirements of the order the handling of cranberries in such minimum quantities as the Committee, with the approval of the Secretary, may prescribe. The exemption for fresh and organically-grown cranberries was implemented in 2000 under the authority in this section.

2000–2001 Volume Regulation

To address the serious oversupply situation being experienced by the industry, the Committee recommended volume control for the 2000–2001 season (September 1, 2000 to August 31, 2001). The Committee determined that the best method of volume control would be the producer allotment program, which provides for an annual marketable quantity and allotment percentage. The final rule establishing the volume regulation was issued on July 3, 2000, and published in the July 11, 2000, issue of the **Federal Register** (65 FR 42598). The marketable quantity for the 2000–2001 crop year was established at 5.468 million barrels.

The allotment percentage equals the marketable quantity divided by the total of all growers' sales histories. Total growers' sales histories were set by the Committee at 6.432 million barrels. Using the formula established under the order (5.468 million barrels divided by 6.432 million barrels), the annual allotment percentage was set at 85 percent. Section 929.250 of the regulations set forth the above mentioned marketable quantity and allotment percentage.

Section 929.104 of the regulations sets forth the noncommercial and noncompetitive outlets for excess cranberries during a year of volume regulation. For the 2000–2001 season, the outlets for excess cranberries are: (1) Foreign countries, except Canada; (2) charitable institutions; (3) any nonhuman food use; and (4) research and development projects dealing with dehydration, radiation, freeze drying, or freezing of cranberries, for the development of foreign markets.

Section 929.148 defines State average yield. Section 929.48(a)(5) sets forth that a sales history for a grower who has no history of sales associated with such grower's acreage be computed by the Committee using the total estimated commercial sales from the cranberry acreage or the State average yield per acre multiplied by the grower's cranberry producing acreage, whichever is greater. For the 2000–2001 crop year volume regulation, the State average yield was defined as the yield per State for the year 1997 or the average of the best 4 years average yield per State out of the last 6 years, whichever is greater.

Section 929.149 sets forth the methods for sales history determinations for the 2000–2001 year of volume regulation. This regulation specified that for growers with 5 years of sales history, a sales history is computed using an average of the highest 4 years of sales. For growers with 6 or more years of sales history, a sales history is computed using an average of the highest 4 of the most recent 6 years of sales. If these growers also have newer acreage with 4 years of sales history or less, and these growers provided the Committee with credible information which allowed the Committee to segregate the sales history of the newer acreage, then that acreage is treated in the same manner as acreage of a grower with 4 years or less of sales history. For a grower with 4 years or less of sales history, the sales history is computed using the highest sales season. Sales history for new acreage with no history of sales (for both new and existing growers) is computed using the estimated commercial sales or State average yield, whichever is greater.

Section 929.158 exempts sales of fresh and organically-grown fruit from the volume regulation. Handlers were required to qualify for the exemption by filing with the Committee the amount of fresh or organic cranberry sales on a grower acquisition listing form. In addition, to receive an exemption for organic cranberry sales, the cranberries must have been certified by a third party organic certifying organization acceptable to the Committee.

Section 929.107 defines ''commercial crop.'' For the 2000–2001 volume regulation, the number of barrels constituting a commercial crop was increased from 15 to 50 barrels per acre. This change assisted growers who harvested cranberries for the first time in 1999. These growers qualified for a new sales history determination if they produced less than 50 barrels per acre.

Section 929.125 sets forth appeal procedures for growers to request a redetermination of their sales histories. Growers, dissatisfied with their sales history determinations, requested a review of the determinations by following a specified procedure. The grower first filed the appeal with the appeals subcommittee within 30 days after receipt of the Committee's determination of sales history. The grower, if dissatisfied with the subcommittee's decision could further appeal to the Secretary, whose decision was final.

The way sales histories were calculated for the 2000–2001 crop year were based on the concerns and comments regarding fairness and equity, which were raised during the rulemaking proceeding. The revised procedures for calculating sales histories were expected to result in an increase in the marketable quantity recommended by the Committee. It was determined that they were necessary in order to allocate allotment among growers in the most equitable manner.

Reformulation of Sales History Calculations for the 2001–2002 Crop Year

The Committee had been discussing the possible use of volume regulation during the 2000–2001 season for over a year. In its deliberations, concerns were voiced about the potential inequities that could result when calculating sales histories. Because sales histories are based on an average of past years' sales, newer growers could be restricted to a greater extent than more established growers. This is because a cranberry bog does not reach full capacity until several years after being planted. Using an average of early years' sales (which are low) can result in sales histories below future sales potential. A more established grower, on the other hand, would have a sales history more reflective of his or her production capacity.

The Committee and the Department gave much thought to the most equitable method of determining sales histories within the scope of the order. The final rule on volume regulation for the 2000 crop year was as flexible as the order would allow in alleviating the differential impact of the volume regulation on growers.

The marketing order provides for recalculating the method for determining sales histories, should volume regulation be recommended for the 2001–2002 season. Specifically, § 929.48(a)(3) states that a new sales history shall be calculated for each grower after each crop year during which a volume regulation has been established using a formula determined by the Committee with the approval of the Secretary.

The amendment subcommittee met several times to develop a better method of assigning sales histories for newer acreage for future volume regulations. One method discussed was the British Columbia Marketing Committee's method of determining sales histories in years of volume regulation that would add sales history to reflect future production on newer acres. Conceptually, this method specifically addresses the situations encountered with newer acres that were experienced this year domestically. It was suggested by the Committee that this method could be adopted for future years of volume regulation.

The new method of calculating sales histories is intended to address problems associated with using a grower's actual sales history without taking into account anticipated production when calculating allotment percentages. Ideally, in a year of volume regulation, all growers' actual crops would be reduced by the same percentage. Because of uncertainties in making crop predictions, allotment percentage calculations are based on averaging growers' sales histories. Calculation of these sales histories does not factor in variables and does not provide any adjustment for new acres as they rapidly increase production during the first several harvests. Therefore, growers can be impacted differently depending on their particular situation. The result is that sales histories for growers with a significant number of acres being harvested for the first, second, third, and fourth time can be well below what the average crop for these growers is expected to be during the next harvest. The restriction percentages for these growers in a year of volume regulation could therefore exceed the average allotment restriction percentage. The method proposed in this rule addresses that issue by minimizing the differential impact among growers with newer acreage.

One of the primary concerns associated with the 2000 crop year volume regulation was that many growers with a combination of both older and newer acreage were not in a position to take advantage of the regulation which provides that growers with acreage 4 years old or younger could use the highest year as his or her sales history. For the more established grower, all sales from all acreage were combined, regardless of the age of the acreage. The average of the best 4 years of sales out of the last 6 years was used as that grower's sales history. Although the regulations allowed these growers to provide credible evidence to support yields from newer acres, not all growers were in a position to do this. The method of calculating sales histories proposed in this rule would specifically resolve this issue because the grower would not have to segregate his or her acreage to receive additional sales history. The grower would merely have to know the year the acreage was planted and report such information to the Committee annually. The revised formula in this proposal would provide a specified amount of additional sales history based on USDA and industry analysis of cranberry production. The amount of such additional sales history would depend on the year of planting. This would provide a direct solution to this issue.

The British Columbia method of calculating sales history is based on acreage up to 4 years old. Once the acreage reaches its fifth harvest, the calculation of sales history shifts into a method of determining sales history using the best 4 out of the most recent 5 or 6 years. Once cranberry acreage reaches full maturity, it is expected that the average of the best 4 out of 6 years would provide a realistic history of sales. In discussing these proposed amendments, the subcommittee was concerned that shifting from the formula for newer acreage to the mature acreage formula after only 4 years could cause a dramatic change in calculation of sales histories. Specifically, growers' sales histories could drop significantly. The subcommittee determined it would be more equitable to use the newer acreage method up to 5 years so that the transition into the method of calculating sales histories based on the best of 4 years for mature acreage would not cause growers' sales histories to fluctuate significantly.

The first step in developing the method proposed in this rule is to determine industry wide average yields for acreage based on the year of planting. These figures would be used in determining additional sales histories under the new formula. An industry survey conducted several years ago for crop forecasting estimated average yields for new acreage to be 80, 130,

180, and 230 barrels per acre in the first, second, third and fourth harvests, respectively. The subcommittee was concerned that this data could be outdated because cultural practices in the industry have changed and new varieties have been planted which have increased yields per acre. In addition, there were concerns about differing first year production between growers who choose to harvest the first year after planting and those that choose to harvest the second year after planting. A grower who waits an additional year is doing so in anticipation of a greater yield. For example, a grower who harvests the first year after planting may only yield about 50–75 barrels an acre in the first harvest, where a grower who waits an additional year could yield about 100–175 barrels per acre in the first harvest. Because there could be a wide variance in these yields, the subcommittee believed that developing a single set of averages to simultaneously accommodate the two scenarios would produce a wide variance and too much of a differential impact among these growers. The subcommittee believed these situations should be considered separately to minimize the differential impact. Therefore, the subcommittee recommended that the method developed should take into account different harvesting times by basing the averages on the year planted.

Although there was agreement that this methodology would be the best course of action for future producer allotment volume regulations, the subcommittee was still concerned that the actual yield averages may not be true today. The subcommittee enlisted the help of the Department in conducting a survey to determine what average yields per acre would be today.

The Department worked with cranberry handlers in assembling data. Handlers were asked to provide information on growers' yield per acre for yearly harvests made 1, 2, 3, 4 and 5 years after planting, respectively, for acres harvested over the past 5 years. The handlers were also asked to indicate which varieties were planted, specifying the proportion of total new acreage dedicated to each variety.

Two large handlers supplied detailed information relative to harvested acres. To supplement this information, data was gathered from the numerous appeals filed this year from growers who delivered cranberries to other handlers. This additional data collection was accomplished to broaden the scope of the industry data used in the analysis.

In many cases, it was not possible to determine the varieties of the cranberries reported. Review of the data indicated that the Stevens variety was the most prevalent variety, but because the varieties could not be definitively segregated, no distinction was made in the analysis regarding variety.

The data combined grower information from all cranberry producing regions, as well as data for all varieties and years of birth (original date of planting). The data was analyzed to determine what an average grower, growing in average conditions, would experience in terms of yield per acre if he/she planted new acreage and then harvested it 5 consecutive years thereafter.

The results were divided into two categories: Group A—growers harvesting for the first time 1 year after planting, and Group B—growers waiting 2 years before the first harvest. The data included the first harvest and four subsequent harvest yields for groups A and B, respectively, and was analyzed to determine the average yields and rates of increase in yields over the first 5 harvests for each grower/bog category.

The analysis of yield progression over the first 5 harvests for groups A and B revealed significant differences in first harvest yields, but supported the conclusion that yield progression rates for subsequent years were comparable for subsequent harvests. Based on this observation, yield rates and expected yield/sales histories were averaged based on the sample size from each group. These averages are 50, 131, 197, 227 and 250 barrels per acre for acres harvested the first, second, third, fourth and fifth year after planting, respectively.

Since these numbers are based on average yields for the sample groups, it is reasonable to conclude that the yields of approximately 50 percent of the growers impacted by this proposal would be higher than the average. To accommodate as many growers as possible, it was agreed to adjust the averages upward by 25 barrels which would result in growers receiving a higher amount of additional sales history under the proposed formula. This would also assure that first harvests (acreage with no sales history) which were provided the State average yield as a sales history in the 2000 crop year would receive a comparable sales history under this proposal. The average expected yields for each year, increased by 25 barrels would be 75, 156, 222, 252 and 275 barrels per acre for acres harvested the first, second, third, fourth and fifth year after planting, respectively.

These yield figures recommended by the subcommittee were incorporated into the proposed formula for determining the additional sales history per acre that growers would be provided. This would apply to acreage planted in 1995 or later. Sales histories for established acreage would continue to be based on an average of the highest 4 years.

For growers whose acreage has 5 years or less of sales history and was planted in 1995 or later, the sales history would be computed using the average of all available years to get actual sales history. In addition to the actual sales history, such growers would be provided additional sales history to account for increased production in a year of volume regulation. The additional sales history would be calculated using the figures in Table 1.

TABLE 1.—ADDITIONAL SALES HISTORY ASSIGNED TO ACREAGE

Date planted	Expected 2001 yield (bbl/acre)	Average sales history (bbl/acre)	Additional 2001 sales history per acre (bbl/acre)
1995	275	226	49
1996	275	158	117
1997	252	95	157
1998	222	39	183
1999	156	0	156
2000	75	0	75

The manner in which the additional sales history numbers were arrived at are as follows. The expected yields per acre in 2001 would be assigned for each year of planting from 1995 to 2000 (see second column in Table 1). The average yields per acre established by the Committee are totaled (depending upon the number of years of production) and the sum is divided by 4 to obtain an average (see third column in Table 1—average sales history). Using the years 1995 through 1999, the average yields per acre are 75, 156, 222, 252 and 275. This average is then subtracted from the expected yield of the acreage in 2001. The difference is the additional sales history for acreage planted in a specified year (see fourth column in Table 1).

For example, acres planted in 1997 and harvested in 1999 would have 2 years of production (1999 and 2000—first harvest occurring 2 years after planting). Estimated yields on that acreage, as established by the Committee, would be 156 and 222 barrels, respectively. These numbers totaled and divided by 4 equal an average sales history on that acreage of 95 barrels. Expected yield in 2001 on acreage planted in 1997 is 252 barrels. Subtracting the average from the expected yield (252 minus 95) results in 157 barrels. This would be the additional sales history per acre assigned to this acreage, *i.e.,* 157 barrels per acre would be added to the grower's actual sales history which would be computed by averaging all available years harvested.

Because yield levels are comparable after the first year of harvest regardless whether first harvest occurred 1 or 2 years after planting, the subcommittee opted to base the formula on acres first harvested 2 years after planting. Based on the industry data analyzed, approximately two-thirds of growers first harvest 2 years after planting. The formula still takes into account growers who harvest for the first time 1 or 2 years after planting.

The proposed calculation represents a realistic number of additional barrels per acre that growers would be provided to account for increased production on newer acres. The new expected yield/sales histories are believed to more accurately reflect U.S. grower yields as the data used represents actual yields for new bogs planted in the United States over the past 5 years in all parts of the production area. It is estimated that the data pool represented roughly 60–65 percent of production area growers having newly planted acreage. Expected yield/sales histories were re-calculated while maintaining the integrity of first harvest yield differences. Additional sales history would still be provided to growers based on the age of their acres.

The formula is a tool used to make an appropriate adjustment in sales histories for growers harvesting young acreage which is not yet producing at optimal capacity. The formula is based on industry data collected by USDA. It is important to note that these are only averages used to determine how much additional sales histories growers would be provided.

To illustrate how this method would work, a few examples follow:

Example 1—Grower With Only Newer Acreage all First Harvested 2 Years After Planting

A grower has a total of 20 acres with the following sales history:

ACTUAL DELIVERIES FROM 1998–2000

# Acres	Planted	Sales (in barrels)			Actual sales history
		1998	1999	2000	
10	1996	1,000	1,750	1,900	
5	1997	.....	520	1,000	
5	1998	.....	.....	500	
Total	.....	1,000	2,270	3,400	2,223.33 barrels.

The actual sales history for these 20 acres for 2001 would be 2,223.33 barrels (total annual sales divided by all available years, or 3). Because the acreage was planted in 1995 or later, this grower would receive additional sales history to reflect expected yields on newer acres in 2001.

In accordance with the formula as set forth in proposed § 929.149(b) of the regulations, this grower would receive an additional 117 barrels per acre for acreage planted in 1996 (10 acres × 117 = 1,170), 157 barrels per acre for the 5 acres planted in 1997 (5 acres × 157 = 785) and 183 barrels per acres for the 5 acres planted in 1998 (5 acres × 183 = 915 for a total of 2,870 barrels of additional sales history. Added to the grower's actual sales history, the total sales history for the year 2001 for this grower's 20 acres would be 5,093.33 barrels. The only information needed to provide the additional sales history to this grower would be the date of planting.

Example 2—Grower With Newer Acres With Sales History and New Acres With No Sales History

A grower has a total of 15 acres with the following sales history:

ACTUAL DELIVERIES FROM 1997–2000

# Acres	Planted	Sales (in barrels)				Actual sales history
		1997	1998	1999	2000	
10	1996	750	1,000	1,800	2,400	
5	2000	.....	.....	.....	0	
Total	.....	750	1,000	1,800	2,400	1,487.5 barrels

The actual sales history for these 15 acres for 2001 would be 1,487.5 barrels. Because the acreage was planted in 1995 or later, this grower would receive additional sales history to reflect expected yields on newer acres in 2001.

In accordance with the formula as set forth in proposed § 929.149(b) of the regulations, this grower would receive an additional 117 barrels per acre for acreage planted in 1996 (10 acres × 117=1,170), 75 barrels for the 5 acres planted in 2000 (5 acres × 75=375) for a total of 1,545 barrels of additional sales history. Added to the grower's actual sales history, the total sales history for the year 2001 for this grower's 15 acres would be 3,032.5 barrels. The only information needed to provide the additional sales history to this grower would be the date of planting.

Example 3—Grower with established acres and newer acres.

A grower has a total of 60 acres with the following sales history:

ACTUAL DELIVERIES FROM 1995–2000

#Acres	Planted	Sales (in barrels)						Actual sales history
		1995	1996	1997	1998	1999	2000	
50	1993	7,500	8,000	6,200	8,800	5,909	8,200	
10	1996				500	1,800	2,400	
Total		7,500	8,000	6,200	9,300	7,700	10,600	
Best 4 of 6			8,000		9,300	7,700	10,600	8,900 barrels

The actual sales history for these 60 acres for 2001 would be 8,900 barrels. Because 10 of the acres were planted after 1995, this grower would receive additional sales history (for these 10 acres) to reflect expected yields on newer acres in 2001.

In accordance with the formula as set forth in proposed § 929.149(b) of the order's regulations, this grower would receive an additional 117 barrels per acre for acreage planted in 1996 (10 acres × 117=1,170) for a total of 1,170 barrels of additional sales history. Added to the grower's actual sales history, the total sales history for the year 2001 for this grower's 60 acres would be 10,070 barrels. The only information needed to provide the additional sales history to this grower would be the date of planting.

The actual production from the 10 newer acres is already included in past sales history. The 1,170 additional barrels are added to sales history to account for the increased production from the newer acres expected in 2001. In this example and in Example 1, the production from the newer acres was broken out of the total production to illustrate how the method works. In actual practice, it would not be necessary to have this information. The only data needed are the dates of planting. This information would be collected annually by the Committee.

Six years of sales history was used in this example. As discussed later in this document, the Committee has recommended that growers can choose the best 4 out of the last 7 crops for 2001 sales history calculations.

State Average Yield Provisions

Section 929.48(a)(5) of the order sets forth that a new sales history for a grower with no sales history is calculated by using the State average yield per acre or the total estimated commercial sales, whichever is greater.

For the 2000–2001 crop year, the State average yield is defined as the average State yields for the year 1997 or the average of the best 4 years out of the last 6 years, whichever is greater. This calculation is similar to that used to compute sales history for more established growers (an average of the best 4 years out of the last 6 years), and would average out seasonal variations in yields. However, if estimated commercial sales are greater than what is computed above, the Committee would use the estimated commercial sales.

To take into account the differences among the States, the Committee recommended calculating the average yield for each State using the best 4 of the last 6 years, and comparing it to the average yield for that State in 1997. The higher of the two figures for each State was used to calculate new sales histories for new growers. A new § 929.148 was added to the order's rules and regulations to set forth this calculation.

The formula for recalculating sales histories set forth in this proposal provides a yield for acres with no sales history based on analysis of industry data. For acreage expected to be harvested for the first time in the year of a volume regulation, the sales history would be 75 barrels for acres harvested the first year after planting and 156 barrels for acres harvested the second year after planting. These yields are based on averages of expected yields from acreage of that age plus an additional 25 barrels and are more in line with actual yields than the current system of providing the State average yield, which is considered high for harvests the first year after planting. Under the current system, growers forfeit any unused allotment. However, in actual practice, this forfeiture is difficult to monitor. The proposed method provides a simpler, more realistic approach to acreage with no sales history.

Therefore, since under the new formula, a definition of State average yield is unnecessary, this proposal would remove § 929.148 from the rules and regulations.

Definition of Commercial Crop

The final rule on the volume regulation changed the number of barrels that defines a commercial crop under the marketing order from 15 to 50 barrels per acre. Calculations of sales histories are based on ''commercial'' cranberry sales. Section 929.107 defines commercial crop as acreage that has a sufficient density of growing vines to produce at least 50 barrels per acre without replanting or renovation. Acreage producing less than 50 barrels per acre will not be considered to produce a commercial crop.

The intent of this provision was to assist growers who harvested cranberries for the first time in 1999. These growers qualified for a new sales history determination for the 2000 crop year if they produced less than 50 barrels per acre in 1999.

A full commercial cranberry crop is usually not harvested until 3 or 4 years

after being planted. Production is usually limited during the first year, with increases in subsequent years until full capacity is reached. This rule change allowed growers who produced less than 50 barrels per acre in 1999, to be eligible to receive as a sales history the determination for growers with no sales history on such acreage (which is the State average yield or the grower's estimated commercial sales, whichever is greater). This change was intended to benefit growers who had very low yields per acre for their first year of production.

The new calculation of sales histories set forth in this proposal would also make unnecessary the need addressed by § 929.107. For acreage expected to be harvested for the first time in the year of a volume regulation, under this proposal, the sales history would be 75 barrels per acre for acres planted in 2000 and 156 barrels per acre for acres planted in 1999. No determinations would be necessary as to how many barrels were produced on the acreage in previous years.

The Committee would still need to determine the acreage reported as first coming into production in the year of volume regulation is viable planted acreage. For example, if a grower reports that 50 acres of cranberries planted in 1999 are going to be harvested for the first time in 2001, the Committee would need to verify that this acreage exists and that the vines are sufficient enough to provide a crop. Since the definition of commercial crop is not necessary if this proposal is implemented, § 929.107, Basis for determining cranberry acreage, would be removed from the rules and regulations.

Change in the Number of Years Used in Computing Sales Histories

Paragraph (a)(1) of § 929.48 of the order sets forth that sales histories are computed using the best 4 out of 6 years of growers' sales. Paragraph (a)(2) of the same section states that the Committee, with the approval of the Secretary, may alter the number and identity of years to be used in computing subsequent sales histories.

At amendment subcommittee meetings and full Committee meetings, the impact of using the year of volume regulation in future calculations of sales histories was discussed. The Committee was concerned that sales off acreage in a year of volume regulation could be unusually low and if that year was used in calculating sales histories for the next year, it could lower some growers sales histories to unrealistic rates.

This proposal is intended to allow the year of volume regulation to be dropped from future sales history calculations if that year was unusually low. Adding an additional year from which growers' highest 4 years of sales can be chosen provides a greater opportunity for growers to maintain a sales history more reflective of their actual sales.

Therefore, paragraph (a) of § 929.149 is proposed to be modified to indicate sales histories shall be computed using an average of the highest 4 of the most recent 7 years of sales.

Fresh and Organic Fruit Exemption

Fresh and organically-grown fruit are exempt from the 2000–01 volume regulation pursuant to § 929.58 of the order which provides that the Committee may relieve from any or all requirements cranberries in such minimum quantities as the Committee, with the approval of the Secretary, may prescribe. Section 929.158 specifies the exemption for fresh and organically-grown fruit.

Fresh fruit accounts for about 4.7 percent of the total production. Organically-grown cranberries comprise an even smaller portion of the total crop than fresh cranberries, about 1,000 barrels.

Under current marketing practices, there is a distinction between cranberries for fresh market and those for processing markets. Cranberries intended for fresh fruit outlets are grown and harvested differently. When cranberries are water picked for processing, the bog is flooded, the cranberries are ''reeled off'' the vines with harvesting equipment designed for water picking that beats the berries off the vines and the cranberries that rise to the top are harvested. In the State of Wisconsin, cranberries for fresh market are water picked but harvested with special equipment designed to remove the fruit gently as opposed to the reels used to knock fruit from the vines when processed fruit is harvested. In addition, water picked cranberries intended for fresh markets are subjected to a drying process to ensure quality. ''Wet'' cranberries (cranberries that are water picked and not dried with special drying equipment) are not used for fresh market retail sales. For these reasons, conversion from a processed grower to a fresh grower in one season is difficult.

Fresh and organic cranberries are small, but important segments of the overall cranberry market, and do not currently contribute to the oversupply situation. Because there is adequate demand for these products, restricting the volume of fresh cranberries that can be sold profitably was not recommended for the 2000–2001 volume regulation. It was discussed at subcommittee and Committee meetings that fresh fruit production requires special cultural practices that need to be implemented to transition the cranberry vines from processed fruit production to fresh fruit production. The exemption for fresh cranberries was intended to apply to cranberries packed in consumer packaging, such as cellophane bags for supermarkets. Any cranberries sorted out from fresh and converted to processing counted against that grower's allotment.

Although the intent of the fresh fruit exemption in the 2000–01 volume regulation was to only exempt cranberries going to retail outlets as fresh cranberries, questions arose as to what constitutes ''fresh'' under the regulations. For example, some growers expressed the desire to sell large bulk bins of wet cranberries to supermarkets. There was at least one report in 2000 of bulk wet cranberry sales to a retail outlet. This was not contrary to the provisions of the 2000 regulation, but it is not what was intended by the Committee. The Committee was concerned that wet cranberries sold in bulk bins would experience serious quality problems for retailers and consumers and thus, have a negative impact on the fresh marketplace. Another example is that some growers wanted to sell their excess cranberries as fresh cranberries to foreign markets, and it was anticipated that foreign customers could have an economic incentive to process the berries and sell in direct competition with regulated cranberries in foreign markets. This also was not the intent of the current regulation.

The subcommittee developed a more specific definition of fresh cranberries so that the intent would be clear for future volume regulations if fresh cranberries are again recommended for exemption. The proposed § 929.158(a) clarifies that sales of packed-out cranberries intended for sale to consumers in fresh form would be exempt from volume regulations. The definition is further clarified to say that fresh cranberries are also sold dry (either dry picked or dried after water picking) in bulk boxes, generally weighing less than 30 pounds. If fresh cranberries are diverted into processing outlets, the exemption does not apply.

The Committee further recommended that growers be required to notify the Committee of their intent to sell fresh fruit in quantities over 300 barrels. It is not intended that small quantities be subject to the regulation. Also, the subcommittee indicated that ''pick-your-own'' operations would be covered under the fresh fruit exemption.

No modifications were recommended for organically grown cranberries. Therefore, organically grown cranberries would be exempt from future volume regulations if recommended by the Committee (and approved by the Secretary). Such cranberries would need to be certified as organic by a third party organic certifying organization acceptable to the Committee. Handlers would qualify for the exemptions by filing the amount of fresh and organic cranberry sales on the grower acquisition listing form.

It was also recommended that a new paragraph (e) be added to § 929.149 regarding the fresh fruit exemption. This paragraph proposes that sales histories be calculated separately for fresh and processed cranberries. This recommendation also would specify that in the event a grower's fruit does not qualify as fresh fruit, the fresh fruit sales history, in whole or in part, be added to the processed fruit sales history with the approval of the Committee. This was recommended by the Committee so that sales histories would be more reflective of actual sales, especially if fresh fruit sales are exempt in the future. Section 929.62(c) of the order specifies that handlers must file certified reports with the Committee as to the quantities of cranberries handled during designated periods. Handlers have been reporting this information and would continue to report this information in accordance with that provision.

The decision to exempt either fresh or organic cranberries from any volume regulation would be discussed and recommended by the Committee at the same time volume regulation is being considered. If fresh or organic cranberries were not recommended for exemption, these provisions would not apply.

Outlets for Excess Cranberries

The purpose of the producer allotment program is to limit the amount of the total crop that can be marketed for normal commercial uses. There is no need to limit the volume of cranberries that may be marketed in noncommercial or noncompetitive outlets. Thus, in accordance with § 929.61, handlers are allowed to dispose of excess cranberries in certain designated noncommercial outlets. That section of the order provides that noncommercial outlets may include charitable institutions and research and development projects for market development purposes. Noncompetitive outlets may include any nonhuman food use (animal feed) and foreign markets, except Canada. Canada is excluded because significant sales of cranberries to Canada could result in transshipment back to the United States of the cranberries exported there. This could disrupt the U.S. market, contrary to the intent of the volume regulation.

To ensure that excess cranberries diverted to the specified outlets do not enter normal marketing channels, certain safeguard provisions are established under § 929.61. These provisions require handlers to provide documentation to the Committee to verify that the excess cranberries were actually used in a noncommercial or noncompetitive outlet. In the case of nonhuman food use, a handler would be required to notify the Committee at least 48 hours prior to disposition so that the Committee staff would have sufficient time to be available to observe the disposition of the cranberries.

In the final rule establishing and implementing the 2000–2001 volume regulation, § 929.104 specified the noncommercial and noncompetitive outlets for excess cranberries as: (1) Foreign countries, except Canada; (2) Charitable institutions; (3) Any nonhuman food use; and (4) Research and development projects dealing with dehydration, radiation, freeze drying, or freezing of cranberries, for the development of foreign markets. This regulation also specified that excess cranberries cannot be handled, i.e. converted into canned, frozen, or dehydrated cranberries or other cranberry products by any commercial process.

The amendment subcommittee discussed that the provision regarding research and development projects was too restrictive and could exclude some outlets for excess cranberries that could be deemed noncommercial and noncompetitive. At the August 28 Committee meeting, it was unanimously recommended to modify paragraph (a)(4) of § 929.104 to state that research and development projects approved by the Committee would be eligible as outlets for excess cranberries. This would provide more flexibility in determining if a specific project could be considered noncompetitive or noncommercial. The Committee would review the activity and make that determination. Research and development projects would not have to be limited to dehydration, radiation, freeze drying, or freezing of cranberries for the development of foreign markets.

Therefore, this proposal would modify § 929.104 to broaden the scope of research and development projects authorized for excess cranberries.

Reinstatement of Allotment Notification Date

Section 929.49 of the order provides that in any year in which an allotment percentage is established by the Secretary, the Committee must notify growers of their annual allotment by June 1. That section also requires the Committee to notify each handler of the annual allotments for that handler's growers by June 1.

The June 1 deadline was suspended in the final rule of the volume regulation for the 2000–2001 crop year to allow adequate time for interested parties to comment on the proposed rule and for the Department to give due consideration to the comments received and issue a final rule.

This proposal would reinstate the June 1 deadline. It was discussed at the Committee meeting that it is critical to have a deadline should volume regulations again be recommended and implemented. The Committee would even prefer the deadline date to be May 1. However, any other date would need to be accomplished through formal rulemaking.

Therefore, this rule proposes reinstating the deadline date of June 1 in § 929.49 of the order. If volume regulations are recommended next year, the Committee intends to make its recommendation at an earlier date than last year so that growers have the opportunity to better prepare for the producer allotment program.

Regulatory Flexibility Act and Effects on Small Businesses

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action and alternatives considered on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

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

There are approximately 20 handlers of cranberries who are subject to regulation under the order and approximately 1,100 producers of cranberries in the regulated area. Small agricultural service firms are defined by the Small Business Administration (13

CFR 121.201) as those having annual receipts of less than $5,000,000, and small agricultural producers are defined as those having annual receipts of less than $500,000.

Of the 1,100 cranberry growers, between 86 and 95 percent are estimated to have sales equal to or less than $500,000. Since 1997, the industry has seen the value of production decrease by 69 percent. Fewer than 60 growers are estimated to have had sales in excess of $500,000 in 1999. Thus, the majority of producers of cranberries may be classified as small entities. The impact of this proposal would apply to all growers harvesting cranberry acreage in the production area planted in 1995 or later.

Six major handlers handle over 97 percent of the crop. Using Committee data on volumes handled, AMS has determined that none of these handlers qualify as small businesses under SBA's definition. The remainder of the crop is marketed by about a dozen grower-handlers who handle their own crops. All of these grower-handlers would be considered small businesses.

This proposal invites comments on revisions to the formula for calculating sales histories under the producer allotment program currently prescribed under the order. This rule would modify the current sales history formula in order to achieve the most equitable manner of apportioning among producers cranberries made available for disposition by handlers in the event volume regulations are recommended for the 2001–2002 season. This rule would also clarify the exemption provisions under the volume regulation provisions for fresh cranberries, modify the outlets for excess cranberries and reinstate the date for the Committee to notify growers and handlers of the allotments. The proposal was unanimously recommended by the Committee at a meeting on August 28, 2000.

The revisions to sales history calculations would benefit a majority of growers, and would be especially beneficial to newer growers who planted acreage in 1995 or later. The modification of the exemption for fresh cranberry sales would clarify the intent of the exemption already in place. The proposed change to the outlets for excess cranberries would broaden the scope of the research and development projects authorized as outlets for excess cranberries. The reinstatement of the June 1 allotment notification date would only undo the suspension of that date that was imposed last year when it became impractical for the Committee to notify growers of their allotments by that date. In the event volume regulations are implemented next season, these proposed changes would have a positive effect on all growers and handlers because they would provide additional allotment to newer acreage, allow for more options in research and development and simplify and clarify the present regulations.

Industry Profile

Cranberries are produced in 10 States, but the vast majority of farms and production is concentrated in Massachusetts, New Jersey, Oregon, Washington, and Wisconsin. Massachusetts was the number one producing State until 1990, when Wisconsin took over the lead. Since 1995, Wisconsin has been the top producing State. Both States account for over 80 percent of cranberry production. The industry has operated under a Federal marketing order since 1962.

Average farm size for cranberry production is very small. The average across all producing States is about 33 acres. Wisconsin's average is twice the U.S. average, at 66.5 acres, and New Jersey averages 83 acres. Average farm size is below the U.S. average for Massachusetts (25 acres), Oregon (17 acres) and Washington (14 acres).

Small cranberry growers dominate in all States: 84 percent of growers in Massachusetts harvest 10,000 or fewer barrels of cranberries, while another 3.8 percent harvest fewer than 25,000 barrels. In New Jersey, 62 percent of growers harvest less than 10,000 barrels, and 10 percent harvest between 10,000 and 25,000 barrels. More than half of Wisconsin growers raise less than 10,000 barrels, while another 29 percent produce between 10,000 and 25,000 barrels. Similar production patterns exist in Washington and Oregon.

Over 90 percent of the cranberry crop is processed, with the remainder sold as fresh fruit. In the 1950s and early 1960s, fresh production was considerably higher than it is today, and in many years, constituted as much as 25–50 percent of total production. Fresh production began to decline in the 1980s, while processed utilization and output soared as cranberry juice products became popular. Today, fresh fruit claims only about 5–6 percent of total production. (Typically, ''shrinkage'' absorbs the remaining 3 percent of production.) Three of the top five States produce cranberries for fresh sales.

Impact of Reformulating Sales History Calculations

The U.S. cranberry industry is experiencing an oversupply situation. Recent increases in acreage and yields have resulted in greater supplies, while demand has remained fairly constant. The result has been building excess inventories and reduced grower returns.

In considering ways to cope with the oversupply, the Committee recommended using volume controls (in the form of producer allotments) for the 2000–2001 crop year. A final rule establishing a marketable quantity and allotment percentage was issued on July 3, 2000, and published in the July 11, 2000, issue of the **Federal Register** (65 FR 42598) to apply to the 2000–2001 crop year.

This is the first time the sales history method of a producer allotment has been used since these provisions were added to the order in 1992. Cranberry bearing acres continue to increase. Many growers, particularly those with acreage 4 years old or less, indicated that the current method of sales history calculation placed them at a disadvantage because of more production on their acreage than their sales histories indicate. It is estimated that approximately 30 percent of all cranberry acreage was planted in 1995 or later. With the volume of new acres within the industry, this would affect many growers.

The Committee had been discussing the possible use of volume regulation for over a year. In its deliberations, concerns were voiced about the most equitable way of calculating sales histories. Because sales histories are based on an average of past years' sales, newer growers would be differently situated than more established growers when it comes to calculating sales histories. This is because a cranberry bog does not reach full capacity until several years after being planted. Using an average of early years' sales (which are low) can result in a sales history below future sales potential. A more established grower, on the other hand, would have a sales history more reflective of his or her production capacity.

The Committee and the Department gave much thought to the most equitable method of determining sales histories within the scope of the order. The final rule on volume regulation for 2000–01 was as flexible as the order would allow in alleviating the differential impact of the volume regulation on growers.

After a year of volume regulation, the Committee is provided the authority to calculate new sales histories for growers. Specifically, § 929.48(a)(3) sets forth that a new sales history shall be calculated for each grower after each crop year, during which a volume regulation has been established, using a

formula determined by the Committee, with the approval of the Secretary.

The amendment subcommittee met several times to develop a better method to assign sales history for newer acreage. They recommended using a modified version of the British Columbia Marketing Committee's method of determining sales histories in years of volume regulation. This method adds sales history to reflect future production on newer acres. Conceptually, this method addresses the situations encountered with newer acres that were experienced this year domestically. It was proposed to adopt this method for future years of volume regulation.

The Committee recommendation to revise the formula would specifically address growers' concerns by providing a more equitable determination of their sales histories. The recommended method would provide additional sales history for growers with newer acreage to account for increased yields for each growing year up to the fifth year by factoring in appropriate adjustments to reflect rapidly increasing production during initial harvests. The adjustments would be in the form of additional sales histories based on the year of planting as shown in the following table.

TABLE 2.—ADDITIONAL SALES HISTORY ASSIGNED TO ACREAGE

Date planted	Additional 2001 sales history per acre
1995	49
1996	117
1997	157
1998	183
1999	156
2000	75

The Committee discussed other alternatives to this method. One suggestion was to allow growers with newer acreage to add a percentage of the State average yield to their sales history each year up to the fourth year. The example presented was that acreage being harvested for the second time during a year of volume regulation would receive a sales history that was 25 percent of the State average yield, a third year harvest would receive 50 percent of State average yield, a fourth year harvest would receive 75 percent of State average yield. Although this method would address some of the problems experienced this year, it was determined that the method proposed would be the simpler and more practical method for growers to obtain the most realistic sales history.

The Committee determined that something needed to be done to address the concerns associated in the 2000 crop year with growers with newer acreage. As stated previously, an appeals process was established for growers to request a redetermination of their sales histories. For the 2000–2001 volume regulation, a total of 247 appeals were received by the appeals subcommittee (the first level of review for appeals) and these appeals demonstrated the majority of issues that impacted growers during the volume regulation. Most of these issues would be addressed by this proposal. The major categories of appeals were as follows:

1. Growers who provided credible evidence to allow the Committee to segregate the sales histories of newer acreage so that the sales histories of the newer acreage could be computed using the highest sales season. The formula proposed in this rule would provide additional sales history to these acres without segregating the sales off these acres. Under this method, their sales histories would more accurately reflect actual sales.

2. Growers with acreage 4 years old or less that stated that using the highest sales season still did not provide a realistic sales history. Under this proposal, these growers would be provided additional sales history to account for the increases in production of newer acres.

3. Growers with acreage harvested in 1999 with a sales history much lower than anticipated yields on the 2000 crop. These growers requested the Committee to apply the State average yield on this acreage. Under this proposal, these growers would be provided additional sales history to account for the increases in production of newer acres. The additional sales history would be provided based on the year the acreage was planted.

4. Growers with acreage with no sales history requesting higher estimated sales than the State average yield. Acreage with no sales history anticipating first harvest in the year of volume regulation would receive a sales history based on the year of planting. It is expected that there will be growers who anticipate higher yields than the sales history provided by this formula. However, the yield rates arrived at were based on analysis of industry data and adjusted up 25 barrels to accommodate as many growers as possible.

5. Growers with a variety of issues relating to weather related damage on acreage, miscalculations of sales histories, etc. It would be expected appeals of this nature would still be filed and handled on a case-by-case basis.

If this proposal is finalized and volume regulation is recommended and implemented next year, the bases for most of the appeals filed in the 2000 crop year would no longer exist. The appeals subcommittee chairman estimated that over 80 percent of the appeals filed this year would not have been filed if the Committee was able to implement this formula for the 2000–01 season.

As stated previously, fewer than 60 of the approximate 1,100 growers are estimated to have sales in excess of $500,000. Also, approximately 30 percent of all cranberry acreage was planted in 1995 or later. Since 86 to 95 percent of cranberry growers may be classified as small businesses, it can be estimated that this proposal would impact mostly small businesses.

Finally, this proposal, if finalized, would not impose any immediate regulations on growers or handlers. It only modifies the formula for calculating sales histories in the event volume regulations are implemented in the future. Implementing this proposed rule would benefit small businesses by allowing them more flexibility in receiving a more equitable sales history if volume regulations are recommended and implemented in future years. In addition, one of the primary reasons for this proposal being made at this time is to provide growers and handlers with advanced notice of the change in calculations to sales history determinations so that they can be informed and make decisions well ahead of the future season.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. In addition, the Department has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule.

In compliance with Office of Management and Budget (OMB) regulations (5 CFR Part 1320) which implement the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and recordkeeping requirements imposed by this order have been previously approved by OMB and assigned OMB Number 0581–0103.

There are some reporting and recordkeeping and other compliance requirements under the marketing order. The reporting and recordkeeping burdens are necessary for compliance purposes and for the developing

statistical data for maintenance of the program. The forms require information that is readily available from handler and grower records and which can be provided without data processing equipment or trained statistical staff.

This proposed rule would necessitate reconfiguring one form currently approved by OMB. The form is entitled CMC–AL 1, Growers Notice of Intent to Produce and Qualify for Annual Allotment. Growers are required to supply the Committee with information relative to their cranberry acreage in order to qualify for an annual allotment. The information includes how many existing and new acres would be producing cranberries in the following season and who would be handling the cranberries. The estimated time for 1,285 growers to complete this form is 20 minutes, once a year for total burden hours of 424.05. If this proposed rule is implemented, the Committee would reconfigure this form to ensure that information relative to this proposal would be included, particularly the date of planting of the acreage. The burden hours of the form would not change and the reconfigured form would be submitted to OMB to replace the current form.

Opportunity for Public Participation in the Rulemaking Process

The Committee's meetings were widely publicized throughout the cranberry industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the August 28, 2000, meeting as well as the amendment subcommittee meetings were public meetings and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

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

A 30-day comment period is provided to allow interested persons to respond to this proposal. Thirty days is deemed appropriate because the Committee meets in February of 2001, to consider volume regulation. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 929

Cranberries, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 929 is proposed to be amended as follows:

PART 929—CRANBERRIES GROWN IN THE STATES OF MASSACHUSETTS, RHODE ISLAND, CONNECTICUT, NEW JERSEY, WISCONSIN, MICHIGAN, MINNESOTA, OREGON, WASHINGTON, AND LONG ISLAND IN THE STATE OF NEW YORK

1. The authority citation for 7 CFR part 929 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 929.49 [Amended]

2. In paragraph (d) of § 929.49, the suspension of the phrase ''On or before June 1'' is removed.

3. In paragraph (e) of § 929.49, the suspension of the phrase ''On or before June 1 of any year in which an allotment percentage is established by the Secretary'' is removed.

4. Section 929.104, paragraph (a)(4), is revised to read as follows:

§ 929.104 Outlets for excess cranberries.

(a) * * *

(4) Research and development projects approved by the committee dealing with the development of foreign and domestic markets, including, but not limited to dehydration, radiation, freeze drying, or freezing of cranberries.

* * * * *

§ 929.148 [Removed]

5. Section 929.148 is removed.

6. Section 929.149 is revised to read as follows:

§ 929.149 Determination of sales history.

A sales history for each grower shall be computed by the committee in the following manner.

(a) For each grower with acreage with 7 or more years of sales history, a new sales history shall be computed using an average of the highest 4 of the most recent 7 years of sales. If the grower has acreage with 6 years sales history, a new sales history shall be computed by averaging the highest 4 of the 6 years. If the grower has acreage with 5 years of sales history and such acreage was planted prior to 1995, a new sales history shall be computed by averaging the highest 4 of the 5 years.

(b) For growers whose acreage has 5 years or less of sales history and was planted in 1995 or later, the sales history shall be computed using the average of all available years and shall be adjusted as provided in paragraph (d).

(c) For growers with acreage with no sales history or for the first harvest of replanted acres, the sales history will be 75 barrels per acre for acres planted or re-planted in 2000 and first harvested in 2001 and 156 barrels per acre for acres planted or re-planted in 1999 and first harvested in 2001.

(d) In addition to the sales history computed in accordance with paragraphs (a) and (b) of this section, additional sales history shall be assigned to growers with acreage planted in 1995 or later. The additional sales histories depending on the date the acreage is planted are shown in Table 1.

TABLE 1.–ADDITIONAL SALES HISTORY ASSIGNED TO ACREAGE

Date planted	Additional 2001 sales history per acre
1995	49
1996	117
1997	157
1998	183
1999	156
2000	75

(e) Sales histories shall be calculated separately for fresh and processed cranberries. Fresh fruit sales history, in whole or in part, may be added to process fruit sales history with the approval of the committee in the event that the grower's fruit does not qualify as fresh fruit at delivery.

7. Section 929.158 is revised to read as follows:

§ 929.158 Exemptions.

If fresh and organically-grown cranberries are exempted from the volume regulation as recommended by the Committee and approved by the Secretary, the following provisions to these exemptions shall apply:

(a) Sales of packed-out cranberries intended for sales to consumers in fresh form shall be exempt from volume regulation provisions. Fresh cranberries are also sold dry in bulk boxes generally weighing less than 30 pounds. Fresh cranberries intended for retail markets are not sold wet. If any such fresh cranberries are diverted into processing outlets, the exemption no longer applies. Growers who intend to handle fresh fruit shall notify the committee of their intent to sell over 300 barrels of fresh fruit.

(b) Sales of organically-grown cranberries are exempt from volume regulation provisions. In order to

receive an exemption for organic cranberry sales, such cranberries must be certified as such by a third party organic certifying organization acceptable to the committee.

(c) Handlers shall qualify for the exemptions in paragraphs (a) and (b) of this section by filing the amount of packed-out fresh or organic cranberry sales on the grower acquisition form.

Dated: January 5, 2001.

Robert C. Keeney,

Deputy Administrator, Fruit and Vegetable Programs.

[FR Doc. 01–949 Filed 1–11–01; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 00–AEA–03]

Proposed Amendment to Class E Airspace; Salisbury, MD

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to amend the Class E airspace at Salisbury, MD. Establishment of Class D airspace at Salisbury, MD, necessitated by the opening of a new Air Traffic Control Tower (ATCT) Controlled airspace extending upward from Above Ground Level (AGL) is needed to accommodate operations under Instrument Flight Rules (IFR) at the airport when the tower is not in operation.

DATES: Comments must be received on or before February 12, 2001.

ADDRESSES: Send comments on the proposal in triplicate to: Manager, Airspace Branch, AEA–520, Docket No. 00–AEA–03, Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809.

The official docket may be examined in the Office of the Regional Counsel, AEA–7 Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809.

An informal docket may also be examined during normal business hours in the Airspace Branch, AEA–520, Eastern Region, 1 Aviation Plaza, Jamaica, NY 11424–4809.

00–AEA–03FR] paragraph 6002 of FAA Order 7400.9G, dated September 10, 2000 and effective September 16, 2000, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be amended in the order.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations (14 CFR Part 71) provides controlled Class E airspace extending upward from the surface for aircraft executing an SIAP at Salisbury-Ocean City, Wicomico Regional Airport.

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 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

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

PART 71—[AMENDED]

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

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

§ 71.1 [Amended]

The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9G, Airspace Designations and Reporting Points, dated September 10, 2000, and effective September 16, 2000, is amended as follows:

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

* * * * *

AEA MD E2, Salisbury, MD (Revised)

Salisbury-Ocean City, Wicomico County Regional Airport
(Lat. 38°20.43′ N/long. 75°30.6′ W)

That airspace extending upward from the surface within a 4.1 mile radius of the Salisbury-Wicomico County Airport and within 3.1 miles each side of the Salisbury VORTAC 209° radial extending from the 4.1 mile radius to 9.2 miles southwest of the VORTAC and within 3.1 miles each side of the Salisbury VORTAC 052° radial extending from the 4.1 mile radius to 8.3 miles northeast of the VORTAC and within 1 mile each side of the Salisbury-Wicomico County Airport localizer northwest course extending from the 4.1 mile radius to 4.8 mile northwest of the localizer and within 3.1 miles each side of the Salisbury VORTAC 132° radial extending from the 4.1 mile radius to 9.2 miles southeast of the VORTAC. This Class E airspace area is effective during those times when the Class D airspace is not in effect.

* * * * *

Issued in Jamaica, New York on December 18, 2000.

Franklin D. Hatfield,

Manager, Air Traffic Division, Eastern Region.

[FR Doc. 01–1089 Filed 1–11–01; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 00–AEA–14]

Class E Airspace

AGENCY: Federal Aviation Administration [FAA], DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to establish Class E airspace at Waynesboro, VA. A helicopter Point in Space Approach has been developed for Augusta Medical Center, Waynesboro, VA. Controlled airspace extending upward from 700 feet to 1200 feet Above Ground Level (AGL) is needed to contain aircraft executing the approach. This action proposes to establish Class E airspace to include the Point in Space approach to Augusta Medical Center Heliport. The area would be depicted on aeronautical charts for pilot reference.

DATES: Comments must be received on or before February 12, 2001.

ADDRESSES: Send comments on the proposal in triplicate to: Manager, Airspace Branch, AEA–520, Docket No. 00–AEA–14, F.A.A. Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809.

The official docket may be examined in the Office of the Regional Counsel, AEA–7, F.A.A. Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809. An informal docket may also be examined during normal business hours in the Airspace Branch, AEA–520. F.A.A. Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809.

FOR FURTHER INFORMATION CONTACT: Mr. Francis T. Jordan, Jr., Airspace

Specialist, Airspace Branch, AEA–520 F.A.A. Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809; telephone: (718) 553–4521.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket number and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Airspace Docket No. 00–AEA–14''. The postcard will be date/time stamped and returned to the commenter. All communications received on or before the closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the Rules Docket both before and after the closing date for comments. A report summarizing each substantive public contact with the FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Office of the Regional Counsel, AEA–7, F.A.A. Eastern Region, 1 Aviation Plaza, Jamaica, NY, 11434–4809. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRMs should also request a copy of Advisory Circular No. 11–2A, which describes the application procedure.

The Proposal

The FAA is considering an amendment to Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to establish Class E airspace area at Waynesboro, VA. An RNAV Point Space Approach has been developed for Augusta Medical Center Heliport, Waynesboro, VA. Controlled airspace extending upward from 700 feet AGL is needed to accommodate the approach. Class E airspace designations for airspace areas extending upward from 700 feet or more above the surface are published in Paragraph 6005 of FAA Order 74009.9H, dated September 1, 2000, and effective September 16, 2000, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed 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 would affect air traffic procedures and air navigation, it is certified that this proposed rule would not have 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

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

PART 71—[AMENDED]

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

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; EO 10854, 24 FR 9656, 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 dated September 10, 2000, and effective September 16, 2000, is proposed to be amended as follows:

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

* * * * *

AEA VA E5, Waynesboro, VA

Augusta Medical Center Heliport
(Lat. 3806.495N, long 07859.204W).

That airspace extending upward from 700 feet above the surface within a 6 mile radius of Augusta Medical Center Heliport.

* * * * *

Issued in Jamaica, New York on December 18, 2000.

F.D. Hatfield,

Manager, Air Traffic Division, Eastern Region.

[FR Doc. 01–1093 Filed 1–11–01; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 203

[Docket No. FR–4469–N–02]

RIN 2502–AH38

Withdrawal of Proposed Rule on Sources of Homeowner Downpayment Pursuant to Section 203 of the National Housing Act

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Withdrawal of proposed rule.

SUMMARY: This Notice withdraws a proposed rule that would have prohibited gifts from non-profit organizations being used for the mortgagor's investment in a mortgaged property if the organization received the funds for the gift either directly or indirectly from the seller.

DATES: This notice is effective January 12, 2001.

FOR FURTHER INFORMATION CONTACT: Vance Morris, Director, Home Mortgage Insurance Division, Room 9266, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410–8000, (202) 708–2700 (this is not a toll-free number). For hearing-and speech-impaired persons, this number may be accessed via TTY (text telephone) by calling the Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

On September 14, 1999, HUD published in the **Federal Register** a proposed rule to establish standards for the use of gifts provided by non-profit organizations as a source of the mortgagor's investment in the mortgaged property. The regulation would have permitted certain gifts by non-profit corporations for use as the mortgagor's investment, but would have prohibited them whenever they were directly or indirectly derived from the seller of the property, or if the seller

paid other consideration or reimbursement to the nonprofit for making the gift.

The comment period closed on November 15, 1999. By the time of the close of the comment period, HUD received 1,871 comments. Only 21 of these comments favored the rule. The overwhelming majority of comments opposed the rule.

Based on these public comments, HUD has determined to withdraw this proposed rule on sources of homeowner downpayment.

Dated: January 2, 2001.

William C. Apgar,

Assistant Secretary for Housing-Federal Housing Commissioner.

[FR Doc. 01–1000 Filed 1–11–01; 8:45 am]

BILLING CODE 4210–27–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–125237–00]

RIN 1545–AY60

Debt Instruments With Original Issue Discount; Annuity Contracts

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations relating to the federal income tax treatment of annuity contracts issued by certain insurance companies. These proposed regulations provide guidance on whether certain annuity contracts are excluded from the definition of a debt instrument under the original issue discount provisions of the Internal Revenue Code. This document also provides a notice of public hearing on the proposed regulations.

DATES: Written or electronically generated comments must be received by April 12, 2001. Requests to speak (with outlines of oral comments to be discussed) at the public hearing scheduled for May 30, 2001, at 10 a.m. must be submitted by May 9, 2001.

ADDRESSES: Send submission to: CC:M&SP:RU (REG–125237–00), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to: CC:M&SP:RU (REG–125237–00), Courier's Desk, Internal Revenue Service, 1111 Constitution Ave., 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/tax_regs/regslist.html.* The public hearing will be held in room 4718, 1111 Constitution Ave., NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Patrick E. White, (202) 622–3920; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, contact LaNita VanDyke, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Sections 163(e) and 1271 through 1275 of the Internal Revenue Code (Code) provide rules for the treatment of debt instruments with original issue discount (OID). Section 1275(a)(1)(A) defines the term ''debt instrument'' to include a bond, debenture, note or certificate or other evidence of indebtedness. Sections 1275(a)(1)(B)(i) and (ii), however, exclude certain annuity contracts from the definition of a debt instrument.

On February 2, 1994, the IRS and Treasury published in the **Federal Register** (59 FR 4799) final regulations concerning a variety of issues under the OID provisions. On January 8, 1998, the IRS and Treasury published in the **Federal Register** (63 FR 1054) final regulations concerning the life annuity exception of section 1275(a)(1)(B)(i). This document contains proposed rules concerning the exception for annuities described in section 1275(a)(1)(B)(ii).

Explanation of Provisions

In general, the OID provisions apply to issuers and holders of debt instruments. The term debt instrument generally means any instrument or contractual arrangement that constitutes indebtedness under general principles of income tax law. See section 1275(a)(1)(A) and § 1.1275–1(d).

If a contract is a debt instrument with OID, section 1272 generally requires the holder of the contract to include OID in income currently on a constant yield basis, regardless of the holder's overall method of accounting. By contrast, the holder of an annuity contract to which section 72 applies generally is allowed to defer recognizing economically earned income until distributions are made on the contract.

Section 1275(a)(1)(B) excepts two types of annuity contracts from the definition of a debt instrument. First, section 1275(a)(1)(B)(i) excepts an annuity contract to which section 72 applies if the contract ''depends (in whole or in substantial part) on the life expectancy of 1 or more individuals.'' Second, section 1275(a)(1)(B)(ii) excepts an annuity contract to which section 72 applies under certain circumstances if the contract ''is issued by an insurance company subject to tax under subchapter L (or by an entity described in section 501(c) and exempt from tax under section 501(a) which would be subject to tax under subchapter L were it not so exempt).''

The legislative history of section 1275(a)(1)(B)(ii) is limited. This exception to the OID rules first appeared when the bill emerged from the Conference Committee in 1984. H.R. 4170, 98th Cong., 2d Sess. § 41 (1984). At that time, section 1275(a)(1)(B)(ii) applied to certain annuity contracts issued by an insurance company subject to tax under subchapter L. The 1984 Conference Report does not elaborate on the meaning of the phrase ''an insurance company subject to tax under subchapter L,'' nor does it explain the purpose of the provision. H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 802–05 (1984), 1984–3 (Vol. 2) C.B. 56–59. In 2000, a technical correction to section 1275(a)(1)(B)(ii) was enacted. The technical correction clarified that section 1275(a)(1)(B)(ii) also applied to annuity contracts issued by ''an entity described in section 501(c) and exempt from tax under section 501(a) which would be subject to tax under subchapter L were it not so exempt.'' Consolidated Appropriations Act, 2001, Public Law 106–554 (114 Stat. 2763).

In 1998, the IRS and Treasury promulgated § 1.1275–1(j), interpreting the life annuity exception of section 1275(a)(1)(B)(i). Commentators had also requested guidance on the scope of the section 1275(a)(1)(B)(ii) exception, particularly with regard to foreign insurers not engaged in a trade or business in the U.S.

The proposed regulations provide that an annuity contract issued by a foreign insurance company is treated as issued by an insurance company subject to tax under subchapter L if the insurance company is subject to tax under subchapter L with respect to income earned on the annuity contract. The IRS and Treasury believe that this is the most natural application of the language of section 1275(a)(1)(B)(ii) and is consistent with the use of that phrase elsewhere in the Code and regulations. See, e.g., sections 953(e)(3)(C) and 1297(b)(2)(B); § 1.848–2(h). The IRS and Treasury also believe that the exception

from the OID rules was intended to preserve a balance between the tax treatment of holders of annuity contracts under section 72 and the tax treatment of issuers of such contracts. This balance does not exist when the annuity contract is issued by a foreign person that is not required to calculate its income with respect to the contract under subchapter L.

Proposed Effective Date

The proposed regulations are proposed to apply for interest accruals on or after the date that is 30 days after final regulations are published in the **Federal Register** on annuity contracts held on or after that date. The regulations will not apply to an annuity contract that was purchased before January 12, 2001. Special rules are provided for additional investments after January 12, 2001 with respect to an annuity contract held as of that date. This effective date framework is similar to that provided in § 1.1275–1(j)(8) with respect to the life annuity exception of section 1275(a)(1)(B)(i).

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 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 these regulations do 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 Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any electronic or written comments (a signed original and eight (8) copies of written comments) that are submitted timely (in the manner described in the **ADDRESSES** portion of this preamble) to the IRS. The IRS and Treasury request comments on the clarity of the proposed rules and how they may be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for May 30, 2001, beginning at 10 a.m. in room 4718, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the 10th Street entrance, located between Constitution and Pennsylvania Avenues, NW. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 15 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see **FOR FURTHER INFORMATION CONTACT.**

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written comments and an outline of topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by May 9, 2001. A period of 10 minutes will be allotted to each person making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Patrick E. White, Office of the Associate Chief Counsel (Financial Institutions & Products). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.1271–0 is amended by adding entries for paragraphs (k) through (k)(3) to § 1.1275–1 to read as follows:

§ 1.1271–0 Original issue discount; effective dates; table of contents.

* * * * *

§ 1.1275–1 Definitions.

* * * * *

(k) Exception under section 1275(a)(1)(B)(ii) for annuities issued by an insurance company subject to tax under subchapter L.

(1) Rule.

(2) Examples.

(3) Effective date.

* * * * *

Par. 3. Section 1.1275–1 is amended by adding paragraph (k) to read as follows:

§ 1.1275–1 Definitions.

* * * * *

(k) *Exception under section 1275(a)(1)(B)(ii) for annuities issued by an insurance company subject to tax under subchapter L*—(1) *Rule.* For purposes of section 1275(a)(1)(B)(ii), an annuity contract issued by a foreign insurance company is considered as issued by an insurance company subject to tax under subchapter L if the insurance company is subject to tax under subchapter L with respect to income earned on the annuity contract.

(2) *Examples.* The following examples illustrate the rule of paragraph (k)(1) of this section. Each example assumes that the annuity contract is a contract to which section 72 applies and was issued in a transaction where there is no consideration other than cash or another qualifying annuity contract, pursuant to the exercise of an election under an insurance contract by a beneficiary thereof on the death of the insured party, or in a transaction involving a qualified pension or employee benefit plan. The examples are as follows:

Example 1. Company X is an insurance company that is organized, licensed and doing business in Country Y. Company X does not have a U.S. trade or business and is not, under section 842, subject to U.S. income tax under subchapter L with respect to income earned on annuity contracts. A, a U.S. taxpayer, purchases an annuity contract from Company X in Country Y. The annuity contract is not excepted from the definition of a debt instrument by section 1275(a)(1)(B)(ii).

Example 2. The facts are the same as in *Example 1,* except that Company X has a U.S. trade or business. A purchased the annuity from Company X's U.S. trade or business. Under section 842(a), Company X is subject to tax under subchapter L with respect to income earned on the annuity contract. Under these facts, the annuity contract is excepted from the definition of a debt instrument by section 1275(a)(1)(B)(ii).

Example 3. The facts are the same as in *Example 2,* except that there is a tax treaty between Country Y and the United States. Company X is a resident of Country Y for purposes of the U.S.-Country Y tax treaty. Company X's activities in the U.S. do not constitute a permanent establishment under the U.S.-Country Y tax treaty. Because Company X does not have a U.S. permanent establishment, Company X is not subject to tax under subchapter L with respect to income earned on the annuity contract. Thus, the annuity contract is not excepted from the

definition of a debt instrument by section 1275(a)(1)(B)(ii).

Example 4. The facts are the same as in *Example 1,* except that Company X is a foreign insurance corporation controlled by a U.S. shareholder. Company X does not make an election under section 953(d) to be treated as a domestic corporation. The controlling U.S. shareholder is required under sections 953 and 954 to include income earned on the annuity contract in its taxable income under subpart F. However, Company X is not subject to tax under subchapter L with respect to income earned on the annuity contract. Thus, the annuity contract is not excepted from the definition of a debt instrument by section 1275(a)(1)(B)(ii).

Example 5. The facts are the same as in *Example 4,* except that Company X properly elects under section 953(d) to be treated as a domestic corporation. By reason of its election, Company X is subject to tax under subchapter L with respect to income earned on the annuity contract. Thus, the annuity contract is excepted from the definition of a debt instrument by section 1275(a)(1)(B)(ii).

(3) *Effective date.* This paragraph (k) is applicable for interest accruals on or after the date that is 30 days after final regulations are published in the **Federal Register**. This paragraph (k) does not apply to an annuity contract that was purchased before January 12, 2001. For purposes of this paragraph (k), if any additional investment in a contract purchased before January 12, 2001 is made on or after January 12, 2001, and the additional investment is not required to be made under a binding written contractual obligation that was entered into before that date, then the additional investment is treated as the purchase of a contract after January 12, 2001.

David A. Mader,

Acting Deputy Commissioner of Internal Revenue.

[FR Doc. 01–271 Filed 1–11–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–103805–99]

RIN 1545–AX56

Agent for Consolidated Group; Hearing Cancellation

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Cancellation of notice of public hearing on proposed rulemaking.

SUMMARY: This document provides notice of cancellation of a public hearing on proposed regulations that address certain issues concerning the agent for an affiliated group when the common parent ceases to be the common parent, as well as questions concerning the scope of the common parent's authority.

DATES: The public hearing originally scheduled for January 22, 2001, at 10 a.m., is cancelled.

FOR FURTHER INFORMATION CONTACT: Sonya M. Cruse of the Regulations Unit at (202) 622–7180 (not a toll-free number).

SUPPLEMENTARY INFORMATION: A notice of proposed rulemaking and notice of public hearing that appeared in the **Federal Register** on September 26, 2000, (65 FR 57755), announced that a public hearing was scheduled for January 22, 2001, at 10 a.m., at the Internal Revenue Service, 1111 Constitution Avenue, NW., room 4718. The subject of the public hearing is proposed regulations under section 1502 of the Internal Revenue Code. The public comment period for these proposed regulations expired on January 1, 2001.

The notice of proposed rulemaking and notice of public hearing, instructed those interested in testifying at the public hearing to submit a request to speak and an outline of the topics to be addressed. As of January 8, 2001, no one has requested to speak. Therefore, the public hearing scheduled for January 22, 2001, is cancelled .

Cynthia Grigsby,

Chief, Regulations Unit, Office of Special Counsel (Modernization and Strategic Planning).

[FR Doc. 01–982 Filed 1–11–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[REG–101739–00]

RIN 1545–AX75

Clarification of Entity Classification Rules

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document proposes regulations under section 7701 that address the Federal tax classification of a business entity wholly owned by a foreign government and provide that a nonbank entity that is wholly owned by a foreign bank cannot be disregarded as an entity separate from its owner (disregarded entity) for purposes of applying the special rules of the Internal Revenue Code applicable to banks. This document also proposes regulations under section 892 that provide that a partnership can be a controlled commercial entity for purposes of section 892(a)(2)(B). In addition, this document provides notice of a public hearing on the proposed regulations.

DATES: Written comments and outline of topics to be discussed at the public hearing scheduled for May 16, 2001, must be received by April 25, 2001.

ADDRESSES: Send submissions to: CC:M&SP:RU (REG–101739–00), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. In the alternative, submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to: CC:M&SP:RU (REG–101739–00), 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 of the IRS Home Page, or by submitting comments directly to the IRS Internet site at: *http://www.irs.gov/tax__regs/regslist.html.* The public hearing will be held in room 6718, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Camille B. Evans, (202) 622–3860 (not a toll-free number); concerning submissions and the hearing, Sonya M. Cruse, (202) 622–7180 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background and Purpose

On December 18, 1996, the IRS and the Treasury Department published the elective regime under section 7701 known as the check-the-box regulations. 61 FR 66584. Generally, the check-the-box regulations allow any business entity to elect to be treated for Federal tax purposes as a corporation, a partnership (if it has two or more members), or a disregarded entity (if it has a single owner). This document proposes to amend the current Procedure and Administration Regulations (26 CFR Part 301) to address the treatment of an entity wholly owned by a foreign government (as defined in § 1.892–2T) and a nonbank entity wholly owned by a foreign bank.

This document also proposes to provide that a partnership can be a controlled commercial entity under section 892.

Explanation of Provisions

A. § 301.7701–2

Section 301.7701–2(b) of the check-the-box regulations specifies that certain business entities are classified as per se corporations for Federal tax purposes (*i.e.*, those business entities that are not permitted to elect a noncorporate Federal tax classification). Section 301.7701–2(b)(6) classifies a business entity wholly owned by a State or any of its political subdivisions as a per se corporation. However, the regulations do not specify that the phrase *State or any political subdivision thereof* includes a foreign government.

The IRS and Treasury believe that it is appropriate to treat a foreign government similarly to a State in this context. Thus, to achieve parallel tax treatment under the check-the-box regulations of a business entity wholly owned by a State or any of its political subdivisions and a business entity wholly owned by a foreign government, these proposed regulations provide that a business entity wholly owned by a foreign government cannot elect to be treated as a disregarded entity.

The check-the-box regulations also provide a special rule for the treatment of nonbank entities that are wholly owned by banks. In particular, § 301.7701–2(c)(2)(ii) provides that a bank cannot treat a wholly owned nonbank entity as a disregarded entity for purposes of applying the special rules of the Internal Revenue Code (Code) applicable to banks. The term bank for this purpose is defined in section 581 to include only domestic entities. Section 301.7701–2(c)(2)(ii) does not explicitly restrict foreign banks from treating their wholly owned nonbank entities as disregarded entities for all tax purposes (because foreign banks are not defined as banks under section 581).

As with the rule described for foreign governments, the IRS and Treasury believe that nonbank entities wholly owned by domestic banks and foreign banks should be treated similarly in this context. These regulations incorporate a reference to section 585(a)(2)(B) (which includes certain foreign banks that are engaged in a U.S. trade or business in the definition of the term bank) in § 301.7701–2(c)(2)(ii). As a result, neither domestic banks nor foreign banks engaged in a U.S. trade or business can treat wholly owned nonbank entities as disregarded entities for purposes of applying the special rules of the Code applicable to banks.

B. § 1.892–5(a)

Section 1.892–5T(a) currently provides that for purposes of defining the term *controlled commercial entity,* the term *entity* encompasses corporations and trusts (including pension trusts described in § 1.892–2T(c)) and estates. To ensure that investments in the United States by a foreign government through separate juridical entities are treated similarly, these proposed regulations under § 1.892–5(a) provide that, for purposes of section 892(a)(2)(B), the term entity also includes a partnership.

Proposed Effective Dates

The regulations that address the Federal tax classification of business entities wholly owned by a foreign government under § 301.7701–2 are proposed to apply on or after the earlier of January 14, 2002 or the date these regulations are published as final regulations in the **Federal Register** to such business entities regardless of any prior entity classification, and the regulations that address the definition of the term entity for purposes of section 892(a)(2)(B) are proposed to apply on or after the earlier of January 14, 2002 or the date these regulations are published as final regulations in the **Federal Register**. The regulations relating to a nonbank entity that is wholly owned by a foreign bank are proposed to apply to taxable years beginning after January 12, 2001.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 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 these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (preferably a signed original and eight (8) copies) that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they may be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for May 16, 2001, beginning at 10 a.m., in room 6718, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Because of access restrictions, visitors will not be admitted beyond the Internal Revenue Building lobby more than fifteen (15) minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons that wish to present oral comments at the hearing must submit timely written comments and an outline of the topics to be discussed and the time to be devoted to each topic (preferably a signed original and eight (8) copies) by April 25, 2001.

A period of ten (10) minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Camille B. Evans of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

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 parts 1 and 301 are proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by removing the entry for ''Sections 1.892–1T through 1.892–7T'' and adding the following entries in numerical order:

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

Section 1.892–1T also issued under 26 U.S.C. 892(c).

Section 1.892–2T also issued under 26 U.S.C. 892(c).

Section 1.892–3T also issued under 26 U.S.C. 892(c).
Section 1.892–4T also issued under 26 U.S.C. 892(c).
Section 1.892–5 also issued under 26 U.S.C. 892(c).
Section 1.892–5T also issued under 26 U.S.C. 892(c).
Section 1.892–6T also issued under 26 U.S.C. 892(c).
Section 1.892–7T also issued under 26 U.S.C. 892(c). * * *

Par. 2. Section 1.892–5 is added to read as follows:

§ 1.892–5 Controlled commercial entity.

(a) through (a)(2) [Reserved]. For further information, see § 1.892–5T(a) through (a)(2).

(3) For purposes of section 892(a)(2)(B), the term *entity* means and includes a corporation, a partnership, a trust (including a pension trust described in § 1.892–2T(c)) and an estate.

(4) *Effective date.* This section applies on or after the earlier of January 14, 2002 or the date these regulations are published as final regulations in the **Federal Register**.

(b) through (d) [Reserved]. For further information, see §§ 1.892–5T(b) through (d).

Par. 3. Section 1.892–5T is amended by:

1. Removing the flush language immediately following paragraph (a)(2).
2. Adding paragraph (a)(3).

The addition reads as follows:

§ 1.892–5T Controlled commercial entity (temporary regulations).

(a) * * *

(3) [Reserved]. For further information, see § 1.892–5(a)(3).

* * * * *

PART 301—PROCEDURE AND ADMINISTRATION

Par. 4. The authority citation for part 301 continues to read in part as follows:

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

Par. 5. Section 301.7701–2 is amended by:

1. Revising paragraphs (b)(6) and (c)(2)(ii).
2. Revising the first sentence of paragraph (e).

The revisions read as follows:

§ 301.7701–2 Business entities; definitions.

* * * * *

(b) * * *

(6) A business entity wholly owned by a State or any political subdivision thereof, or a business entity wholly owned by a foreign government (as defined in § 1.892–2T);

* * * * *

(c) * * *

(2) * * *

(ii) *Special rule for certain business entities.* If the single owner of a business entity is a bank (as defined in section 581, or, in the case of a foreign bank, as defined in section 585(a)(2)(B) without regard to the second sentence thereof), then the special rules of the Internal Revenue Code applicable to banks will continue to apply to the single owner as if the wholly owned entity were a separate entity.

* * * * *

(e) *Effective date.* Except as otherwise provided in this paragraph (e), the rules of this section apply as of January 1, 1997, except that paragraph (b)(6) applies on or after the earlier of January 14, 2002 or the date these regulations are published as final regulations in the **Federal Register** to a business entity wholly owned by a foreign government regardless of any prior entity classification, and paragraph (c)(2)(ii) of this section applies to taxable years beginning after January 12, 2001. * * *

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

[FR Doc. 01–251 Filed 1–11–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 7

[LR–230–76]

Requirements Relating to Certain Exchanges Involving a Foreign Corporation

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Withdrawal of notice of proposed regulations.

SUMMARY: This document withdraws proposed regulations under section 367(c). The proposed regulations correspond to temporary regulations that are also being removed in this issue of the **Federal Register**. The temporary regulations are being removed because they are no longer necessary and, as a result, may be misleading.

FOR FURTHER INFORMATION CONTACT: Mark D. Harris at (202) 622–3860 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On December 30, 1977, the IRS and Treasury published in the **Federal Register** proposed regulations (42 FR 65204) and temporary regulations (42 FR 65152) under section 367(c) of the Internal Revenue Code. The principal purpose of these regulations, §§ 7.367(c)–1 and 7.367(c)–2, was to distinguish between the treatment of transfers described in section 367(c) before and after the enactment of the Tax Reform Act of 1976 (the Act) (90 Stat. 1634). Before enactment of the Act, transfers described in section 367(c) were subject to a ruling requirement. After enactment of the Act, transfers described in section 367(c) were within the scope of §§ 7.367(b)–1 through 7.367(b)–12. In light of the substantial time that has passed since enactment of the Act and, moreover, in light of the fact that §§ 1.367(b)–1 through 1.367(b)–6 have substantially superceded §§ 7.367(b)–1 through 7.367(b)–12, §§ 7.367(c)–1 and 7.367(c)–2 are no longer necessary and may be misleading.

Accordingly, the IRS and Treasury are removing temporary regulations §§ 7.367(c)–1 and 7.367(c)–2 in this issue of the **Federal Register**. Correspondingly, this document removes proposed regulations §§ 7.367(c)–1 and 7.367(c)–2.

List of Subjects in 26 CFR Part 7

Income taxes, Reporting and recordkeeping requirements.

Withdrawal of Proposed Amendments to the Regulations

Accordingly, under the authority of 26 U.S.C. 7805, proposed regulations under 26 CFR part 7 relating to §§ 7.367(c)–1 and 7.367(c)–2, published December 30, 1977 (42 FR 65204), are withdrawn.

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

[FR Doc. 01–490 Filed 1–11–01; 8:45 am]

BILLING CODE 4830–01–U

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4003, 4007, and 4071

RIN 1212–AA95

Assessment of and Relief From Penalties

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Proposed rule.

SUMMARY: The PBGC has issued a number of policy statements about penalties over the last few years. Some of these policy statements have been incorporated into the PBGC's regulations. For the convenience of the

public, the PBGC is now proposing to codify in its regulations an expanded version of the remaining penalty policy statements. Among other things, this expanded version of the PBGC's penalty policies would explain in general terms the meaning of ''reasonable cause'' for penalty waivers and the guidelines for assessing penalties under ERISA section 4071.

DATES: Comments must be received on or before March 13, 2001.

ADDRESSES: Comments may be mailed to the Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026, or delivered to Suite 340 at the above address. Comments also may be sent by Internet e-mail to *reg.comments@pbgc.gov.* Comments will be available for inspection at the PBGC's Communications and Public Affairs Department in Suite 240 at the above address during normal business hours.

FOR FURTHER INFORMATION CONTACT: Harold J. Ashner, Assistant General Counsel, or Deborah C. Murphy, Attorney, Pension Benefit Guaranty Corporation, Office of the General Counsel, Suite 340, 1200 K Street, NW., Washington, DC 20005–4026, 202–326–4024. (For TTY/TTD users, call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: The PBGC administers the pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974 (ERISA). When a single-employer plan terminates without sufficient assets to provide all benefits, the PBGC steps in to ensure that participants and beneficiaries receive their plan benefits, subject to certain legal limits. The PBGC also provides financial assistance to multiemployer plans that become unable to pay benefits.

ERISA and the PBGC's regulations require the payment of premiums to the PBGC and the providing of certain information to the PBGC and to other persons. To promote the effective operation of the insurance program under Title IV, ERISA authorizes the PBGC to assess penalties if premiums are paid late and if certain notices and other material information are not timely provided. (See ERISA sections 4007 and 4071 and the PBGC's regulations on Payment of Premiums (29 CFR Part 4007) and Penalties for Failure to Provide Certain Notices or Other Material Information (29 CFR Part 4071).) The PBGC has published four notices in the **Federal Register** since mid-1995 describing its penalty policies under sections 4007 and 4071.

This proposed rule would expand and codify the policies described in two of those notices: those published July 18, 1995 (60 FR 36837), and December 17, 1996 (61 FR 66338). (The 1995 notice in turn replaced an earlier penalty policy notice published March 3, 1992 (at 57 FR 7605).) The policy guidance would be placed in appendices to the premium payment regulation and the regulation on Penalties for Failure to Provide Certain Notices or Other Material Information. In addition, the PBGC's regulation on Rules for Administrative Review of Agency Decisions (29 CFR Part 4003) would be amended to cover penalties assessed under section 4071.

The policies described in the other two notices have already been codified in PBGC regulations.

- The PBGC's regulations on Termination of Single-Employer Plans (29 CFR Part 4041) and Missing Participants (29 CFR Part 4050) reflect the PBGC's Statement of Policy published March 14, 1997 (at 62 FR 12521), announcing penalty relief for late filing of post-distribution certifications in connection with a plan termination.
- Section 4007.8 of the PBGC's premium payment regulation reflects the PBGC's Statement of Policy published December 2, 1996 (at 61 FR 63874), announcing a new policy regarding the rate at which premium penalties accrue (1 percent or 5 percent per month depending on whether the premium underpayment is self-corrected).

Thus, once the amendments in this rule became effective, all of the PBGC's penalty policies under sections 4007 and 4071 would be in the Code of Federal Regulations. (This rule does not deal with penalties under ERISA section 4302, which applies only to multiemployer plans.)

This rule would not affect the use of any other remedies available to the PBGC and would not address the settlement of legal disputes involving penalties, either alone or in the context of other legal issues.

Compliance With Rulemaking Guidelines

The PBGC has determined that this action is not a ''significant regulatory action'' under the criteria set forth in Executive Order 12866.

Although the PBGC is publishing this rule as a proposed rule, the rule is not subject to notice and comment rulemaking requirements under section 553 of the Administrative Procedure Act because it deals only with general statements of PBGC policy and with PBGC procedural rules. Because no general notice of proposed rulemaking is required, the Regulatory Flexibility Act does not apply. See 5 U.S.C. 601(2), 603, 604.

List of Subjects

29 CFR Part 4003

Administrative practice and procedure, Organization and functions (Government agencies), Pension insurance, Pensions.

29 CFR Part 4007

Penalties, Pension insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 4071

Penalties.

For the reasons given above, the PBGC proposes to amend 29 CFR parts 4003, 4007, and 4071 as follows.

PART 4003—RULES FOR ADMINISTRATIVE REVIEW OF AGENCY DECISIONS

1. The authority citation for part 4003 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3).

2. In § 4003.1, paragraph (a) is amended by removing the words ''(b)(1) through (b)(4)'' and adding in their place the words ''(b)(1) through (b)(5)'' and by removing the words ''(b)(5) through (b)(10)'' and adding in their place the words ''(b)(6) through (b)(11)''; paragraphs (b)(5) through (b)(10) are redesignated as paragraphs (b)(6) through (b)(11); and a new paragraph (b)(5) is added to read as follows:

§ 4003.1 Purpose and scope.

* * * * *

(b) *Scope.* * * *

* * * * *

(5) Determinations with respect to penalties under section 4071 of ERISA.

* * * * *

PART 4007—PAYMENT OF PREMIUMS

3. The authority citation for part 4007 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1303(a), 1306, 1307.

4. In § 4007.8, the introductory text of paragraph (a) is amended by removing the words ''The charge will be based on'' and adding in their place the words ''The amount determined under this paragraph (a) will be based on''; and paragraphs (c) and (d) are revised to read as follows:

§ 4007.8 Late payment penalty charges.

* * * * *

(c) *Reasonable cause waivers.* The PBGC will waive all or part of a late payment penalty charge if the PBGC determines that there is reasonable cause for the late payment. Policy guidelines for applying the ''reasonable cause'' standard are in §§ 32 through 35 of the Appendix to this part.

(d) *Other waivers.* The PBGC may waive all or part of a late payment penalty charge in other circumstances without regard to whether there is reasonable cause. Policy guidelines for waivers without reasonable cause are in § 31(b)(1), (b)(3), and (b)(4) of the Appendix to this part.

* * * * *

5. An appendix is added to part 4007 to read as follows:

Appendix to Part 4007—Policy Guidelines on Penalties

Sec.

General Provisions

1 What is the purpose of this Appendix?
2 What defined terms are used in this Appendix?
3 What is the purpose of a premium penalty?

Procedures

11 What are the basic rules for assessing and reviewing premium penalties?
12 What should I know about preliminary notices of premium penalties?
13 What should I know about premium penalty determinations?
14 What should I know about review of premium penalty determinations?

Premium Penalty Assessment

21 What are the rules for assessing a premium penalty?
22 How do premium penalties apply to small plans?

Waiver Standards

31 What are the standards for waiving a premium penalty?
32 What is ''reasonable cause''?
33 What kinds of facts does the PBGC consider in determining whether there is reasonable cause for a failure to pay a premium?
34 What are some situations that might justify a ''reasonable cause'' waiver?
35 What are some situations that might justify a partial ''reasonable cause'' waiver?

General Provisions

Section 1 What Is the Purpose of this Appendix?

This appendix sets forth principles and guidelines that we intend to follow in assessing, reviewing, and waiving premium penalties. However, this is only general policy guidance. Our action in each case is guided by the facts and circumstances of the case.

Section 2 What Defined Terms Are Used in This Appendix?

The following terms are defined in part 4001 of this chapter: contributing sponsor, ERISA, PBGC, person, plan, and plan administrator. In addition, in this appendix:

(a) *Premium penalty* means a penalty under ERISA section 4007 and § 4007.8 of this part for failing to pay all or part of a premium on time.

(b) *Waiver* means reduction or elimination of a premium penalty that is being or has been assessed.

(c) *We* means the PBGC.

(d) *You* means (according to the context) —

(1) A plan administrator, contributing sponsor, or other person, if —

(i) The person's action or inaction may be the basis for a premium penalty assessment,

(ii) The person may be required to pay the premium penalty, or

(iii) The person is requesting review of the premium penalty; or

(2) An employee or agent of, or advisor to, any of these persons.

Section 3 What Is the Purpose of a Premium Penalty?

The basic purpose of a premium penalty is to encourage you to pay premiums on time. Premium penalties should be fair, simple, effective, and easy to administer. Therefore,—

(a) We assess a lower (one percent) premium penalty if you correct a premium underpayment yourself before we issue a written notice that there is or may be a premium delinquency;

(b) We assess a higher (five percent) premium penalty if you do not self-correct before we issue a notice; and

(c) We waive premium penalties, in whole or in part, if there is reasonable cause or in other appropriate circumstances.

Procedures

Section 11 What Are the Basic Steps for Assessing and Reviewing Premium Penalties?

(a) *Overview.* There are typically three steps in the premium penalty assessment and review process:

(1) A preliminary notice (discussed in § 12), which gives you an opportunity to submit information relating to the premium penalty assessment, or to simply pay the amount owed;

(2) A premium penalty determination (discussed in § 13) that assesses the premium penalty; and

(3) A review of the premium penalty determination (discussed in § 14).

(b) *Relationship to premium procedures.* (1) When we assess a premium penalty for a late premium payment, the late payment often has already been made. However, if the premium has not been paid when we assess a premium penalty, we will generally assess and review the premium (and any related interest) at the same time as we assess and review the penalty. Differences in premium penalty procedures depending on whether the premium has or has not been paid are noted in §§ 12 and 13.

(2) A premium penalty stops accruing when the premium is paid.

(c) *Debt collection.* Our regulation on Debt Collection (29 CFR Part 4903) provides that we may collect amounts that you owe to us (such as premium penalties) by reducing other amounts that the government owes to you (such as tax refunds). Procedures under our debt collection regulation may run separately or together with the premium penalty assessment and review procedures.

(d) *Decision-making standards and guidelines.* At each stage of the premium penalty assessment and review process, we evaluate the circumstances by the same standards and apply the same guidelines in deciding whether to assess or waive a premium penalty and how much the premium penalty should be. However, we may have more information when we review a premium penalty than we had when we originally assessed it, and that may make our decision on review different from our original premium penalty determination.

(e) *Providing information to the PBGC.* (1) It is your responsibility to raise any facts and issues that you want us to consider in making premium penalty assessment or waiver decisions and to support your contentions with documentation such as correspondence and police, fire, or insurance reports. If you want us to consider information that you believe we already have in connection with another case, you should identify the information specifically enough so that we can determine whether we have the information, locate it in our files, and review it.

(2) Since premium penalties are assessed for paying a premium late, it is important that you bring to our attention any information or arguments that tend to show that you were not required to pay a premium or that you paid the premium on time.

(f) *Terminology.* There is a slight difference between the terminology we use in this appendix and the terminology we use in our regulation on Rules for Administrative Review of Agency Decisions (29 CFR Part 4003), which governs our issuance and review of premium penalty determinations:

(1) ''Initial determination'' in the administrative review regulation means the same as ''premium penalty determination'' in this appendix, and

(2) ''Reconsideration of an initial determination'' in the administrative review regulation means the same as ''review of a premium penalty determination'' in this appendix.

Section 12 What Should I Know About Preliminary Notices of Premium Penalties?

Before we make a premium penalty determination, we want you to have an opportunity to give us any information you think we should consider. In most cases, therefore, we send a preliminary notice to tell you that we intend to assess a premium penalty and the reason for the premium penalty. (In some cases, we may skip this preliminary step—for example, if we contact you by telephone to discuss the matter or if we need to make the assessment quickly in order to preserve our right to collect the premium penalty in court.) You may respond to a preliminary notice by submitting any information you want us to consider before we make a premium penalty determination. The preliminary notice will state the time within which you should respond (typically 30 days).

(a) *If premium already paid.* If, by the time we issue a preliminary notice stating that we

intend to assess a premium penalty, you have already paid the late premium, the notice ordinarily tells you the amount of the premium penalty that we intend to assess. (The notice also ordinarily tells you the amount of any interest due on the late premium.) If you pay the amount stated in the preliminary notice without requesting relief, that is the end of the matter.

(b) *If premium not already paid.* If, by the time we issue a preliminary notice stating that we intend to assess a premium penalty, you have not already paid the late premium, the notice ordinarily tells you the amount of premium due and the amount of the premium penalty that has accrued up through the date of the preliminary notice. (The preliminary notice also ordinarily tells you the amount of interest that has accrued on the late premium up through the date of the preliminary notice.) If you pay the amount stated in the preliminary notice within 30 days after the date of the preliminary notice without requesting relief, that is the end of the matter. If you do not pay the amount of unpaid premium within 30 days after the date of the preliminary notice, the premium penalty will continue to accrue (subject to the premium penalty cap).

Section 13 What Should I Know About Premium Penalty Determinations?

As the second step in the premium penalty assessment and review process—after a preliminary notice—we make a premium penalty determination (unless, in response to the preliminary notice, you pay the full premium penalty without requesting relief). (If we skip the preliminary notice step, the premium penalty assessment is the first step in the process.) The premium penalty determination notifies you of the reason for the premium penalty (even if we have already issued a preliminary notice stating the reason) and takes into account any information you may have submitted to us in response to a preliminary notice. We also tell you when and where to send your payment, and we tell you about requesting review of the premium penalty determination. (Complete rules for premium penalty determinations and for requesting review are in part 4003 of this chapter.)

(a) *If premium already paid.* If, by the time we issue a premium penalty determination, you have already paid the late premium, the determination tells you the amount of the premium penalty that we are assessing (taking into account any waiver of all or part of the premium penalty) and how we determined the amount of the premium penalty. (The premium penalty determination also ordinarily tells you the amount of any interest due on the late premium.) If you pay the amount stated in the premium penalty determination without requesting review, that is the end of the matter.

(b) *If premium not already paid.* If, by the time we issue a premium penalty determination, you have not already paid the late premium, the premium penalty determination tells you the amount of premium due and the amount of the premium penalty that has accrued up through the date of the premium penalty determination. (The premium penalty determination also ordinarily tells you the amount of interest that has accrued on the late premium up through the date of the premium penalty determination.) If you pay the amount stated in the premium penalty determination within 30 days after the date of the premium penalty determination without requesting review, that is the end of the matter. If you do not pay the amount of unpaid premium within 30 days after the date of the premium penalty determination, the premium penalty will continue to accrue (subject to the premium penalty cap).

Section 14 What Should I Know About Review of Premium Penalty Determinations?

(a) *Timing.* (1) *General rule.* In general, you must request review of a premium penalty determination within 30 days after the date of the determination; if you do not do so, the determination becomes effective, and we may take steps to collect the premium penalty. In addition, you may not be able to raise in court some legal defenses that you might have against collection of the premium penalty, because you have failed to exhaust administrative remedies. (In some cases, the 30-day limitation for requesting review may be extended or waived. See §§ 4003.4 and 4003.5 of the administrative review regulation. If we notify you that we may attempt to collect a debt resulting from a premium penalty determination by referring it for offset against federal payments that may be due you, you will have at least 60 days to request review. See § 4003.32 of the administrative review regulation.)

(2) *Determinations effective immediately.* We may, in our discretion, make a premium penalty determination effective on the date we issue it—for example, if our ability to bring a collection action in court is about to be cut off by the statute of limitations. If we make a premium penalty determination effective immediately, you are not required to request review by us in order to exhaust your administrative remedies. This means that you have the right to raise legal defenses against collection of the premium penalty in court even if you do not request that we review the determination. (See § 4003.22(b) of the administrative review regulation.) If you do request review by the PBGC, we may review the determination.

(b) *Review of determination.* If you request review of a premium penalty determination within the required time, we review the determination and notify you of the results of the review. This review takes into account any information you may have submitted to us in response to a preliminary notice or a premium penalty determination notice or with your request for review.

(c) *Premium penalty accrual during review.* Requesting review of a premium penalty does not make the premium penalty stop accruing. A premium penalty stops accruing on the date when you pay the premium or, if you pay the premium within 30 days after the date of a PBGC bill for the premium, on the date of the bill. In addition, if you request review of a premium penalty, we may waive the portion of the premium penalty that accrues during review if you make a non-frivolous argument that you were not required to pay the premium, as described in § 31(b)(4) of this Appendix.

Premium Penalty Assessment

Section 21 What Are the Rules for Assessing a Premium Penalty?

The rules for assessing a premium penalty are in § 4007.8 of this part. A premium penalty is assessed for failure to pay a premium on time. In general, the amount of a premium penalty is based on the number of months from the due date to the date of payment, subject to a floor of $25 and a ceiling of 100 percent of the unpaid premium. The premium penalty rate is generally—

(a) 1 percent per month (for all months) on any amount of unpaid premium that you pay on or before the date we issue a written notice that there is or may be a premium delinquency (e.g., a premium bill, a letter initiating a premium compliance review, or a letter questioning a failure to make a premium filing), or

(b) 5 percent per month (for all months) on any amount of unpaid premium that you pay after that date.

Section 22 How Do Premium Penalties Apply to Small Plans?

Since small plan premiums are generally lower than large plan premiums, premium penalties are also generally lower for small plans than for large plans. This is because premium penalties accrue (each month) as a percentage of your premium underpayment.

Waiver Standards

Section 31 What Are the Standards for Waiving a Premium Penalty?

(a) *Facts and circumstances.* In deciding whether to waive a premium penalty in whole or in part, we consider the facts and circumstances of each case.

(b) *Waivers.* (1) *Provisions of law.* We waive all or part of a premium penalty if a statute or regulation requires that we do so. For example, ERISA section 4007(b) and § 4007.8(b) of this part provide for a waiver in certain circumstances involving business hardship; § 4007.8(f) and (g) of this part provides for waivers if certain ''safe harbor'' tests are met; and § 4007.8(e) of this part provides for a waiver of any premium penalty that accrues after the date of a premium bill if you pay the premium within 30 days after the date of the bill.

(2) *Reasonable cause.* We waive a premium penalty if you show reasonable cause for a failure to pay a premium on time. See §§ 32 through 35 for guidelines on ''reasonable cause'' waivers. If there is reasonable cause for only part of a failure to pay a premium, we waive the premium penalty only for that part. In determining whether ''reasonable cause'' exists, we do not consider either—

(i) The likelihood or cost of collecting the premium penalty, or

(ii) The costs and risks of enforcing the premium penalty by litigation.

(3) *Erroneous legal interpretations.* We may waive all or part of a premium penalty if the failure to pay a premium on time that gives rise to the premium penalty is based on your reliance on an erroneous interpretation of the law.

(i) *If you disclose the interpretation to us.* If a failure to pay a premium on time results from your reliance on an erroneous interpretation of the law, we will waive a premium penalty that arises from the failure if you promptly and adequately call our attention to the interpretation and the relevant facts, and the erroneous interpretation is not frivolous. If the interpretation affects a filing that you make with us, you should call our attention to the interpretation with the filing. If you rely on the interpretation to justify not making a filing with us, you should call our attention to the interpretation in a notice submitted to us by the time and in the manner prescribed for the filing not made.

(ii) *If you do not disclose the interpretation to us.* If a failure to pay a premium on time results from your reliance on an erroneous interpretation of the law, and you do not promptly and adequately call our attention to the interpretation and the relevant facts, we may nevertheless waive a premium penalty if the weight of authority supporting the interpretation is substantial in relation to the weight of opposing authority and it is reasonable for you to rely on the interpretation.

(4) *Pendency of review.* If you request review of a premium penalty (as described in § 14 of this Appendix), and you make a non-frivolous argument in your request for review that you were not required to pay the premium, we waive the portion of the premium penalty that accrues during the review process. (If you make a non-frivolous argument that you were not required to pay a portion of the premium, we apply this rule to that portion.)

(5) *Other circumstances.* We may waive all or part of a premium penalty in other circumstances if we determine that it is appropriate to do so. We intend to exercise this waiver authority only in narrow circumstances, primarily if we determine that assessing a premium penalty, or assessing the full amount of a premium penalty, would be inconsistent with the purposes of Title IV of ERISA. For example—

(i) We may waive all or part of a premium penalty if a premium underpayment reflected on a premium form is insignificant and is caused by an inadvertent mathematical error (such as a transposition of digits) on the form. In determining whether and to what extent to grant a waiver in a case of this kind, we consider such factors as how insignificant the underpayment is, whether you have a history of compliance, and whether the underpayment results from an isolated error rather than from a number of errors.

(ii) We may waive all or part of a premium penalty if the law changes shortly before the date a premium payment is due and the premium payment that you make by the due date would have been correct under the law as in effect before the change. In determining whether and to what extent to grant a waiver in a case of this kind, we consider such factors as the length of time between the change in the law and the premium due date, the nature and timing of any publicity given to the change in the law, the complexity of the legal issues, and your general familiarity with those issues.

(c) *Action or inaction of outside parties.* If an accountant, actuary, lawyer, pension consultant, or other individual or firm that is not part of your organization assists you in complying with PBGC requirements, we apply our waiver authority as if the outside individual or firm were part of your organization, as described in § 32(c) of this Appendix.

Section 32 What Is ''Reasonable Cause''?

(a) *General rule.* In general, there is ''reasonable cause'' for a failure to pay a premium on time to the extent that—

(1) The failure arises from circumstances beyond your control, and

(2) You could not avoid the failure by the exercise of ordinary business care and prudence.

(b) *Overlooking legal requirements.* Overlooking legal requirements does not constitute reasonable cause.

(c) *Action or inaction of outside parties.* In some cases an accountant, actuary, lawyer, pension consultant, or other individual or firm that is not part of your organization may assist you in complying with PBGC requirements. If the outside individual's or firm's action, inaction, or advice causes or contributes to a failure to pay a premium on time, our analysis is generally the same as if the outside individual or firm were part of your organization. (In the case of an outside individual who is part of a firm, we generally consider both the individual and the firm to be part of your organization.) Thus, if a failure to pay a premium on time arises from circumstances within the control of the outside individual or firm, or could be avoided by the exercise of ordinary business care and prudence by the outside individual or firm, there is generally no reasonable cause for the failure. The fact that you exercised care and prudence in selecting and monitoring the outside individual or firm is not a basis for a reasonable cause waiver. (However, you may have recourse against the outside individual or firm.)

(d) *Size of organization.* If an organization or one or more of its employees is responsible for taking action, the size of the organization may affect what ordinary business care and prudence would require. For example, ordinary business care and prudence would typically require a larger organization to establish more comprehensive backup procedures than a smaller organization for dealing with situations such as computer failure, the loss of important records, and the inability of an individual to carry out assigned responsibilities. Thus, there may be reasonable cause for a small organization's failure to pay a premium on time even though, if the organization were larger, the exercise of ordinary business care and prudence would have avoided the failure.

(e) *Amount of premium underpayment.* In general, the larger a premium, the more care and prudence you should use to make sure that you pay it on time. Thus, there may be reasonable cause for a small underpayment even though, under the same circumstances, we would conclude that a larger underpayment could have been avoided by the exercise of ordinary business care and prudence.

Section 33 What Kinds of Facts Does the PBGC Consider in Determining Whether There is Reasonable Cause for a Failure to Pay a Premium?

In determining whether a failure to pay a premium on time arose from circumstances beyond your control and whether you could have avoided the failure by the exercise of ordinary business care and prudence—and thus whether waiver of a premium penalty for reasonable cause is appropriate—we consider facts such as the following:

(a) What event or circumstance caused the underpayment and when the event happened or the circumstance arose. The dates you give should clearly correspond with the underpayment upon which the premium penalty is based.

(b) How that event or circumstance kept you from paying the premium on time. The explanation you give should relate directly to the failure to pay a premium that is the subject of the premium penalty.

(c) Whether the event or circumstance was beyond your control.

(d) Whether you could have anticipated the event or circumstance.

(e) How you responded to the event or circumstance, including what steps you took (and how quickly you took them) to pay the premium and how you conducted other business affairs. Knowing how you responded to the event or circumstance may help us determine what degree of business care and prudence you were capable of exercising during that period and thus whether the failure to pay the premium could or could not have been avoided by the exercise of ordinary business care and prudence.

Section 34 What Are Some Situations That Might Justify a ''Reasonable Cause'' Waiver?

The following examples illustrate some of the reasons often given for failures to pay premiums for which we may assess penalties. The situation described in each example may constitute reasonable cause, and each example lists factors we consider in determining whether to grant a premium penalty waiver for reasonable cause in a case of that kind.

(a) *An individual with responsibility for taking action was suddenly and unexpectedly absent or unable to act.* We consider such factors as the following: the nature of the event that caused the individual's absence or inability to act (for example, the resignation of the individual or the death or serious illness of the individual or a member of the individual's immediate family); the size of the organization and what kind of backup procedures it had to cope with such events; how close the event was to the deadline that was missed; how abrupt and unanticipated the event was; how the individual's absence or inability to act prevented compliance; how expensive it would have been to comply without the absent individual; whether and how other business operations and obligations were affected; how quickly and prudently a replacement for the absent individual was selected or other arrangements for compliance were made; and how quickly a replacement for the absent individual took appropriate action.

(b) *A fire or other casualty or natural disaster destroyed relevant records or prevented compliance in some other way.* We consider such factors as the following: the nature of the event; how close the event was to the deadline that was missed; how the event caused the failure to pay the premium; whether other efforts were made to get needed information; how expensive it would have been to comply; and how you responded to the event.

(c) *You reasonably relied on erroneous oral or written advice given by a PBGC employee.* We consider such factors as the following: whether there was a clear relationship between your situation and the advice sought; whether you provided the PBGC employee with adequate and accurate information; and whether the surrounding circumstances should have led you to question the correctness of the advice or information provided.

(d) *You were unable to obtain information (including records and calculations) needed to comply.* We consider such factors as the following: what information was needed; why the information was unavailable; when and how you discovered that the information was not available; what attempts you made to get the information or reconstruct it through other means; and how much it would have cost to comply.

Section 35 What Are Some Situations That Might Justify a Partial ''Reasonable Cause'' Waiver?

(a) Assume that a fire destroyed the records needed to compute a premium payment. If in the exercise of ordinary business care and prudence it should take you one month to reconstruct the records and pay the premium, but the payment was made two months late, it might be appropriate to waive that part of the premium penalty attributable to the first month the payment was late, but not the part attributable to the second month.

(b) Assume that a plan administrator underpaid the plan's flat-rate premium because of reasonable reliance on erroneous advice from a PBGC employee, and also underpaid the plan's variable-rate premium because the plan actuary used the wrong interest rate. A PBGC audit revealed both errors. The PBGC billed the plan for a premium penalty of $5,000—$1,000 for underpayment of the flat-rate premium and $4,000 for underpayment of the variable-rate premium. The plan administrator requested a waiver of the premium penalty. While the erroneous PBGC advice constituted reasonable cause for underpaying the flat-rate premium, there was no showing of reasonable cause for the error in the variable-rate premium. Therefore, we would waive only the part of the premium penalty based on underpayment of the flat-rate portion of the premium ($1,000).

PART 4071—PENALTIES FOR FAILURE TO PROVIDE CERTAIN NOTICES OR OTHER MATERIAL INFORMATION

6. The authority citation for part 4071 is revised to read as follows:

Authority: 28 U.S.C. 2461 note; 29 U.S.C. 1302(b)(3), 1371.

7. Section 4071.1 is amended by adding at the end of the section the following sentence:

§ 4071.1 Purpose and scope.

* * * This part also provides policy guidelines for assessing and reviewing penalties under ERISA section 4071.

8. A new § 4071.4 and a new appendix are added to part 4071 to read as follows:

§ 4071.4 Assessment and review of penalties.

Policy guidelines for assessing, reviewing, and waiving penalties under ERISA section 4071 are in the Appendix to this part.

Appendix to Part 4071—Policy Guidelines on Penalties

Sec.

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35 What is a situation that might justify a partial ''reasonable cause'' waiver?

General Provisions

Section 1 What Is the Purpose of This Appendix?

Section 4071 of ERISA authorizes us to assess a penalty if you do not provide certain notices or other material information within the time limit specified in ERISA or in PBGC regulations. Some of the notices and other material information covered by section 4071 have to be provided to us, and some have to be provided to other parties, such as plan participants. This appendix sets forth principles and guidelines that we intend to follow in assessing, reviewing, and waiving information penalties. However, this is only general policy guidance. Our action in each case is guided by the facts and circumstances of the case.

Section 2 What Defined Terms are Used in This Appendix?

The following terms are defined in part 4001 of this chapter: contributing sponsor, controlled group, employer, ERISA, PBGC, person, plan, plan administrator, and standard termination. In addition, in this appendix:

(a) *Information penalty* means a penalty under ERISA section 4071 for failing to provide section 4071 information on time.

(b) *Section 4071 information* means any notice or other material information that you are required to provide to us or to another party under subtitles A–D of title IV of ERISA, or under section 302(f)(4) or 307(e) of Title I of ERISA, or under PBGC regulations implementing any of these provisions. Whether a particular item of information is ''material'' depends on the facts and circumstances.

(c) *Waiver* means reduction or elimination of an information penalty that is being or has been assessed.

(d) *We* means the PBGC.

(e) *You* means (according to the context)—

(1) A plan administrator, contributing sponsor, or other person, if—

(i) The person's action or inaction may be the basis for an information penalty assessment,

(ii) The person may be required to pay the information penalty, or

(iii) The person is requesting review of the information penalty; or

(2) An employee or agent of, or advisor to, any of these persons.

Section 3 What Is the Purpose of an Information Penalty?

The basic purpose of an information penalty is to encourage you to provide section 4071 information on time. Information penalties should be fair, simple, effective, and easy to administer. Therefore—

(a) We assess lower information penalties for plans of small businesses and for failures to provide section 4071 information that are speedily corrected;

(b) We assess higher information penalties if the facts and circumstances warrant it; and

(c) We waive information penalties, in whole or in part, if there is reasonable cause or in other appropriate circumstances.

Procedures

Section 11 What Are the Basic Steps for Assessing and Reviewing Information Penalties?

(a) Overview. There are typically three steps in the information penalty assessment and review process:

(1) A preliminary notice (discussed in § 12), which gives you an opportunity to submit information bearing on the information penalty assessment;

(2) An information penalty determination (discussed in § 13) that assesses the information penalty; and

(3) A review of the information penalty determination (discussed in § 14).

(b) Debt collection. Our regulation on Debt Collection (29 CFR Part 4903) provides that we may collect amounts that you owe to us (such as information penalties) by reducing other amounts that the government owes to you (such as tax refunds). Procedures under our debt collection regulation may run separately or together with the information penalty assessment and review procedures.

(c) Decision-making standards and guidelines. At each stage of the information penalty assessment and review process, we evaluate the circumstances by the same standards and apply the same guidelines in deciding whether to assess or waive an information penalty and how much the information penalty should be. However, we may have more information when we review an information penalty than we had when we originally assessed it, and that may make our decision on review different from our original information penalty determination.

(d) Providing information to the PBGC. (1) It is your responsibility to raise any facts and issues that you want us to consider in making information penalty assessment or waiver decisions and to support your contentions with documentation such as correspondence and police, fire, or insurance reports. If you want us to consider information that you believe we already have in connection with another case, you should identify the information specifically enough so that we can determine whether we have the information, locate it in our files, and review it.

(2) Since information penalties are assessed for providing section 4071 information late, it is important that you bring to our attention any information or arguments that tend to show that you were not required to provide the section 4071 information or that you provided the section 4071 information on time.

(e) *Terminology.* There is a slight difference between the terminology we use in this appendix and the terminology we use in our regulation on Rules for Administrative Review of Agency Decisions (29 CFR Part 4003), which governs our issuance and review of information penalty determinations:

(1) ''Initial determination'' in the administrative review regulation means the same as ''information penalty determination'' in this appendix, and

(2) ''Reconsideration of an initial determination'' in the administrative review regulation means the same as ''review of an information penalty determination'' in this appendix.

Section 12 What Should I Know About Preliminary Notices of Information Penalties?

Before we make an information penalty determination, we want you to have an opportunity to give us any information you think we should consider. In most cases, therefore, we send a preliminary notice to tell you that we intend to assess an information penalty and the reason for the information penalty. (In some cases, we may skip this preliminary step—for example, if we contact you by telephone to discuss the matter or if we need to make the assessment quickly in order to preserve our right to collect the information penalty in court.) You may respond to a preliminary notice by submitting any information you want us to consider before we make an information penalty determination. The preliminary notice will state the time within which you should respond (typically 30 days).

(a) If section 4071 information already provided. If, by the time we issue a preliminary notice stating that we intend to assess an information penalty, you have already provided the late section 4071 information, the notice ordinarily tells you the amount of the information penalty that we intend to assess. If the preliminary notice states an amount of information penalty and you pay the amount stated in the preliminary notice without requesting relief, that is the end of the matter.

(b) If section 4071 information not already provided. If, by the time we issue a preliminary notice stating that we intend to assess an information penalty, you have not already provided the late section 4071 information, the notice ordinarily tells you the rate of penalty that we intend to assess. Providing the section 4071 information will cut off further accrual of the information penalty.

Section 13 What Should I Know About Information Penalty Determinations?

As the second step in the information penalty assessment and review process—after a preliminary notice—we make an information penalty determination (unless, in response to a preliminary notice that states an amount of information penalty, you pay the full information penalty without requesting relief). (If we skip the preliminary notice step, the information penalty assessment is the first step in the process.) The information penalty determination notifies you of the reason for the information penalty (even if we have already issued a preliminary notice stating the reason) and takes into account any information you may have submitted to us in response to a preliminary notice. We also tell you when and where to send your payment, and we tell you about requesting review of the information penalty determination. (Complete rules for information penalty determinations and for requesting review are in part 4003 of this chapter.)

(a) If section 4071 information already provided. If, by the time we issue an information penalty determination, you have already provided the late section 4071 information, the determination tells you the amount of the information penalty that we are assessing (taking into account any waiver of all or part of the information penalty) and how we determined the amount of the information penalty. If the information penalty determination states an amount of information penalty and you pay the amount stated in the information penalty determination without requesting review, that is the end of the matter.

(b) If section 4071 information not already provided. If, by the time we issue an information penalty determination, you have not already provided the late section 4071 information, the determination ordinarily tells you the rate of penalty we intend to assess. Providing the section 4071 information will cut off further accrual of the information penalty.

Section 14 What Should I Know About Review of Information Penalty Determinations?

(a) Timing. (1) *General rule.* In general, you must request review of an information penalty determination within 30 days after the date of the determination; if you do not do so, the determination becomes effective, and we may take steps to collect the information penalty. In addition, you may not be able to raise in court some legal defenses that you might have against collection of the information penalty, because you have failed to exhaust administrative remedies. (In some cases, the 30-day limitation for requesting review may be extended or waived. See §§ 4003.4 and 4003.5 of the administrative review regulation. If we notify you that we may attempt to collect a debt resulting from an information penalty determination by referring it for offset against federal payments that may be due you, you will have at least 60 days to request review. See § 4003.32 of the administrative review regulation.)

(2) Determinations effective immediately. We may, in our discretion, make an information penalty determination effective on the date we issue it—for example, if our ability to bring a collection action in court is about to be cut off by the statute of limitations. If we make an information penalty determination effective immediately, you are not required to request review by us in order to exhaust your administrative remedies. This means that you have the right to raise legal defenses against collection of the information penalty in court even if you do not request that we review the determination. (See § 4003.22(b) of the administrative review regulation.) If you do request review by the PBGC, we may review the determination.

(b) Review of determination. If you request review of an information penalty determination within the required time, we review the determination and notify you of the results of the review. This review takes into account any information you may have submitted to us in response to a preliminary notice or an information penalty determination notice or with your request for review.

(c) Information penalty accrual during review. Requesting review of an information

penalty does not make the information penalty stop accruing. An information penalty stops accruing when you provide the section 4071 information. In addition, if you request review of an information penalty, we may waive the portion of the information penalty that accrues during review if you make a non-frivolous argument that you were not required to provide the section 4071 information or that you were (and still are) unable to provide it, as described in Sec. 31(b)(4) of this Appendix.

Information Penalty Assessment

Section 21 Where Can I Find the General Principles That the PBGC Follows in Assessing Information Penalties and how the PBGC Applies Those Principles to Specific Cases?

The general principles that we follow in deciding whether to assess an information penalty and, if so, the amount or rate of information penalty to assess are explained in the following sections of this Appendix:

(1) Section 22 contains basic guidance.

(2) Sections 23 and 24 describe some aggravating and mitigating factors.

(3) Sections 25 through 27 describe how we generally treat situations involving multiple persons and multiple failures to provide section 4071 information.

(4) Section 28 contains special guidance for specific types of cases.

Section 22 What Are the General Principles That the PBGC Follows in Deciding Whether To Assess an Information Penalty and, if so, the Amount or Rate of Information Penalty to Assess?

(a) *Facts and circumstances.* In deciding whether to assess an information penalty for a failure to provide section 4071 information on time and, if so, what rate or amount of information penalty to assess, we consider the facts and circumstances of the failure.

(b) *Aggravating and mitigating factors.* Among the facts and circumstances we consider are aggravating and mitigating factors such as those described in §§ 23 and 24 of this Appendix. Aggravating factors tend to make it more likely that we will assess an information penalty, and mitigating factors tend to make it less likely. If we do assess an information penalty, aggravating factors tend to increase the rate or amount of the information penalty we assess, and mitigating factors tend to decrease the rate or amount. An aggravating or mitigating factor may apply to all or only some of the section 4071 information that is not provided and to all or only some days of a delinquency.

(c) *Effect of plan size.*

(1) *Likelihood of assessment.* In general, the likelihood that we will assess an information penalty is strongly influenced by the number of participants in your plan (as determined under paragraph (e)(2) of this section). Thus, for example, we are much less likely to assess an information penalty if your plan has fewer than 100 participants (especially for a first violation) than if your plan has more than 1,000 participants (whether or not it is a first violation). This reflects differences in the ordinary business care and prudence standard for large and small plans (see § 32(c)) and in their access to professional help in monitoring their activities and meeting PBGC requirements.

(2) *Amount or rate of information penalty.* The effect of plan size on the amount or rate of an information penalty is explained in paragraphs (e)(1)(ii) and (e)(1)(iii) of this section.

(d) *Waivers.* We may also reduce or eliminate an information penalty if we have information showing that a partial or complete waiver of the information penalty is appropriate. Waivers are explained in §§ 31 through 35 of this Appendix.

(e) *Basic amount or rate of information penalty.* If we assess an information penalty, the starting point for determining the rate or amount of the information penalty is the rate or amount determined under this section. The amount or rate may be higher or lower based on considerations such as those described in paragraphs (a) through (c) of this section and §§ 23 through 28 of this Appendix.

(1) *Basic guidelines.* Although ERISA section 4071 allows us to assess an information penalty up to $1,100 per day for each failure to provide section 4071 information, the information penalties we assess are generally much lower under the following guidelines.

(i) *Daily amount.* The information penalty is generally $25 a day for the first 90 days that the section 4071 information is late, and $50 for each day thereafter.

(ii) *Limit on total information penalty.* The total information penalty generally does not exceed $100 times the number of participants.

(iii) *Reduction for small plans.* If there are fewer than 100 participants in your plan, we generally reduce the daily information penalty based on the ratio of the number of participants to 100, subject to a floor of $5 a day.

(2) *How we count the number of participants.* For purposes of the per-participant cap and the small plan reduction described in paragraphs (e)(1)(ii) and (e)(1)(iii) of this section, we generally count participants in the following ways:

(i) *In plan terminations.* For a failure to provide section 4071 information under part 4041 of this chapter (dealing with standard and distress plan terminations), we generally use the number of persons entitled to distributions of benefits in the plan termination. For example, if you are a plan administrator, and you are late in certifying to us that all benefits were properly distributed in a plan termination, the information penalty generally should not exceed $100 times the number of persons entitled to distributions of benefits in the plan termination.

(ii) *In other cases.* For any other failure to provide section 4071 information, we generally use the number of participants reported on the PBGC Form 1 premium declaration that you most recently filed before the date of the failure, unless the number of participants has changed significantly since the Form 1 was filed. However, if clearly appropriate in a particular case, we may use a different method of determining the number of participants (*e.g.,* adding up the number of participants in two or more plans).

(3) *Examples.* The following examples illustrate the basic guidelines for assessing information penalties under this section. In these examples, assume that you are the plan administrator of a terminating plan and that you file your post-distribution certification late.

(i) *General rule.* If your plan has 112 participants, and you file 306 days after the last day on which you could have made an information-penalty-free filing, the total information penalty should ordinarily be $11,200, as shown in the following table. (Note that in this example, the cap of $100 times the number of participants applies.)

	Daily rate	Total information penalty
Days 1–90	$25	$2,250 ($25 x 90 days).
Days 91–306	$50	$10,800 ($50 x 216 days).
Total for all days (uncapped)		$13,050 ($2,250 + $10,800).
Total capped information penalty		$11,200 ($100 x 112 participants).

(ii) *Small plan rule.* If your plan has 15 participants, and you file 100 days after the last day on which you could have made an information-penalty-free filing, the total information penalty should ordinarily be $525, as shown in the following table. (Note that in this example, the total information penalty is less than the cap of $100 times the number of participants, *i.e.,* $1,500 ($100 x 15).)

	Daily rate	Total information penalty
Days 1–90	$5 (minimum daily information penalty, since 15/100 x $25 = $3.75).	$450 ($5 x 90 days).
Days 91–100	$7.50 (15/100 x $50)	$75 ($7.50 x 10 days).
Total for all days		$525 ($450 + $75).

Section 23 What Aggravating Factors Does the PBGC Consider?

The aggravating factors that we consider are the following. (We do not consider the absence of mitigating factors to be an aggravating factor.)

(a) *Harmfulness.* Failure to provide section 4071 information on time where the failure is—or has the potential of being—particularly harmful to participants or the PBGC is an aggravating factor. (This may be true even though, by the time we receive the information, any possible harm has been avoided.) Harmfulness may depend on the importance, time-sensitivity, and quantity of section 4071 information you fail to provide on time and on the size of your plan.

(b) *Pattern or practice.* A pattern or practice of failure to provide section 4071 information is an aggravating factor.

(c) *Willfulness.* Willful failure to comply is an aggravating factor.

Section 24 What Mitigating Factors Does the PBGC Consider?

(a) The mitigating factors that we consider are the following (We do not consider the absence of aggravating factors to be a mitigating factor.):

(1) *First-time requirement.* It is a mitigating factor if your failure to provide section 4071 information is a violation of a requirement that applies to you for the first time.

(2) *Self-correction.* It is a mitigating factor if you—

(i) Correct your failure to provide section 4071 information promptly after you discover the failure, and

(ii) Notify us on your own initiative of your failure to provide the section 4071 information before we notify you that you have or may have failed to provide the section 4071 information.

(3) *Corrective action.* It is a mitigating factor if you cooperate with us by taking appropriate corrective action and establishing procedures designed to ensure future compliance.

(b) *Example.* A mid-size company with a pension plan covering 750 participants mistakenly made a quarterly contribution that was too low. The company did not immediately realize that the contribution was too low and did not make a reportable events report to the PBGC. As soon as the company discovered its error, it made a corrective contribution, telephoned the PBGC to alert us to the problem, and promptly filed the required reportable event notice. The company had never before failed to make all required contributions, and both the plan and the company were financially healthy. At the PBGC's request, the plan administrator put in place new procedures to avoid future reporting failures. Under the circumstances, the PBGC might assess no information penalty or might assess an information penalty of less than the amount that would be called for under § 22.

Section 25 What if Multiple Persons Must Give a Notice?

If each of two or more persons is responsible for providing substantially identical section 4071 information to us or to another person or persons, and the information is not provided as required, we may—

(a) Assess an information penalty against any one or more of the persons without regard to whether we assess an information penalty against any other of the persons; and

(b) Determine the amount of information penalty assessed against any person without regard to the amount assessed against any other person.

Section 26 What if Multiple Persons Must Get a Notice?

In general, if you have to give substantially identical notices to multiple persons, we generally assess only a single information penalty for failure to provide the notices as required, regardless of how many persons did not receive a notice as required. However:

(a) The number of persons you did not provide notice to as required may affect the amount of daily information penalty we assess. For example, if you are a plan administrator and you fail to give a Participant Notice under Part 4011 of this chapter as required, we generally assess only one information penalty. But if your plan is quite large, the information penalty we assess is likely to be greater than if the plan were small.

(b) If there are aggravating factors, we may, in addition to assessing a higher information penalty under § 22(b), assess a separate information penalty for each person to whom you failed to give a notice.

Section 27 What if a Single Event or Circumstance Leads to Multiple Failures to Provide Section 4071 Information?

If there are multiple failures to provide section 4071 information relating to a single event or circumstance, we generally assess a separate information penalty for each failure. For example, suppose you are a contributing sponsor of a plan and you fail to make several required contributions to the plan because of a single failure to determine that contributions are necessary for the year. The failure to notify us of each missed contribution is a separate failure for which we generally assess a separate information penalty.

Section 28 What Special Guidance is There for Specific Types of Cases?

The following is special guidance for applying the general assessment principles in specific types of cases:

(a) *Premium information requirements.* If you file a complete, correct premium form (Form 1, Schedule A, Form 1–ES) late, with the full premium payment, we do not assess an information penalty except in unusual cases. The premium penalty for late payment is usually an adequate penalty.

(b) *Plan termination information requirements.* If you fail to file or issue a notice required for a plan termination under Part 4041 of this chapter on time, and we issue a notice of noncompliance nullifying the termination, we do not also assess an information penalty for your failure to file or issue the required notice on time.

(c) *Reportable event post-event notice requirements.* If we assess an information penalty for a failure by a large plan or employer to file a notice of a reportable event under ERISA section 4043, other than an advance notice under ERISA section 4043(b) (which is discussed in paragraph (d) of this section), the amount or rate may be much higher than the basic amount or rate that would be determined under § 22(e) of this Appendix. Such failures usually are—or have the potential of being—particularly harmful to participants or the PBGC if they involve large plans or employers. For example, if you do not give us a required notice of a controlled group member's bankruptcy filing, the controlled group member's assets may be distributed to other creditors before we can file our claims for plan underfunding, and we may therefore be unable to recover on our claims or otherwise participate in the bankruptcy proceedings.

(d) *Reportable event advance notice requirements.* We virtually always assess an information penalty if you fail to file an advance notice of a reportable event under ERISA section 4043(b), and we generally assess the full $1,100-per-day information penalty. This information is generally so time-sensitive and significant that the maximum information penalty is warranted in virtually every case, without regard to whether there are aggravating circumstances in the particular case, because of the need for strong deterrence of violations of this kind.

(e) *Missed contribution notice requirements.* We virtually always assess an information penalty if you fail to file a missed contribution notice (Form 200) under ERISA section 302(f)(4), and we generally assess the full $1,100-per-day information penalty. This information is very time-sensitive because it is the basis for filing a lien under section 302(f) for the protection of the plan. Thus, the maximum information penalty is warranted in virtually every case, without regard to whether there are aggravating circumstances in the particular case, because of the need for strong deterrence of violations of this kind. The fact that the contribution is ultimately made does not undo the potential for harm that exists while the contribution is outstanding. However, we may reduce the information penalty rate for any period during which the notice remains unfiled after the missed contribution is made—for example, from $1,100 per day to $100 per day.

(f) *Employer reporting requirements.* We virtually always assess an information penalty if you fail to file a financial and actuarial information report under ERISA section 4010, covering plans with very high underfunding, and we generally assess the full $1,100-per-day information penalty. Failures to file financial and actuarial information reports generally are—or have the potential of being—so harmful to participants or the PBGC that the maximum information penalty is warranted in virtually every case, without regard to whether there are aggravating circumstances in the particular case, because of the need for strong deterrence of violations of this kind.

Waiver Standards

Section 31 What are the Standards for Waiving an Information Penalty?

(a) *Facts and circumstances.* In deciding whether to waive an information penalty in

whole or in part, we consider the facts and circumstances of each case.

(b) *Waivers.* (1) *Provisions of law.* We waive all or part of an information penalty if a statute or regulation requires that we do so. For example, § 4041.29(b) of this chapter provides that we do not assess an information penalty for a late post-distribution certification except to the extent that you file it more than 90 days after the distribution deadline under § 4041.28(a) of this chapter; and 4050.6(b)(2) of this chapter contains a similar provision for the late filing of information and certifications regarding missing participants in a terminating plan.

(2) *Reasonable cause.* We waive an information penalty if you show reasonable cause for a failure to provide section 4071 information on time. See §§ 32 through 35 for guidelines on ''reasonable cause'' waivers. If there is reasonable cause for only part of a failure to provide section 4071 information, we waive the information penalty only for that part. In determining whether ''reasonable cause'' exists, we do not consider either —

(i) The likelihood or cost of collecting the information penalty, or

(ii) The costs and risks of enforcing the information penalty by litigation.

(3) *Erroneous legal interpretations.* We may waive all or part of an information penalty if the failure to provide section 4071 information on time that gives rise to the information penalty is based on your reliance on an erroneous interpretation of the law.

(i) *If you disclose the interpretation to us.* If a failure to provide section 4071 information on time results from your reliance on an erroneous interpretation of the law, we will waive an information penalty that arises from the failure if you promptly and adequately call our attention to the interpretation and the relevant facts, and the erroneous interpretation is not frivolous. If the interpretation affects a filing that you make with us, you should call our attention to the interpretation with the filing. If you rely on the interpretation to justify not making a filing with us, you should call our attention to the interpretation in a notice submitted to us by the time and in the manner prescribed for the filing not made. If the interpretation affects information that you provide to persons other than us, you should call our attention to the interpretation when you provide the information by sending us a notice addressed to Technical Assistance Branch, Insurance Operations Department, PBGC, 1200 K Street, NW., Washington, DC 20005–4026. If you rely on the interpretation to justify not providing information to persons other than us, you should call our attention to the interpretation by sending a notice to the above address by the time prescribed for providing the information that is not provided.

(ii) *If you do not disclose the interpretation to us.* If a failure to provide section 4071 information on time results from your reliance on an erroneous interpretation of the law, and you do not promptly and adequately call our attention to the interpretation and the relevant facts, we may waive an information penalty that arises from the failure if the weight of authority supporting the interpretation is substantial in relation to the weight of opposing authority and it is reasonable for you to rely on the interpretation.

(4) *Pendency of review.* If you request review of an information penalty (as described in § 14 of this Appendix), and you make a non-frivolous argument that you were not required to provide the section 4071 information or that you were (and still are) unable to provide it, we waive the portion of the information penalty that accrues during the review process. (If you make a non-frivolous argument that you were not required (or were unable) to provide a portion of the section 4071 information, we apply this rule to that portion.) The waiver also applies to the post-review period (the period after we complete our review) if you pay the information penalty within 30 days after the date of our decision and provide the section 4071 information by the time specified in the notice of our decision, which is normally also 30 days after the date of the decision, but may be less depending on the importance of the information. Otherwise, the waiver does not apply to the period from the date of our decision until you provide the section 4071 information.

(5) *Other circumstances.* We may waive all or part of an information penalty in other circumstances if we determine that it is appropriate to do so. We intend to exercise this waiver authority only in narrow circumstances, primarily if we determine that assessing an information penalty, or assessing the full amount of information penalty that might otherwise be appropriate under the guidelines in this appendix, would be inconsistent with the purposes of Title IV of ERISA. For example, we may waive all or part of an information penalty if the law changes shortly before the date when section 4071 information must be provided and the information you provide by that date would have been correct under the law as in effect before the change. In determining whether and to what extent to grant a waiver in a case of this kind, we consider such factors as the length of time between the change in the law and the date by which the section 4071 information must be provided, the nature and timing of any publicity given to the change in the law, the complexity of the legal issues, and your general familiarity with those issues.

(c) *Action or inaction of outside parties.* If an accountant, actuary, lawyer, pension consultant, or other individual or firm that is not part of your organization assists you in complying with PBGC requirements, we apply our waiver authority as if the outside individual or firm were part of your organization, as described in § 32(c) of this Appendix.

Section 32 What Is ''Reasonable Cause''?

(a) *General rule.* In general, there is ''reasonable cause'' for a failure to provide section 4071 information on time to the extent that—

(1) The failure arises from circumstances beyond your control, and

(2) You could not avoid the failure by the exercise of ordinary business care and prudence.

(b) *Overlooking legal requirements.* Overlooking legal requirements does not constitute reasonable cause.

(c) *Action or inaction of outside parties.* In some cases an accountant, actuary, lawyer, pension consultant, or other individual or firm that is not part of your organization may assist you in complying with PBGC requirements. If the outside individual's or firm's action, inaction, or advice causes or contributes to a failure to provide section 4071 information on time, our analysis is generally the same as if the outside individual or firm were part of your organization. (In the case of an outside individual who is part of a firm, we generally consider both the individual and the firm to be part of your organization.) Thus, if a failure to provide section 4071 information on time arises from circumstances within the control of the outside individual or firm, or could be avoided by the exercise of ordinary business care and prudence by the outside individual or firm, there is generally no reasonable cause for the failure. The fact that you exercised care and prudence in selecting and monitoring the outside individual or firm is not a basis for a reasonable cause waiver. (However, you may have recourse against the outside individual or firm.)

(d) *Size of organization.* If an organization or one or more of its employees is responsible for taking action, the size of the organization may affect what ordinary business care and prudence would require. For example, ordinary business care and prudence would typically require a larger organization to establish more comprehensive backup procedures than a smaller organization for dealing with situations such as computer failure, the loss of important records, and the inability of an individual to carry out assigned responsibilities. Thus, there may be reasonable cause for a small organization's failure to provide section 4071 information on time even though, if the organization were larger, the exercise of ordinary business care and prudence would have avoided the failure.

(e) *Potential seriousness of failure to provide section 4071 information on time.* In general, the more potentially serious or harmful a failure to provide section 4071 information on time would be, the more care and prudence you should use to make sure that you provide it on time. Thus, there may be reasonable cause for a minor failure even though, under the same circumstances, we would conclude that a more serious failure could have been avoided by the exercise of ordinary business care and prudence.

Section 33 What Kinds of Facts Does the PBGC Consider in Determining Whether There is Reasonable Cause for a Failure to Provide Section 4071 Information?

In determining whether a failure to provide section 4071 information on time arose from circumstances beyond your control and whether you could have avoided the failure by the exercise of ordinary business care and prudence—and thus whether waiver of an information penalty for reasonable cause is appropriate—we consider facts such as the following:

(a) What event or circumstance caused the failure and when the event happened or the circumstance arose. The dates you give should clearly correspond with the failure upon which the information penalty is based.

(b) How that event or circumstance kept you from providing the section 4071 information on time. The explanation you give should relate directly to the failure to provide section 4071 information that is the subject of the information penalty.

(c) Whether the event or circumstance was beyond your control.

(d) Whether you could have anticipated the event or circumstance.

(e) How you responded to the event or circumstance, including what steps you took (and how quickly you took them) to provide the section 4071 information and how you conducted other business affairs. Knowing how you responded to the event or circumstance may help us determine what degree of business care and prudence you were capable of exercising during that period and thus whether the failure to provide section 4071 information could or could not have been avoided by the exercise of ordinary business care and prudence.

Section 34 What Are Some Situations That Might Justify a ''Reasonable Cause'' Waiver?

The following examples illustrate some of the reasons often given for failures to provide section 4071 information for which we may assess penalties. The situation described in each example may constitute reasonable cause, and each example lists factors we consider in determining whether we should grant an information penalty waiver for reasonable cause in a case of that kind.

(a) *An individual with responsibility for taking action was suddenly and unexpectedly absent or unable to act.* We consider such factors as the following: the nature of the event that caused the individual's absence or inability to act (for example, the resignation of the individual or the death or serious illness of the individual or a member of the individual's immediate family); the size of the organization and what kind of backup procedures it had to cope with such events; how close the event was to the deadline that was missed; how abrupt and unanticipated the event was; how the individual's absence or inability to act prevented compliance; how expensive it would have been to comply without the absent individual; whether and how other business operations and obligations were affected; how quickly and prudently a replacement for the absent individual was selected or other arrangements for compliance were made; and how quickly a replacement for the absent individual took appropriate action.

(b) *A fire or other casualty or natural disaster destroyed relevant records or prevented compliance in some other way.* We consider such factors as the following: the nature of the event; how close the event was to the deadline that was missed; how the event caused the failure to provide section 4071 information; whether other efforts were made to get needed information; how expensive it would have been to comply; and how you responded to the event.

(c) *You reasonably relied on erroneous oral or written advice given by a PBGC employee.* We consider such factors as the following: whether there was a clear relationship between your situation and the advice sought; whether you provided the PBGC employee with adequate and accurate information; and whether the surrounding circumstances should have led you to question the correctness of the advice or information provided.

(d) *You were unable to obtain information (including records and calculations) needed to comply.* We consider such factors as the following: what information was needed; why the information was unavailable; when and how you discovered that the information was not available; what attempts you made to get the information or reconstruct it through other means; and how much it would have cost to comply.

Section 35 What Is a Siuation That Might Justify a Partial ''Reasonable Cause'' Waiver?

Assume that a fire destroyed the records needed for a required filing of section 4071 information. If in the exercise of ordinary business care and prudence it should take you one month to reconstruct the records and prepare the filing, but the filing was made two months late, it might be appropriate to waive that part of the information penalty attributable to the first month the filing was late, but not the part attributable to the second month.

Issued in Washington, D.C., this 5th day of January, 2001.

David M. Strauss,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 01–686 Filed 1–11–01; 8:45 am]

BILLING CODE 7708–01–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 948

[WV–089–FOR]

West Virginia Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing.

SUMMARY: OSM is announcing receipt of a proposed amendment to the West Virginia regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The program amendment consists of a written response to letters sent to the State by OSM, in accordance with the Federal regulations at 30 CFR 732.17(d), which identify changes to SMCRA and the Federal regulations that require the State program to be amended. The amendment submitted by the State is intended to render the West Virginia program no less effective than the Federal requirements.

DATES: If you submit written comments, they must be received on or before 4:00 p.m. (local time), on February 12, 2001. If requested, a public hearing on the proposed amendments will be held at 1:00 p.m. (local time), on February 6, 2001. Requests to speak at the hearing must be received by 4:00 p.m. (local time), on January 29, 2001.

ADDRESSES: Mail or hand-deliver your written comments and requests to speak at the hearing to Mr. Roger W. Calhoun, Director, Charleston Field Office at the address listed below.

You may review copies of the West Virginia program, the proposed amendment, a listing of any scheduled hearings, and all written comments received in response to this document at the addresses below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the proposed amendment by contacting OSM's Charleston Field Office.

Mr. Roger W. Calhoun, Director, Charleston Field Office, Office of Surface Mining Reclamation and Enforcement, 1027 Virginia Street, East, Charleston, West Virginia 25301, Telephone: (304) 347–7158. E-mail: chfo@osmre.gov.

West Virginia Division of Environmental Protection, 10 McJunkin Road, Nitro, West Virginia 25143, Telephone: (304) 759–0515. The proposed amendment will be posted at the Division's Internet page: http://www.dep.state.wv.us.

In addition, you may review copies of the proposed amendment during regular business hours at the following locations:

Office of Surface Mining Reclamation and Enforcement, Morgantown Area Office, 75 High Street, Room 229, P.O. Box 886, Morgantown, West Virginia 26507, Telephone: (304) 291–4004.

Office of Surface Mining Reclamation and Enforcement, Beckley Area Office, 323 Harper Park Drive, Suite 3, Beckley, West Virginia 25801, Telephone: (304) 255–5265.

FOR FURTHER INFORMATION CONTACT: Mr. Roger W. Calhoun, Director, Charleston Field Office; Telephone: (304) 347–7158.

SUPPLEMENTARY INFORMATION:

I. Background on the West Virginia Program

On January 21, 1981, the Secretary of the Interior conditionally approved the

West Virginia program. You can find background information on the West Virginia program, including the Secretary's findings, the disposition of comments, and the conditions of approval in the January 21, 1981, **Federal Register** (46 FR 5915–5956). You can find later actions concerning the conditions of approval and program amendments at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.

II. Discussion of the Proposed Amendment

By letter dated December 20, 2000 (Administrative Record Number WV–1191), the WVDEP submitted an amendment to its program. The program amendment consists of a written response to letters sent to the State by OSM in accordance with the Federal regulations at 30 CFR 732.17(d). 30 CFR 732.17(d) provides that OSM must notify the State of all changes in SMCRA and the Federal regulations which will require an amendment to the State program. Such letters sent by OSM are often referred to as ''732 letters.'' The amendment submitted by the State is intended to render the West Virginia program no less effective than the Federal requirements.

In the December 20, 2000, letter, item 2. concerns a 732 letter dated February 7, 1990, and regulations concerning the exemption for coal extraction incidental to the extraction of other minerals removed for purposes of commercial use or sale. The WVDEP stated that it will develop and submit a rule package for the 2002 legislative session which will contain counterparts to the Federal regulations at 30 CFR Part 702. Therefore, when the State legislature approves new provisions that are intended to satisfy the issues concerning the adequacy of the special reclamation fund, and those provisions are submitted to OSM for review and approval, we will announce the proposed provisions in a future proposed rule notice published in the **Federal Register**. At that time we will invite public comment on whether those provisions satisfy the relevant issues that were identified in the February 7, 1990, 732 letter concerning the exemption for coal extraction incidental to the extraction of other minerals removed for purposes of commercial use or sale.

At item 3. in the December 20, 2000, letter, the WVDEP stated that it has addressed the issues presented in the 732 letter dated October 1, 1991, concerning the adequacy of the special reclamation fund. The WVDEP stated that these 732 issues are the same as those codified in the Federal regulations at 30 CFR 948.16(jjj), (kkk), and (lll). The WVDEP stated that it has addressed its intentions concerning these issues in a letter to OSM dated August 31, 2000. The August 31, 2000, letter states that the WVDEP is actively working to address these issues, and that permanent changes to the West Virginia bonding program must be presented to the state legislature. The WVDEP timeline, the letter stated, provides an opportunity for this issue to be taken up by the 2001 legislature. Therefore, when the State legislature approves new provisions that are intended to satisfy the issues concerning the adequacy of the special reclamation fund, and those provisions are submitted to OSM for review and approval, we will announce the proposed provisions in a future proposed rule notice published in the **Federal Register**. At that time we will invite public comment on whether those provisions satisfy the relevant issues that were identified in the October 1, 1991, 732 letter and the required program amendments codified at 30 CFR 948.16(jjj), (kkk), and (lll).

In its December 20, 2000, letter, at item 4., the WVDEP stated that the State has submitted in a letter to OSM dated April 27, 1997, a program amendment implementing the Energy Policy Act of 1992. On February 9, 1999 (64 FR 6201) we published our final rule notice in the **Federal Register** concerning that amendment. On February 28, 2000 (65 FR 10388), we published a correction notice in the **Federal Register** concerning the February 9, 1999, notice. Since the WVDEP has not submitted any additional information in the December 20, 2000, letter concerning implementation of the Energy Policy Act of 1992, item 4. will not be a part of this rulemaking.

In its December 20, 2000, letter, at item 5. (inadvertently identified as item 6.), the WVDEP stated that OSM is in the process of revising its ownership and control regulations in response to a court decision. The WVDEP further stated that OSM has indicated that it will reissue a 732 letter concerning ownership and control in January 2001. Consequently, the WVDEP has not provided any other response to the 732 letter dated December 24, 1996, concerning changes and additions to existing ownership and control rules at 30 CFR parts 701, 773, 778, 840, and 843. Therefore, item 5. will not be addressed in this rulemaking. On December 19, 2000, OSM published its revised regulations concerning ownership and control in the **Federal Register** (65 FR 79582). In the near future, OSM will provide the WVDEP with a 732 letter detailing the changes that need to be made to the State program as a consequence of the new Federal provisions.

In its December 20, 2000, letter, the State's responses at item 6.F., 6.G., 6.H., and 6.I. indicate that the WVDEP will submit draft proposed language to the State legislature for consideration for rulemaking during its 2002 session. The WVDEP intends that the draft proposed language would satisfy specific issues identified in the 732 letters. When the State legislature approves new rules that are intended to satisfy specific 732 issues, and those rules are submitted to OSM for review and approval, we will announce the proposed rules in a future proposed rule notice published in the **Federal Register**. At that time we will invite public comment on whether those rules satisfy the relevant 732 letters.

In the December 20, 2000, letter, at item 6.J., concerning bond release requirements, the WVDEP stated that it will revise the bond release application to include a written, notarized statement by the permittee that all applicable reclamation requirements specified in the permit have been completed. Since the WVDEP has not submitted specific program changes in its December 20, 2000, letter concerning this issue, item 6.J. will not be part of this rulemaking.

In the December 20, 2000, letter, item 7., concerning staffing level supporting the approved program, the WVDEP stated that the State has previously submitted a staffing plan and schedule to OSM. Since the WVDEP has not submitted specific program changes in its December 20, 2000, letter concerning this issue, item 7. will not be part of this rulemaking.

You will find West Virginia's program amendment presented below. In each item, the State first identifies the 732 letter and the issue, followed by its response to the issue.

1. 732 letter dated March 6, 1990—30 CFR 816.116(b)(3)(i)—Federal rules have been revised to require that minimum stocking and planting arrangements for areas developed for fish and wildlife habitat, recreation, shelterbelts or forest products be specified by the regulatory authority after consultation with and approval by the state agencies responsible for administration of forest and wildlife programs. Consultation and approval may occur as either a program-wide or permit-specific basis.

State response: Consultation and approval occurs on a permit-specific basis. In fact, the wildlife plans are prepared by a biologist from the Division of Natural Resources.

2. 732 letter dated July 22, 1997.

2.A. 30 CFR 701.5 ''other treatment facilities''.

State response: The state does not need this term. There is a definition for ''sediment control or other water retention structure, sediment control or other water retention system or sediment or sediment pone'' at [CSR] 38–2–2.110 and ''chemical treatment'' at [CSR] 38–2–2.21.

2.B. 30 CFR 701.5 ''previously mined area''.

State response: The state does not need the definition of ''previously mined area.'' The term is used in the state's regulations in conjunction with remining operations. Furthermore, the federal definition of ''previously mined area'' and ''remining'' contradicts the definition of ''lands eligible for remining''.

2.C. 30 CFR 701.5 ''siltation structure''.

State response: The state does not need the definition of ''siltation structure''. This term is defined in the federal rule as ''a sedimentation pond'' and corresponds to the state's definition found at [CSR] 38–2–2.110.

2.D. 30 CFR 761.5 ''significant recreational, timber, economic, other values incompatible with surface coal mining operations'' as it relates to federal lands.

State response: The state does not need to define this term since [30 CFR] 740.4 states that this determination is the responsibility of the secretary. Furthermore, there is nothing in state or federal regulation that would restrict the secretary from using [30 CFR] 761.5 in his determination.

2.E. 30 CFR 780.25—Revise the state program to add specific references to NRCS Technical Release No. 60 criteria for dam classification.

State response: Since the state references its Dam Control Act (which contains a dam classification similar to TR–60), it does not need to reference the NRCS criteria.

2.F. 30 CFR 816.49—Performance standards were revised for impoundments to impoundments by referencing NRCS TR–60 and require impoundments meeting Class B or C criteria to comply with the same stability, spillway, foundation, etc. as impoundments meeting MSHA criteria in 30 CFR 77.216(a).

State response: Since the state references its Dam Control Act, its requirements contain similar standards to those contained in 30 CFR 816.49.

2.G. 30 CFR 816.81(a)— * * * Coal mine waste shall be hauled or conveyed and placed for final placement in a controlled manner to * * *.

State response: The state does not need to revise its rules at [CSR] 38–2–22.5 since the state's rules at [CSR] 38–2–22.3.p. has procedures for the spreading and compaction of refuse material for final placement. It states ''the material shall be compacted in layers not exceeding two feet in thickness * * *''. This is similar to 30 CFR 77.215(h).

2.H. 30 CFR 816.104(a)—''Thin Overburden'' definition. 30 CFR 816.105(a)—''Thick Overburden'' definition.

State response: The state does not need to amend its rule. The statute at [W.Va. Code] 22–3–13(b)(3) defines ''think'' [sic; thin] and ''thick'' overburden and has similar language to that contained in 30 CFR 816.104(a) and 30 CFR 816.105(a).

30 CFR 840.11(g)(4)–30 CFR 840.11(h)—Inspection frequencies at abandoned sites.

State response: The state has existing process that addresses whether and to what extent a forfeited site poses or may reasonably be expected to pose imminent danger to the health and safety of the public or significant harm to land and water resources. This process has not been codified.

3. 732 letter dated August 22, 2000—Subsidence due to underground mining is not a surface coal mining operation and it is not prohibited in areas protected under section 552(e) of the Surface Mining Control and Reclamation Act.

State response: The state does not need to amend its rule. Section [W.Va. Code] 22–3–22(d) applies to surface mining operations rather than to underground activities.

4. 732 letter dated August 22, 2000—Valid Existing Rights.

State response: The state does not need to amend its rule since the existing rule is as effective as its federal counterpart.

III. Public Comment Procedures

In accordance with the provisions of 30 CFR 732.17(h), OSM is seeking comments, on whether the proposed amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If the amendment is deemed adequate, it will become part of the West Virginia program.

Written Comments

If you submit written or electronic comments on the proposed amendment during the 30-day comment period, they should be specific, should be confined to issues pertinent to the notice, and should explain the reason for your recommendation(s). We may not be able to consider or include in the Administrative Record comments delivered to an address other than the one listed above (see **ADDRESSES**).

Electronic Comments

Please submit Internet comments as an ASCII, Word Perfect, or Word file avoiding the use of special characters and any form of encryption. Please also include ''Attn: SPATS NO. WV–089–FOR'' and your name and return address in your Internet message. If you do not receive a confirmation that we have received your Internet message, contact the Charleston Field office at (304) 347–7158.

Availability of Comments

Our practice is to make comments, including names and home addresses of respondents, available for public review during our regular business hours at the OSM Administrative Record Room (see **ADDRESSES**). Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Public Hearing

If you wish to speak at the public hearing, you should contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4:00 p.m. (local time), on January 29, 2001. The location and time of the hearing will be arranged with those persons requesting the hearing. If no one requests an opportunity to speak at the public hearing, the hearing will not be held.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who testifies at a public hearing provide us with a written copy of his or her testimony. The public hearing will continue on the specified date until all persons scheduled to speak have been heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after all persons scheduled to speak and persons present in the

audience who wish to speak have been heard.

Any disabled individual who has need for a special accommodation to attend a public hearing should contact the individual listed under **FOR FURTHER INFORMATION CONTACT**.

Public Meeting

If only one person requests an opportunity to speak at a hearing, a public meeting, rather than a public hearing, may be held. If you wish to meet with OSM representatives to discuss the proposed amendment, you may request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings will be open to the public and, if possible, notices of meetings will be posted at the locations listed under **ADDRESSES.** A written summary of each meeting will be made a part of the Administrative Record.

IV. Procedural Determinations

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget under Executive Order 12866.

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart federal regulation.

Executive Order 13132—Federalism

This rule does not have federalism implications. SMCRA delineates the roles of the federal and state governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that state laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and section 503(a)(7) requires that state programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of state regulatory programs and program amendments since each such program is drafted and promulgated by a specific state, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed state regulatory programs and program amendments submitted by the states must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

National Environmental Policy Act

Section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that a decision on a proposed state regulatory program provision does not constitute a major federal action within the meaning of section 102(2)(C) of the National Environmental Policy Act (NEPA) (42 U.S.C. 4332(2)(C)). A determination has been made that such decisions are categorically excluded from the NEPA process (516 DM 8.4.A).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The state submittal which is the subject of this rule is based upon counterpart federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the state. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart federal regulation.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of $100 million.

b. Will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the state submittal which is the subject of this rule is based upon counterpart federal regulations for which an analysis was prepared and a determination made that the federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose a cost of $100 million or more in any given year on any governmental entity or the private sector.

List of Subjects in 30 CFR Part 948

Intergovernmental relations, Surface mining, Underground mining.

Dated: January 5, 2001.

Michael K. Robinson,

Acting Regional Director, Appalachian Regional Coordinating Center.

[FR Doc. 01–1059 Filed 1–11–01; 8:45 am]

BILLING CODE 4310–05–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 2

[FRL–6933–1]

Public Information and Confidentiality: Rescheduling of a Previously-Announced Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is rescheduling the public meeting on its advance notice of proposed rulemaking (ANPRM) and potential revision of the confidential business information (CBI) regulations scheduled for January 18, 2001, as advertised in the December 21, 2000 **Federal Register** (65 FR 80394).

DATES: This meeting has been rescheduled for Wednesday, March 7, 2001 from 9 a.m. to 4:30 p.m. in the EPA Auditorium, 401 M Street, SW., Washington, DC. The meeting has been rescheduled based on requests from the public to allow additional time for stakeholder participation and to avoid

potential travel difficulties in the Washington, D.C. area the week of January 20, 2001.

FOR FURTHER INFORMATION CONTACT: Alan Margolis, Office of Information Collection, Office of Environmental Information, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Mail Code 2822, Washington, DC 20460; Phone, 202–260–9329; Fax, 202–401–4544; Email, *margolis.alan@epa.gov.*

Dated: January 8, 2001.

Mark Luttner,

Director, Office of Information Collection.

[FR Doc. 01–1178 Filed 1–11–01; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 174 and 177

[Docket No. RSPA–01–8587; Notice No. 01–02]

Regulatory Flexibility Act Section 610 and Plain Language Reviews

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice of regulatory review; request for comments.

SUMMARY: RSPA requests comments on the economic impact of its regulations on small entities. As required by the Regulatory Flexibility Act and as published in DOT's Semi-Annual Regulatory Agenda, we are analyzing the rules on Carriage by Rail and Carriage by Public Highway to identify rules that may have a significant economic impact on a substantial number of small entities. We also request comments on ways to make these regulations easier to read and understand.

DATES: Comments must be received by April 12, 2001.

ADDRESSES: Address written comments to the Dockets Management System, U.S. Department of Transportation, Room PL–401, 400 Seventh Street, SW, Washington, DC 20590–0001. Identify the docket number RSPA–99–5143 at the beginning of your comments and submit two copies. If you want to receive confirmation of receipt of your comments, include a self-addressed, stamped postcard. You can also submit comments by e-mail by accessing the Dockets Management System on the Internet at ''http://dms.dot.gov'' or by fax to (202) 366–3753.

The Dockets Management System is located on the Plaza Level of the Nassif Building at the Department of Transportation at the above address. You can review public dockets there between the hours of 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. In addition, you can review comments by accessing the Dockets Management System at ''http://dms.dot.gov.''

FOR FURTHER INFORMATION CONTACT: Susan Gorsky, Office of Hazardous Materials Standards, Research and Special Programs Administration, U.S. Department of Transportation, telephone (202) 366–8553; or Donna O'Berry, Office of Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, telephone (202) 366–4400.

SUPPLEMENTARY INFORMATION:

I. Section 610 of the Regulatory Flexibility Act

A. Background and Purpose

Section 610 of the Regulatory Flexibility Act of 1980 (Public Law 96–354), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), requires agencies to conduct periodic reviews of rules that have a significant economic impact on a substantial number of small business entities. The purpose of the review is to determine whether such rules should be continued without change, amended, or rescinded, consistent with the objectives of applicable statutes, to minimize any significant economic impact of the rules on a substantial number of such small entities.

B. Review Schedule

The Department of Transportation (DOT) published its Semiannual Regulatory Agenda on November 30, 2000, listing in Appendix D (65 FR 74138) those regulations that each operating administration will review under section 610 during the next 12 months. Appendix D also contains DOT's 10-year review plan for all of its existing regulations.

The Research and Special Programs Administration (RSPA, we) has divided its Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180) into 10 groups by subject area. Each group will be reviewed once every 10 years, undergoing a two-stage process—an Analysis Year and Section 610 Review Year. For purposes of these reviews, a year will coincide with the fall-to-fall publication schedule of the Semiannual Regulatory Agenda. Thus, Year 1 began in the fall of 1998 and ended in the fall of 1999; Year 2 began in the fall of 1999 and ended in the fall of 2000; and so on.

During the Analysis Year, we will analyze each of the rules in a given year's group to determine whether any rule has a significant impact on a substantial number of small entities and, thus, requires review in accordance with section 610 of the Regulatory Flexibility Act. In each fall's Regulatory Agenda, we will publish the results of the analyses we completed during the previous year. For rules that have a negative finding, we will provide a short explanation. For parts, subparts, or other discrete sections of rules that do have a significant impact on a substantial number of small entities, we will announce that we will be conducting a formal section 610 review during the following 12 months.

The section 610 review will determine whether a specific rule should be revised or revoked to lessen its impact on small entities. We will consider: (1) the continued need for the rule; (2) the nature of complaints or comments received from the public; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates, or conflicts with other federal rules or with state or local government rules; and (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule. At the end of the Review Year, we will publish the results of our review.

The following table shows the 10-year analysis and review schedule:

RSPA SECTION 610 REVIEW PLAN

[1999–2009]

Title	Regulation	Analysis year	Review year
Incident reports	§§ 171.15 and 171.16	1998	N/A
Hazmat safety procedures	Parts 106 and 107	1999	N/A

RSPA SECTION 610 REVIEW PLAN—Continued

[1999–2009]

Title	Regulation	Analysis year	Review year
General Information, Regulations, and Definitions	Part 171		
Carriage by Rail and Highway	Parts 174 and 177	2000	2001
Carriage by Vessel	Part 176	2001	2002
Radioactive Materials	Parts 172, 173, 174, 175, 176, 178	2002	2003
Explosives	Parts 172, 173, 174, 176, 178	2003	2004
Cylinders	Parts 172, 173, 178, 180		
Shippers—General Requirements for Shipments and Packagings	Part 173	2004	2005
Specifications for Non-bulk Packagings	Part 178	2005	2006
Specifications for Bulk Packagings	Parts 178, 179, 180	2006	2007
Hazardous Materials Table, Special Provisions, Hazardous Materials Communications, Emergency Response Information, and Training Requirements.	Part 172	2007	2008
Carriage by Aircraft	Part 175		

C. Regulations Under Analysis

During Year 3 (2000–2001), the Analysis Year, we will conduct a preliminary assessment of the rules in 49 CFR Part 174, Carriage by Rail, and Part 177, Carriage by Public Highway.

Part 174, Carriage by Rail, includes the following subparts:

Subpart	Title
Subpart A	General Requirements.
Subpart B	General Operating Requirements.
Subpart C	General Handling and Loading Requirements.
Subpart D	Handling of Placarded Rail Cars, Transport Vehicles, and Freight Containers.
Subpart E	Class 1 (Explosive) Materials.
Subpart F	Detailed Requirements for Class 2 (Gases) Materials.
Subpart G	Detailed Requirements for Class 3 (Flammable Liquid) Materials.
Subpart J	Detailed Requirements for Division 6.1 (Poisonous) Materials.
Subpart K	Detailed Requirements for Class 7 (Radioactive) Materials.

Part 177, Carriage by Public Highway, includes the following subparts:

Subpart	Title
Subpart A	General Information and Regulations.
Subpart B	Loading and Unloading.
Subpart C	Segregation and Separation Chart of Hazardous Materials.
Subpart D	Vehicles and Shipments in Transit; Accidents.
Subpart E	Regulations Applying to Hazardous Material on Motor Vehicles Carrying Passengers for Hire.

We are seeking comments on whether any requirements in Parts 174 or 177 have a significant impact 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 fields, and governmental jurisdictions with populations under 50,000. If your business or organization is a small entity and if any of the requirements in Parts 174 or 177 has a significant economic impact on your business or organization, please submit a comment explaining how and to what degree these rules affect you, the extent of the economic impact on your business or organization, and why you believe the economic impact is significant.

II. Plain Language

A. Background and Purpose

The National Partnership for Reinventing Government (NPR) has recommended that the federal government develop a more customer-oriented approach, particularly concerning government regulations and publications. The NPR recommendations suggest that agencies simplify and, as appropriate, rewrite rules and regulations in performance-based, plain-language formats.

Plain language helps readers find requirements quickly and understand them easily. Examples of plain language techniques include:

(1) Undesignated center headings to cluster related sections within subparts.

(2) Short words, sentences, paragraphs, and sections to speed up reading and enhance understanding.

(3) Sections as questions and answers to provide focus.

(4) Personal pronouns to reduce passive voice and draw readers into the writing.

(5) Tables to display complex information in a simple, easy-to-read format.

President Clinton issued an Executive Memorandum on June 1, 1998, calling for agencies to write documents using ''easy-to-read design features.'' To ensure the use of plain language, the President directed agencies to use plain language in all new documents, other than regulations, by October 1, 1998, and to use plain language in all

proposed and final rulemakings published in the **Federal Register** after January 1, 1999. The President also directed agencies to consider rewriting existing regulations in plain language when they have the opportunity and resources to do so. For an example of a rule drafted in plain language, you can refer to RSPA's notice of proposed rulemaking entitled ''Revised and Clarified Hazardous Materials Safety Rulemaking and Program Procedures,'' which was published December 11, 1998 (63 FR 68624). This NPRM proposed to rewrite 49 CFR Part 106 and Subpart A of Part 107 in plain language and to create a new Part 105 that would contain definitions and general procedures. We are currently evaluating comments received in response to the NPRM.

B. Review Schedule

In conjunction with our section 610 reviews, we will be performing plain language reviews of the HMR over a ten-year period on a schedule consistent with the section 610 review schedule. Thus, our review of Parts 174 and 177 will also include a plain language review to determine if the regulations can be reorganized and/or rewritten to make them easier to read, understand, and use. We are also considering a petition for rulemaking jointly filed by the Association of American Railroads and the American Trucking Associations (P–1355) proposing that we consolidate the requirements of Parts 174 and 177 into a new Part 174. The petition further proposes to delete certain requirements in Parts 174 and 177 that are obsolete, duplicative, or do not ''add to the safe transportation of hazardous materials.'' We encourage interested persons to submit draft regulatory language that clearly and simply communicates regulatory requirements, and other recommendations, such as for putting information in tables or consolidating regulatory requirements, that may make the regulations easier to use.

Issued in Washington, D.C. on January 5, 2001, under authority delegated in 49 CFR Part 106.

Robert A. McGuire,

Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration.

[FR Doc. 01–993 Filed 1–11–01; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No.000801223-0223-01; I.D. 062000A]

RIN 0648-AO24

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Operation of a Low Frequency Sound Source by the North Pacific Acoustic Laboratory; Correction

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

ACTION: Correction to a notice of proposed rulemaking.

SUMMARY: This document contains corrections to the notice of proposed rulemaking that was published on December 22, 2000. These corrections are necessary to ensure reviewers provide comments appropriate for the proposed action.

ADDRESSES: A copy of the Scripps Institution of Oceanography (Scripps) application may be obtained by writing to Donna Wieting, Chief, Marine Mammal Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3226.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Hollingshead, Office of Protected Resources, NMFS, (301) 713-2055, ext 128.

SUPPLEMENTARY INFORMATION: On October 22, 1999, NMFS published a notice (64 FR 57026) that NMFS had received a request from Scripps for a small take of certain marine mammal species incidental to the operation of a low frequency sound source previously installed off the north shore of Kauai, HI, by the Acoustic Thermometry of Ocean Climate project.

Need for Correction

As published, the notice contains an error by requesting comment on the impact of explosives on marine mammals. As the Scripps' acoustic source is considered an intermittent sound source and does not result in effects on marine mammals similar to that which would result if the source were an explosive, the sentence may prove to be misleading and, therefore, is in need of correction. While NMFS welcomes comment on its criterion for explosive effects on marine mammals, it specifically requests comment in this document on the effects of intermittent noise on marine mammals.

Correction of Publication

Accordingly, the publication on December 22, 2000, of the notice of proposed rulemaking (I.D. 062000A), which was the subject of FR Doc. 00-32725, is corrected as follows:

On page 80822, in the first column, under the heading of Response to Comment 23, the last sentence beginning on line 10, is corrected to read: ''NMFS invites comment on the criterion for assessing impacts from intermittent noise sources on marine mammals.''

Dated: January 5, 2001.

William T. Hogarth,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 01–912 Filed 1–11–01; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[I.D. 010401A]

Pacific Fishery Management Council; Public Meetings and Hearings

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

ACTION: Notice of availability of salmon management options; public meetings and hearings.

SUMMARY: The Pacific Fishery Management Council (Council) has begun its annual preseason management process for the 2001 ocean salmon fisheries. This document announces the availability of Council documents as well as the dates and locations of Council meetings and public hearings that comprise the Council's complete schedule of events for determining the annual proposed and final modifications to ocean salmon fishery management measures. The agendas for the March and April Council meetings will be published in subsequent **Federal Register** documents prior to the actual meetings.

DATES: Written comments on the salmon management options must be received by March 28, 2001, at noon Pacific Time. For dates and times of the public

meetings and hearings see **SUPPLEMENTARY INFORMATION.**

ADDRESSES: Documents containing the salmon management options will be available from and written comments should be sent to Jim Lone, Chairman, Pacific Fishery Management Council, 2130 SW Fifth Avenue, Suite 224, Portland, Oregon, 97201; phone: 503-326-6352; fax: 503-326-6831. For locations of the public meetings and hearings, see **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: John Coon at 503-326-6352.

SUPPLEMENTARY INFORMATION:

Dates, Times, and Locations

Schedule For Document Availability

February 27, 2001: ''Review of 2000 Ocean Salmon Fisheries'' and ''Preseason Report I-Stock Abundance Analysis for 2001 Ocean Salmon Fisheries'' will be available to the public from the Council office.

March 20, 2001: ''Preseason Report II'' and the public hearing schedule will be mailed to the public. The report will include a description of the adopted salmon management options and a summary of their biological and economic impacts.

April 13, 2001: Newsletter describing adopted ocean salmon fishing management measures will be mailed to the public.

May 1, 2001: Federal regulations will be implemented and ''Preseason Report III- Analysis of Council-Adopted Ocean Salmon Management Measures for 2001 Ocean Salmon Fisheries'' will be available from the Council office (see **ADDRESSES**).

Public Hearings

Public hearings will be held on March 26 to 28, 2001, to receive comments on the proposed ocean salmon fishery management options adopted by the Council. All public hearings begin at 7 p.m. on the dates and at the locations specified here.

March 26, 2001: Chateau Westport, 710 W Hancock, Westport, WA.

March 26, 2001: Red Lion Hotel, 1313 N Bayshore Drive, Coos Bay, OR.

March 27, 2001: Red Lion Hotel Eureka, 1929 Fourth Street, Eureka, CA.

April 2-6, 2001: Council and advisory entities meet at the Red Lion Hotel Sacramento, Sacramento, CA, to adopt 2001 management measures for implementation by NMFS.

April 3, 2001: Testimony on the management options will be taken during the Council meeting at the Red Lion Hotel Sacramento, Sacramento, CA.

Public Meetings

January 16-19, 2001: The Salmon Technical Team (STT) will meet at the Council office in a public work session to draft ''Review of 2000 Ocean Salmon Fisheries'' and to consider any other estimation or methodology issues pertinent to the 2001 ocean salmon fisheries.

February 13-16, 2001: The STT will meet at the Council office in a public work session to draft ''Preseason Report I-Stock Abundance Analysis for 2000 Ocean Salmon Fisheries'' and to consider any other estimation or methodology issues pertinent to the 2001 ocean salmon fisheries.

March 5-9, 2001: Council and advisory entities will meet at the Doubletree Hotel - Columbia River, 1401 North Hayden Island Drive, Portland, OR to adopt the 2001 salmon management options for public review.

Although non-emergency issues not contained in the STT meeting agendas may come before the STT for discussion, those issues may not be the subject of formal STT action during these meetings. STT action will be restricted to those issues specifically listed in this document and to any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the STT's intent to take final action to address the emergency.

Special Accommodations

The meetings and hearings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at503-326-6352 (voice), or 503-326-6831 (fax) at least 5 days prior to the meeting date.

Authority: 16 U.S.C. *et seq.*

Dated: January 8, 2001.

Clarence Pautzke,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 01–1062 Filed 1–11–01; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register

Vol. 66, No. 9

Friday, January 12, 2001

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

Rural Housing Service

Rural Business-Cooperative Service

Rural Utilities Service

Farm Service Agency

Notice of Request for Extension of a Currently Approved Information Collection

AGENCIES: Rural Housing Service, Rural Business-Cooperative Service, Rural Utilities Service, Farm Service Agency, USDA.

ACTION: Proposed collection; comments requested.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the subject agencies' intention to request an extension for a currently approved information collection in support of the programs for 7 CFR part 1951, subpart C, ''Offsets of Federal Payments to USDA Agency Borrowers.''

DATES: Comments on this notice must be received by March 13, 2001, to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Jerry P. Wishall, Senior Loan Officer, USDA, FSA, Farm Loan Programs, Loan Servicing Division, 1400 Independence Ave. SW., Washington, DC 20250–0523, telephone (202) 720–1651. Electronic mail: Jerry_Wishall@wdc.fsa.usda.gov.

SUPPLEMENTARY INFORMATION:

Title: Offsets of Federal Payments to USDA Agency Borrowers.

OMB Number: 0575–0119.

Expiration Date of Approval: February 28, 2001.

Type of Request: Extension of a Currently Approved Information Collection.

Abstract: This regulation identifies documents to be submitted by borrowers to request a different repayment agreement when they are delinquent on their debt to the Federal Government. This regulation does not require a response if the borrower is willing to allow the program payment to be made directly to the Agency. The information is used to determine if a different repayment agreement can be accepted.

Estimate of Burden: Public reporting for this collection of information is estimated to average 1.4 hours per response.

Respondents: Individuals or households, businesses or other for profit and farms.

Estimated Number of Respondents: 18,300.

Estimated Number of Responses per Respondent: 1.

Estimated Number of Responses: 18,300.

Estimated Total Annual Burden on Respondents: 25,206.

Copies of this information collection can be obtained from Barbara Williams, Regulations and Paperwork Management Branch, Support Services Division at (202) 692–0045.

Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the subject agencies, including whether the information will have practical utility; (b) the accuracy of the Agencies' estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Barbara Williams, Regulations and Paperwork Management Branch, Support Services Division, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave. SW., Washington, DC 20250. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: January 5, 2001.

Inga Smulkstys,

Acting Under Secretary for Rural Development.

Dated: January 5, 2001.

Thomas I. Grau,

Acting Under Secretary for Farm and Foreign Agricultural Services.

[FR Doc. 01–1109 Filed 1–11–01; 8:45 am]

BILLING CODE 3410–XT–U

DEPARTMENT OF AGRICULTURE

Forest Service

Coeur d'Alene River Ranger District Small Sales Final EIS Revision, Idaho Panhandle National Forests, Kootenai and Shoshone Counties, Idaho

AGENCY: Forest Service, USDA.

ACTION: Notice; intent to prepare a revised final environmental impact statement.

SUMMARY: The Forest Service will prepare a revised final environmental impact statement (FEIS) to further analyze and disclose the cumulative environmental effects of utilizing timber harvest in numerous small, specific areas of the Coeur d'Alene River Ranger District. The intent of the project is to salvage merchantable timber in stands damaged by ice storms, insect infestation and disease, and to reduce the level of fire risk to the National Forest and to private lands adjacent to National Forest lands.

DATES: Comments concerning the scope of the revision should be received in writing by February 12, 2001.

ADDRESSES: Send written comments to Coeur d'Alene River Ranger District, 2502 East Sherman Avenue, Coeur d'Alene, Idaho, 83814–5899.

FOR FURTHER INFORMATION CONTACT: Bob Rehnborg (Project Team Leader) or Kerry Arneson (NEPA Coordinator) at (208) 769–3000.

SUPPLEMENTARY INFORMATION: A final environmental impact statement and record of decision were issued in July 2000. The decision was appealed. Upon review, the Appeal Deciding Officer reversed the decision, citing inadequate documentation of cumulative effects analysis. The intent of the revised FEIS is to provide the necessary documentation of cumulative effects in relation to the Small Sales project.

While public participation in this analysis is welcome at any time, comments received within 30 days of the publication of this notice will be especially useful in the preparation of the revision, which is expected to be filed with the Environmental Protection Agency and available for public review in February 2001. The comment period on the revised FEIS will end 45 days from the date the Environmental Protection Agency publishes the notice of availability of the revised FEIS in the **Federal Register**. In addition, the public is encouraged to visit with Forest Service officials at any time during the analysis and prior to the decision.

A new decision is anticipated in April 2001. The decision will identify if, when, how and where to schedule activities to meet these goals. The USDA Forest Service is the lead agency for this proposal. Acting District Ranger Jose Castro is the responsible official.

The Forest Service believes it is important at this early stage to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDS*, 435 U.S. 519, 533 (1978). Also, environmental objections that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them.

Comments on the revised FEIS should be as specific as possible. It is also helpful if comments refer to specific pages or chapters. Comments may also address the adequacy of the revised FEIS or the merits of the alternatives formulated and discussed in the revised FEIS. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

Dated: January 2, 2001.

Jose Castro,

Acting District Ranger.

[FR Doc. 01–1003 Filed 1–11–01; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Meeting of the Land Between the Lakes Advisory Board

AGENCY: Forest Service, Agriculture.

ACTION: Notice of meeting.

SUMMARY: The Land Between The Lakes Advisory Board will hold its first meeting to consider various matters. Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App.2.

The meeting agenda includes the following:

(1) Welcome and Introductions

(2) Federal Advisory Committee Guidelines

(3) Protection Act

(4) Bylaws, Operating Procedures, and Public Comment Process

(5) Land Between The Lakes and Forest Service Overview

(6) Forest Planning Overview

The meeting is open to the public; however, due to the length of the scheduled agenda, there will not be an opportunity for oral statements from the public at the meeting. Written comments are invited and may be mailed to: William P. Lisowsky, Area Supervisor, Land Between The Lakes, 100 Van Morgan Drive, Golden Pond, Kentucky 42211. Written comments must be received at Land Between The Lakes by February 7, 2001 in order for copies to be provided to the members at the meeting. Future meetings may provide opportunities for oral comment.

DATES: The meeting will be held on Thursday, February 15, 2001, 8:30 a.m. to 4:00 p.m., CDT.

ADDRESSES: The meeting will be held at Lake Barkley State Resort, Cadiz, Kentucky, and will be open to the public.

FOR FURTHER INFORMATION CONTACT: Sharon Byers, Advisory Board Liaison, Land Between The Lakes, 100 Van Morgan Drive, Golden Pond, Kentucky 42211, 270–924–2002.

SUPPLEMENTARY INFORMATION: Members of the Land Between The Lakes Advisory Board and their appointing agencies are:

Mr. C. Lee Anderson, United States Department of Agriculture
Mr. C. Thomas Bennett, KY Department of Fish & Wildlife
Mr. Reed Conder, Governor of Kentucky
Ms. Ann Fairhurst, United States Department of Agriculture
Mr. James R. Fox, TN Wildlife Resources Agency
Mr. Ben D. Hall, KY Department of Fish & Wildlife
Ms. Dortha N. Lyons, Governor of Kentucky
Mr. Robert Marks, Sr., United States Department of Agriculture
Mr. Jesse Mayo, Governor of Tennessee
Mr. Berlin Stanley Moore, Jr., Trigg County Judge Executive
Ms. Della B. Oliver, Lyon County Judge Executive
Mr. Gordon W. Rahn, United States Department of Agriculture
Mr. James E. Stevens, Lyon County Judge Executive
Mr. Jesse R. Thomas, Trigg County Judge Executive
Mr. David G. Wallace, Stewart County Executive
Mr. Nickolas W. Watson, Stewart County Executive
Ms. Ramay W. Winchester, Governor of Tennessee

Dated: January 4, 2001.

William P. Lisowsky,

Area Supervisor, Land Between The Lakes.

[FR Doc. 01–1002 Filed 1–11–01; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Proposed Change to the Natural Resources Conservation Service's National Handbook of Conservation Practices

AGENCY: Natural Resources Conservation Service (NRCS), U.S. Department of Agriculture, Pennsylvania State Office.

ACTION: Notice of availability of proposed changes in Section IV of the Pennsylvania State NRCS Field Office Technical Guide (FOTG) for review and comment.

SUMMARY: It is the intention of NRCS in Pennsylvania to issue a series of new and revised conservation practice standards in its Technical Guide. These draft standards include the following:

Conservation Crop Rotation (Acre)—Standard Code 328—Draft (9/2000)
Residue Management: No Till/Strip Till (Acre)—Standard Code 329A—Draft (9/2000)
Residue Management: Mulch Till (Acre)—Standard Code 329B—Draft (9/2000)
Residue Management Ridge Till (Acre)—Standard Code 329C—Draft (9/2000)
Contour Farming (Acre)—Standard Code 330—Draft (11/2000)
Contour Buffer Strips (Acre)—Standard Code 332—Draft (11/2000)
Cover Cropping (Acre)—Standard Code 340—Draft (12/2000)
Residue Management: Seasonal (Acre)—Standard Code 344—Draft (9/2000)

Filter Strip (Acre)—Standard Code 393—Draft (9/2000)
Contour Stripcropping (Acre)—Standard Code 585—Draft (11/2000)
Nutrient Management (Acre)—Standard Code 590—Draft (9/2000)
Waste Utilization (Acre)—Standard Code 633—Draft (9/2000)
Conservation Cover (Acre)—Standard Code 327 (10/2000)

DATES: Comments will be received on or before February 12, 2001.

FOR FURTHER INFORMATION CONTACT: Inquire in writing to Janet L. Oertly, State Conservationist, USDA-Natural Resources Conservation Service, Suite 340, One Credit Union Place, Harrisburg, Pennsylvania 17110–2993, telephone (717) 237–2202; fax (717) 237–2238.

Copies of these *draft* practice standards are made available electronicallly on the Pennsylvania Natural Resources Conservation Service (NRCS) website at *www.pa.nrcs.usda.gov.* Click on the ''Conservation Practices for Review'' button to access the *draft* practice standards.

SUPPLEMENTARY INFORMATION: Section 343 of the Federal Agricultural Improvement and Reform Act of 1996 states that revisions made after the enactment of the law to NRCS State technical guides used to carry out highly erodible land and wetland provisions of the law shall be made available for public review and comment. For the next 30 days, the NRCS in Pennsylvania will receive comments relative to the proposed changes. Following that period a determination will be made by the NRCS in Pennsylvania regarding disposition of those comments and a final determination of change will be made.

Dated: December 28, 2000.

Roger F. Hager,

Supervisory Contract Specialist, USDA—Natural Resources Conservation Service.

[FR Doc. 01–1004 Filed 1–11–01; 8:45 am]

BILLING CODE 3410–16–U

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Dairyland Power Cooperative, Notice of Availability of an Environmental Assessment

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice of availability of an environmental assessment.

SUMMARY: Notice is hereby given that the Rural Utilities Service (RUS) is publishing an environmental assessment (EA) for a project proposed by Dairyland Power Cooperative (DPC) of La Crosse, Wisconsin. The project consists of constructing a coal ash landfill at its existing Alma Off-site disposal facility. The project is located in the NE¼ of the NE¼ of section 19 and portions of sections 18 and 20, T21N, R12W, town of Belvidere, Buffalo County, Wisconsin. The proposed landfill will be an expansion of DPC's existing facility. All construction activity will take place on property owned by DPC. RUS proposes to provide financial assistance to DPC for this project.

FOR FUTHER INFORMATION CONTACT: Nurul Islam, Environmental Protection Specialist, Rural Utilities Service, Engineering and Environmental Staff, Stop 1571, 1400 Independence Avenue, SW, Washington, DC 20250–1571, telephone: (202) 720–1414; e-mail: nislam@rus.usda.gov. Information is also available from Bradley P. Foss, Environmental Biologist, DPC, 3200 East Avenue South, La Crosse, Wisconsin 54601, telephone (608) 787–1492, FAX: (608) 787–1490. His e-mail address is: . RUS seeks written comments on the DPC proposal. Written comments should be submitted to RUS within 30 days of the publication of this notice to the above address.

SUPPLEMENTARY INFORMATION: DPC proposes to construct the facility at a site in Buffalo County, Wisconsin. DPC is continuing with the landfill siting and development process for a 32-acres noncontiguous coal ash disposal area at their existing Alma Off-site disposal facility. In addition to the 32 acres required for the ash disposal area, approximately another 32 acres will be required to develop access roads, berms, ditches, sedimentation basins, and temporary stock piles. Soil required for construction of the sub-base, perimeter berms, and the final covering of the disposal area will be obtained from on-site sources. The construction and operation of the facility will not be visible from any public roads or private residences. The anticipated life of the landfill is about 13.9 years at the present disposal rates.

The EA is available for public review at the RUS or the headquarters of DPC at the addresses provided in this notice and at the following locations:

- Buffalo County Clerk's Office, Buffalo County Courthouse, 407 South 2nd Street, Alma, Wisconsin 54610, Tel: (608) 685–6209

Questions and comments should be sent to RUS at the address provided in this notice. RUS will accept questions and comments on the EA for 30 days from the date of publication of this notice.

Any final action by RUS related to the proposed project will be subject to, and contingent upon, compliance with all relevant Federal environmental laws and regulations and completion of environmental review procedures as prescribed by the 7 CFR Part 1794, Environmental Policies and Procedures.

Dated: January 5, 2001.

Lawrence R. Wolfe,

Acting Director, Engineering and Environmental Staff.

[FR Doc. 01–1019 Filed 1–11–01; 8:45 am]

BILLING CODE 3410–15–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Oregon 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 Oregon Advisory Committee to the Commission will convene at 1 a.m. and adjourn at 1 p.m. on Thursday, February 1, 2001, at the Sweetbrier Inn, Board Room, 7125 SW Nyberg Road, Tualatin, Oregon 97062. The purpose of the meeting is to discuss the background and method of conducting the law enforcement project.

Persons desiring additional information, or planning a presentation to the Committee, should contact Philip Montez, Director of the Western Regional Office, 213–894–3437 (TDD 213–894–3435). 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, January 8, 2001.

Edward A. Hailes, Jr.,

Acting General Counsel.

[FR Doc. 01–1105 Filed 1–11–01; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

[I.D. 010901A]

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management

and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Northeast Region Permit Family of Forms.

Form Number(s): None.

OMB Approval Number: 0648-0202.

Type of Request: Regular submission.

Burden Hours: 21,035.

Number of Respondents: 43,203.

Average Hours Per Response: 30 minutes for an initial vessel permit application, 15 minutes for a vessel permit renewal application, 5 minutes for a dealer permit application, 1 hour for an operator permit application, 3 hours for a limited access vessel upgrade or replacement application, 30 minutes for a request for retention of a permit history, 3 hours for limited access permit appeal, 2 minutes for a notification prior to the start or end of a fishing trip or for any other notification related to fishery activity unless otherwise noted below, 3 minutes to declare a block of time out of specified fisheries, 1 hour to install a vessel monitoring system, 5 seconds for an automated position report from a vessel monitoring system, 30 minutes for a request to turn off a vessel monitoring system, 2 minutes for notification for observer coverage, 30 minutes to apply for a Good Samaritan credits when assisting Coast Guard search and rescue operations or assisting in towing a disabled vessel; 5 minutes to request a letter of authorization for an exemption program (unless otherwise noted below), 2 minutes to obtain a Charter/Party Exemption Certificate for Gulf of Maine Closed Areas, 2 minutes to request a certificate for the state waters winter flounder exemption program, 5 minutes for a limited access scallop vessel fishing under the scallop DAS program to request a letter of authorization to fish for scallops with trawl nets, 5 minutes for an initial lobster area designation, 2 minutes for a request for additional lobster gear tags, 3 minutes for a notification of lost lobster gear tags, 2 minutes for a request to change a permit category designation, 2 minutes for a request for transit, 3 minutes for an area declaration, 3 minutes to call out of a fishery, 10 minutes for a gillnet category designation (including initial request for gillnet tags), 2 minutes to request additional gillnet tags, 2 minutes to notify of lost tags and to request replacement, 1 minute to attach a gillnet tag, and 1 hour to request a state quota transfer. Note that many of these requirements only apply to specified fisheries in specified circumstances.

Needs and Uses: Any individual or organization participating in federally-controlled fisheries is required to obtain permits. The purpose and use of permits is to: (1) register fishermen, fishing vessels, fish dealers and processors, (2) list the characteristics of fishing vessels and/or dealer/processor operations, (3) exercise influence over compliance (e.g., withhold issuance pending collection of unpaid penalties), (4) provide a mailing list for the dissemination of important information to the industry, (5) register participants to be considered for limited entry, and (6) provide a universe for data collection samples. Identification of the participants, their gear types, vessels, and expected activity levels is an effective tool in the enforcement of fishery regulations. This information is needed to measure the consequences of management controls as well. Participants in certain fisheries may also be required to notify NOAA before fishing trips for the purpose of observer placement and to make other reports on fishing activities.

Affected Public: Business and other for-profit organizations, individuals and households.

Frequency: On occasion, annual, triennial.

Respondent's Obligation: Mandatory.

OMB Desk Officer: David Rostker, (202) 395-3897.

Copies of the above information collection proposal can be obtained by calling or writing Madeleine Clayton, Departmental Forms Clearance Officer, (202) 482-3129, Department of Commerce, Room 6086, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at *Mclayton@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: January 5, 2001.

Madeleine Clayton,

Departmental Forms Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 01–1063 Filed 1–11–01; 8:45am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

[I.D.010801C]

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: NOAA's Teacher-At-Sea Program.

Form Number(s): None.

OMB Approval Number: 0648-0283.

Type of Request: Regular submission.

Burden Hours: 309.

Number of Respondents: 375.

Average Hours Per Response: 75 minutes for an application, 15 minutes for recommendations, 2 hours per report.

Needs and Uses: The Teacher-At-Sea Program provides educators with the opportunity to participate in research projects aboard NOAA vessels. The respondents are educators who provide information about themselves and their teaching situation and who submit a follow-up report with ideas for classroom applications. Recommendations are also required.

Affected Public: Individuals and households.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain a benefit.

OMB Desk Officer: David Rostker, (202) 395-3897.

Copies of the above information collection proposal can be obtained by calling or writing Madeleine Clayton, Departmental Forms Clearance Officer, (202) 482-3129, Department of Commerce, Room 6086, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at MClayton@doc.gov).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: January 5, 2001.

Madeleine Clayton,

Departmental Forms Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 01–1065 Filed 1–11–01; 8:45 am]

BILLING CODE 3510-12-S

DEPARTMENT OF COMMERCE

Census Bureau

Current Population Survey (CPS)—Census 2000 Match Study

ACTION: Proposed collection; comment request.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before March 12, 2001.

ADDRESSES: Direct all written comments to Madeline Clayton, Departmental Forms Clearance Officer, Department of Commerce, Room 6086, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at MClayton@doc.gov).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Paul Siegel, U.S. Bureau of the Census, HHES–1462–3, Washington, DC 20233–8500 (paul.m.siegel@census.gov).

SUPPLEMENTARY INFORMATION:

I. Abstract

The U.S. Census Bureau plans to create a database of respondent records matched between the Current Population Survey (CPS) and Census 2000. We will use the information to conduct research on estimates of various characteristics from these two sources. This matched database will permit investigating effects of nonresponse error, coverage error, CPS month-in-sample bias, item wording, survey administration, and other forms of non-sampling error on estimates of any characteristic measured in the two surveys. Some examples are unemployment, income, poverty, and racial and ethnic identification. Its immediate uses will be in evaluating differences between Census and CPS estimates of median household income and poverty for small areas.

Most of the matches will be made through use of a computer matching algorithm and through clerical matching performed by Census Bureau employees. These matches will not impose any reporting burden. However, there may be a significant number of unmatched cases that will require field follow-up. The interviews will be conducted to match the people living within a household at the time of the CPS interview to their Census 2000 information, or to confirm that individuals in CPS were missed in Census 2000. The interviews will *only* include questions on social, demographic, or economic characteristics that are necessary to match individuals and households in the two surveys (*e.g.,* address, name, age, date of birth, gender, and relationship to others in the household).

Historically, the Census Bureau has conducted several studies of matched CPS and Census data. These studies include matches of CPS to the Censuses of 1960, 1970, 1980, and 1990.

This study will allow the Census Bureau to answer many questions related to the stated objectives, including:

- What is the magnitude of difference between the census estimates of median household income and poverty and those based on the March supplement to the CPS arising from each of the following sources: (1) Differences in the way in which the data are collected and processed; (2) differences in the population to which the poverty test is applied, *i.e.,* the poverty universe; and (3) the impact of undercoverage and adjustment on both the Census and the CPS estimates.
- To what degree do the census estimates of selected characteristics reflect response errors, as measured by simple response variance and response bias?
- What are the census characteristics of CPS nonrespondents? Are CPS nonrespondents similar to CPS respondents? What adjustments do the match results suggest be made in the CPS sampling or weighting procedures to better adjust for nonresponse bias?
- Which segments of the population does CPS do a good job of covering and which segments are poorly covered? What census information can be used to enhance the CPS sampling and weighting procedures to improve CPS coverage of all segments of the population?
- What are the census characteristics of the unemployed? What are the differences between census and CPS measurements of the unemployed and how do these differences relate to census and CPS characteristics?
- What is the level of month-in-sample bias for selected CPS characteristics? Are any particular segments of the population contributing disproportionately to month-in-sample bias? What results can be used to adjust for CPS month-in-sample bias?
- How are CPS characteristics related to census data (including demographic, socio-economic characteristics)? To what degree do differences between CPS and census response provide information relevant to the ''true'' response (this may address issues of bias in CPS and census estimates)? To what extent can we use census data to assess the accuracy of small area estimation models for estimating CPS characteristics and improving variance estimates? To what extent can census data be used to augment small area estimation models for estimating CPS characteristics and improving variance estimates?
- Who reports race or ethnicity differently in the CPS and census?

II. Method of Collection

The field follow-up will be conducted through face-to face interviews beginning in August of 2001 and ending by October 2001. Identifying information collected throughout the study will be held in strict confidence in accordance with Title 13.

III. Data

OMB Number: Forthcoming.
Form Number: Forthcoming.
Type of Review: Regular Submission.
Affected Public: Those residing at CPS sampled households.
Estimated Number of Respondents: 7,500.
Estimated Time Per Response: 5 minutes.
Estimated Total Annual Burden Hours: 625.
Estimated Total Annual Cost: There is no cost to the respondent other than the time taken to complete the survey.
Respondent's Obligation: Voluntary.
Legal Authority: Title 13 USC, Sections 141 & 193.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or

included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: January 8, 2001.

Madeleine Clayton,

Departmental Forms Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 01–977 Filed 1–11–01; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–485–803]

Certain Cut-to-Length Carbon Steel Plate From Romania: Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of final results of antidumping duty administrative review.

SUMMARY: On September 7, 2000, the Department of Commerce published the preliminary results of administrative review of the antidumping duty order on certain cut-to-length carbon steel plate from Romania. This review covers one manufacturer/exporter of the subject merchandise. The period of review is August 1, 1998 through July 31, 1999.

Based on our analysis of the comments received, we have made changes in the margin calculations. However, these changes did not cause the final results to differ from the preliminary results. The final weighted-average dumping margin for the reviewed firms is listed below in the section entitled ''Final Results of Review.''

EFFECTIVE DATE: January 12, 2001.

FOR FURTHER INFORMATION CONTACT: Fred Baker or Robert James, Enforcement Group III—Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–2924 (Baker), (202) 482–0649 (James).

SUPPLEMENTARY INFORMATION:

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Tariff Act) are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all references to the Department of Commerce (the Department) regulations are to 19 CFR part 351 (2000).

Background

On September 7, 2000, the Department published the preliminary results of administrative review of the antidumping duty order on cut-to-length carbon steel plate from Romania. *See Certain Cut-to-Length Carbon Steel Plate from Romania: Preliminary Results of Antidumping Duty Administrative Review and Final Partial Recision of Review,* 65 FR 54208 (September 7, 2000). The review covers one manufacturer, S.C. Sidex S.A. (Sidex), and one exporter, Metalexportimport, S.A. (MEI). The period of review (POR) is August 1, 1998 through July 31, 1999. We invited parties to comment on our preliminary results of review. On October 10, 2000, MEI/Sidex and petitioners (Bethlehem Steel Corporation and U.S. Steel Group, a unit of USX Corporation) filed case briefs. These parties filed rebuttal briefs on October 17, 2000. This Department has conducted this administrative review in accordance with section 751 of the Tariff Act.

Scope of the Review

The products covered in this review include hot-rolled carbon steel universal mill plates (*i.e.,* flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 millimeters but not exceeding 1,250 millimeters and of a thickness of not less than 4 millimeters, not in coil and without patterns in relief), of rectangular shape, neither clad, plated nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances; and certain hot-rolled carbon steel flat-rolled products in straight lengths, of rectangular shape, hot rolled, neither clad, plated, nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances, 4.75 millimeters or more in thickness and of a width which exceeds 150 millimeters and measures at least twice the thickness, as currently classifiable in the HTS under item numbers 7208.31.0000, 7208.32.0000, 7208.33.1000, 7208.33.5000, 7208.41.0000, 7208.42.0000, 7208.43.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.11.0000, 7211.12.0000, 7211.21.0000, 7211.22.0045, 7211.90.0000, 7212.40.1000, 7212.40.5000, and 7212.50.0000. Included in this review are flat-rolled products of nonrectangular cross-section where such cross-section is achieved subsequent to the rolling process (*i.e.,* products which have been ''worked after rolling'')—for example, products which have been bevelled or rounded at the edges. Excluded from this review is grade X–70 plate.

These HTS item numbers are provided for convenience and customs purposes. The written description remains dispositive.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the ''Issues and Decision Memorandum'' (Decision Memorandum) from Joseph Spetrini, Deputy Assistant Secretary, Import Administration, to Troy Cribb, Assistant Secretary for Import Administration, dated the same date as publication of this notice, which is hereby adopted by this notice. A list of the issues which parties have raised and to which we have responded, all of which are in the Decision Memorandum, is attached to this notice as an Appendix. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum which is on file in room B–099 of the Department of Commerce building. In addition, a complete version of the Decision Memorandum can be accessed directly on the Web at *www.ia.ita.gov.* The paper copy and electronic version of the Decision Memorandum are identical in content.

Change in the Preliminary Results

Based on our analysis of comments received, we have made certain changes in the margin calculations. We have also corrected certain programming and clerical errors in our preliminary results, where applicable. These changes are discussed in the relevant section of the Decision Memorandum.

Final Results of Review

We determine that a margin of zero percent exists for sales of subject merchandise by MEI for the period August 1, 1998 through July 31, 1999. The Department shall instruct the U.S. Customs Service to liquidate all appropriate entries without regard to antidumping duties. The Department will also instruct Customs to end the suspension of liquidation for all entries of subject merchandise produced by Sidex and exported by MEI entered, or withdrawn from warehouse, for consumption on or after August 1, 1998,

and will instruct Customs to release any cash deposits or bonds posted. If applicable, the Department will further instruct Customs to refund with interest any cash deposits on entries made after July 31, 1998.

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of this notice of final results of administrative review for all shipments of cut-to-length carbon steel plate from Romania entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(1) of the Tariff Act: (1) For the reviewed companies the Department shall require no deposit of estimated antidumping duties; (2) for previously reviewed or investigate companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 75.04 percent. This is the ''All Others'' rate from the LTFV investigation. (*See Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from Romania,* 58 FR 37209 (July 9, 1993)).

These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

We are issuing and publishing this administrative review and notice in accordance with sections 751(a)(1) and 777(i) of the Tariff Act.

Dated: January 5, 2001.

Troy H. Cribb,

Assistant Secretary for Import Administration.

Appendix

Comments and Responses.
1. Rescinding the Review.
2. Barter Transactions.
3. Factor Valuation.
4. Overhead.
5. Use of Inflator.
6. Application of Inflator to Labor Costs.
7. Circumstance-of-Sale Adjustments.
8. Facts Available.
9. Ministerial Errors.

[FR Doc. 01–1106 Filed 1–11–01; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–835]

Oil Country Tubular Goods From Japan: 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 administrative review.

EFFECTIVE DATE: January 12, 2001.

FOR FURTHER INFORMATION CONTACT: Samantha Denenberg or Mark Hoadley, AD/CVD Enforcement, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington DC 20230; telephone: (202) 482–1386 or (202) 482–0666, respectively.

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. In addition, unless otherwise indicated, all citations to the Departments's regulations are to the current regulations, codified at 19 CFR part 351 (1999).

Background

On August 26, 1999, the Department of Commerce (the Department) received a request from Dril-Quip Inc. (Dril-Quip) for an administrative review of the following parties: Hallmark Tubulars Ltd. (Hallmark), Itochu Corp. (Itochu), Itochu Project Management Corp. (IPM), and Nippon Steel Corp. (Nippon) regarding the antidumping duty order on oil country tubular goods from Japan. On August 31, 1999, petitioner and Sumitomo Metal Industries, Ltd. (SMI) requested that the Department conduct an administrative review of SMI. On October 1, 1999, the Department published a notice of initiation of this administrative review, covering the period of August 1, 1998 through July 31, 1999 (64 FR 53318). On September 11, 2000, the Department published its preliminary results of this administrative review (65 FR 54838).

Extension of Time Limits for Final Results

Because of the complexities enumerated in the Memorandum from Barbara E. Tillman to Joseph A. Spetrini, *Extension of Time Limit for the Administrative Review of Oil Country Tubular Goods from Japan,* dated January 3, 2001, it is not practical to complete this review within the time limits mandated by section 751(a)(3)(A) of the Act.

Therefore, in accordance with section 751(a)(3)(A) of the Act, the Department is extending the time limit for the final results of review from January 9, 2001 to February 8, 2001.

Dated: January 3, 2001.

Joseph A. Spetrini,

Deputy Assistant Secretary, AD/CVD Enforcement Group III.

[FR Doc. 01–976 Filed 1–11–01; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–856, A–580–846, A–469–810]

Notice of Preliminary Determinations of Sales at Less Than Fair Value: Stainless Steel Angle From Japan, Korea, and Spain

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary determinations.

EFFECTIVE DATE: January 12, 2001.

FOR FURTHER INFORMATION CONTACT: Jarrod Goldfeder (Japan) at (202) 482–

0189, Brian Smith (Korea) at (202) 482–1766, Davina Hashmi (Spain) at (202) 482–5760, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC, 20230.

Preliminary Determinations

We preliminarily determine that stainless steel angle (''SSA'') from Japan, Korea, and Spain are being, or are likely to be, sold in the United States at less-than-fair-value (''LTFV'') prices, as provided in section 733 of the Tariff Act of 1930, as amended (''the Act''). The estimated margins of sales at LTFV are shown in the ''Suspension of Liquidation'' section of this notice.

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 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 refer to 19 CFR Part 351 (2000).

Case History

Since the initiation of these investigations (*Notice of Initiation of Antidumping Investigations: Stainless Steel Angle from Japan, Republic of Korea, and Spain* (65 FR 55504, (September 14, 2000)) (''*Initiation Notice*''), the following events have occurred:

On September 19, 2000, the Department sent letters to the petitioners[1] and all parties named in the petition requesting comments on the product-matching criteria and matching hierarchy in the three individual cases. These parties included: Daido Steel Co., Ltd. (''Daido''), Aichi Steel Corporation (''Aichi''), and Sumitomo Metal Industries, Ltd., (''Sumitomo''), possible exporters/producers of SSA from Japan; Bae Myung Metal Co., Ltd. (''Bae Myung''), a possible exporter/producer of SSA from Korea; and Roldan, S.A. (''Roldan''), a possible exporter/producer of SSA from Spain. *See* ''Respondent Selection'' section of this notice for further discussion of how the Department determined the respondents in these investigations. On September 21, 2000, the petitioners submitted comments on the physical characteristics for product-matching purposes in all three cases.

On September 25, 2000, Bae Myung submitted a letter of appearance and a request that certain SSA be excluded from the scope of the investigation concerning Korea. On October 4, 2000, the petitioners filed comments on Bae Myung's scope-exclusion request. *See* ''Scope Comments'' section of this notice for further discussion. On September 28, 2000, the United States International Trade Commission (''ITC'') preliminarily determined that there is a reasonable indication that imports of SSA from Japan, Korea, and Spain are materially injuring (or threatening with material injury) the United States industry. *See Stainless Steel Angle from Japan, Korea and Spain,* 65 FR 60451 (October 11, 2000), and USITC publication 3356 (October 2000) entitled *Stainless Steel Angle from Japan, Korea and Spain: Investigation Nos. 731–TA–888–890* (Preliminary).

As a result of our research to determine the proper recipients of the antidumping questionnaires in the three cases, on October 12, 2000, we issued antidumping duty questionnaires[2] to two Korean companies (Bae Myung and SK Global Co., Ltd. (''SK Global'')) and to the Spanish company (Roldan). On October 13, 2000, we issued questionnaires to three Japanese companies (Aichi, Daido, and Sumitomo). *See* ''Respondent Selection'' section of this notice for further discussion. On October 17, 2000, Roldan submitted a letter of appearance.

On November 20, 2000, Bae Myung's counsel indicated that Bae Myung would not be submitting a response to the antidumping duty questionnaire. At that time, the Department informed Bae Myung's counsel that Bae Myung's failure to submit a response would result in the application of facts available. *See* November 20, 2000, memorandum to the case file concerning SSA from Korea. On November 21, 2000, Roldan's counsel indicated that Roldan was not submitting a response to the antidumping duty questionnaire. At that time, the Department informed Roldan's counsel that Roldan's failure to submit a response would result in the application of facts available. *See* November 21, 2000, memorandum to the case file concerning SSA from Spain. On November 27, 2000, the Department sent letters to SK Global (*i.e.,* the other Korean respondent) and the three Japanese respondents informing them that the Department did not receive their responses to the antidumping duty questionnaire and that, if they did not contact the Department by December 4, 2000, the Department would resort to facts available in making its preliminary determinations. None of these respondents contacted the Department by December 4, 2000.

Scope of Investigations

For purposes of these investigations, the term ''stainless steel angle'' includes hot-rolled, whether or not annealed or descaled, stainless steel products of equal leg length angled at 90 degrees, that are not otherwise advanced. The stainless steel angle subject to these investigations is currently classifiable under subheadings 7222.40.30.20 and 7222.40.30.60 of the *Harmonized Tariff Schedules of the United States* (''HTSUS''). Specifically excluded from the scope of these investigations is stainless steel angle of unequal leg length. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of these investigations is dispositive.

Scope Comments

On September 25, 2000, Bae Myung, a Korean respondent, requested that the Department exclude from the scope of the proceeding on SSA from Korea certain SSA products that Slater (*i.e.,* one of the petitioners) does not produce. Specifically, Bae Myung stated that Slater does not make SSA with leg lengths under one inch or over three inches and that SSA of different leg lengths cannot be used in the same application and thus are not substitutable. We did not receive scope comments from SK Global or from the respondents in the cases of SSA from Japan or Spain.

On October 4, 2000, we received comments from the petitioners requesting that we reject Bae Myung's request to exclude products that Slater did not produce. The petitioners based their request on established Department practice, which is not to alter the petitioner's scope definition except to clarify ambiguities in the language or address administrability problems, citing the *Notice of Final Determination*

[1] The petitioners are Slater Steels Corporation, Speciality Alloys Division (''Slater''), and the United Steel Workers of America, AFL–CIO/CLC (collectively, ''the petitioners'').

[2] Section A of the questionnaire requested general information concerning the company's corporate structure and business practices, the merchandise under investigation that it sells, and the sales of that merchandise in all markets. Sections B and C of the questionnaire requested home market sales listings and U.S. sales listings. Section D of the questionnaire requested information regarding the cost of production (''COP'') of the foreign like product and the constructed value (''CV'') of the merchandise under investigation. Section E of the questionnaire requested information regarding the cost of further manufacture or assembly performed in the United States.

of Sales at Less-Than-Fair-Value: Melamine Institutional Dinnerware Products from the People's Republic of China, 62 FR 1708 (Jan. 13, 1997) and *Final Affirmative Countervailing Duty Determination: Stainless Steel Sheet and Strip in Coils from Italy,* 64 FR 30624, 30635 (June 8, 1999). The petitioners state that, in this case, they have identified the products in the petition clearly. Moreover and most importantly, the petitioners state, the statute does not require that the domestic industry must currently produce every kind of product included within the scope of a petition. Rather, the petitioners maintain, products are often included in the scope of an investigation because they are similar to and competitive with the domestic like product.

In analyzing Bae Myung's scope-exclusion request, we examined the ITC's preliminary determination report (*i.e.,* ITC publication No. 3356, dated October 2000) to determine whether the ITC found that the specific products identified by Bae Myung in its exclusion request constitute a domestic like product distinct from the rest of the products covered by the scope of these investigations. We found no indication in the ITC's preliminary determination report that leg lengths under one inch or over three inches should be considered as separate domestic like products. In addition, we examined whether this scope-exclusion request had been an issue in an earlier proceeding involving SSA from Japan (*see Final Determination of Sales at Less Than Fair Value: Stainless Steel Angle from Japan,* 60 FR 16608 (March 31, 1995)). In this past case, as well as in the current cases, we found no indication that any sizes of SSA with equal leg lengths should constitute distinct domestic like products or foreign like products for comparison purposes. Therefore, after reviewing the comments submitted by Bae Myung and the petitioners, the ITC report, and the earlier investigation on SSA case from Japan, we have determined that the scope of the investigation of SSA from Korea, as well as that of the investigations of SSA from Japan and Spain, should also include SSA with leg lengths under one inch and over three inches.

Period of Investigation

The period of these investigations (''POI'') is August 1, 1999, through July 31, 2000.

Selection of Respondents

Section 777A(c)(1) of the Act directs the Department to calculate individual dumping margins for each known exporter and producer of the subject merchandise. However, section 777A(c)(2) of the Act gives the Department discretion, when faced with a large number of exporters/producers, to limit its examination to a reasonable number of such companies if it is not practicable to examine all companies. Where it is not practicable to examine all known exporters/producers of subject merchandise, this provision permits the Department to investigate either (1) a sample of exporters, producers, or types of products that is statistically valid based on the information available at the time of selection, or (2) exporters and producers accounting for the largest volume of the subject merchandise that can be reasonably examined.

In their petition, the petitioners identified Aichi, Daido, and Sumitomo as possible exporters/producers of SSA from Japan, Bae Myung as a possible exporter/producer of SSA from Korea, and Roldan as a possible exporter/producer of SSA from Spain. On September 25, 2000, we sent a cable to our U.S. embassy in each of the three countries to inquire whether there were any other companies besides those listed in the petition that either exported or produced SSA during the POI in that particular country. The embassies did not indicate that there were any other exporters or producers of the subject merchandise.

To identify further the universe of potential respondents from the three countries to which we should send an antidumping duty questionnaire for purposes of these LTFV investigations, we performed the following steps in each case. For the case concerning Japan, we conducted a U.S. Customs Service (''Customs Service'') query and obtained information on the quantity and value of SSA imported from Japan into the United States on an annual basis for 1997, 1998, 1999, and January to June 2000. An analysis of the Customs Service data confirmed two of the three manufacturers of SSA in Japan named in the petition. The query covered SSA within the HTS numbers 7222.40.30.20 and 7222.40.30.60, which may include non-subject SSA (*e.g.,* unequal lengths). Additionally, we conducted an internet search which yielded no additional information. Based on these steps, we determined that Aichi, Daido, and Sumitomo were the only appropriate Japanese recipients of our questionnaire for purposes of conducting this investigation. *See* ''Memorandum to the File regarding Questionnaire Recipients'' dated December 27, 2000, for further discussion.

For the case concerning Korea, we conducted a Customs Service query and obtained information on the quantity and value of SSA imported from Korea into the United States on an annual basis for 1997, 1998, 1999, and January to June 2000. An analysis of the Customs Service data indicated that there was only one manufacturer/exporter of SSA in Korea. The query covered SSA within the HTS numbers 7222.40.30.20 and 7222.40.30.60, which may include non-subject SSA (*e.g.,* unequal lengths). Finally, we conducted an internet search which revealed that another Korean company, SK Global, may have also exported or produced SSA that entered the U.S. market during the POI. Based on the above-mentioned steps, we determined that Bae Myung and SK Global were the only appropriate Korean recipients of our questionnaire for purposes of conducting this investigation. *See* ''Memorandum to the File regarding Questionnaire Recipients'' dated December 11, 2000, for further discussion.

For the case concerning Spain, we conducted a Customs Service query and obtained information on the quantity and value of SSA imported from Spain into the United States on an annual basis for 1997, 1998, 1999, and January to June 2000. An analysis of the Customs Service data indicated that there were possibly ten manufacturers/exporters of SSA in Spain. Based on this data, we found that Roldan accounted for almost 100 percent of the total quantity of subject merchandise entered into the United States in 1999 and 2000. The other manufacturers accounted for an insignificant amount of the total quantity entered into the United States. The query covered SSA within the HTS numbers 7222.40.30.20 and 7222.40.30.60, which may include non-subject SSA (*e.g.,* unequal lengths). We also consulted the 1999 steel manufacturer's reference book, *Iron and Steel Works of the World,* which indicated that Roldan was the only SSA manufacturer in Spain. Our internet search indicated that Roldan was the only manufacturer/exporter of SSA in Spain and, thus, the only appropriate Spanish recipient of our questionnaire for purposes of conducting this investigation. *See* ''Respondent Selection Memorandum to the File'' dated January 3, 2001, for further discussion.

After confirming the proper recipients of the antidumping questionnaires in the three cases, we determined that, given our resources, we would be able

to investigate all companies identified in the petition and the additional Korean company (SK Global) identified in our internet research.

Facts Available

As stated above, none of the respondents from any of the three SSA cases responded to the Department's antidumping duty questionnaire. Section 776(a)(2) of the Act provides that, ''if an interested party or any other person—(A) withholds information that has been requested by the administering authority; (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782; (C) significantly impedes a proceeding under this title; or (D) provides such information but the information cannot be verified as provided in section 782(i), the administering authority...shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination under this title.'' Pursuant to section 776(a) of the Act, we have determined that the use of facts available is appropriate in determining the preliminary dumping margins for Aichi, Daido, and Sumitomo (*i.e.,* the three respondents in the Japan case), Bae Myung and SK Global (*i.e.,* the two respondents in the Korea case), and Roldan (*i.e.,* the sole respondent in the Spain case) because all of these companies failed to respond to our questionnaire.

Section 776(b) of the Act provides that the Department may use adverse inferences in selecting facts otherwise available if a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. See also Statement of Administrative Action (''SAA'') accompanying the URAA, H.R. Rep. No. 103–316 at 870 (1994). Failure by Aichi, Daido, Sumitomo, Bae Myung, SK Global, and Roldan to respond to the Departments's antidumping duty questionnaire constitutes a failure to act to the best of their ability to comply with a request for information, within the meaning of section 776(b) of the Act. Therefore, the Department has determined that the use of an adverse inference in selecting the facts available to determine the preliminary margins for these respondents is warranted. Because we were unable to calculate margins for these respondents from Japan, Korea, and Spain, consistent with our practice, we have assigned the respondents in these cases the highest margins alleged in the petition or as we recalculated (*see Notice of Preliminary Determinations of Sales at Less Than Fair Value: Certain Large Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Japan and Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Japan and the Republic of South Africa,* 64 FR 69718, 69722 (December 14, 1999), and *Notice of Preliminary Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Germany,* 63 FR 10847, 10848 (March 5, 1998)). Based on amendments to the petition and the Department's recalculations, where applicable, the highest margin for SSA from Japan is 114.51 percent, the highest margin in for SSA from Korea is 99.56 percent, and the highest margin for SSA from Spain is 61.45 percent. *See Initiation Notice,* 65 FR at 55505–55507.

Section 776(b) of the Act states that an adverse inference may include reliance on information derived from the petition. *See* also SAA at 829–831. Section 776(c) of the Act provides that, when the Department relies on secondary information (such as the petition) in using the facts otherwise available, it must, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal.

The SAA clarifies that ''corroborate'' means that the Department will satisfy itself that the secondary information to be used has probative value (*see* SAA at 870). The SAA also states that independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and U.S. Customs Service data, and information obtained from interested parties during the particular investigation (*see* SAA at 870).

To corroborate the margin calculations in the petition, we examined the rates contained in the petition. The U.S. prices in the petition were based on quotes to U.S. customers, most of which were obtained through market research. Additionally, the normal values were based on actual price quotations obtained through market research. *See Notice of Initiation,* 65 FR at 55506, and ''Country-Specific Import Administration AD Investigation Initiation Checklist'' dated September 7, 2000, for a discussion of the margin calculations in the petition applicable to each LTFV proceeding.

In accordance with section 776(c) of the Act, to the extent practicable, we examined the key elements of the calculations of export price and normal value upon which the petitioners based their margins for the petition. This information includes evidence such as U.S. Customs Service statistics or market studies we consider to be reliable because they are based on actual, independent trade data and analysis. We were able to corroborate the U.S. prices in the petition by comparing these prices to publicly available information based on IM–145 import statistics. We consider export prices which are based on U.S. import statistics to be corroborated (*see Certain Cut-to-Length Carbon Steel Plate from Mexico: Final Results of Antidumping Duty Administrative Review,* 64 FR 76, 84 (January 4, 1999) (Comment 13) (''*CTL Plate from Mexico*'')). With regard to the normal values in the petition, the Department did not receive any useful information from the respondents or other interested parties and is aware of no other independent sources of information that would enable it to corroborate the margin calculations in the petition further. *See* ''Country-Specific Memoranda to the File Regarding the Facts Available Rate and Corroboration of Secondary Information,'' for each SSA case dated January 3, 2001, for further discussion.

The implementing regulation for section 776 of the Act, codified at 19 CFR 351.308(d), states, ''(t)he fact that corroboration may not be practicable in a given circumstance will not prevent the Secretary from applying an adverse inference as appropriate and using the secondary information in question.'' Additionally, the SAA at 870 states specifically that, where ''corroboration may not be practicable in a given circumstance,'' the Department may nevertheless apply an adverse inference. The SAA at 869 emphasizes that the Department need not prove that the facts available are the best alternative information. Therefore, based on our efforts, described above, to corroborate information contained in the petition for each LTFV proceeding and in accordance with 776(c) of the Act, which discusses facts available and corroboration, we consider the margins in the petition to be corroborated to the extent practicable for purposes of these preliminary determinations (*see CTL Plate from Mexico,* 64 FR at 84).

All Others Rate

Section 733(d)(1)(A)(ii) of the Act, in accordance with section 735(c)(5)(B) of the Act, provides that, where the estimated weighted-average dumping margins established for all exporters and producers individually investigated are zero or de minimis or are determined entirely under section 776 of the Act, the Department may use any reasonable method to establish the estimated all-others rate for exporters and producers

not individually investigated. *See also* SAA at 873. Our recent practice under these circumstances has been to assign, as the ''all others'' rate, the simple average of the margins in the petition. We have done so in these cases. *See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coil from Canada,* 64 FR 15457 (March 31, 1999), and *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coil from Italy,* 64 FR 15458, 15459 (March 21, 1999).

Suspension of Liquidation

In accordance with section 733(d) of the Act, we are directing the Customs Service to suspend liquidation of all entries of SSA from Japan, Korea, and Spain that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**.

We will also instruct the Customs Service to require a cash deposit or the posting of a bond equal to the dumping margins, as indicated in the chart below. These instructions will remain in effect until further notice. The dumping margins for each LTFV proceeding are as follows: **FOOTNOTES** [1]: The petitioners are Slater Steels Corporation, Speciality Alloys Division (''Slater''), and the United Steel Workers of America, AFL-CIO/CLC (collectively, ''the petitioners''). [2]: Section A of the questionnaire requested general information concerning the company's corporate structure and business practices, the merchandise under investigation that it sells, and the sales of that merchandise in all markets. Sections B and C of the questionnaire requested home market sales listings and U.S. sales listings. Section D of the questionnaire requested information regarding the cost of production (''COP'') of the foreign like product and the constructed value (''CV'') of the merchandise under investigation. Section E of the questionnaire requested information regarding the cost of further manufacture or assembly performed in the United States.

Exporter/Manufacturer **(Japan)**	Weighted-Average Margin Percentage
Japan.	
Daido	114.51
Aichi	114.51
Sumitomo	114.51
All Others	70.48
Korea.	
Bae Myung	99.56
SK Global	99.56
All Others	40.21
Spain.	
Roldan	61.45
All Others	24.32

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our preliminary determinations. If our final determinations are affirmative, the ITC will determine before the later of 120 days after the date of these preliminary determinations or 45 days after our final determinations whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

Public Comment

Case briefs or other written comments in at least ten copies must be submitted to the Assistant Secretary for Import Administration no later than 50 days after the date of publication of this notice and rebuttal briefs no later than 55 days after the date of publication of this notice. A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. In accordance with section 774 of the Act, we will hold a public hearing, if requested by any interested party, to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. If a request for a hearing is made, the hearing will be tentatively held two days after the deadline for submission of the rebuttal briefs, time and room to be determined, at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC, 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time. If such a hearing is requested, the Department may schedule a single hearing to encompass all three LTFV proceedings.

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 30 days of the publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs. If these investigations proceed normally, we will make our final determinations by no later than 75 days after the date of these preliminary determinations.

These determinations are published pursuant to sections 733(f) and 777(i)(1) of the Act.

Troy H. Cribb,

Assistant Secretary for Import Administration.

[FR Doc. 01–1107 Filed 1–11–01; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–831]

Notice of Extension of the Time Limit for Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils From Taiwan

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: January 12, 2001.

FOR FURTHER INFORMATION CONTACT: Michael Panfeld, AD/CVD Enforcement Group III, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–0172.

SUPPLEMENTARY INFORMATION:

The Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Act) are to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act.

Background

On September 6, 2000, the Department published a notice of initiation of the administrative review of the antidumping duty order on Stainless Steel Sheet and Strip in Coils from Taiwan, covering the period June 8, 1999 through June 30, 2000 (65 FR 64662). The initiation was amended on November 30, 2000 (65 FR 71299).

Extension of Time Limit for Preliminary Results

Section 751(a)(3)(A) of the Act requires the Department to make a preliminary determination within 245 days after the last day of the anniversary month of an order or finding for which a review is requested. The preliminary results of this review are currently due no later than April 2, 2001. Because of the complex issues enumerated in the Memorandum from Edward C. Yang to Joseph A. Spetrini, *Extension of Time Limit for the Preliminary Results of*

Administrative Review of Certain Stainless Steel Sheet and Strip in Coils from Taiwan, dated January 8, 2001, and on file in the Central Records Unit (CRU) of the Main Commerce Building, Room B–099, we find that it is not practicable to complete this review by the scheduled deadline. Therefore, in accordance with section 751(a)(3)(A) of the Act, the Department is extending the time period for issuing the preliminary results of review by 90 days (July 2, 2001).

Dated: January 8, 2001.

Joseph A. Spetrini,

Deputy Assistant Secretary, AD/CVD Enforcement Group III.

[FR Doc. 01–1108 Filed 1–11–01; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–475–812]

Grain-Oriented Electrical Steel From Italy; Final Results of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of final results of countervailing duty administrative review.

SUMMARY: On July 7, 2000, the Department of Commerce (the Department) published in the **Federal Register** its preliminary results of the administrative review of the countervailing duty order on grain-oriented electrical steel for the period January 1, 1998 through December 31, 1998.

Based on our analysis of the comments received, and the decision of the Court of Appeals for the Federal Circuit in *Delverde S.r.L.* v. *United States,* 202 F.3d 1360 (Fed. Cir. 2000) (*Delverde III*), the Department has reexamined its change in ownership analysis and methodology. As a result, we have made changes to the net subsidy rate. Therefore, the final results differ from the preliminary results. The final net subsidy rate for the reviewed company is listed below in the section entitled ''Final Results of Review.''

EFFECTIVE DATE: January 12, 2001.

FOR FURTHER INFORMATION CONTACT: Stephanie Moore or Darla Brown, Office of AD/CVD Enforcement VI, Group II, Import Administration, U.S. Department of Commerce, Room 4012, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230. Telephone numbers (202) 482–3692 or (202) 482–2849, respectively.

SUPPLEMENTARY INFORMATION:

Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the provisions of the Tariff Act of 1930 (the Act), as amended by the Uruguay Round Agreements Act (URAA) effective January 1, 1995. In addition, unless otherwise indicated, all citations to the Department's regulations are to the regulations codified at 19 CFR part 351 (1999).

Background

On July 7, 2000, the Department published the preliminary results of the administrative review of the countervailing duty order on grain-oriented electrical steel. *See Grain-Oriented Electrical Steel from Italy; Preliminary Results of Countervailing Duty Administrative Review and Extension of Time Limit for Final Results of Countervailing Duty Administrative Review,* 65 FR 41950 (July 7, 2000). This review covers one manufacturer/exporter, Acciai Speciali Terni S.p.A. (AST). The review covers the period January 1, 1998 through December 31, 1998, and 28 programs.

In the preliminary results, the Department invited interested parties to comment in their case briefs on the implications for this proceeding, if any, of the *Delverde III* decision. Both petitioners and AST provided comments in their case and rebuttal briefs. On September 28, 2000, we sent a questionnaire soliciting information from AST, the Government of Italy (GOI) and the European Commission (EC) regarding the change in ownership issue. On October 20, 2000, AST submitted its response. The Department issued supplemental questionnaires to the respondents on October 27, 2000, and received responses on November 14, 2000.

On November 21, 2000, the Department issued its interpretation of *Delverde III* and its revised change in ownership approach in the *Draft Results of Redetermination Pursuant to Court Remand, Acciai Speciali Terni S.p.A.* v. *United States* (*Draft Redetermination*), which pertains to the *Final Affirmative Countervailing Duty Determination: Stainless Steel Plate in Coils from Italy,* 64 FR 15508 (March 31, 1999). On November 22, 2000, we placed the public version of this *Draft Redetermination* on the record of this administrative review and provided interested parties an opportunity to comment on the change in ownership approach set forth in the *Draft Redetermination.* On December 6, 2000, petitioners and AST submitted comments. A public hearing was held on December 15, 2000, in which both parties participated. On December 19, 2000, the Department issued the *Final Results of Redetermination Pursuant to Court Remand, Acciai Speciali Terni S.p.A.* v. *United States* (*Final Redetermination*), which was placed on this record as well.

Scope of the Review

Imports covered by this review are shipments of grain-oriented electrical steel from Italy, which is a flat-rolled alloy steel product containing by weight at least 0.6 percent of silicon, not more than 0.08 percent of carbon, not more than 1.0 percent of aluminum, and no other element in an amount that would give the steel the characteristics of another alloy steel, of a thickness of no more than 0.56 millimeters, in coils of any width, or in straight lengths which are of a width measuring at least 10 times the thickness. The products covered by this review are provided for under the following item numbers of the Harmonized Tariff Schedule of the United States (HTSUS): 7225.10.0030, 7226.10.1030, 7226.10.5015, and 7226.10.5065. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this proceeding is dispositive.

Analysis of Comment Received

All issues raised in the case and rebuttal briefs submitted by parties to this administrative review are addressed in the ''Issues and Decision Memorandum'' (*Decision Memorandum*) from Holly A. Kuga, Acting DAS, Group II, Import Administration, to Troy H. Cribb, Assistant Secretary for Import Administration, dated concurrent with this notice, which is hereby adopted into this notice. A list of issues which parties have raised and to which we have responded, all of which are in the *Decision Memorandum,* is attached to this notice as Appendix I. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum which is on file in room B–099 of the Main Commerce Building. In addition, a complete version of the *Decision Memorandum* can be accessed directly on the internet at http://ita.doc.gov/import_admin/records/frn, under the heading ''Italy.'' The paper copy and electronic version of the *Decision Memorandum* are identical in content.

Changes Since the Preliminary Results

Based on our analysis of comments received, and the Department's revised change in ownership approach based on the Court's ruling in *Delverde III,* we have made certain changes to the net subsidy rate. These changes are discussed in the relevant sections of the *Decision Memorandum.*

Final Results of Review

In accordance with 19 CFR 351.212(b), we calculated an individual subsidy rate for the producer/exporter subject to this review. We will instruct the U.S. Customs (Customs) to assess countervailing duties as indicated below on all appropriate entries. For the period January 1, 1998, through December 31, 1998, we determine the net subsidy rate for the reviewed company to be as follows:

Margin	
Manufacturer/Exporter	Percent
AST	14.25

We will instruct Customs to assess countervailing duties as indicated above. The Department will also instruct Customs to collect cash deposits of estimated countervailing duties in the percentages detailed above of the f.o.b. invoice price on all shipments of the subject merchandise from reviewed companies, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review.

Because the URAA replaced the general rule in favor of a country-wide rate with a general rule in favor of individual rates for investigated and reviewed companies, the procedures for establishing countervailing duty rates, including those for non-reviewed companies, are now essentially the same as those in antidumping cases, except as provided for in section 777A(e)(2)(B) of the Act. The requested review will normally cover only those companies specifically named. *See* 19 CFR 351.213(b). Pursuant to 19 CFR 351.212(c), for all companies for which a review was not requested, duties must be assessed at the cash deposit rate, and cash deposits must continue to be collected at the rate previously ordered. As such, the countervailing duty cash deposit rate applicable to a company can no longer change, except pursuant to a request for a review of that company. *See Federal-Mogul Corporation and The Torrington Company* v. *United States,* 822 F. Supp. 782 (CIT 1993); *Floral Trade Council* v. *United States,* 822 F. Supp. 766 (CIT 1993). Therefore, the cash deposit rates for all companies except those covered by this review will be unchanged by the results of this review.

We will instruct Customs to continue to collect cash deposits for non-reviewed companies at the most recent company-specific or country-wide rate applicable to the company. Accordingly, the cash deposit rates that will be applied to non-reviewed companies covered by this order will be the rate for that company established in the most recently completed administrative proceeding conducted under the Act, as amended by the URAA. If such a review has not been conducted, the rate established in the most recently completed administrative proceeding pursuant to the statutory provisions that were in effect prior to the URAA amendments is applicable. *See Final Affirmative Countervailing Duty Determination: Grain-Oriented Electrical Steel from Italy,* 59 FR 18357 (April 18, 1994). These rates shall apply to all non-reviewed companies until a review of a company assigned these rates is requested. In addition, for the period January 1, 1998, through December 31, 1998, the assessment rates applicable to all non-reviewed companies covered by this order are the cash deposit rates in effect at the time of entry.

This notice serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This administrative review is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act (19 U.S.C. 1675(a)(1) and 19 U.S.C. 1677f(i)(1)).

Dated: January 3, 2002.

Richard W. Moreland,

Acting Assistant Secretary for Import Administration.

Appendix I—Issues Discussed in Decision Memorandum

http://ita.doc.gov/import_ admin/records/frn, under the heading (''Italy'').

Methodology and Background Information

I. Change in Ownership
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  C. Creditworthiness
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III. Facts Available
  A. Adverse Facts Available

Analysis of Programs

I. Programs Conferring Subsidies
  A. Equity Infusions
  B. Debt Forgiveness: 1988–1990 Restructuring Plan
  C. Debt Forgiveness: 1993–1994 Restructuring Plan
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European Commission Programs

  A. ECSC Loans under Article 54
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  A. Rotation Fund
  B. Grants Under Law 10/81—Energy Conservation
  C. Brite-EuRam Project Grants
  D. Loan from IRI to KAI for the Purchase of AST
  E. Lending from the Ministry of Industry under Law 675/77
  F. Mortgage Loans from the Ministry of Industry Under Law 675/77
  G. Personnel Retraining Grants under Law 675/77
  H. Capital Grants under Law 675/77
  I. Reductions of the VAT under Law 675/ 77
  J. Worker Training under Law 181/89 (Early Retirement Provision)
  K. Reindustrialization under Law 181/89
  L. Law 488/92 Investment Grants
  M. Subsidized Export Financing Under Law 227/77
  N. Finsider Loans
  O. Interest Subsidies under Law 617/81
  P. Financing under Law 464/7
  Q. Interest Contributions under the Sabatini Law (Law 1329/65)
  R. Social Security Exemptions
  S. ILOR and IRPEG Exemptions
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III. Analysis of Comments
  Comment 1: Change In Ownership (Privatization)—Interpretation of Delverde III
  Comment 2: The Department's New Change In Ownership Approach
  Comment 3: Successor-in-Interest Test
  Comment 4: WTO Implications on Change in Ownership
  Comment 5: Application of the Department's New Approach to Change In Ownership
  Comment 6: Facts Otherwise Available
  Comment 7: Spin-Off Transactions
  Comment 8: 1993 Debt Forgiveness Apportionment
  Comment 9: 1993 Gross Debt vs. Net Debt
  Comment 10: 1993 Creditworthiness
  Comment 11: Countervailability of European Social Fund

Comment 12: Countervailability of European Coal and Steel Community Article 54 Loans
Comment 13: Countervailability of Pre-Privatization Retirement Benefits under Law 451/94
Comment 14: 1988 Equity Infusion

[FR Doc. 01–975 Filed 1–11–01; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 010801E]

South Pacific Tuna Act

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Proposed collection; Comment request.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before March 13, 2001.

ADDRESSES: Direct all written comments to Madeleine Clayton, Departmental Forms Clearance Officer, Department of Commerce, Room 6086, 14th and Constitution Avenue NW, Washington DC 20230 (or via Internet at MClayton@doc.gov).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Raymond P. Clarke, National Marine Fisheries Service, 1601 Kapiolani Blvd., Suite 1110, Honolulu, Hawaii 96814-4704, (808-973-2935 ext. 205), on the Internet at ray.clarke@noaa.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States, signed in Port Moresby, Papua New Guinea, in 1987, and its annexes, schedules and implementing agreements, as amended (Treaty), authorize U.S. tuna vessels to fish within fishing zones of a large region of the Pacific Ocean. The South Pacific Tuna Act (16 U.S.C. 973g and 973f) and U.S. implementing regulations (50 CFR 282.3 and 282.5) authorize the collection of information from participants in the Treaty fishery.

Vessel operators who wish to participate in the Treaty fishery must submit annual license and registration applications and periodic written reports of catch and unloading of fish from a licensed vessel. The information collected is submitted to the Forum Fisheries Agency (FFA) through the U.S. government (National Marine Fisheries Service). License and registration application information is used by FFA to determine the operational capability and financial responsibility of a vessel operator interested in participating in the Treaty fishery. Information obtained from vessel catch and unloading reports is used by FFA to assess fishing effort and fishery resources in the region and to track the amount of fish caught within each Pacific island state's exclusive economic zone for fair disbursement of Treaty monies. If the information is not collected, the U.S. government will not meet its obligations under the Treaty, and the lack of fishing information will result in poor management of the fishery resources.

II. Method of Collection

The information is collected using forms required under the Treaty.

III. Data

OMB Number: 0648-0218.
Form Number: None.
Type of Review: Regular submission.
Affected Public: Business and other for-profit organizations.
Estimated Number of Respondents: 32.
Estimated Time Per Response: 15 minutes for a license application or a registration application, 1 hour for a catch report, and 30 minutes for an unloading log sheet.
Estimated Total Annual Burden Hours: 248.
Estimated Total Annual Cost to Public: $576.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: January 4, 2001.

Madeleine Clayton,

Departmental Forms Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 01–1060 Filed 1–11–01; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 010801D]

NOAA Customer Surveys

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Proposed collection; Comment request.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before March 13, 2001.

ADDRESSES: Direct all written comments to Madeleine Clayton, Departmental Forms Clearance Officer, Department of Commerce, Room 6086, 14th and Constitution Avenue NW, Washington DC 20230 (or via Internet at MClayton@doc.gov).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Richard Roberts, OFA1x1, Station 8118, 1305 East-West Highway, Silver Spring, MD 20910 (phone 301-713-3525, ext. 115).

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Oceanic and Atmospheric Administration (NOAA) is planning to seek renewed Paperwork Reduction Act approval for a generic clearance for customer surveys conducted by NOAA program offices.

Under the generic clearance, specific surveys are submitted to OMB for fast-track approval if they are consistent with the types of questions approved in the generic clearance. NOAA uses the surveys to determine whether customers are satisfied with products and services received and to solicit suggestions for improvements.

II. Method of Collection

Various methods are used, but the primary method is either a paper or electronic form.

III. Data

OMB Number: 0648-0342.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Individuals and households, business and other for-profit organizations, not-for-profit institutions, and state, local, or tribal governments.

Estimated Number of Respondents: 7,000.

Estimated Time Per Response: Response times vary with the specific survey, but average 15 minutes or less.

Estimated Total Annual Burden Hours: 1,500.

Estimated Total Annual Cost to Public: $2,000.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: January 4, 2001.

Madeleine Clayton,

Departmental Forms Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 01–1064 Filed 1–11–01; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0014]

Proposed Collection; Comment Request; Entitled Statement and Acknowledgment (Standard Form 1413)

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension of an existing OMB clearance (9000–0014).

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning Statement and Acknowledgment (Standard Form 1413). The clearance currently expires on April 30, 2001.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Comments may be submitted on or before March 13, 2001.

ADDRESSES: Comments, including suggestions for reducing this burden, should be submitted to: FAR Desk Officer, OMB Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (MVRS), 1800 F Street, NW., Room 4035, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Linda Nelson Federal Acquisition Policy Division, GSA (202) 501–1900.

ADDRESSES: Comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, should be submitted to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat, 1800 F Street, NW., Room 4037, Washington, DC 20405.

SUPPLEMENTARY INFORMATION:

A. Purpose

Standard Form 1413, Statement and Acknowledgment, is used by all Executive Agencies, including the Department of Defense, to obtain a statement from contractors that the proper clauses have been included in subcontracts. The form includes a signed contractor acknowledgment of the inclusion of those clause in the subcontract.

B. Annual Reporting Burden

Respondents: 31,500.
Responses Per Respondent: 2.
Total Responses: 63,000.
Hours Per Response: .05.
Total Burden Hours: 3,150.

Obtaining Copies of Proposals

Requester may obtain a copy of the justification from the General Services Administration, FAR Secretariat (MVRS), 1800 F Street, NW, Room 4035, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0014, Statement and Acknowledgment, Standard Form 1413, in all correspondence.

Dated: January 9, 2001.

Al Matera,

Acting Director, Federal Acquisition Policy Division.

[FR Doc. 01–1098 Filed 1–11–01; 8:45 am]

BILLING CODE 6820–34–U

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0122]

Proposed Collection; Comment Request Entitled Scope and Duration of Contract

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance (9000–0122).

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning Scope and Duration of Contract. The clearance currently expires on April 30, 2001.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Comments may be submitted on or before March 13, 2001.

FOR FURTHER INFORMATION CONTACT: Julia Wise, Federal Acquisition Policy Division, GSA (202) 208–1168.

ADDRESSES: Comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, should be submitted to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat, 1800 F Street, NW., Room 4035, Washington, DC 20405. Please cite OMB Control No. 9000–0122, Scope and Duration of Contract, in all correspondence.

SUPPLEMENTARY INFORMATION:

A. Purpose

The FAR clause at 52.241–3 requires the utility to furnish the Government with a complete set of rates, terms and conditions, and any subsequently approved or proposed revisions when proposed.

B. Annual Reporting Burden

Respondents: 1,028.
Responses Per Respondent: 5.
Total Responses: 5,140.
Hours Per Response: .25.
Total Burden Hours: 1,285.

C. Annual Recordkeeping Burden

Recordkeepers: 1,000.
Hours Per Recordkeeper: 1.
Total Recordkeeping Burden Hours: 1,000.

Obtaining Copies of Proposals

Requester may obtain a copy of the proposal from the General Services Administration, FAR Secretariat (MVRS), 1800 F Street, NW., Room 4035, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0122, Scope and Duration of Contract, in all correspondence.

Dated: January 9, 2001.

Al Matera,

Acting Director, Federal Acquisition Policy Division.

[FR Doc. 01–1099 Filed 1–11–01; 8:45 am]

BILLING CODE 6820–34–U

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0123]

Proposed Collection; Comment Request Entitled Change in Rates or Terms and Conditions of Service for Regulated Services

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance (9000–0123).

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning Change in Rates or Terms and Conditions of Service for Regulated Services. The clearance currently expires on April 30, 2001.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Comments may be submitted on or before March 13, 2001.

FOR FURTHER INFORMATION CONTACT: Julia Wise, Federal Acquisition Policy Division, GSA (202) 208–1168.

ADDRESSES: Comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, should be submitted to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat, 1800 F Street, NW., Room 4035, Washington, DC 20405. Please cite OMB Control No. 9000–0123, Change in Rates or Terms and Conditions of Service for Regulated Services, in all correspondence.

SUPPLEMENTARY INFORMATION:

A. Purpose

The FAR clause at 52.241–7 requires the utility to furnish the Government with a complete set of rates, terms and conditions, and any subsequently approved or proposed revisions when proposed.

B. Annual Reporting Burden

Respondents: 1,028.

Responses Per Respondent: 5.

Total Responses: 5,140.

Hours Per Response: .25 minutes.

Total Burden Hours: 1,285.

C. Annual Recordkeeping Burden

Recordkeepers: 1,000.

Hours Per Recordkeeper: 1.

Total Recordkeeping Burden Hours: 1,000.

Obtaining Copies of Proposals

Requester may obtain a copy of the proposal from the General Services Administration, FAR Secretariat (MVRS), Room 4035, 1800 F Street, NW., Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0123, Change in Rates or Terms and Conditions of Service for Regulated Services, in all correspondence.

Dated: January 9, 2001.

Al Matera,

Acting Director, Federal Acquisition Policy Division.

[FR Doc. 01–1100 Filed 1–11–01; 8:45 am]

BILLING CODE 6820–34–U

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0124]

Proposed Collection; Comment Request Entitled Capital Credits

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance (9000–0124).

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning Capital Credits. The clearance currently expires on April 30, 2001.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Comments may be submitted on or before March 13, 2001.

FOR FURTHER INFORMATION CONTACT: Julia Wise, Federal Acquisition Policy Division, GSA (202) 208–1168.

ADDRESSES: Comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, should be submitted to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat, 1800 F Street, NW, Room 4035, Washington, DC 20405.

SUPPLEMENTARY INFORMATION:

A. Purpose

The FAR clause 52.241–13, Capital Credits, is designed to obtain an accounting of Capital Credits due the Government when the Government is a member of a cooperative.

B. Annual Reporting Burden

Respondents: 450.
Responses Per Respondent: 1.
Total Responses: 450.
Hours Per Response: 2.
Total Burden Hours: 900.

C. Annual Recordkeeping Burden

Recordkeepers: 450.
Hours Per Recordkeeper: 1.
Total Recordkeeping Burden Hours: 450.

Obtaining Copies of Proposals

Requester may obtain a copy of the proposal from the General Services Administration, FAR Secretariat (MVRS), Room 4035, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0124, Capital Credits, in all correspondence.

Dated: January 9, 2001.

Al Matera,

Acting Director, Federal Acquisition Policy Division.

[FR Doc. 01–1101 Filed 1–12–01; 8:45 am]

BILLING CODE 6820–34–U

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0125]

Proposed Collection; Comment Request Entitled Written Refusal of a Utility Supplier To Execute a Utility Contract

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance (9000–0125).

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning Written Refusal of a Utility Supplier to Execute a Utility Contract. This clearance currently expires on April 30, 2001.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Comments may be submitted on or before March 13, 2001.

FOR FURTHER INFORMATION CONTACT: Julia Wise, Federal Acquisition Policy Division, GSA (202) 208–1168.

ADDRESSES: Comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, should be submitted to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat, 1800 F Street, NW., Room 4035, Washington, DC 20405.

SUPPLEMENTARY INFORMATION:

A. Purpose

The Federal Acquisition Regulation requires that contracts comply with the applicable Federal laws and the relevant parts of the FAR. The written and definite refusal by a utility supplier to execute a tendered contract (41.202(c)) is intended to identify those suppliers who refuse to do so and the rationale of the supplier for refusing.

B. Annual Reporting Burden

Respondents: 50.
Responses Per Respondent: 1.
Total Annual Responses: 50.
Hours Per Response: .50.
Total Burden Hours: 25.

Obtaining Copies of Proposals

Requester may obtain a copy of the proposal from the General Services Administration, FAR Secretariat (MVRS), Room 4035, 1800 F Street, NW., Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0125, Written Refusal of a Utility Supplier to Execute a Utility Contract, in all correspondence.

Dated: January 9, 2001.

Al Matera,

Acting Director, Federal Acquisition Policy Division.

[FR Doc. 01–1102 Filed 1–11–01; 8:45 am]

BILLING CODE 6820–34–U

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0126]

Proposed Collection; Comment Request Entitled Electric Service Territory Compliance Representation

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for comments regarding an extension to an existing OMB clearance (9000–0126).

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (CMB) a request to review and approve an extension of a currently approved information collection requirement concerning Electric Service Territory Compliance Representation. The clearance currently expires on April 30, 2001.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Comments may be submitted on or before March 13, 2001.

FOR FURTHER INFORMATION CONTACT: Julia Wise, Federal Acquisition Policy Division, GSA (202) 208–1168.

ADDRESSES: Comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, should be submitted to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat, 1800 F Street, NW., Room 4035, Washington, DC 20405.

SUPPLEMENTARY INFORMATION:

A. Purpose

The representation at 52.241–1, Electric Service Territory Compliance Representation, is required when proposed alternatives of electric utility suppliers are being solicited. The representation and legal and factual rationale, if requested by the contracting officer, is necessary to ensure Government compliance with Public Law 100–202.

B. Annual Reporting Burden

Respondents: 200.
Responses Per respondent: 2.5.
Total annual responses: 500.
Hours Per Response: .45.
Total Burden Hours: 225.

Obtaining Copies of Proposals

Requester may obtain a copy of the proposal from the General Services Administration, FAR Secretariat (MVRS), Room 4035, 1800 F Street, NW., Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0126, Electric Service Territory Compliance Representation, in all correspondence.

Dated: January 9, 2001.

Al Matera,

Acting Director, Federal Acquisition Policy Division.

[FR Doc. 01–1103 Filed 1–11–01; 8:45 am]

BILLING CODE 6820–34–U

DEPARTMENT OF DEFENSE

Office of the Secretary

Establishment of the Panel to Review the V–22 Program

ACTION: Notice of establishment.

SUMMARY: The Panel to Review the V–22 Program is being established in consonance with the public interest and in accordance with the provisions of Pub. L. 92–463, the ''Federal Advisory Committee Act,'' Title 5 U.S.C., Appendix 2. Due to the urgent business tasked to this Panel by the Secretary of Defense, this notice is being published less than 15 days before the Panel's establishment.

This Panel will conduct an independent, high-level review of the V–22 program to include safety of the aircraft and recommend any proposed changes or corrective actions, and report the results to the Secretary of Defense.

The Panel will consist of four members with expertise, knowledge, and experience necessary in matters related to the V–22 review.

FOR FURTHER INFORMATION CONTACT: Gary Grey, OUSD (Acquisition, Technology, and Logistics), 703–697–0638.

Dated: January 4, 2001.

L.M. Bynum,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 01–997 Filed 1–11–01; 8:45 am]

BILLING CODE 5000–10–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Advisory Committee on Military Personnel Testing

ACTION: Notice.

Pursuant to Public Law 92–463, notice is hereby given that a meeting of the Defense Advisory Committee on Military Personnel Testing is scheduled to be held from 8 a.m. to 5 p.m. on February 1, 2001, and from 8 a.m. to 5 p.m. on February 2, 2001. The meeting will be held at the Austin Sheraton Hotel, Austin, Texas. The purpose of the meeting is to review planned changes and progress in developing computerized and paper-and-pencil enlistment tests and renorming of the tests. Persons desiring to make oral presentations or submit written statements for consideration at the Committee meeting must contact Dr. Jane M. Arabian, Assistant Director, Accession Policy, Office of the Assistant Secretary of Defense (Force Management Policy), Room 2B271, The Pentagon, Washington, DC 20301–4000, telephone (703) 697–9271, no later than January 22, 2001.

Dated: January 5, 2001.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 01–994 Filed 1–11–01; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board

ACTION: Notice of Change of Advisory Committee Meeting.

SUMMARY: The Defense Science Board (DSB) Task Force on High Energy Laser Weapon Systems Applications originally planned to meet January 23–24, 2001; however, the meeting has been rescheduled for January 25–26, 2001. The meeting will be held Strategic Analysis Inc., 3601 Wilson Boulevard, Arlington, VA 22201.

Dated: January 5, 2001.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 01–998 Filed 1–11–01; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF EDUCATION

Ability-to-Benefit Tests

AGENCY: Department of Education.

ACTION: List of approved ''Ability to Benefit'' tests and passing scores; notice.

SUMMARY: The Secretary updates the list of approved ''ability-to-benefit'' (ATB) tests to include the Combined English Language Skills Assessment (CELSA) test Forms 1 and 2 published by the Association of Classroom Teacher Testers (ACTT). The Secretary has approved this test and its passing scores under section 484(d) of the Higher Education Act of 1965, as amended (HEA), and the implementing regulations in 34 CFR Part 668, Subpart J. An institution may use the CELSA test as an approved English as a Second Language (ESL) test to determine if a student who does not have a high school diploma or its recognized equivalent is eligible to receive funds under any title IV, HEA program. (The title IV, HEA programs include the Federal Pell Grant, Federal Family Education Loan, William D. Ford Federal Direct Loan, Federal Perkins Loan, Federal Work-Study, Federal Supplemental Educational Opportunity Grant, and the Leveraging Educational Assistance Partnership (LEAP) programs.)

FOR FURTHER INFORMATION CONTACT: Lorraine Kennedy, U.S. Department of Education, 400 Maryland Avenue, SW., Regional Office Building 3, Room 3045, Washington, DC 20202–5451, Telephone: (202) 708–8242. 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 alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT.**

SUPPLEMENTARY INFORMATION: On October 25, 1996, we published a notice in the **Federal Register** (61 FR 55542–55543) that provided a list of eight ''ability-to-benefit'' tests that the Secretary approved under section 484(d) of the HEA and the implementing regulations in 34 CFR Part 668, Subpart J. We also included the approved passing scores for each of the approved tests. We added a ninth approved test, the American College Testing (ACT) Service test, and its passing score, in a **Federal Register** notice dated October 27, 1998, (63 FR 57540–57541). Finally, in a **Federal Register** notice dated May 5, 1999, (64 FR 24246–24247), we indicated that the nine approved ATB tests could be used for students with disabilities if certain conditions were met.

We are now adding a new approved test, the Combined English Language Skills Assessment (CELSA) test Form 1 and Form 2, as an approved English as a Second Language (ESL) test under 34 CFR 668.153(a)(2) and (a)(4). The passing score for Form 1 is 90 and the passing score for Form 2 is 90.

The CELSA test can be used to determine the ability-to-benefit of two groups of students whose native language is not English and who are not fluent in English. One group includes students who are enrolled solely in an ESL program. The second group includes students who are enrolled in a postsecondary educational program that is taught in English and has an ESL component where the students are also enrolled in the ESL component.

Please note that the CELSA test cannot be used for the following three groups of students whose native language is not English and who are not fluent in English:

Students who are enrolled in a program that is taught entirely in the students' native language which is not English.

Students who are enrolled in a program that is taught in English without an ESL component.

Students who are enrolled in a program that is taught in English with an ESL component but do not enroll in the ESL component.

Under 34 CFR 668.145(c)(1), when the Secretary approves an ATB test and the passing score on the test, the Secretary publishes the name of the test and the passing score in the **Federal Register**. Accordingly, the Secretary is publishing this update notice to indicate the approved additional test, CELSA, and its passing score. For the convenience of all interested parties, we are also including the nine previously approved ATB tests and passing scores. These 10 tests and passing scores are:

1. American College Testing (ACT): (English and Math)

Passing Scores: The approved passing scores on this test are as follows: English (14) and Math (15).

Publisher: The test publisher and the address, contact person, telephone, and fax number of the test publisher are: American College Testing (ACT), Placement Assessment Programs, 2201 North Dodge Street, P.O. Box 168, Iowa City, Iowa 52243, Contact: Dr. James Maxey, Telephone: (319) 337–1100, Fax: (319) 337–1790.

2. ASSET Program: Basic Skills Tests (Reading, Writing, and Numerical)—Forms B2 and C2.

Passing Scores: The approved passing scores on this test are as follows: Reading (34), Writing (34), and Numerical (33).

Publisher: The test publisher and the address, contact person, telephone, and fax number of the test publisher are: American College Testing (ACT), Placement Assessment Programs 2201 North Dodge Street, P.O. Box 168, Iowa City, Iowa 52243, Contact: Dr. John D. Roth, Telephone: (319) 337–1030, Fax: (319) 337–1790.

3. Career Programs Assessment (CPAT) Basic Skills Subtests (Language Usage, Reading and Numerical)—Forms A, B, and C.

Passing Scores: The approved passing scores on this test are as follows: Language Usage (43), Reading (44), and Numerical (42).

Publisher: The test publisher and the address, contact person, telephone, and fax number of the test publisher are: American College Testing (ACT), Placement Assessment Programs, 2201 North Dodge Street, P.O. Box 168, Iowa City, Iowa 52243, Contact: Dr. John D. Roth, Telephone: (319) 337–1030, Fax: (319) 337–1790.

4. Combined English Language Skills Assessment (CELSA), Forms 1 and 2.

Passing Scores: The approved passing scores on this test are as follows: CELSA Form 1 (90) and CELSA Form 2 (90).

Publisher: The test publisher and the address, contact person, telephone, and fax number of the test publisher are: Association of Classroom Teacher Testers (ACTT), 1187 Coast Village Road, PMB 378, Montecito, California 93108–2794, Contact: Pablo Buckelew, Telephone: (805) 569–0734, Fax: (805) 569–0004.

5. COMPASS Subtests: Prealgebra/Numerical Skills Placement, Reading Placement, and Writing Placement.

Passing Scores: The approved passing scores on this test are as follows: Prealgebra/Numerical (21), Reading (60), and Writing (31).

Publisher: The test publisher and the address, contact person, telephone, and fax number of the test publisher are: American College Testing (ACT), Placement Assessment Programs, 2201 North Dodge Street, P.O. Box 168, Iowa

City, Iowa 52243, Contact: Dr. John D. Roth, Telephone: (319) 337–1030, Fax: (319) 337–1790.

6. Computerized Placement Tests (CPTs)/Accuplacer (Reading Comprehension, Sentence Skills, and Arithmetic).

Passing Scores: The approved passing scores on this test are as follows: Reading Comprehension (52), Sentence Skills (60), and Arithmetic (36).

Publisher: The test publisher and the address, contact person, telephone, and fax number of the test publisher are: The College Board, 45 Columbus Avenue, New York, New York 10023–6992 Contact: Ms. Loretta M. Church, Telephone: (212) 713–8000, Fax: (212) 713–8063.

7. Descriptive Tests: Descriptive Tests of Language Skills (DTLS) (Reading Comprehension, Sentence Structure and Conventions of Written English)—Forms M–K–3KDT and M–K–3LDT; and Descriptive Tests of Mathematical Skills (DTMS) (Arithmetic)—Forms M–K–3KDT and M–K–3LDT.

Passing Scores: The approved passing scores on this test are as follows: Reading Comprehension (108), Sentence Structure (9), Conventions of Written English (309), and Arithmetic (506).

Publisher: The test publisher and the address, contact person, telephone, and fax number of the test publisher are: The College Board, 45 Columbus Avenue, New York, New York 10023–6992, Contact: Ms. Loretta M. Church, Telephone: (212) 713–8000, Fax: (212) 713–8063.

8. Test of Adult Basic Education (TABE): (Reading Total, *Total Mathematics, Total Language)—Forms 5 and 6, Level A, Complete Battery and Survey Versions.*

Passing Scores: The approved passing scores on this test are as follows: Reading Total (768), Total Mathematics (783), Total Language (714).

Publisher: The test publisher and the address, contact person, telephone, and fax number of the test publisher are: CTB/McGraw-Hill, 20 Ryan Ranch Road, Monterey, California 93940–5703, Contact: Ms. Rea Christoffersson, Telephone: (831) 393–7363, Fax: (831) 393–7142.

9. Test of Adult Basic Education (TABE): (Reading, *Total Mathematics, Language)—Forms 7 and 8, Level A, Complete Battery and Survey Versions.*

Passing Scores: The approved passing scores on this test are as follows: Reading (559), Total Mathematics (562), Language (545).

Publisher: The test publisher and the address, contact person, telephone, and fax number of the test publisher are: CTB/McGraw-Hill, 20 Ryan Ranch Road, Monterey, California 93940–5703, Contact: Ms. Rea Christoffersson, Telephone: (831) 393–7363, Fax: (831) 393–7142.

10. *Wonderlic Basic Skills Test (WBST)—Verbal Forms VS–1 & VS–2, Quantitative Forms QS–1 & QS–2.*

Passing scores: The approved passing scores on this test are as follows: Verbal (200) and Quantitative (210).

Publisher: The test publisher and the address, contact person, telephone, and fax number of the test publisher are: Wonderlic Personnel Test, Inc., 1509 N. Milwaukee Ave., Libertyville, IL 60048–1380, Contact: Mr. Victor S. Artese, Telephone: (800) 323–3742, Fax: (847) 680–9492.

Duration of Approval

The Secretary approves each of these tests for five years, unless the Secretary withdraws this approval or the publisher requests that approval of a test be withdrawn. In either case, the Secretary will publish a notice in the **Federal Register** indicating this change.

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or portable document format (PDF) on the Internet at either of the following sites:

http://ocfo.ed.gov/fedreg.htm
http://www.ed.gov/news.html

To use PDF you must have Adobe Acrobat Reader, which is available free at either of the previous sites. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC area at (202) 512–1530.

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Program Authority: 20 U.S.C. 1091(d).

Dated: January 9, 2001.

Greg Woods,

Chief Operating Officer, Student Financial Assistance.

[FR Doc. 01–1055 Filed 1–11–01; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[CFDA No.: 84.310A]

Parental Assistance Program

AGENCY: Department of Education.

ACTION: Notice of Proposed Priority for Fiscal Year (FY) 2001.

SUMMARY: The Assistant Secretary proposes to give a competitive preference in the FY 2001 grant competition under the Parental Assistance Program (20 U.S.C. 5911 *et seq.*). The program provides grants to eligible non-profit organizations, and eligible non-profit organizations in consortia with local educational agencies (LEAs), to establish parental information and resource centers.

Under this competitive preference, the Assistant Secretary would award up to 10 additional points to an applicant that would implement comprehensive strategies designed to strengthen school-family-community partnerships in order to help children in low-performing schools reach high academic standards.

DATES: We must receive your comments on the proposed priority or before February 12, 2001.

ADDRESSES: Address all comments about this proposed priority to Daisy Greenfield, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Avenue, SW., Room 3E307, Washington, DC 20202–6410, Telephone: (202) 401–0039, FAX: (202) 205–0303. If you prefer to send your comments through the Internet, use the following address: daisy_greenfield@ed.gov.

FOR FURTHER INFORMATION CONTACT: Daisy Greenfield, (202) 401–0039. 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 alternative format (*e.g.,* Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION:

Invitation To Comment

Interested persons are invited to submit comments and recommendations regarding the proposed priority. All comments submitted in response to this notice will be available for public inspection, during and after the comment period, in Room 3E307, 400 Maryland Avenue, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Eastern Time, Monday through Friday of each week except Federal holidays.

Assistance to Individual With Disabilities in Reviewing the Rulemaking Record

On request, the Department supplies an appropriate aid, such as a reader or print magnifier, to an individual with a

disability who needs assistance to review the comments. If you want to schedule an appointment for this type of aid, you may call (202) 205–8113 or (202) 260–9895. If you use a TDD, you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Background

Research has shown that one of the keys to improving the achievement levels of children is increasing family and community involvement in children's education. Strong school-family-community partnerships include practices such as the following: (1) helping families establish home environments that support children's academic success; (2) improving communication among schools, families, and the community concerning all aspects of children's education; (3) encouraging effective volunteerism among families and community members to enhance classroom activities and school functions; (4) providing information to families on how to encourage their children's learning and to assist with curriculum-related activities; (5) including families in various aspects of school governance; and (6) facilitating cooperation and interaction among schools, families, and the community to achieve shared goals.

Title IV of the Goals 2000: Educate America Act, authorizes Parental Information and Resource Centers (PIRCs), which seek to increase parents' knowledge of and confidence in child-rearing activities as well as help to build and strengthen partnerships between parents and schools in meeting the educational needs of children. PIRCs are currently providing information, training and support services to parents and professionals who work with parents. They are also implementing strategies that foster more frequent and meaningful opportunities for parents and schools to work together; this work may include the full range of schools, *e.g.* elementary, secondary, low-performing, gifted and talented, magnet, alternative, *etc.* One of the keys to improving the achievement levels of children in low-performing schools, particularly at-risk children, is implementing specific strategies to enhance the involvement and participation of parents in all aspects of their children's education. The Assistant Secretary proposes to give a competitive preference to applicants that would implement comprehensive strategies designed to enhance parental involvement in low-performing schools—in particular, in schools that have been identified as in need of improvement under Title I of the Elementary and Secondary Education Act. (These are schools that have been identified as not making continuous and sustained academic progress toward meeting state standards. These schools also tend to have high percentages of minority and high-poverty students and are frequently located in rural and urban areas). To receive this preference, an applicant must be a consortium that includes a non-profit organization and one or more LEAs. The schools to be assisted by the grant must be low-performing schools identified as in need of improvement under Title I. The Assistant Secretary believes that consortia applications would be particularly effective in helping LEAs and low-performing schools build the capacity to enhance and sustain high-quality parental involvement programs. The Department currently does not fund any consortia grants under the Parental Assistant Program.

The Assistant Secretary will announce final priorities for these competitions in a notice in the **Federal Register**. The final priorities will be determined by responses to this notice, available funds, and other considerations of the Department.

Competitive Preference

Under 34 CFR 75.105 (c)(2)(i) and Title IV of the Goals 2000 Educate America Act, the Assistant Secretary proposes a competitive preference in the FY 2001 competition under the Parental Assistance Program. To receive this preference, an applicant must—

(1) Consist of a consortium that includes a non-profit organization and one or more LEAs with low-performing schools. The low-performing schools must be schools identified as in need of improvement under Section 1116(c) of Title I of the Elementary and Secondary Education Act.

(2) Propose to implement comprehensive strategies designed to strengthen school-family-community partnerships in order to help children in the low-performing schools reach challenging academic standards. The applicant must clearly describe the role of the non-profit organization and the LEA(s) in conducting these activities with the identified low-performing schools.

(3) Provide documentation from the identified low-performing schools demonstrating that the schools will cooperate and coordinate with the applicant in implementing the proposed activities.

An applicant that meets the competitive preference would receive up to 10 points in the competition. These points are in addition to any points the applicant earns under the selection criteria. The number of points awarded would be determined on the basis of how well the applicant addresses the competitive preference.

Electronic Access to This Document

You may review this document, as well as all other Department of Education documents published in the **Federal Register,** in text or Adobe Portable Document Format (PDF) on the Internet at either of the following sites:

http://ocfo.ed.gov/fedreg.htm
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To use PDF you must have Adobe Acrobat Reader, which is available free at either of the preceding sites. If you have question about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC 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*

Program Authority: 20 U.S.C. 59911 *et seq.*

Dated: January 8, 2001.

Michael Cohen,

Assistant Secretary for Elementary and Secondary Education

[FR Doc. 01–1054 Filed 1–11–01; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER01–596–000]

Alabama Electric Marketing, LLC; Notice of Issuance of Order

January 8, 2001.

Alabama Electric Marketing, LLC (AEM) submitted for filing a rate schedule under which AEM will engage in wholesale electric power and energy transactions at market-based rates. AEM also requested waiver of various Commission regulations. In particular, AEM requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuance of securities and assumptions of liability by AEM.

On January 3, 2001, pursuant to delegated authority, the Director, Division of Corporate Applications, Office of Markets, Tariffs and Rates, granted requests for blanket approval under Part 34, subject to the following:

Within thirty days of the date of the order, any person desiring to be heard

or to protest the blanket approval of issuances of securities or assumptions of liability by AEM should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214).

Absent a request for hearing within this period, AEM is authorized to issue securities and assumes obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of the applicant, and compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of AEM's issuances of securities or assumptions of liability.

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is February 2, 2001.

Copies of the full text of the Order are available from the Commission's Public Reference Branch, 888 First Street, NE., Washington, D.C. 20426. The order 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. 01–1015 Filed 1–11–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER01–129–001]

Consolidated Edison Company of New York, Inc.; Notice of Filing

January 5, 2001.

Take notice that on December 29, 2000, Consolidated Edison Company of New York, Inc. (Con Edison), tendered for filing a revised rate schedule in the above-listed docket.

Con Edison states that a copy of this filing has been served by mail upon NYPA.

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 and protests should be filed on or before January 19, 2001. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http://www.ferc.fed.us/efi/doorbell.htm.

David P. Boergers,

Secretary.

[FR Doc. 01–1043 Filed 1–11–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER01–542–000]

STI Capital Company; Notice of Issuance of Order

January 8, 2001.

STI Capital Company (STI) submitted for filing a rate schedule under which STI will engage in wholesale electric power and energy transactions at market-based rates. STI also requested waiver of various Commission regulations. In particular, STI requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuance of securities and assumptions of liability by STI.

On January 3, 2001, pursuant to delegated authority, the Director, Division of Corporate Applications, Office of Markets, Tariffs and Rates, granted requests for blanket approval under part 34, subject to the following:

Within thirty days of the date of the order, any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by STI 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).

Absent a request for hearing within this period, STI is authorized to issue securities and assume obligations or liabilities as a guarantor, endorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of the applicant, and compatible with the public interest, and is reasonably necessary or appropriate for such proposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of STI's issuances of securities or assumptions of liability.

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is February 2, 2001.

Copies of the full text of the Order are available from the Commission's Public Reference Branch, 888 First Street, NE., Washington, DC 20426. The Order 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. 01–1016 Filed 1–11–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP01–61–000]

Viking Gas Transmission Company; Notice of Application

January 8, 2001.

On December 29, 2000, Viking Gas Transmission Company (Viking), 825 Rice Street, St. Paul, Minnesota 55117, filed in Docket No. CP01–61–000, an abbreviated application pursuant to Section 7(c) of the Natural Gas Act (NGA) and the Commission's Rules and Regulations for a certificate of public convenience and necessity authorizing Viking to construct certain pipeline facilities referred to as the Hallock Project, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may be viewed at *http://www.ferc.fed.us/online/rims.htm* (call 202–208–2222 for assistance).

Viking proposes in the Hallock Project to install 5.6 miles of 24-inch security looping to provide a second line in the first segment of its mainline from near the Emerson Interconnect with TransCanada Pipelines Ltd. (TCPL) to

its first compressor station, the Hallock Compressor Station. Viking is proposing this project to enable it to maintain gas flow into its system from TCPL without interruption to customers when this area of the existing pipe will be taken out of service temporarily for necessary integrity testing and maintenance work. The construction and operation of the proposed facilities also will provide Viking with the opportunity to reduce its fuel consumption at the Hallock Compressor Station by an estimated 81,000 Dth annually.

Specifically, Viking proposes to construct and operate the following facilities:

—5.6 miles of 24-inch mainline loop segment adjacent to Viking's existing line in Kittson County, Minnesota;

—Two pig launchers, a relief valve for overpressure pressure protection, two mainline block valves, blowdown valves, and tie-in piping and fittings to be installed on approximately one acre of property to be purchased in Kittson County, Minnesota; and

—Tie-in piping with one mainline suction valve within the fenced boundaries of Viking's Hallock Compressor Station.

The proposed facilities will not create incremental capacity beyond the Hallock Compressor Station which is limited to 877 psig. An incremental capacity will be created in the proposed 5.6-miles line. This capacity is not marketable since Viking currently serves no markets in this area and none are anticipated. The proposed Hallock Project facilities are anticipated to go into service on or about November 1, 2001.

The estimated cost of Viking's proposed construction is approximately $3.9 million. Viking anticipates that it will make a general rate case filing for the demand rates during December 2001, at which time Viking will seek to roll in the Hallock Project costs. Viking estimates the cost impact of the project to be $0.0036 per Dth per day on a 100% load factor basis. Also, Viking anticipates that the reduction in system fuel requirements will result in fuel savings of approximately $324,000 annually. This reduction will accrue back to Viking's current and future customers through the fuel tracker and true-up provisions in Article XXVI of its tariff.

Questions regarding the details of this proposed project should be directed to Michael L. Jablonske, Vice President, Viking Gas Transmission Company, 825 Rice Street, St. Paul, Minnesota 55117, at 651–229–2254, or by fax at 651–229–2434.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before January 22, 2001, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, D.C. 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission may issue a preliminary determination on non-environmental issues prior to the completion of its review of the environmental aspects of the project. This preliminary determination typically considers such issues as the need for the project and its economic effect on existing customers of the applicant, on other pipelines in the area, and on landowners and communities. For example, the Commission considers the extent to which the applicant may need to exercise eminent domain to obtain rights-of-way for the proposed project and balances that against the non-environmental benefits to be provided by the project. Therefore, if a person has comments on community and landowner impacts from this proposal, it is important either to file comments or to intervene as early in the process as possible.

Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at *http://www.ferc.fed.us/efi/doorbell.htm*.

If the Commission decides to set the application for a formal hearing before an Administrative Law Judge, the Commission will issue another notice describing that process. At the end of the Commission's review process, a final Commission order approving or denying a certificate will be issued.

David P. Boergers,

Secretary.

[FR Doc. 01–1014 Filed 1–11–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER01–566–000]

Duke Energy McClain, LLC; Notice of Issuance of Order

January 8, 2001.

Duke Energy McClain, LLC (Duke McClain) submitted for filing a rate schedule under which Duke McClain will engage in wholesale electric power and energy transactions at market-based rates. Duke McClain also requested waiver of various Commission regulations. In particular, Duke McClain requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by Duke McClain.

On January 3, 2001, pursuant to delegated authority, the Director, Division of Corporate Applications, Office of Markets, Tariffs and Rates,

granted requests for blanket approval under part 34, subject to the following:

Within thirty days of the date of the order, any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Duke McClain 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).

Absent a request for hearing within this period, Duke McClain is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security or another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of the applicant, and compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of Duke McClain's issuances of securities or assumptions of liability.

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is February 2, 2001.

Copies of the full text of the Order are available from the Commission's Public Reference Branch, 888 First Street, NE., Washington, DC 20426. The Order 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. 01–1042 Filed 1–11–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

FEDERAL ENERGY REGULATORY COMMISSION

[Docket No. EL00–95–007, et al.]

San Diego Gas & Electric Company, et al.; Electric Rate and Corporate Regulation Filings

January 5, 2001.

Take notice that the following filings have been made with the Commission:

1. San Diego Gas & Electric Company Complainant, v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange, Respondents

[Docket No. EL00–95–007]

Take notice that on December 29, 2000, San Diego Gas & Electric Company (SDG&E) tendered for filing pursuant to Ordering Paragraph (A) of the Commission's December 15, 2000 Order Directing Remedies for California Wholesale Electric Markets (the Order), 93 FERC ¶ 61,294, its compliance filing.

The tendered compliance filing made by SDG&E describes how it is effecting within 15 days the Commission's termination of SDG&E's authority to sell its resources into the California Power Exchange Corporation (''PX'') markets.

Copies of this filing were served upon the Public Utilities Commission of the State of California and other interested parties.

Comment date: January 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

2. FirstEnergy Corp. on behalf of: American Transmission Systems, Inc., The Cleveland Electric Illuminating Company, Mid-Atlantic Energy Development Company, Ohio Edison Company, Pennsylvania Power Company, The Toledo Edison Company, FirstEnergy Services Corp., FirstEnergy Generation Corp. and FirstEnergy Nuclear Operating Company

[Docket Nos.EC01–52–000 and ER01–842–000]

Take note that on December 29, 2000, FirstEnergy Corp. filed an application pursuant to section 203 of the Federal Power Act for approval of the transfer of jurisdictional facilities to an affiliated competitive services unit, and for approval pursuant to Section 205 of the Federal Power Act of related intracompany agreements, in furtherance of its corporate separation plan as approved by the Public Utilities Commission of Ohio.

Copies of this filing have been served on the utility commissions in Ohio and Pennsylvania.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

3. San Diego Gas & Electric Company Complainant, v. Sellers of Energy and Ancillary Services, Into Markets Operated by the California, Independent System Operator and the California Power Exchange, Respondents

[Docket No. EL00–95–008]

Take notice that on January 2, 2001, the California Independent System Operator Corporation (ISO) tendered a filing in compliance with the Commission's December 15, 2000 Order in EL00–95–000, *et al.*

The ISO states that this filing has been served on the California Public Utilities Commission and on all parties on the official service.

Comment date: January 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

4. San Diego Gas & Electric Company Complainant, v. Sellers of Energy and Ancillary Services, Into Markets Operated by the California, Independent System Operator and the California Power Exchange, Respondents.

[Docket No. EL00–95–009]

Take notice that on January 2, 2001, the California Power Exchange Corporation (CalPX) tendered for filing in compliance with the Commission's December 15, 2000 Order in Docket No. EL00–95–000, *et al.*

Comment date: January 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

5. San Diego Gas & Electric Company Complainant, v. Sellers of Energy and Ancillary Services, Into Markets Operated by the California, Independent System Operator and the California Power Exchange, Respondents

[Docket No. EL00–95–010]

Take notice that on January 2, 2001, Pacific Gas and Electric Company tendered for filing with the Federal Energy Regulatory Commission (Commission) a filing in compliance with the Commission's December 15, 2000 Order in Docket No. EL00–95–000, *et al.*

Comment date: January 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

6. Illinois Power Company

[Docket Nos. ER99–4415–004, ER99–4530–004 and EL00–7–004]

Take notice that on December 20, 2000, Illinois Power Company filed an amendment to its Compliance Filing and Revised Open Access Transmission Tariff filed with the Federal Energy

Regulatory Commission on November 9, 2000.

Comment date: January 16, 2001, in accordance with Standard Paragraph E at the end of this notice.

7. Consolidated Edison Company of New York, Inc.

[Docket No. ER01–130–001]

Take notice that on December 29, 2000, Consolidated Edison Company of New York, Inc. (Con Edison), tendered for filing a revised rate schedule in the above-listed docket.

Con Edison states that a copy of this filing has been served by mail upon LIPA.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

8. Consolidated Edison Company of New York, Inc.

[Docket No. ER01–160–001]

Take notice that on December 29, 2000, Consolidated Edison Company of New York, Inc. (Con Edison), tendered for filing a revised rate schedule in the above-listed docket.

Con Edison states that a copy of this filing has been served upon O&R.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

9. Consolidated Edison Company of New York, Inc.

[Docket No. ER01–161–001]

Take notice that on December 29, 2000, Consolidated Edison Company of New York, Inc. (Con Edison), tendered for filing a revised rate schedule in the above-listed docket.

Con Edison states that a copy of this filing has been served by mail upon Central Hudson.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

10. Consolidated Edison Company of New York, Inc.

[Docket No. ER01–471–001]

Take notice that on December 29, 2000, Consolidated Edison Company of New York, Inc. (Con Edison) tendered for filing a revised rate schedule in the above-listed docket.

Con Edison states that a copy of this filing has been served by mail upon Central Hudson.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

11. PacifiCorp

[Docket No. ER01–814–000]

Take notice that on December 28, 2000, PacifiCorp tendered for filing in accordance with 18 CFR 35 of the Commission's Rules and Regulations, Long-Term Firm Transmission Service Agreements with Public Service Company of Colorado (PSCO) under PacifiCorp's FERC Electric Tariff, Second Revised Volume No. 11 (Tariff).

Copies of this filing were supplied to the Washington Utilities and Transportation Commission and the Public Utility Commission of Oregon.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

12. Duquesne Light Company

[Docket No. ER01–815–000]

Take notice that on December 28, 2000, Duquesne Light Company (DLC), tendered for filing a Service Agreement dated December 28, 2000 with Engage Energy America Corp., under DLC's Open Access Transmission Tariff (Tariff). The Service Agreement adds Engage Energy America Corp. as a customer under the Tariff.

DLC requests an effective date of December 28, 2000 for the Service Agreement.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

13. Duquesne Light Company

[Docket No. ER01–816–000]

Take notice that December 28, 2000, Duquesne Light Company (DLC), tendered for filing a Service Agreement dated December 28, 2000 with Engage Energy America Corp. under DLC's Open Access Transmission Tariff (Tariff). The Service Agreement adds Engage Energy America Corp. as a customer under the Tariff.

DLC requests an effective date of December 28, 2000 for the Service Agreement.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

14. New England Power Company

[Docket No. ER01–817–000]

Take notice that on December 28, 2000, New England Power Company (NEP), tendered for filing Supplement No. 8 to Service Agreement No. 12 (Eastern Edison Company) under Montaup Electric Company, FERC Electric Tariff, First Revised Volume No. 1 (Tariff No. 1).

The Supplement provides for NEP (as successor to Montaup Electric Company (Montaup)) to make a lump sum payment to its affiliate, Massachusetts Electric Company (as successor to Eastern Edison Company), of $10.3 million on or before December 29, 2000, reducing the Montaup Contract Termination Charge factor recovered under Service Agreement No. 12 to 1.95 cents per kWh for the year 2001.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

15. New England Power Company

[Docket No. ER01–818–000]

Take notice that on December 28, 2000, New England Power Company (as successor to Montaup Electric Company) (NEP), tendered for filing Supplement No. 7 to Service Agreement No. 12 (Eastern Edison Company) under Montaup Electric Company, FERC Electric Tariff, First Revised Volume No. 1. The Supplement takes the form of a Stipulation and Agreement between Massachusetts Electric Company (as successor to Eastern Edison Company) and NEP (as successor to Montaup Electric Company).

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

16. California Independent System Operator Corporation

[Docket No. ER01–819–000]

Take notice that on December 28, 2000, the California Independent System Operator Corporation (ISO), tendered for filing a revision to the ISO Tariff, Amendment No. 34 for acceptance by the Commission. The ISO states that the purpose of the amendment is to clarify certain issues associated with implementation of the new transmission Access Charge methodology proposed in Amendment No. 27. In addition, the ISO is providing information as to the new transmission Access Charge rates that will be in effect if the Commission approves the City of Vernon joining the ISO effective January 1, 2001 and the amount of Firm Transmission Rights that will be given to Vernon in accordance with the ISO Tariff.

The ISO is requesting waiver of the 60-day notice requirement to allow the amendment to be made effective January 1, 2001.

The ISO states that this filing has been served the Public Utilities Commission of California, the California Energy Commission, the California Electricity Oversight Board, and all parties, including Vernon, with effective Scheduling Coordinator Agreements under the ISO Tariff.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

17. New England Power Company

[Docket No. ER01–820–000]

Take notice that on December 28, 2000, New England Power Company (NEP), tendered for filing Supplement No. 33 to Service Agreement No. 23 between NEP and The Narragansett Electric Company (Narragansett) under NEP's Primary Service for Resale Tariff (Tariff No. 1) and Supplement No. 18 to Service Agreement No. 20 between NEP and Massachusetts Electric Company (Mass. Electric) under Tariff No. 1.

Supplement No. 33 to the Narragansett Service Agreement provides that on or before December 29, 2000, NEP shall make a lump sum payment to Narragansett of $5 million. The resulting Narragansett Contract Termination Charge (CTC) factor will be reduced from 1.15 cents per kWh to 0.80 cents per kWh for the year 2001. Supplement No. 18 to the Mass. Electric Service Agreement provides that on or before December 29, 2000, NEP shall make a lump sum payment to Mass. Electric of $52.2 million. Supplement No. 18 also makes two adjustments to the Mass. Electric CTC formula. The resulting Mass. Electric CTC factor will be reduced from 1.32 cents per kWh to 0.98 cents per kWh for the year 2001.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

18. Duke Electric Transmission

[Docket No. ER01–821–000]

Take notice that on December 28, 2000, Duke Electric Transmission (Duke), tendered for filing amendments to its Network Integration Transmission Service Agreement with the Southeastern Power Administration.

Duke requests that the amendments be made effective January 1, 2001.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

19. PECO Energy Company

[Docket No. ER01–822–000]

Take notice that on December 28, 2000, PECO Energy Company (PECO), tendered for filing under Section 205 of the Federal Power Act, 16 U.S.C. S 792 *et seq.*, an Agreement dated December 18, 2000 with ACN Power, Inc. (ACN) under PECO's FERC Electric Tariff Original Volume No. 1 (Tariff).

PECO requests an effective date of December 18, 2000 for the Agreement.

PECO states that copies of this filing have been supplied to ACN Power, Inc. and to the Pennsylvania Public Utility Commission.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

20. Public Service Company of New Hampshire

[Docket No. ER01–823–000]

Take notice that on December 28, 2000, Public Service Company of New Hampshire (PSNH), tendered for filing an information statement concerning PSNH's fuel and purchased power adjustment clause charges and credits for the following periods.

January 1, 2000 to June 30, 2000
July 1, 2000 to December 31, 2000

The information statement is submitted pursuant to a settlement agreement approved by the Commission in *Publ Serv. Co. Of New Hampshire,* 57 FERC ¶ 61,068 (1991), and a settlement stipulation approved by the Commission by Letter Order in Docket Nos. ER91–143–000, ER91–235–000 and EL91–15–000, dated July 22, 1992.

Copies of this filing were served upon the Town of Ashland Electric Company and the New Hampton Village Precinct.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

21. American Transmission Company LLC

[Docket No. ER01–825–000]

Take notice that on December 29, 2000, American Transmission Company LLC (ATCLLC), tendered for filing an Interim Interconnection Agreement between ATCLLC and LSP-Whitewater Limited Partnership.

ATCLLC requests an effective date of January 1, 2001.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

22. American Transmission Company LLC

[Docket No. ER01–826–000]

Take notice that on December 29, 2000, American Transmission Company LLC (ATCLLC), tendered for filing a Network Operating Agreement and Network Integration Transmission Service Agreement between ATCLLC and Edison Sault Electric Company.

ATCLLC requests an effective date of January 1, 2001.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

23. WEC Operating Companies

[Docket No. ER01–827–000]

Take notice that on December 29, 2000, the Wisconsin Energy Corporation Operating Companies (WEC Operating Companies), tendered for filing FERC Electric Tariff Original Volume No. 2 (the Joint Ancillary Services Tariff) of WEC Operating Companies consisting of Wisconsin Electric Power Company and Edison Sault Electric Company and also submitted First Revised Page No. 1 of WEC Operating Companies FERC Electric Tariff First Revised Volume No. 1, Notice of Cancellation of WEC Operating Companies Joint Open Access Transmission Tariff, with a requested effective date the later of the date of FERC's approval of WEC Operating Companies Joint Ancillary Services Tariff, January 1, 2001, or the Operation Date of the American Transmission Company, LLC (ATCLLC).

The WEC Operating Companies state that the Commission has recently approved the transfer of their transmission facilities to ATCLLC, which does not own or control any generation resources. Because the transmission facilities historically owned by Wisconsin Electric Power Company and Edison Sault Electric Company will be owned and operated by ATCLLC, the WEC Operating Companies will sell specified ancillary services under a Joint Ancillary Services Tariff and will cancel the WEC Operating Companies' Joint Open Access Transmission Tariff. The WEC Operating Companies state that the rates for ancillary services available under the Joint Ancillary Services Tariff are identical to rates that were previously incorporated in the Joint Open Access Transmission Tariff of the WEC Operating Companies. In order to comply with FERC Order No. 888, ATCLLC and eligible customers may purchase ancillary services from the WEC Operating Companies in accordance with the rates, terms and conditions of the Joint Ancillary Services Tariff.

The WEC Operating Companies request an effective date for the Joint Ancillary Services Tariff and the cancellation of the WEC Operating Companies Joint Open Access Transmission Tariff of the later of January 1, 2001, or the operation date of ATCLLC.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

24. Wisconsin Electric Power Company

[Docket No. ER01–828–000]

Take notice that on December 29, 2000, Wisconsin Electric Power Company tendered for filing a Notice of Cancellation of FERC Rate Schedules Nos. 81 and 82.

Wisconsin Electric requests that cancellation be effective on January 1, 2001.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

25. WEC Operating Companies

[Docket No. ER01–829–000]

Take notice that on December 29, 2000, Wisconsin Energy Corporation Operating Companies (WEC Operating Companies) and American Transmission Company LLC (ATCLLC), tendered for filing seven Notices of Assignment that WEC Operating Companies will assign to ATCLLC Service Agreement Nos. 16, 17, 126, 162, 166, 188 and 189 under the WEC Operating Companies, FERC Electric Tariff Original Volume No. 1 (Joint Open Access Transmission Tariff) for service under ATCLLC's FERC Electric Tariff Original Volume No. 1.

WEC Operating Companies and ATCLLC are requesting an effective date for the assignment of the later of January 1, 2001 or the operation date of ATCLLC.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

26. Indeck Pepperell Power Associates

[Docket No. ER01–830–000]

Take notice that on December 29, 2000, Indeck Pepperell Power Associates, Inc. (Indeck Pepperell), tendered for filing with the Federal Energy Regulatory Commission a Power Purchase and Sale Agreement (Service Agreement) between Indeck Pepperell and Enron Power Marketing, Inc. (EPMI), dated December 27, 2000, for service under Rate Schedule FERC No. 1.

Indeck Pepperell requests that the Service Agreement be made effective as of January 1, 2001.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

27. San Diego Gas & Electric Company

[Docket No. ER01–831–000]

Take notice that on December 29, 2000, San Diego Gas & Electric Company (SDG&E), tendered for filing a revision to its Transmission Owner Tariff.

The tendered tariff revisions would implement Amendment 27 to the California Independent System Operator (ISO) Tariff. Among other things, Amendment 27 provides for the addition of new entities as Participating Transmission Owners (PTOs) under the ISO Tariff. The revisions include rate changes required to implement Amendment 27.

SDG&E requests that these rate changes be made effective January 1, 2001, if the Commission approves the City of Vernon joining the ISO as a PTO effective January 1, 2001.

Copies of this filing were served upon the Public Utilities Commission of the State of California and other interested parties.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

28. Southern California Edison Company

[Docket No. ER01–832–000]

Take notice that on December 29, 2000, Southern California Edison Company (SCE), tendered for filing a revision to its Transmission Owner Tariff (TO Tariff), FERC Electric Tariff, First Revised Original Volume No. 6. The proposed revision modifies SCE's TO Tariff to accommodate the implementation by the California Independent System Operator Corporation (ISO) of the new Transmission Access Charges (TAC) methodology.

SCE asks that FERC authorize that the changes to the proposed TO Tariff changes be made effective for service rendered on and after January 1, 2001, provided that the City of Vernon, California (Vernon) becomes a Participating Transmission Owner as of January 1, 2001.

A copy of this filing was mailed to the Public Utilities Commission of the State of California, the California Independent System Operator, and the California Electricity Oversight Board, as well as each entity that received party status in Docket Nos. ER00–2019, ER01–315, EL00–105, EL01–14, EC01–14, and ER97–2355–000 et al.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

29. Pacific Gas and Electric Company

[Docket No. ER01–833–000]

Take notice that on December 29, 2000, Pacific Gas and Electric Company (PG&E), tendered for filing unexecuted copies of: (i) an Interconnection Agreement between PG&E and Modesto Irrigation District (Modesto) for Mountain House Area; and (ii) a Wholesale Distribution Tariff Service Agreement between PG&E and Modesto (Service Agreement). In its filing, PG&E explains that the Interconnection Agreement (IA) establishes the terms and conditions under which PG&E will provide electric system interconnection between PG&E and Modesto in an area of San Joaquin County, California, known as Mountain House Community Services District (Mountain House). The Service Agreement, which is taken from the pro forma agreement in PG&E's approved Wholesale Distribution Tariff, defines the terms of wholesale distribution service PG&E will provide to Modesto for service to the Mountain House area.

On behalf of itself and Modesto, PG&E requests an effective date of January 1, 2001. This is the date on which new state legislation (A.B. 2638) takes effect, which provides that Modesto will be the exclusive provider of retail electric service in the Mountain House area. PG&E represents that the subject agreements it is submitting for Commission approval are necessary in order to comply with this new state law.

Copies of this filing have been served upon Modesto, the California Independent System Operator Corporation, and the California Public Utilities Commission.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

30. American Transmission Company LLC

[Docket No. ER01–834–000]

Take notice that on December 29, 2000, American Transmission Company LLC (ATCLLC), tendered for filing a Network Operating Agreement and Network Integration Transmission Service Agreement between ATCLLC and Stratford Water & Electric Utility.

ATCLLC requests an effective date of January 1, 2001.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

31. American Transmission Company LLC

[Docket No. ER01–835–000]

Take notice that on December 29, 2000, American Transmission Company LLC (ATCLLC), tendered for filing an Interim Interconnection Agreement between ATCLLC and SEI Wisconsin LLC.

ATCLLC requests an effective date of January 1, 2001.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

32. California Independent System Operator Corporation

[Docket No. ER01–836–000]

Take notice that on December 29, 2000, the California Independent System Operator Corporation (ISO)

tendered a proposed amendment (Amendment No. 35) to the ISO Tariff. The modifications proposed in Amendment No. 35 include the following: changes related to distributed Generation, including changes that will clarify the metering and telemetry requirements for distribution-level Generation and changes that will reduce the threshold for participation by Generating Units in the ISO's Ancillary Services markets from 10 MW to 1 MW; modifications that will enhance the ISO's RMR pre-dispatch provisions; the incorporation into the ISO Tariff of requirements for Generators set forth in the Western Systems Coordinating Council Reliability Criteria Agreement; the addition of a mechanism to recover FERC Annual Charges from entities receiving transmission service on the ISO Controlled Grid; extension of the partial waiver of ''No Pay'' penalties for Participating Loads; a change to the deadline for submission of meter data to the ISO, which will align the Tariff with current practice; and several miscellaneous Tariff revisions necessary to comply with prior Commission orders and to correct typographical errors.

The ISO states that this filing has been served upon the Public Utilities Commission of the State of California, the California Energy Commission, the California Electricity Oversight Board, the owners of RMR Units, and all parties with effective Scheduling Coordinator Service Agreements under the ISO Tariff.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

33. PacifiCorp

[Docket No. ER01–837–000]

Take notice that PacifiCorp on December 29, 2000, tendered for filing in accordance with 18 CFR 35 of the Commission's Rules and Regulations, Umbrella Service Agreements with Tuscon Electric Power Company (Tuscon) under PacifiCorp's FERC Electric Tariff, Second Revised Volume No. 11 (Tariff).

Copies of this filing were supplied to the Washington Utilities and Transportation Commission and the Public Utility Commission of Oregon.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

34. FPL Energy Vansycle, L.L.C.

[Docket No. ER01–838–000]

Take notice that on December 29, 2000, FPL Energy Vansycle, L.L.C. (Vansycle), tendered for filing an application for authorization to sell wholesale power at market-based rates, and certain ancillary services at market-based rates into the California market. Vansycle also requested that the Commission accept for filing a long-term Power Purchase Agreement for the sale of power from Vansycle to Pacificorp Power Marketing, Inc. as a stand-alone rate schedule under its proposed market rate tariff. Vansycle has requested that this Market Rate Tariff and Power Purchase Agreement become effective upon commencement of service.

Copies of this filing have been served on the Washington Utilities and Transportation Commission, Oregon Public Service Commission, Florida Public Service Commission, Arkansas Public Service Commission, Mississippi Public Service Commission, Louisiana Public Service Commission, Texas Public Utility Commission, and the Council of the City of New Orleans.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

35. Pacific Gas and Electric Company

[Docket No. ER01–839–000]

Take notice that on December 29, 2000, Pacific Gas and Electric Company (PG&E), tendered for filing proposed revisions to its Transmission Owner Tariff (TO Tariff), FERC Electric Tariff Volume No. 5. These revisions are intended to facilitate implementation by the California Independent System Operator Corporation (ISO) of its revised Transmission Access Charge (TAC) methodology and corresponding rates under its tariff.

PG&E requests that these TO Tariff revisions become effective on January 1, 2001, if the City of Vernon, California is a party to the Transmission Control Agreement among the ISO and Participating Transmission Owners as of that date.

Copies of this filing were served upon the Public Utilities Commission of the State of California and all interested parties.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

36. Consumers Energy Company

[Docket No. ER01–840–000]

Take notice that on December 29, 2000 Consumers Energy Company (Consumers), tendered for filing an Interconnection Agreement between Consumers and American Transmission Company, LLC (ATCLLC) and a Coordinated Operating Agreement (jointly Agreements) between Consumers and Wisconsin Electric Power Company (Wisconsin Electric), both dated December 26, 2000. The Agreements are to replace a Network Integration Transmission Service Agreement and a Network Operating Agreement between Consumers and Edison Sault Electric Company, scheduled to terminate December 31, 2000.

Consumers requested that the Agreements be allowed to become effective January 1, 2001.

Copies of the filing were served upon ATCLLC, Wisconsin Electric, the Wisconsin Public Service Commission and the Michigan Public Service Commission.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

37. Xcel Energy Services Inc.

[Docket No. ER01–841–000]

Take notice that on December 29, 2000, Xcel Energy Services Inc., (Xcel Services) on behalf of Southwestern Public Service Company (SPS), tendered for filing pursuant to Section 206 of the Federal Power Act Amended and Restated Agreements for Wholesale Full Requirements Electric Power Service between SPS and Central Valley Electric Cooperative, Inc., Farmers' Electric Cooperative, Inc., Lea County Electric Cooperative, Inc., Lyntegar Electric Cooperative, Inc., and Roosevelt County Electric Cooperative, Inc.

Xcel Services requests an effective date for the revised Amended and Restated Agreements as soon as practical, but in no event after April 30, 2001. Accordingly, to the extent necessary, Xcel Services seeks waiver of the Commission's filing requirements. Xcel Services has posted the filing according to the requirements of 18 CFR 35.2(d).

Copies of the filing are available for public inspection in SPS's offices in Amarillo, Texas.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

38. Wisconsin Power & Light Company

[Docket No. ER01–843–000]

Take notice that on December 28, 2000, Wisconsin Power & Light Company (WPL), tendered for filing an amended Power Supply Agreement with WPPI. WPL also refiled its PR–1 rate schedule in compliance with Commission Order No. 614.

WPL indicates that copies of the filing have been provided to WPPI and to the Public Service Commission of Wisconsin.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

39. San Diego Gas & Electric Company

[Docket No. ER01–844–000]

Take notice that on December 28, 2000, San Diego Gas & Electric (SDG&E), tendered for filing a change in rate for the Transmission Revenue Balancing Account Adjustment set forth in its Transmission Owner Tariff (TO Tariff). The effect of this rate change is to reduce rates for jurisdictional transmission service utilizing that portion of the California Independent System Operator-Controlled Grid owned by SDG&E.

SDG&E requests that this rate change be made effective January 1, 2001.

Copies of this filing were served upon the Public Utilities Commission of the State of California and all interested parties.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

40. FirstEnergy Generation Corp.

[Docket No. ER01–845–000]

Take notice that on December 28, 2000, FirstEnergy Generation Corp. (Genco), a newly-formed generation company subsidiary of FirstEnergy Corp., tendered for filing its FERC Electric Tariff, Original Volume No. 1 (the Tariff), pursuant to which it is proposing to make sales of electricity to wholesale purchasers at market-based rates. The Tariff also establishes rates, terms and conditions for assignment by Genco of transmission services it has reserved for its own use.

Genco has requested to have the Tariff accepted for filing and permitted to become effective on January 1, 2001, and to have the FERC grant waivers and other authorizations with respect to its regulations that are similar to those granted to other utility-affiliated generation companies.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

41. Wisconsin Electric Power Company

[Docket No. ER01–846–000]

Take notice that on December 28, 2000, Wisconsin Electric Power Company (Wisconsin Electric), tendered for filing a supplement to a Network Integration Transmission Service Agreement between itself and Oconto Falls Electric and Water Commission (Oconto Falls). The supplement reduces the monthly distribution demand charge paid by Oconto Falls under Service Agreement No. 96, under Wisconsin Energy Corporation Operating Companies FERC Electric Tariff, Volume No. 1.

Wisconsin Electric requests an effective date of May 15, 1996 and waiver of the Commission's notice requirements. Wisconsin Electric will refund to Oconto Falls the amount of the distribution demand charge collected above the new charge, with interest, since service commencement.

Copies of the filing have been served on Oconto Falls, the Public Service Commission of Wisconsin and the Michigan Public Service Commission.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

42. Wisconsin Electric Power Company

[Docket No. ER01–847–000]

Take notice that on December 28, 2000, Wisconsin Electric Power Company (Wisconsin Electric), tendered for filing, pursuant to Section 35.13 of the Commission's regulations, 18 CFR 35.12, an amendment to Exhibit C of a Revised Power Sales Agreement between Wisconsin Electric and Wisconsin Public Power, Inc. (WPPI). The purpose of the amendment is to reflect the fact that, as of January 1, 2001, the price for wholesale distribution service to WPPI will be set forth in a new wholesale distribution agreement between Wisconsin Electric and WPPI, and will no longer be set forth in Exhibit C.

Comment date: January 19, 2001, 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, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 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. 01–1013 Filed 1–11–01; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6614–6]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under Section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 260–5076. An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 14, 2000 (65 FR 20157).

Draft EISs

ERP No. D–COE–D36118–DE Rating LO, Fenwick Island Feasibility Study, Storm Damage Reduction, Delaware Coast from Cape Henlopen to Fenwick Island, Protective Berm and Dune Construction, Community of Fenwick Island, Sussex County, DE.

Summary: EPA did not have any objections regarding this proposed project.

ERP No. DS–AFS–L60104–WA Rating EC2, Huckleberry Land Exchange Consolidate Ownership and Enhance Future Conservation and Management, Updated Information, Proposal to Exchange Land and Mineral Estates, Federal Land and Non Federal Land, Mt. Baker—Snoqualmie National Forest, Skagit Snohomish, King, Pierce, Kittitas, and Lewis Counties, WA.

Summary: EPA expressed environmental concerns about the condition of Weyerhaeuser's commercial timberland parcels, especially high road density, composition and structure which are being reviewed for inclusion in the Mt. Baker—Snoqualmie National Forest. EPA also raised concerns that the current resource allocations are not adequate to restore water quality, aquatic habitat, habitat connectivity, and critical endangered species habitat as proposed in the DEIS.

ERP No. DS–BLM–K39058–CA Rating EC2, Cadiz Groundwater Storage and Dry-Year Supply Program, Amendment

of the California Desert Conservation Area Plan, Additional Information, Groundwater Monitoring and Management Program, Issuance of Right-of-Way Grants and Permits, San Bernardino County, CA.

Summary: EPA expressed concerns based on potential impacts to groundwater quality and quantity and uncertainties in the proposed Groundwater Monitoring and Management Plan. EPA recommended that the FEIS provide additional information regarding groundwater monitoring and impacts, as well as crucial information on the Management Plan, including protocols and criteria for selecting members for the scientific and decisionmaking work groups, and for making recommendations, independent review, and decisionmaking.

Final EISs

ERP No. F–COE–K36134–CA Murrieta Creek Flood Control and Protection, Implementation, Riverside County, CA.

Summary: EPA expressed objections that the Corps continues to propose Alternative 6, which EPA believes is not economically or environmentally feasible. EPA also noted that the Final EIS continues to be inadequate. EPA is particularly concerned over impacts to wetlands.

ERP No. F–FHW–D40267–WV WV–9 Improvements, from Charles Town Bypass (U.S. 340) to the Virginia Line, Funding and COE Section 404 Permit, Shenandoah River, Jefferson Co., WV and Loudoun Co., VA.

Summary: EPA expressed concern over the level of information provided for a causeway construction, construction-related traffic; and impacts from and to an adjacent quarry.

ERP No. F–FHW–K40233–CA US–7 Expressway Project, Construction between CA–98 to Interstate 8, Improve Access to the new Calexico East Port of Entry, Funding and COE Section 404 Permit, Imperial County, CA.

Summary: EPA is generally satisfied with the information supplemented in the FEIS which disclose potential indirect and cumulative project impacts, and with the steps that will be taken to reduce adverse impacts to water quality.

Dated: January 9, 2001.

B. Katherine Biggs,

Associate Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 01–1117 Filed 1–11–01; 8:45 am]

BILLING CODE 6560–50–U

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6614–5]

Environmental Impact Statements; Notice of Availability

RESPONSIBLE AGENCY: Office of Federal Activities, General Information (202) 564–7167 or www.epa.gov/oeca/ofa

Weekly receipt of Environmental Impact Statements

Filed January 02, 2001 Through January 05, 2001

Pursuant to 40 CFR 1506.9.

EIS No. 000475, Revised Draft EIS, COE, NY, Sauquoit Creek Flood Control Project, Significant Revisions Concerning Old Project Descriptions, Alternatives Considered and New Project and Original Project Comparisons of Environmental Impacts, Sauquoit Creek Basin, Whitesboro, Oneida County, NY, Due: November 20, 2000, Contact: Kimberly Rightler (212) 264–9846. This Revised Draft EIS replaces DEIS #860064, filed 02/21/1986. Due to an Administrative Error by the US Army Corps of Engineers (COE) the above Revised Draft EIS was not properly filed with the US EPA. COE has confirmed that distribution of the Revised Draft EIS was made available to all federal agencies and interested parties for the 45-day review period. For further information contact the COE Contact listed above.

EIS No. 010000, Final EIS, NPS, FL, Dry Tortugas National Park General Management Plan, Implementation, Monroe County, FL, Due: February 12, 2001, Contact: Richard Ring (305) 242–7710.

EIS No. 010001, Draft EIS, FAA, GA, Hartsfield Atlanta International Airport, Construction and Operation of the 9,000-Foot Fifth Runway and Associated Projects, Approval of Airport Layout Plan (ALP), City of Atlanta, Fulton and Clayton Counties, GA, Due: February 26, 2001, Contact: Donna M. Meyer (404) 305–7150.

EIS No. 010002, Draft EIS, MMS, AK, Liberty Development and Production Plan, Beaufort Sea Oil and Gas Development, Implementation, To Transport and Sell Oil to the U.S. and World Markets, Right-of-Way Application, Offshore Beaufort Sea Marine Environment and Onshore North Slope of Alaska Coastal Plan, AK, Due: March 13, 2001, Contact: George Valiulis (703) 787–1662.

EIS No. 010003, Draft EIS, NOA, HI, GU, AS, Coral Reef Ecosystems of the Western Pacific Region, Fishery Management Plan, Including Amendments to Four Existing FMPs, Amendment 7—Bottomfish and Seamount Groundfish Fisheries, Amendment 11—Crustaceans Fisheries; Amendment 5—Precious Corals Fisheries and Amendment 10—Pelagics Fisheries, HI, GU and AS, Due: February 26, 2001, Contact: Charles Karnella (202) 482–5916.

EIS No. 010004, Final EIS, FRC, IL, WI, Guardian Pipeline Project, Proposal to Construct and Operate an Interstate Natural Gas Pipeline that would extend from Joliet (Will County), IL and Ixonia (Jefferson County), WI, Due: February 12, 2001, Contact: Paul McKee (202) 208–1088.

EIS No. 010005, Final EIS, AFS, OR, Ashland Creek Watershed Protection Project, Proposal to Manage Vegetation, Rogue River National Forest, Ashland Ranger District, City of Ashland, Jackson County, OR, Due: February 12, 2001, Contact: Kristi Mastrofini (541) 482–3333.

EIS No. 010006, Final EIS, BLM, MT, SD, ND, Montana, North Dakota and Portions of South Dakota Off-Highway Vehicle Management and Plan Amendment, Implementation, MT, ND and SD, Due: February 12, 2001, Contact: Jerry Majerus (406) 538–1924.

EIS No. 010007, Final EIS, AFS, CA, NV, Sierra Nevada Forest Plan Amendment Project, Implementation, several counties, CA and NV, Due: February 12, 2001, Contact: John Bradford (916) 492–7554.

Amended Notices

EIS No. 000349, Draft EIS, AFS, ID, Curfew National Grassland Land and Resource Management Plan, Implementation, Caribou-Targhee National Forest, Oneida County, ID, Due: March 30, 2001, Contact: Jack Blackwell (801) 625–5605. Revision of FR notice published on 10/20/2000: CEQ Comment Date has been Extended from 01–29–2001 to 03/30/2001.

EIS No. 000384, Draft Supplement, FHW, CO, Colorado Forest Highway 80, Guanella Pass Road (also known as Park County Road 62, Clear Creek County Road 381 and Forest Development Road 118), Additional Alternative includes Rehabilitation, Light Reconstruction and Full Construction, Funding, Clear Creek and Park Counties, CO, Due: February 02, 2001, Contact: Richard Cushing (303) 716–2138. Revision of FR notice published on 11/17/2000: CEQ Comment Date has been extended from 01/16/2001 to 02/02/2001.

EIS No. 000456, Draft EIS, AFS, AK, Cholmondeley Timber Sales, Implementation, Harvesting Timber, Tongass Forest Plan, Tongass National Forest, Craig Ranger District, West of Ketchikan and South of Prince of Wales Island, AK, Due: February 12, 2001, Contact: Dale Kanen (907) 826–3271. Revision of FR notice published on 12/29/2000: CEQ Due Date Corrected from 02/19/2001 to 02/12/2001.

EIS No. 000464, Draft EIS, NOA, WA, Anadromous Fish Agreements and Habitat Conservation Plans for the Welss, Rocky Reach, and Rock Island Hydroelectric Projects, Implementation, Incidental Take Permits, Chelan and Douglas Counties, WA, Due: March 29, 2001, Contact: Bob Dach (503) 736–4734. Revision of FR notice published on 12/29/2000: CEQ Due Date Corrected from 02/12/2001 to 03/29/2001.

Dated: January 9, 2001.

B. Katherine Biggs,

Associate Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 01–1116 Filed 1–11–01; 8:45 am]

BILLING CODE 6560–50–U

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SES Performance Review Board Members

AGENCY: Equal Employment Opportunity Commission (EEOC).

ACTION: Notice.

SUMMARY: Notice is hereby given of the names of the members of the SES Performance Review Board of EEOC for FY 2000.

FOR FURTHER INFORMATION CONTACT: Patricia Cornwell Johnson, Director, Office of Human Resources, Equal Employment Opportunity Commission, 1801 L Street, N.W., Washington, D.C. 20507, (202) 663–4306.

SUPPLEMENTARY INFORMATION: Pursuant to the requirement of 5 U.S.C. 4314(c)(1), membership of the SES Performance Review Board is as follows: Ms. Emilie G. Heller, Director, Policy Management and Coordination, Equal Employment Opportunity Commission (Chair); Mr. James N. Finney, Associate General Counsel, Systemic Investigations and Review Programs, Equal Employment Opportunity Commission; Mr. John P. Rowe, Director, Chicago District Office, Equal Employment Opportunity Commission; and Ms. Peggy Mastroianni, Associate Legal Counsel, Equal Employment Opportunity Commission (Alternate).

Signed at Washington, D.C., on the 8th day of January 2001.

For the EEOC.

Ida L. Castro,

Chairwoman.

[FR Doc. 01–1078 Filed 1–11–01; 8:45 am]

BILLING CODE 6570–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority, Comments Requested.

January 5, 2001.

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 March 13, 2001. 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 Commissions, 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 Control Number: 3060–0346.

Title: Section 78.27 License conditions.

Form Number: n/a.

Type of Review: Extension of a currently approved collection.

Respondents: Individuals or households, Business and other for-profit entities, Not-for profit institutions.

Number of Respondents: 455.

Estimated Time Per Response: 10 minutes (.167) estimated for both the petition and complaint process.

Total Annual Burden: 76 hours.

Total Annual Costs: $ 0.00.

Needs and Uses: The information collection requirements reported under this control number are necessary in order to inform the Commission whether all pending CARS stations that have either commenced operation or experienced delays in construction that have hence delayed operation. These filings are essential to the Commission, in that they are used to ensure appropriate frequency coordination and to prevent frequency interference.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 01–1035 Filed 1–11–01; 8:45 am]

BILLING CODE 6712–01–U

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

January 5, 2001.

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, 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 March 13, 2001. 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 Commissions, 445 12th Street, SW., Room 1–A804, 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 Control Number: 3060–0692.

Title: Home Wiring Provisions.

Form Number: n/a.

Type of Review: Extension of a currently approved collection.

Respondents: Individuals or households; Business and other for-profit entities.

Number of Respondents: 30,500.

Estimated Time Per Response: .5–5 hours estimated for both the petition and complaint process.

Total Annual Burden: 46,114 hours.

Total Annual Costs: $37,510.

Needs and Uses: The information collection requirements reported under this control number are necessary in order to protect consumers from unnecessary disruption of service and expense caused by removal of home wiring and to allow consumers to use the wiring for service received from alternative MVPD's.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 01–1036 Filed 1–11–01; 8:45 am]

BILLING CODE 6712–01–U

FEDERAL COMMUNICATIONS COMMISSION

First Meeting of the Advisory Committee for the 2003 World Radiocommunication Conference (WRC–03 Advisory Committee)

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the initial meeting of the WRC–03 Advisory Committee will be held on January 30, 2001, at the Federal Communications Commission. The purpose of the meeting is to begin preparations for the 2003 World Radiocommunication Conference.

DATES: January 30, 2001; 10:00 am–12:00 noon.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Room TW–C305, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Julie Garcia, FCC International Bureau, Planning and Negotiations Division, at (202) 418–0763.

SUPPLEMENTARY INFORMATION: As part of its preparations for the 2003 World Radiocommunication Conference (WRC–03), the Federal Communications Commission (FCC) has amended the charter of its Advisory Committee for the 2000 Radiocommunication Conference. The Advisory Committee will now be called the Advisory Committee for the 2003 Radiocommunication Conference, and its scope of activities will be to address issues contained in the agenda for WRC–03. The Federal Communications Commission (FCC) established the WRC–03 Advisory Committee to provide advice, technical support and recommendations relating to the preparation of United States proposals and positions for the 2003 World Radiocommunication Conference (WRC–03).

In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, this notice advises interested persons of the first meeting of the WRC–03 Advisory Committee. The WRC–03 Advisory Committee has an open membership. All interested parties are invited to participate in the Advisory Committee and to attend its meetings. The proposed agenda for the first meeting is as follows:

Agenda

First Meeting of the WRC–03 Advisory Committee, Federal Communications Commission, 445 12th Street, SW., Room TW–C305, Washington, DC 20554.

January 30, 2001; 10:00 am–12:00 noon.

1. Opening Remarks.
2. Approval of Agenda.
3. Report on Suggestions for Improving the WRC Preparatory Process.
4. Outline of WRC–03 Preparatory Process.
5. Advisory Committee Structure and Meeting Schedule.
6. Report on Recent International Telecommunication Union Meetings.
7. Other Business.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

[FR Doc. 01–1037 Filed 1–11–01; 8:45 am]

BILLING CODE 6712–01–U

FEDERAL COMMUNICATIONS COMMISSION

[Report No. 2460]

Petitions for Reconsideration of Action in Rulemaking Proceeding

January 4, 2001.

Petitions for Reconsideration have been filed in the Commission's rulemaking proceeding listed in this Public Notice and published pursuant to 47 CFR section 1.429(e). The full text of this document is available for viewing and copying in Room CY–A257, 445 12th Street, SW., Washington, DC, or may be purchased from the Commission's copy contractor, ITS, Inc. (202) 857–3800. Oppositions to these petitions must be filed by January 29, 2001. See section 1.4(b)(1) of the Commission's rules (47 CFR 1.4(b)(1)). Replies to an opposition must be filed within 10 days after the time for filing oppositions have expired.

Subject: Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Nonduplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions of Broadcast Signals (CS Docket No. 00–2)

Number of Petitions Filed: 3.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 01–1040 Filed 1–11–01; 8:45 am]

BILLING CODE 6712–01–M

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–1352–DR]

Alabama; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Alabama (FEMA–1352–DR), dated December 18, 2000, and related determinations.

EFFECTIVE DATE: December 18, 2000.

FOR FURTHER INFORMATION CONTACT: Madge Dale, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3772.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated December 18, 2000, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121, *et seq.*, as amended by the Disaster Mitigation Act of 2000, Pub. L. No. 106–390, 114 Stat. 1552 (2000), as follows:

I have determined that the damage in certain areas of the State of Alabama, resulting from severe storms and tornadoes on December 16, 2000, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121, *et seq.*, as amended by the Disaster Mitigation Act of 2000, Pub. L. No. 106–390, 114 Stat. 1552 (2000), (Stafford Act). I, therefore, declare that such a major disaster exists in the State of Alabama.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes, such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance, assistance for Categories A and B (debris removal and emergency protective measures) under the Public Assistance program, and Hazard Mitigation in the designated areas. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance or Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

Notice is hereby given that pursuant to the authority vested in the Director of the Federal Emergency Management Agency under Executive Order 12148, I hereby appoint John D. Hannah of the Federal Emergency Management Agency to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the State of Alabama to have been affected adversely by this declared major disaster:

The counties of Dale, Etowah, Geneva, Henry, Houston, Limestone, Macon, St. Clair, and Tuscaloosa for Individual Assistance.

The counties of Dale, Etowah, Geneva, Henry, Houston, Limestone, Macon, St. Clair, and Tuscaloosa for debris removal and emergency protective measures (Categories A & B) under Public Assistance.

All counties within the State of Alabama are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 83.537, Community Disaster Loans; 83.538, Cora Brown Fund Program; 83.539, Crisis Counseling; 83.540, Disaster Legal Services Program; 83.541, Disaster Unemployment Assistance (DUA); 83.542, Fire Suppression Assistance; 83.543, Individual and Family Grant (IFG) Program; 83.544, Public Assistance Grants; 83.545, Disaster Housing Program; 83.548, Hazard Mitigation Grant Program)

James L. Witt,

Director.

[FR Doc. 01–1028 Filed 1–11–01; 8:45 am]

BILLING CODE 6718–02–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–1352–DR]

Alabama; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Alabama (FEMA–1352–DR), dated December 18, 2000, and related determinations.

EFFECTIVE DATE: December 22, 2000.

FOR FURTHER INFORMATION CONTACT: Madge Dale, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3772.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective December 22, 2000.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 83.537, Community Disaster Loans; 83.538, Cora Brown Fund Program; 83.539, Crisis Counseling; 83.540, Disaster Legal Services Program; 83.541, Disaster Unemployment Assistance (DUA); 83.542, Fire Suppression Assistance; 83.543, Individual and Family Grant (IFG) Program; 83.544, Public Assistance Grants; 83.545, Disaster Housing Program; 83.548, Hazard Mitigation Grant Program)

Lacy E. Suiter,

Executive Associate Director, Response and Recovery Directorate.

[FR Doc. 01–1029 Filed 1–11–01; 8:45 am]

BILLING CODE 6718–02–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–1354–DR]

Arkansas; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Arkansas (FEMA–1354–DR), dated December 29, 2000, and related determinations.

EFFECTIVE DATE: January 8, 2001.

FOR FURTHER INFORMATION CONTACT: Madge Dale, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3772.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective January 8, 2001.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 83.537, Community Disaster Loans; 83.538, Cora Brown Fund Program; 83.539, Crisis Counseling; 83.540, Disaster Legal Services Program; 83.541, Disaster Unemployment Assistance (DUA); 83.542, Fire Suppression Assistance; 83.543, Individual and Family Grant (IFG) Program; 83.544, Public Assistance Grants; 83.545, Disaster Housing Program; 83.548, Hazard Mitigation Grant Program)

Lacy E. Suiter,

Executive Associate Director, Response and Recovery Directorate.

[FR Doc. 01–1030 Filed 1–11–01; 8:45 am]

BILLING CODE 6718–02–P ≤

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–3156–EM]

New Jersey; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency for the State of New Jersey (FEMA–3156–EM), dated November 1, 2000, and related determinations.

EFFECTIVE DATE: December 27, 2000.

FOR FURTHER INFORMATION CONTACT: Madge Dale, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3772.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is amended to May 30, 2000 through November 1, 2000. Further, FEMA intends to provide emergency protective measures (Category B), at 75 percent Federal funding for eligible costs incurred by the State government.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 83.537, Community Disaster Loans; 83.538, Cora Brown Fund Program; 83.539, Crisis Counseling; 83.540, Disaster Legal Services Program; 83.541, Disaster Unemployment Assistance (DUA); 83.542, Fire Suppression Assistance; 83.543, Individual and Family Grant (IFG) Program; 83.544, Public Assistance Grants; 83.545, Disaster Housing Program; 83.548, Hazard Mitigation Grant Program.)

James L. Witt,

Director.

[FR Doc. 01–1033 Filed 1–11–01; 8:45 am]

BILLING CODE 6718–02–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–3155–EM]

New York; Amendment No. 2 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of New York, (FEMA–3155–EM), dated October 11, 2000, and related determinations.

EFFECTIVE DATE: December 27, 2000.

FOR FURTHER INFORMATION CONTACT: Madge Dale, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3772.

SUPPLEMENTARY INFORMATION: The notice of an emergency for the State of New York is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared an emergency by the President in his declaration of October 11, 2000: The counties of Bronx, Chautauqua, Chenango, Clinton, Columbia, Jefferson, Kings, Livingston, Madison, Ontario, Orleans, Oswego, Queens, Richmond, Tompkins, Wayne, and Wyoming for emergency protective measures (Category B) at 75 percent Federal funding for eligible expenses. This assistance excludes regular time costs for subgrantees regular employees.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 83.537, Community Disaster Loans; 83.538, Cora Brown Fund Program; 83.539, Crisis Counseling; 83.540, Disaster Legal Services Program; 83.541, Disaster Unemployment Assistance (DUA); 83.542, Fire Suppression Assistance; 83.543, Individual and Family Grant (IFG) Program; 83.544, Public Assistance Grants; 83.545, Disaster Housing Program; 83.548, Hazard Mitigation Grant Program.)

Lacy E. Suiter,

Executive Associate Director, Response and Recovery Directorate.

[FR Doc. 01–1031 Filed 1–11–01; 8:45 am]

BILLING CODE 6718–02–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–3155–EM]

New York; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency for the State of New York (FEMA–3155–EM), dated October 11, 2000, and related determinations.

EFFECTIVE DATE: December 27, 2000.

FOR FURTHER INFORMATION CONTACT: Madge Dale, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3772.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is amended to May 22, 2000 through November 1, 2000. Further, FEMA intends to provide emergency protective measures (Category B), at 75 percent Federal funding for eligible costs incurred by the State government.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 83.537, Community Disaster Loans; 83.538, Cora Brown Fund Program; 83.539, Crisis Counseling; 83.540, Disaster Legal Services Program; 83.541, Disaster Unemployment Assistance (DUA); 83.542, Fire Suppression Assistance; 83.543, Individual and Family Grant (IFG) Program; 83.544, Public Assistance Grants; 83.545, Disaster Housing Program; 83.548, Hazard Mitigation Grant Program).

James L. Witt,

Director.

[FR Doc. 01–1032 Filed 1–11–01; 8:45 am]

BILLING CODE 6718–02–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–1351–DR]

Wyoming; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Wyoming (FEMA–1351–DR), dated December 13, 2000, and related determinations.

EFFECTIVE DATE: December 13, 2000.

FOR FURTHER INFORMATION CONTACT: Madge Dale, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3772.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated December 13, 2000, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121, *et seq.*, as amended by the Disaster Mitigation Act of 2000, Pub. L. No. 106–390, 114 Stat. 1552 (2000), as follows:

I have determined that the damage in certain areas of the State of Wyoming, resulting from severe winter storms beginning on October 31, 2000, and continuing through November 20, 2000, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121, *et seq.*, as amended by the Disaster Mitigation Act of 2000, Pub. L. No. 106–390, 114 Stat. 1552 (2000) (Stafford Act), I, therefore, declare that such a major disaster exists in the State of Wyoming.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes, such amounts as

you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance and Hazard Mitigation in the designated areas and any other forms of assistance under the Stafford Act you may deem appropriate. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance or Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

Notice is hereby given that pursuant to the authority vested in the Director of the Federal Emergency Management Agency under Executive Order 12148, I hereby appoint Steven R. Emory of the Federal Emergency Management Agency to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the State of Wyoming to have been affected adversely by this declared major disaster:

The counties of Crook, Goshen, Platte and Weston for Public Assistance.

All counties within the State of Wyoming are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 83.537, Community Disaster Loans; 83.538, Cora Brown Fund Program; 83.539, Crisis Counseling; 83.540, Disaster Legal Services Program; 83.541, Disaster Unemployment Assistance (DUA); 83.542, Fire Suppression Assistance; 83.543, Individual and Family Grant (IFG) Program; 83.544, Public Assistance Grants; 83.545, Disaster Housing Program; 83.548, Hazard Mitigation Grant Program)

James L. Witt,

Director.

[FR Doc. 01–1027 Filed 1–11–01; 8:45 am]

BILLING CODE 6718–02–P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY:

Background

On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board of Governors of the Federal Reserve System (Board) its approval authority under the Paperwork Reduction Act, as per 5 CFR 1320.16, to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board under conditions set forth in 5 CFR 1320 Appendix A.1. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the OMB 83–Is and supporting statements and approved collection of information instruments are placed into OMB's public docket files. The Federal Reserve may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Request for Comment on Information Collection Proposal(s)

The following information collections, which are being handled under this delegated authority, have received initial Board approval and are hereby published for comment. At the end of the comment period, the proposed information collections, along with an analysis of comments and recommendations received, will be submitted to the Board for final approval under OMB delegated authority. Comments are invited on the following:

a. whether the proposed collection of information is necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility;

b. the accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. ways to enhance the quality, utility, and clarity of the information to be collected; and

d. ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments must be submitted on or before March 12, 2001.

ADDRESSES: Comments, which should refer to the OMB control number or agency form number, should be addressed to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551, or mailed electronically to regs.comments@federalreserve.gov. Comments addressed to Ms. Johnson may be delivered to the Board's mail room between 8:45 a.m. and 5:15 p.m., and to the security control room outside of those hours. Both the mail room and the security control room are accessible from the courtyard entrance on 20th Street between Constitution Avenue and C Street, NW. Comments received may be inspected in room M–P–500 between 9 a.m. and 5 p.m., except as provided in section 261.14 of the Board's Rules Regarding Availability of Information, 12 CFR 261.14(a).

A copy of the comments may also be submitted to the OMB desk officer for the Board: Alexander T. Hunt, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: A copy of the proposed form and instructions, the Paperwork Reduction Act Submission (OMB 83–I), supporting statement, and other documents that will be placed into OMB's public docket files once approved may be requested from the agency clearance officer, whose name appears below.

Mary M. West, Federal Reserve Board Clearance Officer (202–452–3829), Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may contact Diane Jenkins (202–452–3544), Board of Governors of the Federal Reserve System, Washington, DC 20551.

Proposal to approve under OMB delegated authority the extension for three years, without revision, of the following reports:

1. Report title: Monthly Report of Traveler's Checks Outstanding.

Agency form number: FR 2054.

OMB control number: n/a.

Frequency: Monthly.

Reporters: Seven major nonbank issuers of travelers checks in the United States

Annual reporting hours: 84.

Estimated average hours per response: 1.0.

Number of respondents: 7.

Small businesses are not affected.

General description of report: This information collection is voluntary (12 U.S.C. 353 *et seq.*) and is given confidential treatment (5 U.S.C. 552(b)(4)).

Abstract: This report collects, as of the end of each month, the total amount

outstanding of dollar-denominated traveler's checks issued by seven major nonbank issuers. The Federal Reserve uses these data in the computation of the nonbank traveler's check component of the monetary aggregates.

2. *Report titles:* Uniform Application for Municipal Securities Principal or Municipal Securities Representative Associated with a Bank Municipal Securities Dealer; Uniform Termination Notice for Municipal Securities Principal or Municipal Securities Representative Associated with a Bank Municipal Securities Dealer.

Agency form number: FR MSD–4, FR MSD–5.

OMB control number: 7100–0100, 7100–0101.

Frequency: On occasion.

Reporters: State member banks, bank holding companies, and foreign dealer banks engaging in activities as municipal securities dealers.

Annual reporting hours: 36 (FR MSD–4), 20 (FR MSD–5).

Estimated average hours per response: 1.00 (FR MSD–4), 0.25 (FR MSD–5).

Number of respondents: 36 (FR MSD–4), 80 (FR MSD–5).

Small businesses are not affected.

General description of report: These information collections are mandatory (15 U.S.C. 78o–4, 78q, and 78u) and are given confidential treatment (5 U.S.C. 552(b)(6)).

Abstract: The MSD–4 collects information, such as personal history and professional qualifications, on an employee whom the bank wishes to assume the duties of a municipal securities principal or representative. The FR MSD–5 collects the date of, and reason for, termination of such an employee.

3. *Report titles:* Notice by Financial Institutions of Government Broker or Government Securities Dealer Activities; Notice by Financial Institutions of Termination of Activities as a Government Securities Broker or Government Securities Dealer.

Agency form number: FR G–FIN, FR G–FINW.

OMB control number: 7100–0224.

Frequency: On occasion.

Reporters: State member banks, foreign banks, uninsured state branches or state agencies of foreign banks, commercial lending companies owned or controlled by foreign banks, and Edge corporations.

Annual reporting hours: 25 (FR G–FIN), 0.5 (FR G–FINW).

Estimated average hours per response: 1.00 (FR G–FIN), 0.25 (FR G–FINW).

Number of respondents: 25 (FR G–FIN), 2 (FR G–FINW).

Small businesses are affected.

General description of report: These information collections are mandatory (15 U.S.C. 78o–5(a)(1)(B)) and are not given confidential treatment.

Abstract: The Government Securities Act of 1986 (the Act) requires financial institutions to notify their appropriate regulatory authority of their intent to engage in government securities broker or dealer activities, to amend information submitted previously, and to record their termination of such activity. The Federal Reserve Board uses the information in its supervisory capacity to measure compliance with the Act.

Board of Governors of the Federal Reserve System, January 8, 2001.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 01–989 Filed 1–11–01; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

SUMMARY:

Background

Notice is hereby given of the final approval of proposed information collections by the Board of Governors of the Federal Reserve System (Board) under OMB delegated authority, as per 5 CFR 1320.16 (OMB Regulations on Controlling Paperwork Burdens on the Public). Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the OMB 83–Is and supporting statements and approved collection of information instruments are placed into OMB's public docket files. The Federal Reserve may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Mary M. West—Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202–452–3829)

OMB Desk Officer—Alexander T. Hunt—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, DC 20503 (202–395–7860)

Final Approval Under OMB Delegated Authority of the Extension for Three Years, Without Revision, of the Following Reports:

1. *Report title:* Domestic Branch Notification.

Agency form number: FR 4001.

OMB Control number: 7100–0097.

Frequency: On occasion.

Reporters: State member banks.

Annual reporting hours: 156 hours.

Estimated average hours per response: 30 minutes for expedited notifications; 1 hour for nonexpedited notifications.

Number of respondents: 169 expedited; 71 nonexpedited.

Small businesses are affected.

General description of report: This information collection is mandatory (12 U.S.C. 321) and is not given confidential treatment.

Abstract: The Federal Reserve System requires a state member bank to file a notification whenever it proposes to establish a domestic branch. There is no formal reporting form; banks notify the Federal Reserve by letter prior to making the proposed investment. The Federal Reserve uses the information to fulfill its statutory obligation to supervise state member banks.

2. *Report title:* Investment in Bank Premises Notification.

Agency form number: FR 4014.

OMB control number: 7100–0139.

Frequency: On occasion.

Reporters: State member banks.

Annual reporting hours: 3 hours.

Estimated average hours per response: 30 minutes.

Number of respondents: 5.

Small businesses are affected.

General description of report: This information collection is mandatory (12 U.S.C. 371d) and is not given confidential treatment.

Abstract: The Federal Reserve System requires a state member bank to file a notification whenever it proposes to make an investment in bank premises that results in its total bank premises investment exceeding its capital stock and surplus or, if the bank is well capitalized and in good condition, exceeding 150 percent of its capital stock and surplus. There is no formal reporting form; banks notify the Federal Reserve by letter fifteen days prior to making the proposed investment. The Federal Reserve uses the information to fulfill its statutory obligation to supervise state member banks.

3. *Report title:* Semiannual Report of Derivatives Activity.

Agency form number: FR 2436.

OMB control number: 7100–0286.

Frequency: Semiannual.

Reporters: large U.S. dealers of over-the-counter (OTC) derivatives.

Annual reporting hours: 1,800 hours.

Estimated average hours per response: 100.

Number of respondents: 9.

Small businesses are not affected.

General description of report: This information collection is voluntary (12 U.S.C. 248 (a), 353–359, and 461) and is given confidential treatment (5 U.S.C. 552 (b) (4)).

Abstract: The FR 2436 collects derivatives market statistics from a sample of nine large U.S. dealers of over-the-counter (OTC) derivatives. Data are collected on notional amounts and gross market values of the volumes of broad categories of foreign exchange, interest rate, equity- and commodity-linked OTC derivatives instruments across a range of underlying currencies, interest rates, and equity markets.

This collection of information complements the ongoing triennial Survey of Foreign Exchange and Derivatives Market Activity (FR 3036). The FR 2436 collects similar data on the outstanding volume of derivatives, but not on derivatives turnover. As with the FR 3036, the Federal Reserve conducts this report in coordination with other central banks and forwards the aggregated data furnished by U.S. reporters to the Bank of International Settlements (BIS), which publishes global market statistics that are aggregations of national data.

4. *Report title:* Reports Related to Securities Issued by State Member Banks as Required by Regulation H.

Agency form number: Reg H–1.

OMB control number: 7100–0091.

Frequency: On occasion.

Reporters: State member banks.

Annual reporting hours: 2,085 hours.

Estimated average hours per response: 5.11.

Number of respondents: 24.

Small businesses are not affected.

General description of report: This information collection is mandatory (15 U.S.C. 781(i)) and is not given confidential treatment.

Abstract: The Federal Reserve's Regulation H requires certain state member banks to submit information relating to their securities to the Board of Governors of the Federal Reserve System on the same forms that bank holding companies and nonbank entities use to submit similar information to the Securities and Exchange Commission (SEC). The information is primarily used for public disclosure and is available to the public upon request.

Board of Governors of the Federal Reserve System, January 8, 2001.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 01–990 Filed 1–11–01; 8:45 am]

BILLING CODE 6210–01–P

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. Additional information on all bank holding companies may be obtained from the National Information Center website at www.ffiec.gov/nic/.

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 February 5, 2001.

A. Federal Reserve Bank of Chicago (Phillip Jackson, Applications Officer) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. Ames National Corporation, Ames, Iowa; to retain 5.39 percent of investment in Mahaska Investment Company, Oskaloosa, Iowa, and obtain approval to acquire a total of 10 percent of the voting shares of Mahaska Investment Company, Oskalossa, Iowa, and its subsidiary banks, Mahaska State Bank, Oskaloosa, Iowa, and Pella State Bank, Pella, Iowa.

In connection with this application, Applicant also has applied to acquire Midwest Federal Savings & Loan Association of Eastern Iowa, Burlington, Iowa, Central Valley Bank, Ottumwa, Iowa, and thereby engage in operating savings associations, pursuant to § 225.28(b)(4)(ii) of Regulation Y.

Board of Governors of the Federal Reserve System, January 8, 2001.

Robert deV. Frierson

Associate Secretary of the Board.

[FR Doc. 01–991 Filed 1–11–01; 8:45 am]

BILLING CODE 6210–01–S

GENERAL SERVICES ADMINISTRATION

Office of Communications; Cancellation of a Standard Form

AGENCY: General Services Administration.

ACTION: Notice.

SUMMARY: The Department of Agriculture and the Department of Interior has cancelled the following Optional Form because of low usage: OF 289, Property Loss or Damage Report—Fire Suppression.

DATES: Effective upon publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Barbara Williams, General Services Administration, (202) 501–0581.

Dated: January 2, 2001.

Barbara M. Williams,

Deputy Standard and Optional Forms Management Officer.

[FR Doc. 01–1104 Filed 1–11–01; 8:45 am]

BILLING CODE 6820–34–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 98E–0490]

Determination of Regulatory Review Period for Purposes of Patent Extension; Synvisc Hylan G–F 20 (5,099,013)®

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for Synvisc Hylan G–F 20 (5,099,013)® and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the

Commissioner of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that medical device.

ADDRESSES: Submit written comments and petitions to the Dockets Management Branch (HFA 305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Claudia V. Grillo, Regulatory Policy Staff (HFD–007), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–594–5645.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Public Law 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For medical devices, the testing phase begins with a clinical investigation of the device and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the device and continues until permission to market the device is granted. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Commissioner of Patents and Trademarks may award (half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a medical device will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(3)(B).

FDA recently approved for marketing the medical device Synvisc Hylan G–F 20 (5,099,013)®. Synvisc Hylan G–F 20 (5,099,013)® is indicated for the treatment of pain in osteoarthritis of the knee in patients who have failed to respond adequately to conservative nonpharmacologic therapy and to simple analgesics (e.g., acetaminophen). Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for Synvisc Hylan G–F 20 (5,099,013)® (U.S. Patent No. 5,099,013) from Biomatrix, Inc., and the Patent and Trademark Office requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated December 11, 1998, FDA advised the Patent and Trademark Office that this medical device had undergone a regulatory review period and that the approval of Synvisc Hylan G–F 20 (5,099,013)® represented the first permitted commercial marketing or use of the product. Shortly thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for Synvisc Hylan G–F 20 (5,099,013)® is 2,949 days. Of this time, 1,783 days occurred during the testing phase of the regulatory review period, while 1,166 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date a clinical investigation involving this device was begun:* July 14, 1989. FDA has verified the applicant's claim that the date the investigational device exemption (IDE) required under section 520(g) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360j(g)) for human tests to begin became effective July 14, 1989.

2. *The date the application was initially submitted with respect to the device under section 515 of the act (21 U.S.C. 360e):* May 31, 1994. FDA has verified the applicant's claim that the premarket approval application (PMA) for Synvisc Hylan G–F 20 (5,099,013)® (PMA P940015) was initially submitted May 31, 1994.

3. *The date the application was approved:* August 8, 1997. FDA has verified the applicant's claim that PMA P940015 was approved on August 8, 1997.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 396 days of patent term extension.

Anyone with knowledge that any of the dates as published is incorrect may submit to the Dockets Management Branch (address above) written comments and ask for a redetermination by March 13, 2001. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by July 11, 2001. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30. Comments and petitions should be submitted to the Dockets Management Branch. Three copies of any information 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. Comments and petitions may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 20, 2000.

Jane A. Axelrad,

Associate Director for Policy, Center for Drug evaluation and Research.

[FR Doc. 01–974 Filed 1–11–01; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Anti-Infective Drugs Advisory Committee; Amendment of Notice

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an amendment to the notice of meeting of the Anti-Infective Drugs Advisory Committee. This meeting was announced in the **Federal Register** of December 27, 2000 (65 FR 81874). The amendment is being made to cancel the entire session on January 29, 2001. This meeting will be open to the public. There are no other changes.

FOR FURTHER INFORMATION CONTACT: Thomas H. Perez, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–6758, e-mail: PerezT@cder.fda.gov, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 12530. Please call the Information Line for up-to-date information on this meeting.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of December 27, 2000 (65 FR 81874), FDA announced that a meeting of the Anti-Infective Drugs Advisory Committee would be held on January 29 and 30, 2001. On page 81874, beginning in the first column, the *Date and Time*, *Location*, *Agenda*, and *Procedure* portions of this meeting are amended to read as follows:

Date and Time: The meeting will be held on January 30, 2001, 8 a.m. to 6 p.m.

Location: Holiday Inn, The Ballrooms, Two Montgomery Ave., Gaithersburg, MD.

Agenda: The committee will consider the safety and efficacy of a new drug application (NDA) 50–755, Augmentin ES™ (amoxicillin/clavulanate) 90 milligrams per kilograms per day, SmithKline Beecham Pharmaceuticals, for the treatment of pediatric patients with acute otitis media due to penicillin resistant *Streptococcus pneumoniae*.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person by January 22, 2001. Oral presentations from the public will be scheduled between approximately 2:45 p.m. to 3:45 p.m. Time allotted for each presentation may be limited. Those desiring to make formal oral presentations should notify the contact person before January 22, 2001, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: January 5, 2001.

Linda A. Suydam,

Senior Associate Commissioner.

[FR Doc. 01–1056 Filed 1–11–01; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[Document Identifier: HCFA–R–26]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Health Care Financing Administration, DHHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Health Care Financing Administration (HCFA), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Type of Information Request: Extension of a currently approved collection; Title of Information Collection: Clinical Laboratory Improvement Amendments (CLIA) and the ICRs contained in the supporting regulations in 42 CFR 493.1–.2001; Form Number: HCFA–R–26 (OMB approval #: 0938–0612); Use: The ICRs referenced in 42 CFR part 493 outline the requirements necessary to determine an entity's compliance with CLIA. CLIA requires laboratories that perform testing on human beings to meet performance requirements (quality standards) in order to be certified by HHS; Frequency:Other: As needed; Affected Public; Business or other for-profit, Not-for-profit institutions, Federal government, State, local or tribal gov't; Number of Respondents: 149,700; total Annual Responses: 700,650; Total Annual Hours Requested: 10,230,714.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access HCFA's Web Site address at http://www.hcfa.gov/regs/prdact95.htm, or E-mail your request, including your address, phone number, OMB number, and HCFA document identifier, to Paperwork@hcfa.gov, or call the Reports Clearance Office on (410) 786–1326. Written comments and recommendations for the proposed information collections must be mailed within 60 days of this notice directly to the HCFA Paperwork Clearance Officer designated at the following address: HCFA, Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards, Attention: Julie Brown, Room N2–14–26, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

John P. Burke III,

HCFA Reports Clearance Officer, HCFA Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards.

[FR Doc. 01–1069 Filed 1–11–01; 8:45 am]

BILLING CODE 4120–03–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[Docket Identifier: HCFA–1500]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Health Care Financing Administration, DHHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Health Care Financing Administration (HCFA), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Type of Information Request: Extension of a currently approved collection; Title of Information Collection; Medicare/Medicaid Health Insurance Common Claim Form, Instructions, and Supporting Regulations: 42 CFR 414.40, 424.32, 424.44; Form Number: NCFA–1500, HCFA–1490U, HCFA–1490S (OMB approval #: 0938–0008); Use: This form is a standardized form for use in the Medicare/Medicaid programs to apply for reimbursement for covered services. In addition, it reduces cost and administrative burdens associated with claims since only one coding system is used and maintanined; Frequency: On occasion; Affected Public: Business or other for-profit, Not-for-profit institutions; Number of Respondents: 1,321,417; Total Annual Responses: 1,321,417; Total Annual Hours Requested: 44,189,007.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access HCFA's Web Site address at http://www.hcfa.gov/regs/prdact95.htm, or E-mail your request, including your address, phone number, OMB number, and HCFA document identifier, to Paperwork@hcfa.gov, or call the Reports

Clearance Office on (410) 786–1326. Written comments and recommendations for the proposed information collections must be mailed within 60 days of this notice directly to the HCFA Paperwork Clearance Officer designated at the following address: HCFA, Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards, Attention: Julie Brown, Room N2–14–26, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

John P. Burke III,

HCFA Reports Clearance Officer, HCFA Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards.

[FR Doc. 01–1070 Filed 1–11–01; 8:45 am]

BILLING CODE 4120–03–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[Docket Identifier: HCFA–10006]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Health Care Financing Administration, DHHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Health Care Financing Administration (HCFA), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Type of Information Request: Extension of a currently approved collection; Title of Information Collection: TWWIIA Demonstration to Maintain Independence and Employment Grants; Form No.: HCFA–10006 (OMB approval #: 0938–0799); Use: Section 204 of the Ticket To Work and Work Incentives Act provides for the establishment of grants for states that develop and implement demonstration programs designed to support working people with physical or mental impairments that without medical assistance will result in disability. State agencies will be applying for these grants; Frequency: Annually; Affected Public: State, local or tribal gov't; Number of Respondents: 56; Total Annual Responses: 56; Total Annual Burden Hours: 5,600.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access HCFA's Web Site address at http://www.hcfa.gov/regs/prdact95.htm, or E-mail your request, including your address, phone number, OMB number, and HCFA document identifier, to Paperwork@hcfa.gov, or call the Reports Clearance Office on (410) 786–1326. Written comments and recommendations for the proposed information collections must be mailed within 30 days of this notice directly to the OMB desk officer: OMB Human Resources and Housing Branch, Attention: Wendy Taylor, New Executive Office Building, Room 10235, Washington, DC 20503.

John P. Burke III,

HCFA Reports Clearance Officer, HCFA Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards.

[FR Doc. 01–1067 Filed 1–11–01; 8:45 am]

BILLING CODE 4120–03–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[Document Identifier: HCFA–R–315]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Health Care Financing Administration, DHHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Health Care Financing Administration (HCFA), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Type of Information Request: Extension of a currently approved collection; Title of Information Collection: Collection of Data on Physician Encounters from Medicare+Choice Organizations; Form No.: HCFA–R–315 (OMB approval #: 0938–0805); Use: HCFA requires physician encounter data from Medicare+Choice organizations to develop and implement a risk adjustment payment methodology as required by the Balanced Budget Act of 1997; Frequency: Monthly; Affected Public: Business and other for-profit, Not-for-profit institutions; Number of Respondents: 300; Total Annual Responses: 75,600,000; Total Annual Burden Hours: 938,700.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access HCFA's Web Site address at http://www.hcfa.gov/regs/prdact95.htm, or E-mail your request, including your address, phone number, OMB number, and HCFA document identifier, to Paperwork@hcfa.gov, or call the Reports Clearance Office on (410) 786–1326. Written comments and recommendations for the proposed information collections must be mailed within 30 days of this notice directly to the OMB desk officer: OMB Human Resources and Housing Branch, Attention: Wendy Taylor, New Executive Office Building, Room 10235, Washington, DC 20503.

John P. Burke III,

HCFA Reports Clearance Officer, HCFA Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards.

[FR Doc. 01–1068 Filed 1–11–01; 8:45 am]

BILLING CODE 4120–03–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Vaccine Injury Compensation Program; List of Petitions Received

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Health Resources and Services Administration (HRSA) is

publishing this notice of petitions received under the National Vaccine Injury Compensation Program (''the Program''), as required by section 2112(b)(2) of the Public Health Service (PHS) Act, as amended. While the Secretary of Health and Human Services is named as the respondent in all proceedings brought by the filing of petitions for compensation under the Program, the United States Court of Federal Claims is charged by statute with responsibility for considering and acting upon the petitions.

FOR FURTHER INFORMATION CONTACT: For information about requirements for filing petitions, and the Program in general, contact the Clerk, United States Court of Federal Claims, 717 Madison Place, NW., Washington, DC 20005, (202) 219–9657. For information on HRSA's role in the Program, contact the Director, National Vaccine Injury Compensation Program, 5600 Fishers Lane, Room 8A–46, Rockville, MD 20857; (301) 443–6593.

SUPPLEMENTARY INFORMATION: The Program provides a system of no-fault compensation for certain individuals who have been injured by specified childhood vaccines. Subtitle 2 of title XXI of the PHS Act, 42 U.S.C. 300aa–10 *et seq.*, provides that those seeking compensation are to file a petition with the U.S. Court of Federal Claims and to serve a copy of the petition on the Secretary of Health and Human Services, who is named as the respondent in each proceeding. The Secretary has delegated her responsibility under the Program to HRSA. The Court is directed by statute to appoint special masters who take evidence, conduct hearings as appropriate, and make initial decisions as to eligibility for, and amount of, compensation.

A petition may be filed with respect to injuries, disabilities, illnesses, conditions, and deaths resulting from vaccines described in the Vaccine Injury Table (the Table) set forth at section 2114 of the PHS Act or as set forth at 42 CFR 100.3, as applicable. This Table lists for each covered childhood vaccine the conditions which will lead to compensation and, for each condition, the time period for occurrence of the first symptom or manifestation of onset or of significant aggravation after vaccine administration. Compensation may also be awarded for conditions not listed in the Table and for conditions that are manifested after the time periods specified in the Table, but only if the petitioner shows that the condition was caused by one of the listed vaccines.

Section 2112(b)(2) of the PHS Act, 42 U.S.C. 300aa–12(b)(2), requires that the Secretary publish in the **Federal Register** a notice of each petition filed. Set forth below is a list of petitions received by HRSA on July 7, 2000, through September 27, 2000.

Section 2112(b)(2) also provides that the special master ''shall afford all interested persons an opportunity to submit relevant, written information'' relating to the following:

1. The existence of evidence ''that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition,'' and

2. Any allegation in a petition that the petitioner either:

(a) ''Sustained, or had significantly aggravated, any illness, disability, injury, or condition not set forth in the Table but which was caused by'' one of the vaccines referred to in the Table, or

(b) ''Sustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Table the first symptom or manifestation of the onset or significant aggravation of which did not occur within the time period set forth in the Table but which was caused by a vaccine'' referred to in the Table.

This notice will also serve as the special master's invitation to all interested persons to submit written information relevant to the issues described above in the case of the petitions listed below. Any person choosing to do so should file an original and three (3) copies of the information with the Clerk of the U.S. Court of Federal Claims at the address listed above (under the heading ''For Further Information Contact''), with a copy to HRSA addressed to Director, Bureau of Health Professions, 5600 Fishers Lane, Room 8–05, Rockville, MD 20857. The Court's caption (Petitioner's Name v. Secretary of Health and Human Services) and the docket number assigned to the petition should be used as the caption for the written submission.

Chapter 35 of title 44, United States Code, related to paperwork reduction, does not apply to information required for purposes of carrying out the Program.

List of Petitions

1. Cathryn Audet on behalf of Joshiah Audet, Portland, Maine, Court of Federal Claims Number 00–0376V
2. Kriste Sweeney, Chicago, Illinois, Court of Federal Claims Number 00–0378V
3. Chandria and Lonnie Finley on behalf of Dylon Tyler Finley, Pueblo, Colorado, Court of Federal Claims Number 00–0405V
4. Colleen Patricia Berry, Reston, Virginia, Court of Federal Claims Number 00–0407V
5. Margaret D. Millar, Moline, Illinois, Court of Federal Claims Number 00–0409V
6. Deena and Tony Beard on behalf of Aaron Beard, Louisville, Kentucky, Court of Federal Claims Number 00–0417V
7. Anthony Tedesco, Mt. Clemens, Michigan, Court of Federal Claims Number 00–0419V
8. Gwennette Grisson on behalf of Melik Swans, Philadelphia, Pennsylvania, Court of Federal Claims Number 00–0421V
9. Kelly and William Gertz on behalf of Morgan Gertz, Deceased, Loveland, Colorado, Court of Federal Claims Number 00–0422V
10. Kwok Yam Lee on behalf of Michael Kak-Sin Lee, Oakland, California, Court of Federal Claims Number 00–0423V
11. Heather George on behalf of Kelcey L. Gomez, Grand Haven, Michigan, Court of Federal Claims Number 00–0425V
12. Patricia and Andrew Walther on behalf of Patricia Ann Walther, Fort Stewart, Georgia, Court of Federal Claims Number 00–0426V
13. Melissa Jessee on behalf of Justin Jessee, Norton, Virginia, Court of Federal Claims Number 00–0448V
14. Thomas A. Esnough on behalf of Thomas A. Esnough, Jr., Omaha, Nebraska, Court of Federal Claims Number 00–0450V
15. Tina and Raymond Dilts on behalf of Jacob T. Dilts, Chesapeake, Virginia, Court of Federal Claims Number 00–0464V
16. Allison and James Jackson on behalf of Korey Lynn Jackson, Coral, Florida, Court of Federal Claims Number 00–0469V
17. Marion Tanner on behalf of Aaron Tanner, Nederland, Texas, Court of Federal Claims Number 00–0470V
18. Dawn White on behalf of Michael White, Houston, Texas, Court of Federal Claims Number 00–0476V
19. Josephine and Alma Leithead on behalf of Julian Leithead, Deceased, Springerville, Arizona, Court of Federal Claims Number 00–0481V
20. Darlene Goodman on behalf of Tiffany Goodman, Deceased, Babylon, New York, Court of Federal Claims Number 00–0484V
21. Carolyn Collins-Anthonsen, Dolton, Illinois, Court of Federal Claims Number 00–0485V

22. Leticia E. Vega-Christiansen, Antioch, California, Court of Federal Claims Number 00–0488V
23. Jacque and Dick Ransom on behalf of Jasper Maulden, Deceased, Rockingham, North Carolina, Court of Federal Claims Number 00–0494V
24. Stephanie Tedesco on behalf of Bianca Tedesco, Danbury, Connecticut, Court of Federal Claims Number 00–0511V
25. Patricia and Paul Bell on behalf of Katherine Bell, Miami, Florida, Court of Federal Claims Number 00–0515V
26. Danielle Beers, Fort Wainwright, Alaska, Court of Federal Claims Number 00–0530V
27. Maria Cristina Veliz on behalf of Joshua Guerra, Miami, Florida, Court of Federal Claims Number 00–0535V
28. Stacy and Frank Stratman on behalf of Hayden Stratman, Vienna, Virginia, Court of Federal Claims Number 00–0536V
29. Alicia Alba on behalf of Raymond Alba, Vienna, Virginia, Court of Federal Claims Number 00–0537V
30. Shannon and Gary White on behalf of Mitchel Trenton White, Kalispell, Montana, Court of Federal Claims Number 00–0546V
31. Pamela J. Curtis, Houston, Texas, Court of Federal Claims Number 00–0548V
32. Cheryl and Michael Kulkusky on behalf of Kody Kulkusky, Taneytown, Maryland, Court of Federal Claims Number 00–0549V
33. Becky and Gregory Lilly on behalf of Trent Malcolm Lilly, Portage, Michigan, Court of Federal Claims Number 00–0550V
34. Christopher Peeler on behalf of Robert Peeler, Indianapolis, Indiana, Court of Federal Claims Number 00–0552V
35. Malicia Lorraine and Gladstone Tulloch on behalf of Natalia Destiny Tulloch, Deceased, Orlando, Florida, Court of Federal Claims Number 00–0556V
36. Susan and Robert Vignato on behalf of Anthony Dean Vignato, Sterling, Virginia, Court of Federal Claims Number 00–0562V
37. Carolann Dougherty on behalf of Roseann Dougherty, Vienna, Virginia, Court of Federal Claims Number 00–0570V
38. Jane and Marc Jaszewski on behalf of Jillian Marie Jaszewski, St. Paul, Minnesota, Court of Federal Claims Number 00–0581V

Dated: January 8, 2001.

Claude Earl Fox,

Administrator.

[FR Doc. 01–1057 Filed 1–11–01; 8:45 am]

BILLING CODE 4160–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Health Professions Preparatory, Pregraduate, and Indian Health Professions Scholarship Programs

AGENCY: Indian Health Service, HHS.

ACTION: Notice of Availability of Funds for Health Professions Preparatory, Pregraduate, and Indian Health Professions Scholarship Programs for Fiscal Year (FY) 2001.

SUMMARY: The Indian Health Service (IHS) is publishing a Notice of Availability of Funds for Health Professions Preparatory, Pregraduate, and Indian Health Professions Scholarship Programs for Fiscal Year (FY) 2001.

The IHS announces the availability of approximately $3,593,000 to fund scholarships for the Health Professions Preparatory and Pregraduate Scholarship Programs for FY 2001 awards. These programs are authorized by section 103 of the Indian Health Care Improvement Act (IHCIA), Pub. L. 94–437, as amended by Pub. L. 100–713, Pub. L. 102–573, and Pub. L. 104–313.

The Indian Health Scholarship (Professions), authorized by section 104 of the IHCIA, Pub. L. 94–437, as amended by Pub. L. 100–713, by Pub. L. 102–573, and by Pub. L. 104–313 has approximately $8,372,000 available for FY 2001 awards. Full-time and part-time scholarships will be funded for each of the three scholarship programs.

Full-time and part-time scholarships will be funded for each of the three scholarship programs.

The Indian Health Professions Preparatory Scholarship is listed as No. 93.123 in the office of Management and Budget *Catalog of Federal Domestic Assistance* (CFDA). The Health Professions Pregraduate Scholarship is listed as No. 93.971, and the Indian Health Scholarship (Professions) is listed as No. 93.972 in the CFDA.

The Public Health Service (PHS) is committed to achieving the health promotion and disease prevention objectives of *Healthy People 2010*, a PHS-led activity for setting priority areas. This program announcement is related to the priority area of Education and Community-Based Programs. Potential applicants may obtain a copy of *Healthy People 2010*, (Full Report; Stock No. 017–001–00474–0) or *Healthy People 2010* (Summary Report; Stock No. 017–001–00473–1) through the Superintendent of Documents, Government Printing Office, Washington, DC 20402–9325 (Telephone 202–783–3238).

DATE: The application deadline for both new and continuing applicants is April 1, 2001. If April 1 falls on the week-end, the application will be due on the following Monday. Applications shall be considered as meeting the deadline if they are received by the appropriate Scholarship Coordinator on the deadline date or postmarked on or before the deadline date.

(Applicants should request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.) Applications received after the announced closing date will be returned to the applicant and will not be considered for funding.

ADDRESSES: Application packets may be obtained by calling or writing to the addresses listed below. The application form number is IHS 856, 856–2 through 856–8, 815, 816, 818 (approved under OMB No. 0917–0006, expires 04/30/01).

IHS Area Office and States/Locality served	Scholarship coordinator/Address
Aberdeen Area IHS: Iowa, Nebraska, North Dakota, South Dakota	Ms. Lila Topalian, Scholarship Coordinator, Aberdeen Area IHS, Federal Building, Room 309, 115 4th Avenue, SE, Aberdeen, SD 57401, Tele: 605–226–7553.
Alaska Area Native Health Service: Alaska	Ms. Rea Bavilla, Scholarship Coordinator, Alaska Area IHS, 4141 Ambassador Drive, Rm. 349, Anchorage, Alaska 99508, Tele: 907–729–1332.
Alburquerque Area IHS:	

IHS Area Office and States/Locality served	Scholarship coordinator/Address
Colorado, New Mexico	Ms. Alvina Waseta, Scholarship Coordinator, Albuquerque Area IHS, 505 Homestead Road, NE, Albuquerque, NM 87110, Tele: 505–248–4807.
Bemidji Area IHS: Illinois, Indiana, Michigan, Minnesota, Wisconsin	Mr. Tony Buckanaga, Scholarship Coordinator, Bemidji Area IHS, 522 Minnesota Avenue, NW, Bemidji, MN 56601, Tele: 218–759–3415.
Billings Area IHS: Montana, Wyoming	Mr. Sandy Macdonald, Scholarship Coordinator, Billings Area IHS, Area Personnel Office, P.O. Box 36600, 2900 4th Avenue, North, Billings, MT 59103, Tele: 406–247–7213.
California Area IHS: California, Hawaii	Ms. Mona Celli, Scholarship Coordinator, California Area IHS, 650 Capitol Mall, 3rd Floor, Sacramento, CA 95814, Tele: 916–930–3981.
Nashville Area IHS: Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, District of Columbia.	Mr. Jesse Thomas, Scholarship Coordinator, Nashville Area IHS, 711 Stewarts Ferry Pike, Nashville, TN 37214, Tele: 615–736–2430.
Navajo Area IHS: Arizona, New Mexico, Utah	Ms. Roselinda Allison, Scholarship Coordinator, Navajo Area IHS, P.O. Box 9020, Window Rock, AZ 86515, Tele: 520–871–1358.
Oklahoma City Area IHS: Kansas, Missouri, Oklahoma	Ms. Jo Berryman, Scholarship Coordinator, Oklahoma City Area IHS, Five Corporate Plaza, 3625 N.W. 56th Street, Oklahoma City, OK 73112, Tele: 405–951–3939.
Phoenix Area IHS: Arizona, Nevada, Utah	Richard Gerry, Scholarship Coordinator, Phoenix Area IHS, Two Renaissance Square, 40 North Central Avenue, Suite #600, Phoenix, AZ 85004, Tele: 602–364–5220.
Portland Area IHS: Idaho, Oregon, Washington	Ms. Darlene Marcellay-Hyland, Scholarship Coordinator, Portland Area IHS, 1220 SW Third Avenue, Rm 440, Portland, OR 97204–2892, Tele: 503–326–2015.
Tucson Area IHS: Arizona, Texas	Ms. Malinda Paul, Scholarship Coordinator, Tucson Area IHS, 7900 South ''J.'' Stock Road, Tucson, AZ 85746, Tele: 520–295–2441.

FOR FURTHER INFORMATION CONTACT: Please address application inquiries to the appropriate Indian Health Service Area Scholarship Coordinator. Other programmatic inquiries may be addressed to Ms. Rose Jerue, Chief, Scholarship Branch, Indian Health Service, Twinbrook Metro Plaza, Suite 100, 12300 Twinbrook Parkway, Rockville, Maryland 20852; Telephone 301–443–6197. (This is not a toll-free number.) For grants information, contact Mr. Al Whiteman, Grants Management Officer, Grants Management Branch, Division of Acquisition and Grants Operations, Indian Health Service, Room 100, 12300 Twinbrook Parkway, Rockville, Maryland 20852; Telephone 301–443–5204. (This is not a toll-free number.)

A. General Program Purpose: These grants programs are intended to encourage American Indians and Alaska Natives to enter the health professions and to assure the availability of Indian health professions to serve Indians.

B. Eligibility Requirements: 1. The Health Professions Preparatory Scholarship awards are made to American Indians or Alaska Natives who meet the criteria in section 4(c) of the IHCIA, as amended, who have successfully completed high school education or high school equivalency and who have been accepted for enrollment in a compensatory, pre-professional general education course or curriculum. Support is limited to 2 years for full-time students and the part-time equivalent of 2 years not to exceed 4 years for part-time students.

2. The Health Professions Pregraduate Scholarship awards are made to American Indians or Alaska Natives who meet the criteria in section 4(c) of the IHCIA, as amended, who have successfully completed high school education or high school equivalency and who have been accepted for enrollment or are enrolled in an accredited pregraduate program leading to a baccalaureate degree in pre-medicine or pre-dentistry. Support is limited to 4 years for full-time students and the part-time equivalent of 4 years not to exceed 8 years for part-time students.

3. The Indian Health Scholarship (Professions) may be awarded only to an individual who is a member of a federally recognized tribe as provided by section 104, 4(c), and 4(d) of the IHCIA. Membership in a tribe recognized only by a state does not meet this statutory requirement. To receive an Indian Health Scholarship (Professions) an otherwise eligible individual must be enrolled in an appropriately accredited school and pursuing a course of study in a health profession as defined by section 4(n) of the IHCIA. Support is limited to 4 years for full-time students and the part-time equivalent of 4 years not to exceed 8 years for part-time students.

Awards for the Indian Health Scholarships (Professions) will be made in accordance with 42 CFR 36.330. Recipients shall incur a service obligation prescribed under section

338C of the Public Health Service Act (43 U.S.C. 244m) which shall be met by service:

(1) in Indian Health Service;

(2) in a program conducted under a contract or compact entered into under the Indian Self-Determination Act;

(3) in a program assisted under Title V of the Indian Health Care Improvement Act (Pub. L. 94–437) and its amendments; and

(4) in private practice of his or her profession, if the practice (a) is situated in a health professional shortage area, designated in regulations promulgated by the Secretary and (b) addresses the health care needs of a substantial number of Indians as determined by the Secretary in accordance with guidelines of the Service;

Pursuant to the Indian Health Amendments of 1992 (Pub. L. 104—313), a recipient of an Indian Health Professions Scholarship may, at the election of the recipient, meet his/her active duty service obligation prescribed under section 338c of the Public Health Service Act (42 U.S.C. 254m) by a program specified in options (1)–(4) above that:

(1) is located on the reservation of the tribe in which the recipient is enrolled; or

(ii) serves the tribe in which the recipient is enrolled.

In summary, all recipients of the Indian Health Scholarship (Professions) are reminded that recipients of this scholarship incur a service obligation. Moreover, this obligation shall be served at a facility determined by the Director, IHS, consistent with IHCIA, Pub. L. 94–437, as amended by Pub. L. 100–713, and Pub. L. 102–573.

C. *Fund Availability:* Both part-time and full-time scholarship awards will be made in accordance with regulations at 42 CFR Part 36.320, incorporated in the application materials, for Health Professions Preparatory Scholarship Program for Indians and 42 CFR Part 36.370, incorporated in the application materials, for Health Professions Pregraduate Scholarship Program for Indians. Approximately 238 awards, 100 of which are continuing, will be made under the Health Professions Preparatory and Pregraduate Scholarship Programs for Indians. The awards are for 10 months in duration and the average award to a full-time student is approximately $18,000. In FY 2001, approximately $1,500,000 is available for continuation awards and approximately $2,250,000 is available for new awards.

Approximately 393 awards, 179 of which are continuing, will be made under the Indian Health Scholarship (Professions) Program. Awards will be made to both full-time and part-time students. The awards are for 12 months in duration and the average award to a full-time student is for approximately $19,000. In FY 2001, approximately $3,410,000 is available for continuation awards, and $4,485,000 is available for new awards.

No more than 20% of available funds will be used for part-time scholarships this fiscal year. Students are considered part-time if they are enrolled for a minimum of 6 hours of instruction and are not considered in full-times status by their college/university. Documentation must be received from part-time applicants that their school and course curriculum allows less than full-time status.

D. *Criteria for Evaluation:* Applications will be evaluated against the following criteria:

1. Needs of the IHS. Applicants are considered for scholarship awards based on their desired career goals and how these goals relate to current Indian health manpower needs. Applications for each health career category are reviewed and ranked separately.

2. Academic Performance. Applicants are rated according to their academic performance as evidenced by transcripts and faculty evaluations. In cases where a particular applicant's school has a policy not to rank students academically, faculty members are asked to provide a personal judgement of the applicant's achievement. Health Professions applicants with a cumulative GPA below 2.0 are not eligible to apply.

3. Faculty/Employer Recommendations. Applicants are rated according to evaluations by faculty members and current and/or former employees regarding the applicant's potential in the chosen health related professions.

4. Stated Reasons for Asking for the Scholarship and Stated Career Goals. Applicants must provide a brief written explanation of reasons for asking for the scholarship and of career goals. The applicant's narrative will be judged on how well it is written and content.

5. Applicants who are closest to graduation or completion are awarded first. For example, senior and junior applicants under the Health Professions Pregraduate Scholarship receive funding before freshmen and sophomores.

E. *Priority Categories:* Regulations at 42 CFR 36.304 provide that the IHS shall, from time to time, publish a list of health professions eligible for consideration for the award of Indian Health Professions Preparatory and Pregraduate Scholarships and Indian Health Scholarships (Professions). Section 104(b)(1) of the IHCIA, as amended by the Indian Health Care Amendment of 1988, Pub. L. 100–713, authorizes the IHS to determine specific health professions for which Indian Health Scholarships will be awarded. The list of priority health professions that follow, by scholarship program, and based upon the needs of the IHS as well as upon the needs of the American Indians and Alaska Natives for additional service by specific health profession.

1. Health Professions Preparatory Scholarship Scholarships. Below is the list of disciplines to be supported and priority is based on academic level:

A. Pre-Dietetics.
B. Pre-Engineering.
C. Pre-Medical Technology.
D. Pre-Nursing.
E. Pre-Pharmacy.
F. Pre-Physical Therapy.
G. Pre-Social Work (Jr and Sr undergraduate years).

2. Health Professions Pregraduate Scholarships. Below is the list of disciplines to be supported and priority is based on academic level: Senior, Junior, Sophomore, Freshman:

A. Pre-Dentistry.
B. Pre-Medicine.

3. Indian Health Scholarships (Professions). Below is a list of disciplines to be supported and priority is based on academic level, unless specified: Graduate, Senior, Junior, Sophomore, Freshman:

A. Associate Degree Nurse.
B. Chemical Dependency Counseling.
C. Civil Engineering: B.S.
D. Clinical Psychology: Ph.D. only
E. Coding Specialist: Certificate
F. Dentistry
G. Dietician: B.S.
H. Environmental Engineering: B.S.
I. Health Education: Masters level only.
J. Health Records: R.H.I.T. and R.H.I.A.
K. Injury Prevention Specialist
L. Medical Social Work: Masters level only.
M. Medical Technology: B.S.
N. Medicine: Allopathic and Osteopathic.
O. Nurse: B.S.*
P. Nurse: M.S.*
Q. Nurse: R.N.A.

* (Priority consideration will be given to Registered Nurses employed by the Indian Health Service; in a program assisted under a contract entered into under the Indian Self-Determination Act; or in a program assisted under Title V of the Indian Health Care Improvement Act.)

R. Optometry.

S. Para-Optometric.
T. Pharmacy: B.S., Pharm D.
U. Physician Assistant.
V. Physical Therapy.
W. Podiatry: D.P.M.
X. Public Health: M.P.H. only (Applicants must be enrolled or accepted in a school of public health in specialty areas such as Dietetics and Community Development in health).
Y. Public Health Nutrition: Masters level only.
Z. Radiologic Technology: Certificate, Associate, and B.S.
AA. Respiratory Therapy: Associate
BB. X-Ray Ultrasonography.

Interested individuals are reminded that the list of eligible health and allied health professions is effective for applicants for the 2001–2002 academic year. These priorities will remain in effect until superseded. Applicants for health and allied health professions not on the above priority list will be considered pending the availability of funds and dependent upon the availability of qualified applicants in the priority areas.

Dated: January 3, 2001.

Michael H. Trujillo,

Assistant Surgeon General, Director.

[FR Doc. 01–1058 Filed 1–11–01; 8:45 am]

BILLING CODE 4160–16–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552(c)(4) and 552(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Clinical Trials Review Committee.

Date: February 25–27, 2001.

Time: 7:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn, 8777 Georgia Avenue; Silver Spring, MD 20910.

Contact Person: Joyce A. Hunter, PhD, Review Branch, Room 7192, Division of Extramural Affairs, National Heart, Lung, and Blood Institute, National Institutes of Health, Bethesda, MD 20892–7924, 301/435–0277.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Reserach; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health HHS)

Dated: January 5, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 01–967 Filed 1–11–01; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the Board of Scientific Counselors, NIEHS.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Institute of Environmental Health Sciences, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, NIEHS.

Date: February 19–21, 2001.

Closed: February 19, 2001, 8 pm to 9:30 pm.

Agenda: To review and evaluate programmatic and personnel issues.

Place: Doubletree Guest Suites, 2515 Meridian Parkway, Research Triangle Park, NC 27709.

Open: February 20, 2001, 8:30 am to 5 pm.

Agenda: An overview of the organization and conduct of research in the Epidemiology Branch; and a Tenure Review Presentation.

Place: Nat. Institute of Environmental Health Sciences, South Campus, Conference Rooms 101 ABC, 111 T.W. Alexander Drive, Research Triangle Park, NC 27709.

Closed: February 21, 2001, 8:30 am to Adjournment.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: Nat. Institute of Environmental Health Sciences, South Campus, Conference Rooms 101 ABC, 111 T.W. Alexander Drive, Research Triangle Park, NC 27709.

Contact Person: Paul Nettesheim, MD, DMS, Acting Scientific Director, Office of the Scientific Director, Nat. Institute of Environmental Health Sciences, National Institutes of Health, Mail Drop A2–09, 111 T.W. Alexander Drive, Research Triangle Park, NC 27709, 919/541–3205.

(Catalogue of Federal Domestic Assistance Program Nos. 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing; 93.115, Biometry and Risk Estimation—Health Risks for Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143; NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences, National Institutes of Health, HHS)

Dated: January 5, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 01–958 Filed 1–11–01; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis And Musculoskeletal And Skin Disease; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussion could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel.

Date: January 29, 2001.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate contract proposals.

Place: 45 Natcher Bldg., Rm 5As.25u, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Tracy A. Shahan, PhD, Scientific Review Administrator, National Institutes of Health/NIAMS, Natcher Bldg., Room 5AS25H, Bethesda, MD 20892, (301) 594–4952.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: January 5, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 01–959 Filed 1–11–01; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6) Title U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Allergy, Immunology, and Transplantation Research Committee.

Date: January 30–31, 2001.

Time: January 30, 2001, 1:30 pm to 5 pm.

Agenda: To review and evaluate grant applications.

Place: Monterey Beach Hotel, 2600 Sand Dunes Drive, Monterey, CA 93940.

Time: January 31, 2001, 8:00 am to adjournment.

Agenda: To review and evaluate grant applications.

Place: Monterey Beach Hotel, 2600 Sand Dunes Drive, Monterey, CA 93940.

Contact Person: Ken Wasserman, PHD, Scientific Review Administrator, Scientific Review Program; Division of Extramural Activities, NIAID, NIH, Room 2217, 6700–B Rockledge Drive, 7610, Bethesda, MD, 301 496–2550, kw159p@nih.gov.

(Catalog of Federal Domestic Assitance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: January 5, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Comittee Policy.

[FR Doc. 01–960 Filed 1–11–01; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel.

Date: March 1, 2001.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, MD 20814.

Contact Person: Yen Li, PhD, Scientific Review Administrator, Scientific Review Program, Division of Extramural Activities, NIAID, NIH, Room 2217, 6700–B Rockledge Drive, MSC 7610, Bethesda, MD 20892–7610, 301 496–2550, yli@niaid.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: January 5, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 01–961 Filed 1–11–01; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Disease, Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552(b)(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel.

Date: February 16, 2001.

Time: 8:30 am to 3 pm.

Agenda: To review and evaluate contract proposals.

Place: Holiday Inn—Gaithersburg, 2 Montgomery Village Avenue, Gaithersburg, MD 20879,

Contact Person: Vassil S. Georgiev, PhD, Scientific Review Administrator, Scientific Review Program, Division of Extramural Activities, NIAID, NIH, Room 2217, 6700–B Rockledge Drive, MSC, 7610, Bethesda, MD 20892–7610, 301–496–2550.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: January 5, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 01–962 Filed 1–11–01; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel.

Date: February 7–9, 2001.

Time: 8:30 am to 5 pm.

Agenda: To review and evaluate grant applications.

Place: Georgetown Suites, 1000 29th Street, N.W., Washington, DC 20007.

Contact Person: Priti Mehrotra, PhD, PhD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, Bethesda, MD 20892, 301–496–2550, pm158b@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: January 5, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 01–963 Filed 1–11–01; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Communication Disorders Review Committee.

Date: February 21–23, 2001.

Time: 8:00 am to 5:00 pm.

Agenda: To review and evaluate grant applications.

Place: The Hyatt Regency Hotel, One Bethesda Metro Center, Bethesda, MD 20841.

Contact Person: Melissa Stick, PhD, MPH, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, NIDCD/NIH, 6120 Executive Blvd., Bethesda, MD 20892, 301–496–8683.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: January 5, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 01–964 Filed 1–11–01; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Institute of Allergy and Infectious Diseases Special Emphasis Panel, February 8, 2001, 8:00 am to February 9, 2001, 5:00 pm, Holiday Inn Downtown DC, 1155 14th Street, NW, Washington, DC 20005 which was published in the **Federal Register** on December 19, 2000, 65 FR 79377.

The meeting will be held at the Bethesda Holiday Inn, Bethesda, Maryland. The meeting is closed to the public.

Dated: January 5, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 01–965 Filed 1–11–01; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Deafness and Other Communications Disorders Special Emphasis Panel.

Date: January 23, 2001.

Time: 3:30 pm to 4:30 pm.

Agenda: To review and evaluate contract proposals.

Place: 6120 Executive Blvd., Suite 400C, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Stanley C. Oaks, Jr., PhD, Scientific Review Branch, Division of Extramural Research, Executive Plaza South, Room 400C, 6120 Executive Blvd., Bethesda, MD 20892—7180, 301–496–8683.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: January 5, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 01–966 Filed 1–11–01; 8:45 am]

BILLING CODE 4140–01–U

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Advisory Council for Nursing Research, January 23, 2001, 1 p.m. to January 24, 2001, 1 p.m., Building 31C, Conference Room 10, National Institutes of Health, 31 Center Drive, Bethesda, MD, 20892 which was published in the **Federal Register** on December 12, 2000, FR 65 77654.

The meeting will be held in open session on January 23 from 1 p.m. to 5 p.m. and on January 24 from 9 a.m. to 10 a.m. The closed session begins on January 24 at 10 a.m. The meeting is partially Closed to the public.

Dated: January 5, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 01–968 Filed 1–11–01; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4650–N–01]

Notice of Submission of Proposed Information Collection to OMB; Mortgage Insurance Termination; Application for Premium Refund or Distributive Share Payment

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* February 12, 2001.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval number (2502–0414) 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, Q, Department of Housing and Urban Development, 451 Seventh Street, Southwest, Washington, DC 20410; e-mail Wayne_Eddins@HUD.gov; telephone(202) 708–2374. This is not a toll-number. Copies of the proposed forms and other available documents submitted to OMB may be obtained form 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 name and telephone number of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

This Notice Also Lists the Following Information

Title of Proposal: Mortgage Insurance Termination; Application for Premium Refund or Distributive Share Payment

OMB Approval Number: 2502–0414

Form Numbers: HUD–27050–A and HUD–27050–B

Description of the Need for the Information and its Proposed Use: The Mortgage Insurance Termination form is used by FHA-approved lenders to terminate FHA insurance to comply with HUD requirements. The Application for Premium Refund or Distributive Share Payment is used by homeowners to apply for the unearned portion of the mortgage insurance premium or a distributive share payment.

Respondents: Individuals or households, Business or other-for-profit

Frequency of Submission: On occasion

Reporting Burden:

Number of Respondents	×	Frequency of Response	×	Hours per Response	=	Burden Hours
391,500		2.06		0.16		129,700

Total Estimated Burden Hours: 129,700

Status: Reinstatement, without change

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: January 5, 2001.

Wayne Eddins,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 01–1001 Filed 1–11–01; 8:45 am]

BILLING CODE 4210–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4644–N–02]

Federal Property Suitable as Facilities to Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Clifford Taffet, room 7266, Department of Housing and Urban Development, 451 Seventh Street SW, Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1–800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or

made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Brian Rooney, Division of Property Management, Program Support Center, HHS, room 5B–41, 5600 Fishers Lane, Rockville, MD 20857; (301) 443–2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Clifford Taffet at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (*i.e.,* acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appr9priate landholding agencies at the following addresses: *AIR FORCE:* Ms. Barbara Jenkins, Air Force Real Estate Agency (Area-MI), Bolling Air Force Base, 112 Luke Ave., Suite 104, Building 5683, Washington, DC 20332–8020; (202) 767–4184; *COE*: Ms. Shirley Middleswarth, Army Corps of Engineers, Management & Disposal Division, Pulaski Building, Room 4224, 20 Massachusetts Ave., NW, Washington, DC 20314–1000; (202) 761–0515; *DOT:* Mr. Rugene Spruill, Space Management, SVC–140, Transportation Administrative Service, Center, Department of Transportation, 400 7th Street, SW Room 2310, Washington, DC 20590; (202) 366–4246; *GSA:* Mr. Brian K. Polly, Assistant Commissioner, General Services Administration, Office of Property Disposal, 18th and F Streets, NW, Washington, DC 20405; (202) 501–0386; *NAVY:* Mr. Charles C. Cocks, Director, Department of the Navy, Real Estate Policy Division, Naval Facilities Engineering Command, Washington Navy Yard, 1322 Patterson Ave., SE, Suite 1000, Washington, DC 20374–5065; (202) 685–9200; (These are not toll-free numbers).

Dated: January 4, 2001.

John D. Garrity,

Director, Office of Special Needs Assistance Programs.

Title V, Federal Surplus Property Program Federal Register Report for 1/12/01

Suitable/Available Properties

Buildings (by State)

Alaska

Bldg. 747
USCG Integrated Support Command
Nemetz Housing
Kodiak Co: AK 99615–
Landholding Agency: DOT
Property Number: 87200110001
Status: Excess
Comment: 4-plex, needs repair, presence of asbestos/lead paint, most recent use—residential, off-site use only.

Bldg. 750
USCG Integrated Support Command
Nemetz Housing
Kodiak Co: AK 99615–
Landholding Agency: DOT
Property Number: 87200110002
Status: Excess
Comment: 4-plex, needs repair, presence of asbestos/lead paint, most recent use—residential, off-site use only.

Bldg. 751
USCG Integrated Support Command
Nemetz Housing
Kodiak Co: AK 99615–
Landholding Agency: DOT
Property Number: 87200110003
Status: Excess
Comment: 4-plex, needs repair, presence of asbestos/lead paint, most recent use—residential, off-site use only.

Suitable/Available Properties

Buildings (by State)

Alaska

Bldg. 752
USCG Integrated Support Command
Nemetz Housing
Kodiak Co: AK 99615–
Landholding Agency: DOT
Property Number: 87200110004
Status: Excess
Comment: 4-plex, needs repair, presence of asbestos/lead paint, most recent use—residential, off-site use only.

Bldg. 753
USCG Integrated Support Command
Nemetz Housing
Kodiak Co: AK 99615–
Landholding Agency: DOT
Property Number: 87200110005
Status: Excess
Comment: 4-plex, needs repair, presence of asbestos/lead paint, most recent use—residential, off-site use only.

Bldg. 754
USCG Integrated Support Command
Nemetz Housing
Kodiak Co: AK 99615–
Landholding Agency: DOT
Property Number: 87200110006
Status: Excess
Comment: 4-plex, needs repair, presence of asbestos/lead paint, most recent use—residential, off-site use only.

Suitable/Available Properties

Buildings (by State)

Alaska

Bldg. 755
USCG Integrated Support Command
Nemetz Housing
Kodiak Co: AK 99615–
Landholding Agency: DOT
Property Number: 87200110007
Status: Excess
Comment: 4-plex, needs repair, presence of asbestos/lead paint, most recent use—residential, off-site use only.

Bldg. 759
USCG Integrated Support Command
Nemetz Housing
Kodiak Co: AK 99615–
Landholding Agency: DOT
Property Number: 87200110008
Status: Excess
Comment: 4-plex, needs repair, presence of asbestos/lead paint, most recent use—residential, off-site use only.

California

Bldg. 200
Naval Postgraduate School
Monterey Co: CA 93943–
Landholding Agency: Navy
Property Number: 77200110007
Status: Excess
Comment: 7390 sq. ft., needs rehab, presence of asbestos/lead paint, most recent use—police station.

Suitable/Available Properties

Buildings (by State)

California

Bldg. 205
Naval Postgraduate School
Monterey Co: CA 93943–
Landholding Agency: Navy
Property Number: 77200110008
Status: Excess
Comment: 3886 sq. ft., needs rehab, presence of asbestos/lead paint, most recent use—offices.

Bldg. 211
Naval Postgraduate School
Monterey Co: CA 93943–
Landholding Agency: Navy
Property Number: 77200110009
Status: Excess
Comment: 6329 sq. ft., needs rehab, presence of asbestos/lead paint, most recent use—offices.

Bldg. 228
Naval Postgraduate School
Monterey Co: CA 93943–
Landholding Agency: Navy
Property Number: 77200110010
Status: Excess
Comment: 6000 sq. ft., needs rehab, presence of asbestos/lead paint, most recent use—fitness center.

Suitable/Available Properties

Buildings (by State)

Hawaii

8 Bldgs.
Iroquois Point Navy Housing
Ewa Beach Co: HI 96706–
Location: #5404, 5409, 5415, 5441, 5403, 5411, 5413, 5435
Landholding Agency: Navy
Property Number: 77200110015
Status: Unutilized
Comment: 1808 to 2000 sq. ft., presence of asbestos/lead paint, most recent use—residential, off-site use only.

Indiana

Radio Tower
Myers Locks & Dam Project
Mt. Vernon Co: IN 47620–
Landholding Agency: COE
Property Number: 31200040002
Status: Excess
Comment: communication, off-site use only.

Towers #1 & #2
Newburgh Locks & Dam
Newburgh Co: IN 47630–
Landholding Agency: COE
Property Number: 31200040003
Status: Excess
Comment: radio towers, off-site use only.

Suitable/Available Properties

Buildings (by State)

Indiana

Radio Tower
Cagles Mill Project
Cloverdale Co: IN 47872–
Landholding Agency: COE
Property Number: 31200040004
Status: Excess
Comment: communication, off-site use only.

Radio Tower
C.M. Harden Project
Rockville Co: IN 47872–
Landholding Agency: COE
Property Number: 31200040005
Status: Excess
Comment: communication, off-site use only.

Radio Tower
Mississinewa Lake Project
Peru Co: IN 46970–
Landholding Agency: COE
Property Number: 31200040006
Status: Excess
Comment: communication, off-site use only.

Suitable/Available Properties

Buildings (by State)

Indiana

Radio Tower
Patoka Lake Project
Birdseye Co: IN 46970–
Landholding Agency: COE
Property Number: 31200040007
Status: Excess
Comment: communication, off-site use only.

Minnesota

Storage Bldg.
Upper St. Anthony Falls Lock & Dam
Minneapolis Co: Hennepin MN 55401–2528
Landholding Agency: COE
Property Number: 31200040009
Status: Unutilized
Comment: 192 sq. ft., cold storage, off-site use only.

Montana

Bldg. 1
Butte Natl Guard
Butte Co: Silverbow MT 59701–
Landholding Agency: COE
Property Number: 31200040010
Status: Unutilized
Comment: 22799 sq. ft., presence of asbestos, most recent use—cold storage, off-site use only.

Suitable/Available Properties

Buildings (by State)

Montana

Bldg. 2
Butte Natl Guard
Butte Co: Silverbow MT 59701–
Landholding Agency: COE
Property Number: 31200040011
Status: Unutilized
Comment: 3292 sq. ft., most recent use—cold storage, off-site use only.

Bldg. 3
Butte Natl Guard
Butte Co: Silverbow MT 59701–
Landholding Agency: COE
Property Number: 31200040012
Status: Unutilized
Comment: 964 sq. ft., most recent use—cold storage, off-site use only.

Bldg. 4
Butte Natl Guard
Butte Co: Silverbow MT 59701–
Landholding Agency: COE
Property Number: 31200040013
Status: Unutilized
Comment: 72 sq. ft., most recent use—cold storage, off-site use only.

Suitable/Available Properties

Buildings (by State)

Montana

Bldg. 5
Butte Natl Guard
Butte Co: Silverbow MT 59701–
Landholding Agency: COE
Property Number: 31200040014
Status: Unutilized
Comment: 1286 sq. ft., most recent use—cold storage, off-site use only.

New York

Lockport Comm. Facility
Shawnee Road
Lockport Co: Niagara NY
Landholding Agency: 18200040004
Status: Excess
Comment: 2 concrete block bldgs., (415 & 2929 sq. ft.) on 7.68 acres.

Land (by State)

Kentucky

Carr Creek Lake Project
Tract Nos. 611, 681, 619
Sassafras Co: KY 41759–9703
Landholding Agency: COE
Property Number: 31200040008
Status: Excess
Comment: irregular-shaped, very steep.

Suitable/Unavailable Properties

Buildings (by State)

Maine

Dow Pines Rec Site
Great Pond Co: Hancock ME 04408–
Landholding Agency: Air Force
Property Number: 18200040005
Status: Excess
Comment: 12 bldgs. totaling 19012 sq. ft. on approx. 376 acres, (5 cabins, bathhouse, rec bldg, lodges).

Suitable/To Be Excessed

Buildings (by State)

South Dakota

Family Residence
Oahe Dam/Lake Oahe Proj.
205 East 5th Ave
Pierre Co: SD 57501–
Landholding Agency: COE
Property Number: 31200040015
Status: Unutilized
Comment: 912 sq. ft., possible asbestos/lead paint, off-site use only.

Family Residence
Oahe Dam/Lake Oahe Proj.
2412 East Reen St.
Pierre Co: SD 57501–
Landholding Agency: COE
Property Number: 31200040016
Status: Unutilized
Comment: 912 sq. ft., possible asbestos/lead paint, off-site use only.

Family Residence
Oahe Dam/Lake Oahe Proj.
914 South Arthur Ave
Pierre Co: SD 57501–
Landholding Agency: COE
Property Number: 31200040017
Status: Unutilized
Comment: 1248 sq. ft., possible asbestos/lead paint, off-site use only.

Suitable/To Be Excessed

Buildings (by State)

South Dakota

Family Residence
Oahe Dam/Lake Oahe Proj.
917 South McKinley Ave
Pierre Co: SD 57501–
Landholding Agency: COE
Property Number: 31200040018
Status: Unutilized
Comment: 1488 sq. ft., possible asbestos/lead paint, off-site use only.

Unsuitable Properties

Buildings (by State)

Arizona

Bldg. 321
Marine Corps Air Station
Yuma Co: AZ 85369–
Landholding Agency: Navy
Property Number: 77200110001
Status: Excess
Reason: Extensive deterioration.

Bldg. 322
Marine Corps Air Station
Yuma Co: AZ 85369–
Landholding Agency: Navy
Property Number: 77200110002
Status: Excess
Reason: Extensive deterioration.

Bldg. 331
Marine Corps Air Station
Yuma Co: AZ 85369–
Landholding Agency: Navy
Property Number: 77200110003
Status: Excess
Reason: Extensive deterioration.

Unsuitable Properties

Buildings (by State)

Arizona

Bldg. 332
Marine Corps Air Station
Yuma Co: AZ 85369–
Landholding Agency: Navy
Property Number: 77200110004
Status: Excess
Reason: Extensive deterioration.

California

Bldg. 27
Naval Postgraduate School
Fleet Numerical Meteor & Ocean. Ctr.
Monterey Co: CA 93943–
Landholding Agency: Navy
Property Number: 77200110005
Status: Excess
Reason: Secured Area.

Bldg. 50
Naval Postgraduate School
Fleet Numerical Meteor & Ocean. Ctr.
Monterey Co: CA 93943–
Landholding Agency: Navy
Property Number: 77200110006
Status: Excess
Reason: Secured Area.

Unsuitable Properties

Buildings (by State)

California

Bldg. 1468
Naval Base Ventura
on Parcel 1
Port Hueneme Co: Ventura CA 93042–5000
Landholding Agency: Navy
Property Number: 77200110013
Status: Unutilized
Reason: Secured Area

Bldg. 1469
Naval Base Ventura
on Parcel 1
Port Hueneme Co: Ventura CA 93042–5000
Landholding Agency: Navy
Property Number: 77200110014
Status: Unutilized
Reason: Secured Area

Florida

Bldg. 1558
Naval Station Mayport
Mayport Co: Duval FL 32228–
Landholding Agency: Navy
Property Number: 77200110016
Status: Unutilized
Reasons: Floodway, Secured Area, Extensive deterioration.

Unsuitable Properties

Buildings (by State)

Idaho

Rexburg Army Reserve Center
379 S. 2nd St. East
Rexburg Co: Madison ID 83440–
Landholding Agency: GSA
Property Number: 54200110001
Status: Excess
Reason: Within 2000 ft. of flammable or explosive material
GSA Number: 9–D–ID–546.

North Carolina

Bldg. 1856
Camp Lejeune
Camp Lejeune Co: Onslow NC 28542–0004
Landholding Agency: Navy
Property Number: 77200110017
Status: Unutilized
Reason: Extensive deterioration.

Texas

Bldg. 1504
Naval Air Station
Joint Reserve Base
Ft. Worth Co: Tarrant TX 76127–6200
Landholding Agency: Navy
Property Number: 77200110018
Status: Unutilized
Reason: Extensive deterioration.

Unsuitable Properties

Land (by State)

California

Parcel 1
Naval Base Ventura
NWC & SWC 32nd Ave.
Port Hueneme Co: Ventura CA 93043–4300
Landholding Agency: Navy
Property Number: 77200110011
Status: Underutilized
Reason: Secured Area.

Parcel 2
Naval Base Ventura
NWC Patterson Rd.
Port Hueneme Co: Ventura CA 93043–4300
Landholding Agency: Navy
Property Number: 77200110012
Status: Underutilized
Reason: Secured Area.

[FR Doc. 01–631 Filed 1–11–01; 8:45 am]

BILLING CODE 4210–29–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Rhode Island National Wildlife Refuge Complex; Notice of Availability

SUMMARY: Pursuant to the National Wildlife Refuge System Improvement Act of 1997, the U.S. Fish and Wildlife Service (Service) has published a Draft Comprehensive Conservation Plan and Environmental Assessment for the Rhode Island National Wildlife Refuge Complex. This plan describes how the Service intends to manage the five refuges in Rhode Island during the next 15 years. These refuges include: Block Island NWR, Ninigret NWR, John H. Chafee NWR, Sachuest Point NWR, and Trustom Pond NWR.

DATES: Formal public hearings will be held beginning at 7:00 p.m. on February 6 in Middletown, RI; February 7 in South Kingstown, RI; and, February 8 on Block Island. The hearings will provide an opportunity for all interested parties to formally present oral or written testimony on the draft document before a hearing officer and court reporter. Those wishing to do so will be able to sign up to speak when they enter the hearing room. The formal public hearings will be held at:

February 6: Middletown High School Cafeteria, 130 Valley Road, Middletown, RI 02879

February 7: South Kingstown High School Cafeteria, 215 Columbia Street, Wakefield, RI 02879

February 8: Block Island School Library, High Street, New Shoreham, RI 02807

Prior to each formal hearing, from 6:00 to 7:00 p.m., the Service will host an Open House to provide an opportunity for public comment on a separate Environmental Assessment for the proposed Rhode Island Refuge Visitor Center and Administrative Offices which is being released concurrently with the draft Comprehensive Conservation Plan.

All other comments should be sent by either traditional or electronic mail, no later than March 2, 2001, to: The Rhode Island Refuges CCP Planning Team, U.S. Fish and Wildlife Service, 300 Westgate Center Drive, Hadley, MA 01035–9589, or FW5RW_CCP@fws.gov.

ADDRESSES: Additional information or copies of an executive summary of the plan or the complete document may be obtained by contacting Gary Andres,

Rhode Island National Wildlife Refuge Complex, Shoreline Plaza Route 1A, P.O. Box 307, Charlestown, Rhode Island 02813, telephone 401–364–9124.

SUPPLEMENTARY INFORMATION: The draft Comprehensive Conservation Plan and Environmental Assessment fully describes, evaluates, and compares four alternatives for managing the natural resources and public use opportunities on the Rhode Island National Wildlife Refuge Complex. One of the alternatives represents the Service's Proposed Action. The four alternatives are:

Alternative A

This is the No Action Alternative required by the Council of Environmental Quality's regulations on the implementation of the National Environmental Policy Act (NEPA). Selection of this alternative would not change our current management programs on any of the five refuges. Our land acquisition program would continue to be focused on the 735 acres remaining within the currently approved acquisition boundaries. We would continue to emphasize management for the federally threatened piping plover and restoration of early-successional coastal sandplain habitats and wetlands. Public use opportunities would not change appreciably.

Alternative B

Alternative B is the Service's Proposed Action; that is, the alternative currently recommended for approval. Selection of this alternative would expand all Refuge boundaries, increasing our current land acquisition goal by 3,200 acres. Alternative B would increase protection and management for endangered, threatened, and other species of concern, increase restoration of early-successional native habitats and wetlands, and increase biological inventories and monitoring. Opportunities would increase for all six priority public uses, which include hunting, fishing, wildlife observation and photography, environmental education and interpretation. Compatibility determinations for the proposed priority public use activities are included as an appendix to the document. These compatibility determinations establish which public uses support the achievement of refuge purposes or the National Wildlife Refuge System mission and would be allowed on refuge land.

Alternative C

This alternative would also increase protection, management, restoration, monitoring and inventories of species and habitats similar to Alternative B. However, selection of this alternative would increase our current land acquisition goal by 11,500 acres. Refuge staff would take the lead in accomplishing interagency, watershed-based planning initiatives, respective recovery team tasks, and ecosystem team priorities. This alternative would eliminate existing incompatible, non-wildlife dependent uses by 2002, three years sooner than the other alternatives. Environmental education would be emphasized over other priority public uses on each refuge.

Alternative D

This alternative would maintain current biological resource program priorities, which include protecting piping plover, and managing early-successional native habitats and wetlands. Selection of this alternative would pursue the current land acquisition goal of 735 acres, similar to Alternative A. This alternative is distinguished from the others by the amount of resources directed towards expanding all priority public use opportunities on each refuge.

Dated: January 8, 2001.

Dr. Mamie A. Parker,

Acting Regional Director, U.S. Fish and Wildlife Service, Hadley, Massachusetts.

[FR Doc. 01–1021 Filed 1–11–01; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Receipt of Applications for Permit; Endangered Species

The following applicants have applied for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*). Written data or comments should be submitted to the Director, U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203 and must be received by the Director within 30 days of the date of this publication.

Applicant: Henry Doorly Zoo, Omaha, NE, PRT–035467

The applicant requests a permit to export cryopreserved semen collected from one captive born male gorilla (*Gorilla gorilla*) to the Johannesburg Zoological Gardens, Parkview, South Africa for the purpose of enhancement of the survival of the species through captive propagation by artificial insemination.

Applicant: Rosita H. Roden, New York, NY, PRT—037356

The applicant requests a permit to import headdresses and other indigenous ceremonial products derived from wild Harpy eagle (*Harpia harpyja*) Razor-billed curassow (*Mitu mitu*), Jabiru (*Jabiru mycteria*), and Woolly spider monkey (*Brachyteles arachnoides*) from the Amazon Rainforest in Brazil. The purpose of the import is to enhance the survival of the species.

The U.S. Fish and Wildlife has information collection approval from OMB through February 28, 2001. OMB Control Number 1018–0093. Federal Agencies may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a current valid OMB control number.

Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to the following office within 30 days of the date of publication of this notice: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203. Phone: (703/358–2104); Fax: (703/358–2281).

Dated: January 8, 2000.

Anna Barry,

Branch of Permits, Division of Management Authority.

[FR Doc. 01–1012 Filed 1–11–01; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Klamath River Basin Fisheries Task Force; Meeting

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of meeting.

SUMMARY: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App. I), this notice announces a meeting of the Klamath River Basin Fisheries Task Force, established under the authority of the Klamath River Basin Fishery Resources Restoration Act (16 U.S.C. 460ss *et seq.*). The meeting is open to the public.

DATES: The Klamath River Basin Fisheries Task Force (Task Force) will meet from 8 a.m. to 5 p.m. on February 8, 2001, and from 8 a.m. to 3:45 p.m. on February 9, 2001.

PLACE: The meeting will be held at the Best Western Brookings Inn, 1143 Chetco Avenue, Brookings, Oregon.

FOR FURTHER INFORMATION CONTACT: Dr. Ronald A. Iverson, Project Leader, Fish and Wildlife Service, 1829 South Oregon Street, Yreka, California 96097, telephone (530) 842–5763.

SUPPLEMENTARY INFORMATION: For background information on the Task Force, please refer to the notice of their initial meeting that appeared in the **Federal Register** on July 8, 1987 (52 FR 25639).

Dated: January 5, 2001.

Mary Elle Mueller,

Acting California/Nevada Operations Manager, California/Nevada Office, Fish and Wildlife Service.

[FR Doc. 01–1022 Filed 1–11–01; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Revised Notice of Intent To Prepare an Environmental Impact Statement/ Environmental Impact Report for the Torres Martinez-Calpine Power Generating Facility, Riverside County, California

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Revised notice.

SUMMARY: This notice revises a notice published on June 13, 2000, in the **Federal Register** (65 FR 37163), which informed the public that the Bureau of Indian Affairs, in cooperation with the Torres Martinez Desert Cahuilla Indians and Calpine Corporation, intended to gather information necessary to prepare an Environmental Impact Statement (EIS) for a power generating facility that Calpine proposes to construct and operate on 41.5 acres of the Torres Martinez Indian Reservation in Riverside County, California. The purposes of this revised notice are to (1) announce that the Bureau will be preparing an Environmental Impact Report (EIR) in conjunction with the EIS; (2) to include in the project description modifications made to the project after the original notice was published; and (3) to update the environmental issues identified for the project. Details on the changes are included in a revised **SUPPLEMENTARY INFORMATION** section. This notice also announces a public scoping meeting for the content of the EIS/EIR.

DATES: Comments on the scope and implementation of this proposal must arrive by February 12, 2001. The public scoping meeting will be held on January 30, 2001, from 7:00 p.m. to 8:00 p.m., or until all attendees who wish to do so have had the opportunity to register their views.

ADDRESSES: You may mail or hand carry written comments to Ronald M. Jaeger, Regional Director, Pacific Region, Bureau of Indian Affairs, 2800 Cottage Way, Sacramento, California, 95825–1846.

The January 30, 2001, public scoping meeting will be held at the Tribal Hall, Torres Martinez Indian Reservation, 66–725 Martinez Road, Thermal, California.

FOR FURTHER INFORMATION CONTACT: William Allan, (916) 978–6043, or Bobbi Fletcher, (760) 397–9850.

SUPPLEMENTARY INFORMATION: Calpine Corporation, through an agreement with the Torres Martinez Desert Cahuilla Indians, plans to construct, own and operate a 600 megawatt natural gas-fired power plant on a 41.5 acre parcel of tribal trust land in Riverside County, California, northeast of the town of Mecca. The parcel is located along 62nd Avenue, east of Johnson Street near the Coachella Canal.

Natural gas is proposed to be supplied to the plant by a new 11 to 17 mile gas line extending north to a connection point north of the I–10 Freeway. Electricity produced by the plant would be routed through an on-site substation to the first point of junction with the interconnected transmission system via existing electrical transmission lines. To relieve the potential for localized transmission system congestion beyond the point of first interconnection, the project would also require construction of a new electrical transmission line segment between the site and a substation in the city of Coachella, plus improvements to several miles of existing off-site transmission lines. Cooling water for the power plant is proposed to be obtained from the Coachella Canal immediately east of the site, or from an on-site groundwater well. The plant would utilize a zero-discharge system, wherein cooling water would be repeatedly cycled and then evaporated in on-site evaporation ponds.

The areas of environmental concern to be addressed in the EIS/EIR include agricultural, water, biological, mineral, paleontological, visual/aesthetic and cultural resources, geology, soils, traffic and transportation, land use, noise, air quality, public health and infrastructure, environmental hazards, hazardous materials and waste, worker safety, socioeconomics/environmental justice, and Indian trust assets. Others may be added based on comments received during the scoping process.

Public Comment Solicitation

As an alternative to submitting written comments regarding the content of the EIS/EIR to the location identified in the **ADDRESSES** section, interested persons may instead comment via the Internet to billallan@bia.gov. Please submit Internet comments as an ASCII file, avoiding the use of special characters and any form of encryption. If you do not receive confirmation from the system that your Internet message was received, contact us directly at (916) 978–6043.

Comments, including names and home addresses of respondents, will be available for public review at the mailing address shown in the **ADDRESSES** section, during regular business hours, 8:00 a.m. to 4:30 p.m., Monday through Friday, except holidays. Individual respondents may request confidentiality. If you wish us to withhold your name and/or address from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your written comment. Such requests will be honored to the extent allowed by law. We will not, however, consider anonymous comments. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public inspection in their entirety.

Authority

This notice is published in accordance with section 1503.1 of the Council on Environmental Quality Regulations (40 CFR Parts 1500 through 1508), implementing the procedural requirements of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), and the Department of the Interior Manual (516 DM 1–6), and is in the exercise of authority delegated to the Assistant Secretary—Indian Affairs by 209 DM 8.

Dated: January 9, 2001.

Michael Anderson,

Acting Assistant Secretary—Indian Affairs.

[FR Doc. 01–1115 Filed 1–11–01; 8:45 am]

BILLING CODE 4310–02–U

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Colorado River Irrigation Project—Irrigation Division, Arizona, Irrigation Rate Adjustment

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final notice of rate adjustment.

SUMMARY: The Bureau of Indian Affairs (BIA) is adjusting irrigation rates for customers of Colorado River Irrigation Project, Irrigation Division, for the 2001 irrigation season. The Notice of Proposed Rate Adjustment was published in the **Federal Register** on October 5, 2000 (65 FR 59461). The public and interested parties were provided an opportunity to submit written comments during the 60-day period subsequent to October 5, 2000. No comments were received.

EFFECTIVE DATE: The new rates for the 2001 irrigation season are effective on January 12, 2001.

FOR FURTHER INFORMATION CONTACT: Regional Director, Bureau of Indian Affairs, Western Region, P.O. Box 10, Phoenix, Arizona 85001, Telephone (602) 379–6956.

SUPPLEMENTARY INFORMATION: The authority to issue this document is vested in the Secretary of the Interior by 5 U.S.C. 301; the Act of August 14, 1914 (38 Stat. 583; 25 U.S.C. 385). The Secretary has delegated this authority to the Assistant Secretary—Indian Affairs pursuant to part 209 Departmental Manual, Chapter 8.1A and memorandum dated January 25, 1994, from Chief of Staff, Department of the Interior, to Assistant Secretaries, and Heads of Bureaus and Offices.

The new rates are specified in the following schedule.

Irrigation Rate Per Assessable Acre—2001 Irrigation Season

1. When Does This Schedule Apply to Me?

This schedule applies to you if you irrigate lands within the CRIP/ID for the 2001 irrigation season.

2. What Will BIA Charge for the 2001 Irrigation Season?

The following table shows how we will bill you.

For * * *	We will bill you * * *
(1) Zero to 5 acre-feet/acre.	$37.00 per assessable acre.
(2) Excess Water above 5 acre-feet.	$17.00 per acre foot.

Regulatory Planning and Review (E.O. 12866): This rate adjustment is not a significant regulatory action and has been reviewed by the Office of Management and Budget under Executive Order 12866.

Regulatory Flexibility Act: This rate making is not a rule for the purposes of the Regulatory Flexibility Act because it is ''a rule of particular applicability relating to rates.'' 5 U.S.C. 601(2).

Unfunded Mandates Reform Act of 1995: This rate adjustment imposes no unfunded mandates on any governmental or private entity and is in compliance with the provisions of the Unfunded Mandates Reform Act of 1995.

Takings (E.O. 12630): The Department has determined that this rate adjustment does not have significant ''takings'' implications.

Federalism (E.O. 13132): The Department has determined that this rate adjustment does not have significant Federalism effects because it pertains solely to Federal-tribal relations and will not interfere with the roles, rights, and responsibilities of states.

Civil Justice Reform (E.O. 12988): In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act of 1995: This rate adjustment does not contain collections of information requiring approval under the Paperwork Reduction Act of 1995.

NEPA Compliance: The Department has determined that this rate adjustment does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required under the National Environmental Policy Act of 1969.

Dated: December 20, 2000.

Kevin Gover,

Assistant Secretary—Indian Affairs.

[FR Doc. 01–1041 Filed 1–11–01; 8:45 am]

BILLING CODE 4310–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–030–1220–PD; Closure Notice No. NV–030–2001–001]

Emergency Closure of Federal Lands

AGENCY: Bureau of Land Management (BLM).

SUMMARY: Notice is hereby given that certain BLM public lands in Alpine County, CA, west of Foothill Road, which include the mouth of Faye Canyon and Luther Creek, are closed to all motorized vehicles. The recent opening of a Forest Service parking lot and trailhead adjacent to the subject BLM lands has dramatically increased the potential for motorized public access. This temporary closure is necessary to preclude potential adverse effects to soils, vegetation, cultural, wildlife and riparian resources.

EFFECTIVE DATES: This closure goes into effect upon publication in the **Federal Register**, and will remain in effect until the Manager, Carson City Field Office, determines it is no longer needed.

FOR FURTHER INFORMATION OR TO C0MMENT CONTACT: Arthur Callan, Outdoor Recreation Planner, 5665 Morgan Mill Road, Carson City, Nevada 89701. Telephone (775) 885–6000 or e-mail: acallan@nv.blm.gov.

SUPPLEMENTARY INFORMATION: The lands included in this closure are those public lands within Mt. Diablo Meridian, Sections 26 and 35, T. 12 N., R. 19 E. The authorities for this closure are 43 CFR 8341.2 and 8364.1. Any person failing to comply with the closure order is subject to arrest and fines in accordance with the applicable provisions of 18 USC 3571 and/or imprisonment not to exceed 12 months. This order applies to all motorized vehicles excluding (1) any emergency, law enforcement or agency vehicles while being used for emergency or administrative purposes, and (2) any vehicle whose use is expressly authorized in writing by the Manager, Carson City Field Office.

Dated: December 20, 2000.

John O. Singlaub,

Carson City Field Manager.

[FR Doc. 01–1074 Filed 1–11–01; 8:45 am]

BILLING CODE 4310–HC–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–030–01–1020–PE: GP1–0068]

Notice of Meeting of John Day/Snake Resource Advisory Council

AGENCY: Vale District, Bureau of Land Management, Interior.

ACTION: Meeting of John Day/Snake Resource Advisory Council (RAC): Pendleton, Oregon February 12–13, 2001.

SUMMARY: On February 12, 2001 at 11 a.m. there will be a meeting of the John Day/Snake RAC at the Red Lion Hotel, 304 Southeast Nye Avenue in

Pendleton, Oregon. The meeting is open to the public. Public comments will be received at 10 a.m. on February 13, 2001. The following topics will be discussed by the council: RAC membership update; Hells Canyon Subgroup update; Blue Mountain Subgroup update; ICBEMP Subgroup update; OHV Subgroup update; Noxious Weeds Subgroup udpate; Program of work review; Counties Payment Act (1608 Act); and a 15 minute round table for general issues.

FOR FURTHER INFORMATION CONTACT: Sandy L. Guches, Bureau of Land Management, Vale District Office, 100 Oregon Street, Vale, Oregon 97918, Telephone (541) 473–3144

Sandy L. Guches,

Acting District Manager.

[FR Doc. 01–1005 Filed 1–11–01; 8:45 am]

BILLING CODE 4310–33–M

DEPARTMENT OF THE INTERIOR

National Park Service

Final Supplemental Environmental Impact Statement, Yosemite Valley Plan, Yosemite National Park, Mariposa, Madera, and Tuolumne Counties, California; Notice of Approval of Record of Decision

SUMMARY: Pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (Pub. L. 91–190, as amended) and the regulations promulgated by the Council on Environmental Quality (40 CFR 1505.2), the Department of the Interior, National Park Service has prepared and approved a Record of Decision for the Final Supplemental Environmental Impact Statement on the Yosemite Valley Plan for Yosemite National Park. The decisions reached are consistent with the Revised Record of Decision for the Merced Wild and Scenic River Comprehensive Management Plan/Final Environmental Impact Statement.

DECISION: The National Park Service (NPS) will implement actions, strategies, and programs encompassed in Alternative 2 as described in the Final Supplemental Environmental Impact Statement on the Yosemite Valley Plan. The selected alternative provides for an overall combination of actions to restore natural processes in Yosemite Valley, preserve cultural resource values, reduce harmful environmental impacts (including those related to traffic congestion), and continue to provide opportunities for high-quality visitor experiences based upon resource values. This course of action and four alternatives were identified and analyzed in the Draft and Final Supplemental Environmental Impact Statements (issued April 2000 and November 2000 respectively). The NPS identified Alternative 2 as presented in the Final Supplemental Environmental Impact Statement as the ''environmentally preferred'' alternative. Elements of the selected alternative are to be implemented as soon as practical.

PUBLIC REVIEW AND CONSULTATION: The Draft and Final Supplemental Environmental Impact Statements (SEIS) on the Yosemite Valley Plan were prepared by the NPS pursuant to the National Environmental Policy Act. A Notice of Intent to initiate this conservation planning and environmental impact analysis process was published in the **Federal Register** on December 16, 1998. General issues and specific concerns already raised during previous relevant planning processes were provided to the public. Scoping comments were received through February 1, 1999. The Draft Yosemite Valley Plan/SEIS was formally announced for public review per Notice of Availability published in the **Federal Register** on April 13, 2000. The Final Yosemite Valley Plan/SEIS was announced on November 21, 2000. From initiation of the scoping process through December 26, 2000 when the ''No Action'' period for the Final Yosemite Valley Plan/SEIS officially concluded, almost 11,000 written responses were received (all written comments will be archived and available for public review in the park's research library). In addition, over 150 public meetings, discussions, and briefings (attended by over 1500 individuals and representatives of organizations, Tribes, elected officials, and congressional delegations) were conducted in the park, throughout California, and in Seattle, Washington; Denver, Colorado; Chicago, Illinois; and Washington, DC.

The NPS also consulted with various regulatory and resource protection agencies including the Advisory Council on Historic Preservation, State Historic Preservation Office, and the US Fish and Wildlife Service. As a result of these collaborations, as well as the public involvement indicated above, four action alternatives and appropriate mitigation strategies were identified, compared, and refined.

COPIES: Interested parties can review the Record of Decision on the NPS website at *www.nps.gov/yose/planning.* Copies can also be obtained by contacting the Superintendent, Yosemite National Park, P.O. Box 577, Yosemite, California 95389; via telephone request at (209) 372–0261; or via email request at yose_planning@nps.gov.

Dated: January 5, 2001.

William C. Walters,

Acting Regional Director, Pacific West Region.

[FR Doc. 01–1110 Filed 1–11–01; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects in the Possession of the Utah Museum of Natural History, Salt Lake City, UT, and in the Control of the U.S. Department of the Interior, Bureau of Reclamation, Upper Colorado Region, Salt Lake City, UT

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is hereby given in accordance with provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), 43 CFR 10.9, of the completion of an inventory of human remains and associated funerary objects in possession of the Utah Museum of Natural History, Salt Lake City, UT, and in control of the U.S. Department of the Interior, Bureau of Reclamation, Upper Colorado Region, Salt Lake City, UT.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 43 CFR 102.2(c). The determinations within this notice are the sole responsibility of the museum, institution, or Federal agency that has control of these cultural items. The National Park Service is not responsible for the determinations within this notice.

A detailed assessment of the human remains was made by the Bureau of Reclamation and Utah Museum of Natural History professional staff in consultation with representatives of the Paiute Indian Tribe of Utah; Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, Arizona; San Juan Southern Paiute Tribe of Arizona; White Mesa Ute Tribe; Ute Indian Tribe of the Uintah & Ouray Reservation, Utah; Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado; and the Ute Mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah.

In 1962, human remains representing one individual were collected from a site near Bicknell, Wayne County, UT, under a memorandum of agreement between the Department of

Anthropology, University of Utah, and the U.S. Department of the Interior, National Park Service, acting on behalf of the Bureau of Reclamation during the archeological inventory for the Glen Canyon Archeological Project. No known individual was identified. No associated funerary objects are present.

Archaeological evidence indicates that the human remains are Native American from the protohistoric or contact period. Geography, kinship, anthropology, and linguistics evidence, and expert opinion indicate that the remains are those of a member of the Escalante Band of the Southern Paiute, who inhabited this area during the protohistoric and contact period, and who are most closely associated with the contemporary Paiute Indian Tribe of Utah.

In 1962, human remains representing two individuals were collected from a site near Escalante, Garfield County, UT, under a memorandum of agreement between the Department of Anthropology, University of Utah, and the U.S. Department of the Interior, National Park Service, acting on behalf of the Bureau of Reclamation during the archaeological inventory for the Glen Canyon Archaeological Project. No known individuals were identified. No associated funerary objects are present.

Material culture near the interments indicate that the human remains are Native American from the contact period. Geography, kinship, anthropology, and linguistics evidence, and expert opinion indicate that the remains are the two individuals are those of members of the Escanlante Band of the Southern Paiute, who inhabited this area during the protohistoric and contact period, and who are most closely associated with the contemporary Paiute Indian Tribe of Utah.

Based on the above-mentioned information, officials of the Bureau of Reclamation have determined that, pursuant to 43 CFR 10.2(d)(1), the human remains above represent the physical remains of three individuals of Native American ancestry. Officials of the Bureau of Reclamation also have determined that, pursuant to 43 CFR 10.2(e), there is a relationship of shared group identity that can be reasonably traced between these Native American human remains and the Paiute Indian Tribe of Utah.

This notice has been sent to officials of the Paiute Indian Tribe of Utah; Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, Arizona; San Juan Southern Paiute Tribe of Arizona; White Mesa Ute Tribe; Ute Indian Tribe of the Uintah & Ouray Reservation, Utah; Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado; and the Ute Mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah. Representatives of any other Indian tribe that believes itself to be culturally affiliated with these human remains should contact Dr. Nancy Coulam, Regional Archaeologist, Bureau of Reclamation, 125 South State Street, Salt Lake City, UT 84138–1102, telephone (801) 524–3684, before February 12, 2001. Repatriation of the human remains to the Paiute Indian Tribe of Utah may begin after that date if no additional claimants come forward.

Dated: January 4, 2001.

John Robbins,

Assistant Director, Cultural Resources Stewardship and Partnerships.

[FR Doc. 01–1111 Filed 1–11–01; 8:45 am]

BILLING CODE 4310–70–M

INTERNATIONAL TRADE COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: United States International Trade Commission.

DATE AND TIME: January 18, 2001 at 2 p.m.

PLACE: Room 101, 500 E Street, SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda for future meeting: None.
2. Minutes.
3. Ratification List.
4. Inv. Nos. 731–TA–865–867 (Final) (Stainless Steel Butt-Weld Pipe Fittings from Italy, Malaysia, and the Philippines)—briefing and vote. (The Commission is currently scheduled to transmit its determination and commissioners' opinions to the Secretary of Commerce on January 29, 2001.)
5. Outstanding action jackets: (1.) Document No. INV–00–223: Approved of final report in Inv. No. TA–204–3 (Lamb Meat).

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: January 9, 2001.

Donna R. Koehnke,

Secretary.

[FR Doc. 01–1204 Filed 1–10–01; 2:15 am]

BILLING CODE 7020–02–M

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Worldcom, Inc & Intermedia Communications, Inc.

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. section 16(b) through (h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with the United States District court for the District of Columbia, Washington, D.C. in *United States of America* v. *WorldCom. Inc. & Intermediate Communications, Inc.* Civil Action No. 00–2789. On November 17, 2000, the United States filed a Complaint alleging that the proposed acquisition by WorldCom of the Internet backbone business assets of Intermedia Communications, Inc. would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed the same time as the Complaint, requires WorldCom to divest all of Intermedia's assets except for Intermedia's interest in the capital stock of Digex, Inc. Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice in Washington, DC in Room 200, 325 Seventh Street, NW., and at the Office of the Clerk of the United States District Court for the District of Columbia, Washington, DC.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Donald Russell, Chief, Telecommunications Task Force, Suite 8000, Antitrust Division, Department of Justice, Washington, DC 20530, (telephone: (202) 514–5621).

Constance K. Robinson,

Director of Operations & Merger Enforcement.

Hold Separate Stipulation and Order

It is hereby stipulated and agreed by and between the undersigned parties, subject to approval and entry by the Court, that:

I. Definitions

As used in this Hold Separate Stipulation and Order:

A. *Acquirer* means the entity to whom defendants divest the Intemedia Assets.

B. *WorldCom* means defendant WorldCom, Inc., a Georgia corporation with its headquarters in Clinton, Mississippi, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint

ventures, and their directors, officers, managers, agents and employees.

C. *Intermedia* means defendant Intermedia Communications, Inc., a Delaware Corporation with its headquarters in Tampa, Florida, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents and employees.

D. *Digex* means Digex, Inc., a Delaware Corporation with its headquarters in Beltsville, Maryland, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents and employees.

E. *Capital Stock of Digex* means the capital stock of Digex, regardless of class, owned by Intermedia.

F. *Intermedia Assets* means all of assets of Intermedia, except for the Capital Stock of Digex, including:

1. All tangible assets that comprise the Intermedia business, including research and development activities; all networking equipment and fixed assets, personal property, office furniture, materials, supplies, and other tangible property and all assets used exclusively in connection with the Intermedia Assets; all licenses, permits and authorizations issued by any governmental organization relating to the Intermedia Assets; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings, relating to the Intermedia Assets, including supply agreements, all customer lists, contracts, accounts, and credit records; all repair and performance records and all other records relating to the Intermedia Assets;

2. All intangible assets used in the development, production, servicing and sale of Intermedia Assets, including, but not limited to all patents, licenses and sublicenses, intellectual property, copyrights, trademarks, trade names, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, all research data concerning historic and current research and development relating to the Intermedia Assets, quality assurance and control procedures, design tools and simulation capability, all manuals and technical information defendants provide to their own employees, customers, suppliers, agents or licensees, and all research data concerning historic and current research and development efforts relating to the Intermedia Assets, including, but not limited to designs of experiments, and the results of successful and unsuccessful designs and experiments.

G. *Merger* means the proposed merger of WorldCom and Intermedia pursuant to the merger agreement dated September 5, 2000.

II. Objectives

The final Judgment filed in this case is meant to ensure defendants' prompt divestiture of the Intermedia Assets for the purpose of preserving a viable competitor in the provision of Internet backbone and access services in order to remedy the effects that the United States alleges would otherwise result from WorldCom's acquisition of Intermedia. This Hold Separate Stipulation and Order ensures, prior to such divestitures, that the Intermedia Assets remain independent, economically viable, and ongoing business concerns that will remain independent and uninfluenced by WorldCom, and that competition is maintained during the pendency of the ordered divestitures.

III. Jurisdiction and Venue

This Court has jurisdiction over each of the parties hereto and over the subject matter of this action, and venue of this action is proper in the United States District Court for the District of Columbia. The Complaint states a claim upon which relief may be granted against defendants under Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

IV. Compliance With and Entry of Final Judgment

A. The parties stipulate that a Final Judgment in the form attached hereto as Exhibit A may be filed with and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. 16), and without further notice to any party or other proceedings, provided that the United States has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on defendants and by filing that notice with the Court.

B. Defendants shall abide by and comply with the provisions of the proposed Final Judgment, pending the Judgment's entry by the Court, or until expiration of time for all appeals of any Court ruling declining entry of the proposed Final Judgment, and shall, from the date of the signing of this Stipulation by the parties, comply with all the term and provisions of the proposed Final Judgment as though the same were in full force and effect as an order of the Court.

C. Defendants shall not consummate the transaction sought to be enjoined by the Complaint herein before the Court has signed this Hold Separate Stipulation and Order.

D. This Stipulation shall apply with equal force and effect to any amended proposed Final Judgment agreed upon in writing by the parties and submitted to the Court.

E. In the event (1) the United States has withdrawn its consent, as provided in Section IV(A) above, or (2) the proposed Final Judgment is not entered pursuant to this Stipulation, the time has expired for all appeals of any Court ruling declining entry of the proposed Final Judgment, and the Court has not otherwise ordered continued compliance with the terms and provisions of the proposed Final Judgment, then the parties are released from all further obligations under this Stipulation, and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding.

F. Defendants represent that the divestiture ordered in the proposed Final Judgment can and will be made, and that defendants will later raise no claim of mistake, hardship or difficulty of compliance as grounds for asking the Court to modify any of the provisions contained therein.

G. The United States and Defendants, WorldCom and Intermedia, by their respective attorneys, have consented to the entry of this Hold Separate Stipulation and Order without trial or adjudication of any issue of fact or law, and without this Hold Separate Stipulation and Order constituting any evidence against or admission by any part regarding any issue of fact or law.

V. Hold Separate Provisions

A. Until the closing of the Merger contemplated by the Final Judgment:

1. Intermedia shall preserve, maintain, and continue to operate the Intermedia Assets as an independent, ongoing, economically viable competitive business, with management, sales, and operations of such assets held entirely separate, distinct, and apart from those of WorldCom's operations. WorldCom shall not coordinate its production, marketing, or terms of sale of any products with those produced by or sold under any of the Intermedia Assets. Within twenty (20) days after the entry of the Hold Separate Stipulation and

Order, defendants will inform the United States of the steps defendants have taken to comply with this Hold Separate Stipulation and Order.

2. Intermedia shall use all reasonable efforts to maintain and increase the sales and revenues of the services provided by the Intermedia Assets, and shall maintain at 2000 or previously approved levels for 2001, whichever are higher, all promotional, advertising, sales, technical assistance, network capacity configurations and expansions, marketing and merchandising support for the Intermedia Assets.

3. Intermedia shall take all steps necessary to ensure that the Intermedia Assets are fully maintained an operable condition at no less than their current capacity and sales, including projected capacity expansions currently planned or planned prior to negotiations between the defendants relating to the Merger, and shall maintain and adhere to normal repair and maintenance schedules for the Intermedia Assets.

4. Intermedia shall not remove, sell, lease, assign, transfer, pledge, or otherwise dispose of any of the Intermedia Assets.

5. WorldCom shall not solicit to hire, or hire, any employee of any business that is a part of the Intermedia Assets.

6. Defendants shall take no action that would jeopardize, delay, or impede the sale of the Intermedia Assets.

B. After the closing of the Merger and until the divestiture required by the Final Judgment has been accomplished.

1. Defendants shall preserve, maintain, and continue to operate the Intermedia Assets as an independent, ongoing, economically viable competitive business, with management, sales, operations of such assets held entirely separate, distinct, and apart from those of WorldCom's other operations. WorldCom shall not coordinate its production, marketing, or terms of sale of any products with those produced by or sold under any of the Intermedia Assets. Within twenty (20) days after the closing of the Merger, defendants will inform the United States of the steps defendants have taken to comply with this Hold Separate Stipulation and Order.

2. Defendants shall take all steps necessary to ensure that (1) the Intermedia Assets will be maintained and operated as independent, ongoing, economically viable and active competitor in the provision of telecommunications services currently offered by Intermedia; (2) management of the Intermedia Assets will not be influenced by WorldCom (or Digex); and (3) the books, records, competitively sensitive sales, marketing and pricing information, and decision-making concerning provision of services by any of the Intermedia Assets will be kept separate and apart from WorldCom's other operations.

3. Defendants shall use all reasonable efforts to maintain and increase the sales and revenues of the services provided by the Intermedia Assets, and shall maintain at 2000 or previously approved levels for 2001, whichever are higher, all promotional, advertising, sales, technical assistance, network capacity configurations and expansions, marketing and merchandising support of the Intermedia Assets.

4. WorldCom shall provide sufficient working capital and lines and sources of credit to continue to maintain the Intermedia Assets as economically viable and competitive, ongoing businesses, consistent with the requirements of Sections V(A) and (B).

5. WorldCom shall take all steps necessary to ensure that the Intermedia Assets are fully maintained in operable condition at no less than its current capacity and sales, including projected capacity expansions currently planned or planned prior to negotiations between the defendants relating to the Merger, and shall maintain and adhere to normal repair and maintenance schedules for the Intermedia Assets.

6. Defendants shall not, except as part of a divestiture approved by the United States in accordance with the terms of the proposed Final Judgment, remove, sell, lease, assign, transfer, pledge, or otherwise dispose of any of the Intemedia Assets.

7. Defendants shall maintain, in accordance with sound accounting principles, separate, accurate, and complete financial ledgers, books, and records that report on a periodic basis, such as the last business day of every month, consistent with past practices, the assets, liabilities, expenses, revenues and income of products produced, distributed or sold utilizing the Intermedia Assets.

8. Defendants shall take no action that would jeopardize, delay, or impede the sale of the Intermedia Assets.

9. Except in the ordinary course of business or as is otherwise consistent with this Hold Separate Stipulation and Order, defendants shall not hire, transfer, terminate, or otherwise alter the salary or employment agreements for any Intermedia employee who, on the date of defendants' signing of this Hold Separate Stipulation and Order is a member of Intermedia's management. Further, during the tendency of this Hold Separate Stipulation and Order, and consistent with the Final Judgment, defendant WorldCom shall not solicit to hire, or hire, any employee of any business that is a part of the Intermedia Assets.

C. Defendants shall take no action that would interfere with the ability of any trustee appointed pursuant to the Final Judgment to complete the divestitures pursuant to the Final Judgment to an Acquirer acceptable to the United States.

D. This Hold Separate Stipulation and Order shall remain in effect until consummation of the divestiture required by the proposed Final Judgment or until further order of the Court.

Dated: November 17, 2000.

Respectfully submitted;

For Plaintiff, United States of America

Charles F. Rule,

For Defendant, WorldCom, Inc.

Brad E. Mutschelknaus,

For Defendant, Intermedia Communications, Inc.

Order

It is so ordered by the Court, this _____day of _____, 2000.

_____

United States District Judge

Proposed Final Judgment

Whereas, plaintiff, United States of America, filed its Complaint on November 17, 2000, and plaintiff and defendants, WorldCom Inc. (''WorldCom'') and Intermedia Communications, Inc. (''Intermedia''), by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law;

And Whereas, this Final Judgment does not constitute any evidence against or admission by any party regarding any issue of fact or law;

And Whereas, defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

And Whereas, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by the defendants to assure that competition is not substantially lessened;

And Whereas, plaintiff requires defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

And Whereas, defendants have represented to the United States that the divestitures required below can and will be made and that they will later raise no claims of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

Now Therefore, before testimony is taken, and without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is *Ordered, Adjudged, and Decreed:*

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against defendants under Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

II. Definitions

As used in this Final Judgment:

A. *Acquirer* means the entity to whom defendants divest the Intermedia Assets.

B. *WorldCom* means defendant WorldCom, Inc., a Georgia corporation with its headquarters in Clinton, Mississippi, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents and employees.

C. *Intermedia* means defendant Intermedia Communications, Inc., a Delaware Corporation with its headquarters in Tampa, Florida, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents and employees.

D. *Digex* means Digex, Inc., a Delaware Corporation with its headquarters in Beltsville, Maryland, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents and employees.

E. *Capital Stock of Digex* means the capital stock of Digex, regardless of class, owned by Intermedia.

F. *Intermedia Assets* means all of assets of Intermedia, except for the Capital Stock of Digex, including:

1. All tangible assets that comprise the Intermedia business, including research and development activities; all networking equipment and fixed assets, personal property, office furniture, materials, supplies, and other tangible property and all assets used exclusively in connection with the Intermedia Assets; all licenses, permits and authorizations issued by any governmental organization relating to the Intermedia Assets; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings, relating to the Intermedia Assets, including supply agreements; all customer lists, contracts, accounts, and credit records; all repair and performance records and all other records relating to the Intermedia Assets;

2. All intangible assets used in the development, production, servicing and sale of Intermedia Assets, including, but not limited to all patents, licenses and sublicenses, intellectual property, copyrights, trademarks, trade names, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, all research data concerning historic and current research and development relating to the Intermedia Assets, quality assurance and control procedures, design tools and simulation capability, all manuals and technical information defendants provide to their own employees, customers, suppliers, agents or licensees, and all research data concerning historic and current research and development efforts relating to the Intermedia Assets, including, but not limited to designs of experiments, and the results of successful and unsuccessful designs and experiments.

G. *Merger* means the proposed merger of WorldCom and Intermedia pursuant to the merger agreement dated September 5, 2000.

III. Applicability

A. This Final Judgment applies to WorldCom and Intermedia, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. Defendants shall require, as a condition of the sale or other disposition of all or substantially all the Intermedia Assets, that the purchaser agrees to be bound by the provisions of this Final Judgment, provided, however, that defendants need not obtain such an agreement from the Acquirer.

IV. Divestitures

A. Defendants are ordered and directed, within one hundred eighty (180) calendar days from the closing of the Merger following the receipt of all required approvals by the Federal Communications Commission and state authorities, to divest the Intermedia Assets as an ongoing, viable business in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States in its sole discretion. The United States, in its sole discretion, may agree to an extension of this time period for up to thirty (30) calendar days after regulatory approvals required to close the divestiture of the Intermedia Assets have been obtained. The United States shall notify the Court in the case of such an extension. Defendants agree to use their best efforts to divest the Intermedia Assets as expeditiously as possible.

B. In accomplishing the divestiture ordered by this Final Judgment, defendants promptly shall make known, by usual and customary means, the availability of the Intermedia Assets. Defendants shall inform any person making an inquiry regarding a possible purchase of the Intermedia Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Intermedia Assets customarily provided in a due diligence process except such information or documents subject to attorney-client privilege or attorney work-product privileges. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

C. Defendants shall provide the Acquirer and the United States information relating to the personnel involved in the management of the Intermedia Assets and personnel engaged in the provision and selling of services offered by the Intermedia Assets in order to enable the Acquirer to make offers of employment. Defendants shall not interfere with any negotiations by the Acquirer to employ any Intermedia employee who works at, or whose primary responsibility concerns, any business that is part of the Intermedia Assets. Further, for a period of twelve (12) months following the closing of the Merger, defendants shall not solicit to hire, or hire, any Intermedia employee who, within six (6) months of the date of the sale of the business that is part of the Intermedia Assets that employs the individual, receives a reasonable offer of employment from the approved Acquirer of the Intermedia Assets, unless such employee is terminated or laid off by the Acquirer.

D. Defendants shall permit prospective Acquirers of the Intermedia Assets to have reasonable access to personnel and to make inspections of the physical facilities of the Intermedia Assets any and all environmental, zoning, and other permit or license documents and information, and to make inspection of the Intermedia Assets, and have access to any and all financial, operational, business,

strategic or other documents and information customarily provided as part of a due diligence process.

E. Defendants shall warrant to any Acquirer of the Intermedia Assets that the assets will be fully operational on the date of sale.

F. Defendants shall not take any action, direct or indirect, that will impede in any way the operation, sale, or divestiture of the Intermedia Assets.

G. Unless the United States otherwise consents in writing, the divestitures pursuant to Section IV or by trustee appointed pursuant to Section V of this Final Judgment shall include all Intermedia Assets and be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Intermedia Assets can and will be used by the Acquirer as a viable, ongoing business engaged in the provision of Internet backbone and access services. Unless the United States otherwise consents in writing, the divestitures required by Section IV or V shall be made to a single Acquirer. If, after making a reasonable, good faith effort, Defendants are unable to effect a sale to a single Acquirer, they may submit more than one Acquirer for approval by the United States which, in its sole discretion, may determine whether to permit such a sale. The divestiture, whether pursuant to Section IV or Section V of this Final Judgment, shall be made to an Acquirer for whom it is demonstrated to the United States's sole satisfaction that: (1) The Acquirer has the capability and intent of competing effectively in the provision of Internet backbone and access services; and (2) the Acquirer has the managerial, operational, and financial capability to compete effectively in the provision of Internet backbone and access services. Such divestiture shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between an Acquirer and defendants gives any defendant the ability unreasonably to raise the Acquirer's costs, lower the Acquirer's efficiency, or otherwise interfere in the ability of the Acquirer to compete effectively.

H. Nothing herein shall be construed to provide to any person or entity that is not a party to this Final Judgment any rights with respect to its enforcement, modification or termination.

V. Appointment of Trustee

A. In the event that defendants have not divested the Intermedia Assets within the time specified in Section IV(A) of this Final Judgment, defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee to be selected by the United States and approved by the Court to effect the divestiture of the Intermedia Assets.

B. After the appointment of the trustee becomes effective, only the trustee shall have the right divest the Intermedia Assets. The trustee shall have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States at such price and on such terms as are then obtainable upon reasonable efforts of the trustee, subject to the provisions of Sections IV, V and VI of this Final Judgment, and shall have such other powers as the Court shall deem appropriate. Subject to Section V(D) of this Final Judgment, the trustee shall have the power and authority to hire at the cost and expense of defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the judgment of the trustee to assist in the divestiture. The trustee shall have the power and authority to accomplish the divestiture at the earliest possible time to an Acquirer acceptable to the United States, in its sole discretion, and shall have such other powers as this Court shall deem appropriate.

C. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by defendants must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VI.

D. The trustee shall serve at the cost and expense of defendants, on such terms and conditions as the United States approves, and shall account for all monies derived from the sale of each asset sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to defendants and the trust shall then be terminated. The compensation of such trustee and of any professionals and agents retained by the trustee shall be reasonable in light of the value of the divested Intermedia Assets and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestitures, including their best efforts to effect all necessary regulatory approvals. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the Intermedia Assets, and defendants shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to reasonable protection for trade secrets or other confidential research, development or commercial information. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestiture.

F. After its appointment, the trustee shall file monthly reports with the United States and the Court setting forth the trustee's efforts to accomplish the divestitures ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Intermedia Assets, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest the Intermedia Assets.

G. If the trustee has not accomplished such divestiture within six months after its appointment, the trustee shall file promptly with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the United States, who shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

VI. Notice of Proposed Divestiture

A. Within two (2) business days following execution of a definitive divestiture agreement, defendants or the

trustee, whichever is then responsible for effecting the divestiture, shall notify the United States of the proposed divestiture. If the trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed transaction and list the name, address, and telephone number of each person not previously identified who offered, or expressed an interest in or desire to acquire any ownership interest in the Intermedia Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from defendants, the proposed Acquirer, any other third party, or the trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer, or any other potential Acquirer. Defendants and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from defendants, the proposed Acquirer, any third party, and the trustee, whichever is later, the United States shall provide written notice to defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to defendants' limited right to object to the sale under Section V(C) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer, or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by defendants under Section V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Financing

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

VIII. Hold Separate

Until the divestiture required by this Final Judgment has been accomplished, defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture order by this Court.

IX. Affidavits

A. Within twenty (20) calendar days of the filing of the Complaint in this matter and every thirty (30) calendar days thereafter until the divestiture has been completed, pursuant to Section IV or Section V of this Final Judgment, defendants shall deliver to the United States an affidavit as to the fact and manner of compliance with Sections IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who during the preceding thirty days made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Intermedia Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts defendants have taken to solicit buyers for the Intermedia Assets and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by defendants, including limitation on information, shall be made within fourteen (14) days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, defendants shall deliver to the United States an affidavit which describes in reasonable detail all actions defendants have taken and all steps defendants have implemented on an ongoing basis to preserve and maintain the Intermedia Assets and to comply with Section VIII of this Final Judgment. The affidavit also shall describe, but not be limited to, defendants' efforts to maintain and operate the Intermedia Assets as a viable active competitor; to maintain separate management, staffing, sales, marketing, and pricing the Intermedia Assets; and to maintain the Intermedia Assets in operable condition at current (and currently projected future) capacity configurations. Defendants shall deliver to the United States and affidavit describing any changes to the efforts and actions outlined in defendants' earlier affidavit(s) filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Intermedia Assets until one year after such divestiture has been completed.

D. Defendants shall promptly inform the United States of any change in the management or operation of the Intermedia Assets that would affect the defendants' ability to fulfill their obligations under this Final Judgment or the Hold Separate Stipulation and Order. Such notice shall include a description of all the steps defendants have taken or will take regarding the subject of such notice.

X. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants, be permitted:

1. Access during office hours of defendants to inspect and copy, or at the option of the United States, to require defendants to provide copies of, all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of defendants, relating to any matters contained in this Final Judgment; and

2. To interview, either informally or on the record, defendant's officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint of interference by the defendants.

B. Upon the written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit such written reports, under oath if requested, relating to any of the matters contained in this Final Judgment and the Hold Separate Stipulation and Order as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or

for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendants to the United States, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,'' then the United States shall give defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI. No Reacquisition

Defendants may not reacquire any part of the Intermedia Assets during the term of this Final Judgment.

XII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIII. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment will expire upon the tenth anniversary of the date of its entry.

XIV. Public Interest Determination

Entry of this Final Judgment is in the public interest.

Date: _____

Court approval subject to procedures of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16.

_____

United States District Judge

Competitive Impact Statement

The United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA''), 15 U.S.C. § 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

On November 17, 2000, the United States filed a civil antitrust Complaint alleging that the proposed acquisition of Intermedia Communications, Inc. (''Intermedia'') by WorldCom, Inc. (''WorldCom'') would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The Complaint alleges that WorldCom and Intermedia are two leading providers of Internet backbone service. As explained below, the acquisition of Intermedia by WorldCom will substantially lessen competition in the market for Tier 1 Internet backbone services in violation of Section 7 of the Clayton Act.

The request for relief in the Complaint seeks: (1) A judgment that the proposed acquisition would violate Section 7 of the Clayton Act; (2) a permanent injunction preventing WorldCom and Intermedia from merging; and (3) such other relief that the Court deems proper.

Shortly before the United States filed its Complaint, the United States and defendants reached agreement on the terms of a proposed Final Judgment. The proposed Final Judgment would permit WorldCom and Intermedia to complete their merger, and thus enable WorldCom to acquire ownership of a controlling stock interest in Digex, Inc. now owned by Intermedia, but it would require WorldCom thereafter to divest all of Intermedia's businesses and assets (except for the Digex stock) as an integrated, ongoing concern. Subject to the possibility of extensions under certain limited circumstances, the divestiture must occur within one hundred eighty days of WorldCom's closing of the Intermedia transaction. The proposed Final Judgment, along with the Hold Separate Stipulation and Order, also contain provisions restricting WorldCom from interfering in the ongoing operations of Intermedia's business, or from participating in the management or governance of Intermedia, in order to minimize the risk of competitive harm that otherwise might arise pending completion of the divestiture.

The United States and the defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate the action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof. The United States and defendants have also stipulated, consistent with the proposed Final Judgment, to a number of requirements designed to maintain the business and assets of Intermedia as a fully separate, competitive business pending entry of the proposed Final Judgment and pending the divestiture.

II. Description of the Events Giving Rise to the Alleged Violation

A. The Defendants and the Proposed Transaction

WorldCom, Inc., formerly known as MCI WorldCom, Inc., is a corporation organized and existing under the laws of the State of Georgia, with its principal place of business in Clinton, Mississippi. It is one of the largest global telecommunications providers. WorldCom's 1999 annual revenues totaled approximately $37 billion.

WorldCom's UUNET subsidiary is by far the largest provider of Internet backbone services in the world, whether measured by revenues or Internet traffic carried. UUNET offers a wide range of retail and wholesale Internet backbone services, including ''dial-up'' (i.e., through shared modem banks) and dedicated Internet access (i.e, through direct connections to the customer), as well as value-added services such as Internet protocol virtual private networks (''IP/VPNs''), web site hosting, applications hosting, and Internet security services.

Intermedia Communications, Inc. is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business in Tampa, Florida. Intermedia is a broad-based, integrated telecommunications provider that primarily offers local and long distance voice and data communications solutions to business and government customers. In addition to its other voice and data business, Intermedia operates a significant nationwide Internet backbone network, offering a broad suite of dedicated and dial-up Internet connectivity services to Internet Services Providers (''ISPs''), businesses and government customers. In 1999, Intermedia served approximately 90,000 business and government customers, and had consolidated revenues of approximately $906 million. Intermedia also owns a controlling stake—approximately 94% of the voting securities and 62% of all outstanding common shares—in Digex, Inc., a publicly traded Delaware corporation headquarted in Beltsville, Maryland. Digex is a leading provider of managed web site hosting and related services. Digex's revenues during the last twelve months were approximately $108 million.

On September 5, 2000, WorldCom and Intermedia entered into an agreement whereby WorldCom will acquire Intermedia by assuming Intermedia's debt and issuing its stock in exchange for the Intermedia shares. The transaction is valued at approximately $6 billion, which reflects

approximately $3 billion in equity and $3 billion in debt and preferred stock.

On October 23, 2000, the Defendants filed an application for the transfer of control of various licenses issued by the FCC to Intermedia that are necessary for it to conduct its business. Unless and until their FCC application is granted, the Defendants cannot consummate the merger.

B. Markets To Be Harmed By the Proposed Merger

The explosive growth of the Internet over the past several years has transformed the American economy as well as the lifestyles of millions of American consumers and businesses. Indeed, the Internet is fast becoming as much a part of daily life as the television and the telephone. From a basic network that served primarily the military and academic institutions, the Internet has expanded into a global network of public and private networks which enables end users to communicate with each other and access large amounts of information data, and educational and entertainment services. These end users—individuals, businesses, content providers, governments, and universities—obtain access to the Internet either through a ''dial-up'' modem or other consumer Internet access connection (*e.g.*, cable modem or digital subscriber line service), or through a dedicated high-speed facility (''dedicated access'') provided by one of thousands of ISPs. ISPs provide access to the Internet on a local, regional, or national basis. While ISPs operate their own networks of varying size, most have limited facilities.

An ISP can connect any customer on its network to any of the other customers on its network. In order to allow its customers to communicate with the many end users connected to other networks, however, an ISP must establish direct or indirect interconnections with those other networks. Interconnection agreements between networks are voluntary and consensual in nature, and are not subject to governmental regulation.

Because the Internet comprises thousands of separate networks, direct interconnections between each of those networks and all other networks would be impractical. Instead, an Internet ''backbone'' provider (''IBP'') aggregates the connections between these smaller networks into a large ''network of networks'' served by that backbone. These large IBP networks are able to use high-capacity long-haul transmission facilities to interconnect their own customers with each other. In addition, these IBPs can establish interconnections with other IBPs to provide access to the ultimate ''network of networks'' known generally as the Internet, in which customers of one IBP are able to connect with customers of another network. This hierarchical structure dramatically reduces the number of direct and indirect interconnections that have to be negotiated, created and managed. One impact of the hierarchical structure of the Internet is that a large IBP controls the physical path of access to a large base of customers.

Physically, connectivity between networks is similar whether the connection is from an end user to an ISP, from an ISP to an IBP, or between two IBPs, in that a transmission interface between the two sides of each data exchange is established and packets of data are sent from one side of the interface to the other and processed based on a common standard. The precise type of infrastructure chosen and method of payment for the data exchange vary depending on the relative bargaining positions and capabilities of the parties on each side of the interconnection. Sometimes the transmission facilities are dedicated solely to data exchanges between two parties and sometimes there are shared access facilities for interchange, such as modem banks or the public interconnection facilities—the Network Access Point (''NAPs'') and Metropolitan Area Exchanges (''MAEs''[1]

There are a variety of relationships at the pints of interconnection. Mass market customers typically pay an ISP for the right to connect, typically using the shared public telephone infrastructure, to ISP's network and through it to all the networks to which the ISP is connected directly or indirectly. Corporate customers typically pay an ISP for a dedicated connection to the ISP's network and to the other networks to which it is connected. Likewise, the relationship between an ISP and an IBP typically involves the ISP buying access to the IBP's own network and through it to the other IBP networks and, thus, to the ISPs who chose to connect first to the other IBPs.

In contrast, the connectivity IBPs offer to each other is more variable. Some IBPs interconnect over private facilities, sharing the cost evenly and without regard to the balance of traffic flowing in each direction, but agreeing only to deliver packets addressed to users on their own network (and those of their customers). Such a relationship is often referred to as a ''private peering'' agreement. ''Peering'' stands in stark contrast to ''transit'' agreements where one IBP offers another IBP interconnection on the same kinds of terms as it offers connectivity to other customers, *i.e.*, the ability to interconnect with the transit provider's customers and the customers of any other network to which the IBP is connected. Intermediate arrangements, such as ''paid peering'' and peering only at public interconnection sites also occur between IBPs.[2]

An IBP's willingness to peer privately with another IBP typically depends in large part on the relative volumes of traffic the IBPs would send to or receive from one another. A small number of IBPs have such large networks of customers that they have the ability to ensure that they always receive interconnection with other IBPs that are on terms at least as favorable to themselves as to the other side of the interconnection and the ability to ensure as much as possible any desired level of quality for the interconnection. These large IBPs (''Tier 1 IBPs'') typically connect with each other through private, unpaid peering connections. In contrast, smaller IBPs are frequently customers—either transit customers of Tier 1 IBPs or paid peering customers—or have lower quality interconnection because they peer only at public interconnection points. These arrangements for connectivity between IBPs are, in effect, resold as a bundle when an IBP offers to provide general Internet connectivity (*i.e.*, the kind of arrangement typically sold by an IBP to its dedicated access customers), and the terms of these IBP-interconnection arrangements are important determinants of an IBP's ability to compete for sales of the bundled product. IBPs with less traffic that must purchase a significant amount of their connectivity to other IBPs operate at a substantial cost disadvantage compared

[1] The NAPs and MAEs are public interconnection facilities operated private parties, through which an ISP or IBP can exchange traffic with another network if both chose to do so. UUNET owns and operates three of the largest and busiest public interconnection points (MAE-East, MAE-West, and MAE-Central), along with four smaller regional public MAEs.

[2] During the past few years, the explosive growth of the Internet has overwhelmed the public interconnection points. Despite the expansion of existing public access points and the addition of new public access points to accommodate this growth, the NAPs and MAEs remain chronically congested. Private interconnections thus tend to offer considerably higher quality connections between networks in part because the quality is not affected by the volume of traffic coming from or between other networks, as it would be at a congested public facility.

to Tier 1 IBPs, which tend to rely exclusively on peering.

Tier 1 IBPs also have significant competitive advantages compared to lower tier IBPs in terms of their ability to provide higher-quality general Internet connectivity service. A customer purchasing general Internet connectivity from a Tier 1 IBP will more often be exchanging data efficiently over direct and private interconnections than would be the case for the same customer purchasing general Internet connectivity from a lower-tier IBP that has to rely more on indirect transit service or on the inferior and congested public interconnection points.

Because of these differences, the provision of Tier 1 backbone services is distinguished from that provided by other IBPs for customers seeking general Internet connectivity. For connectivity limited to the specific network (and customers) of a Tier 1 IBP, connectivity to a different IBP is not an effective substitute.

A relevant product market affected by this transaction is the provision of Internet connectivity by Tier 1 IBPs. Because providing customers with Tier 1 IBP connectivity in the United States requires domestic operations, such customers are unlikely to turn to any foreign providers that lack these domestic operations in response to a small but significant nontransitory increase in price.

C. Anticompetitive Consequences of the Merger

WorldCom's wholly owned subsidiary, UUNET, is by far the largest Tier 1 IBP by any relevant measure and is already approaching a dominant position in the Internet backbone market. Based upon a study conducted by the Department of Justice in February 2000, UUNET's share of all Internet traffic sent to or received from the customers of the 15 largest Internet backbones in the United States was about 37%, more than twice the share of the next-largest Tier 1 IBP, Sprint. Although far smaller than UUNET, Intermedia is also a significant provider of Internet backbone to dedicated Internet access customers. The 15 largest backbones represent approximately 95% of all U.S. dedicated Internet access revenues.

As is true in network industries generally, the value of Internet access to end users becomes greater as more and more end users can easily be reached through the Internet. The benefit that one end user derives from being able to communicate effectively with additional users is known as a ''network externality.'' Under some conditions, this network externality creates strong incentives for IBPs to negotiate efficient interconnection arrangements between one another. By doing so, each IBP can improve the quality and minimize the cost of the services it offers to its own customers.

When two IBPs are comparable in size, they are likely to be in position of rough parity with one another in negotiating interconnection arrangements. A substantial size disparity between IBPs, however, may alter the bargaining leverage between those IBPs. In this context, the smaller IBP may suffer greater harm than the larger IBP from a failure to achieve interconnection, since that failure would adversely affect the cost and quality of a larger proportion of the communications of the smaller IBP's customers than of the communications of the larger IBP's customers. In an extreme case, when a IBP grows to a point at which it controls a substantial share of the total Internet end user base and its size greatly exceeds that of any other network, the dominant IBP may be able to ''tip'' the market. By degrading the quality or increasing the price of interconnection with smaller networks it can obtain advantages in attracting customers to its network. Customers will recognize that they can communicate more effectively with a larger number of other end users if they are on the largest network, and this effect feeds upon itself and becomes more powerful as larger numbers of customers choose the largest network. Faced with a reduction of quality or an increase in the cost of interconnection with the dominant IBP, rivals may be unable to compete on a long-term basis and may exit the market. If rivals decide to pass on these costs, users of connectivity will respond by selecting the dominant network as their provider. Once this occurs, restoring the market to a competitive state could require extraordinary means, including some form of government regulation.

Given UUNet's current position in the IBP market, a significant increase in UUNet's size relative to other IBPs would create an unacceptable risk of anticompetitive behavior. UUNet might be able to charge higher prices for interconnection to another IBP, convert non-paying IBPs to paying IBPs, avoid giving better prices to small IBPs, or lower the quality of interconnection to the smaller IBPs, increasing the likelihood of a ''tipping'' of the Internet backbone market towards monopoly.

Entry into the Tier 1 Internet backbone services market would not be timely, likely, or sufficient to remedy the proposed merger's likely anticompetitive harm. Entry barriers are already high, and the proposed transaction will raise barriers to entry even higher. Entry sufficient to offer a significant competitive constraint on the provision of connectivity by Tier 1 IBPs requires substantial time and enormous sums of capital to build a network of sufficient size and capacity to attract the relevant base of customers, and to attract and retain the scarce, highly skilled technical personnel required for its operations. Through this transaction, UUNET/Intermedia would enhance its ability to control and inhibit successful entry by refusing to interconnect with new entrants or by limiting those connections in order to control the growth of its rivals. By degrading the quality of interconnection and raising its rivals' costs, UUNET/Intermedia would further prevent entry and expansion by other IBPs. Moreover, through its control of public interconnection facilities (*e.g.,* MAE-East, MAE-West) and its refusal to upgrade these facilities, UUNET would be able to limit opportunities for existing rivals and new entrants to build their traffic volumes through public peering.

For these reasons, the United States concluded that the WorldCom/Intermedia merger as proposed may substantially lessen competition in violation of Section 7 of the Clayton Act, in the market for the provision of Internet connectivity by Tier 1 IBPs.

III. Explanation of the Proposed Final Judgment

A. Divestiture Requirement

The proposed Final Judgment will preserve competition in the market for the provision of Internet connectivity by Tier 1 IBPs by limiting UUNET's increase in its control over Internet traffic. Section IV of the proposed Final Judgment requires WorldCom, within one hundred eighty (180) calendar days from the closing of WorldCom's underlying acquisition of Intermedia, to divest all of the Intermedia assets, except for the voting interest in Digex, as an ongoing, viable business to an acquirer acceptable to the United States. Thus, although the proposed Final Judgment permits WorldCom to retain Intermedia's interest in Digex, it prohibits UUNET from acquiring Intermedia's Internet backbone connectivity network, business, customer relationships and traffic.

Through the sale of Intermedia assets, the proposed Final Judgment's prohibitions will help to prevent UUNET from increasing its level of customer traffic relative to other Tier 1

IBPs and thus will help to preserve competition. Absent these prohibitions, the likely result of a combined WorldCom and Intermedia would be higher prices and lower output than there otherwise would be for connectivity to Tier 1 IBPs. As discussed above, Digex is primarily provider of managed web-hosting services.

Intermedia and Digex currently operate as independent companies with virtually no shared employees. Intermedia has a controlling voting interest in Digex which it will transfer to WorldCom. The entity that currently constitutes Intermedia, which includes the Internet backbone provider business, will be divested as a whole. The proposed Final Judgment, along with the Hold Separate Stipulation and proposed Order, ensures that the Intermedia assets and businesses are maintained wholly separate from WorldCom pending both the closing of the WorldCom-Intermedia merger and the divestiture of Intermedia to a qualified buyer. Section XI of the proposed Final Judgment prohibits WorldCom from reacquiring any part of the divested Intermedia assets during the ten year term of the decree. In the Event that WorldCom has not completed the divestiture within the specified time period, including possible extension pursuant to Section IV(A), Section V provides for the appointment of a trustee who shall have the power and authority to accomplish the divestiture.

B. Other Decree Provisions

In order to monitor and ensure compliance with the Final Judgment, Section IX requires periodic affidavits on the fact and manner of defendants' compliance with divestiture and the Final Judgment. Section X gives the United States various rights, including the ability to inspect the defendant's records, to conduct interviews and to take sworn testimony of the defendant's officers, directors, employees and agents, and to require defendants to submit written reports. These rights are subject to legally recognized privileges, and any information the United States obtains using these powers is protected by specified confidentiality obligations.

The Court retains jurisdictions under Section XII, and Section XIII provides that the proposed Final Judgment will expire on the tenth anniversary of the date of its entry, unless extended by the Court.

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15. U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal courts to recover three times the damages a person has suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against the defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**. The United States will evaluate and respond to the comments. All comments will be given due consideration by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the responses of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: Donald J. Russell, Chief, Telecommunications Task Force, United States Department of Justice, Antitrust Division, 1401 H Street, NW., Suite 8000, Washington, DC 20530.

The proposed Final Judgment provides in Section XII that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate to carry out or construe the Final Judgment, to modify any of its provisions, to enforce compliance, and to punish any violations of its provisions.

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, seeking an injunction to block consummation of the WorldCom/Intermedia merger and a full trial on the merits. The United States is satisfied, however, that the divestiture of Intermedia as an ongoing business and other relief contained in the proposed Final Judgment will preserve competition in the market for the provision of Internet connectivity by Tier 1 IBPs. This proposed Final Judgment will also avoid the substantial costs and uncertainty of a full trial on the merits on the violations alleged in the Complaint. Therefore, the United States believes that there is no reason under the antitrust laws to proceed with further litigation if Intermedia is sold in the manner required by the proposed Final Judgment.

VII. Standard of Review Under the APPA for Proposed Final Judgment

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' In making that determination, the court may consider:

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e) (emphasis added). As the United States Court of Appeals for the D.C. Circuit held, this statute permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States* v. *Microsoft,* 56 F.3d 1448, 1461–62 (D.C. Cir. 1995).

In conducting this inquiry, ''[t]he Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and

less costly settlement through the consent decree process.'' [3] Rather,

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. *Mid-America Dairymen, Inc.,* 1977–1 Trade Case. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981); *see also Microsoft,* 56 F.3d at 1460–62. Precedent requires that

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''within the reaches of the public interest.'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[4]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' '' *United States* v. *American Tel. & Tel Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982), *aff'd sub nom., Maryland* v. *United States,* 460 U.S. 1001 (1983) (quoting *Gillette Co.,* 406 F. Supp. at 716); *United States* v. *Alcan Aluminum, Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985).

Moreover, the court's role under the Tunney Act is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459. Since ''[t]he court's authority to review the decree depends entirely on the government's exercising its prosecutional discretion by bringing a case in the first place,'' it follows that the court ''is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States might have but did not pursue. *Id.*

VIII. Determinative Documents

There are not determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment. Consequently, the United State has not attached any such materials to proposed Final Judgment.

Dated: December 21, 2000.

Respectfully submitted,
Donald J. Russell,
Chief.

A. Douglas Melamed,
Acting Assistant Attorney General.

Constance K. Robinson,
Director of Operations and Merger Enforcement.

David F. Smutny (DC Bar No. 435714),
J. Parker Erkmann,
Lorenzo McRae II,
Trial Attorneys, U.S. Department of Justice, Antitrust Division.

Telecommunications Task Force, 1401 H. Street, N.W., Suite 8000, Washington, D.C. 20530 (202) 514–5621.

Certificate of Service

I hereby certify that copies of the foregoing Competitive Impact Statement was served, as indicated below, this 21st day of December, 2000 upon each of the parties listed below:

Charles F. Rule, Esq. (BY HAND), Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, DC 20004–2401, (202) 662–5119, Counsel for WorldCom, Inc.

Brad E. Mutschelknaus, Esq. (BY HAND), Kelley Drye & Warren, LLP, 1200 19th Street, N.W., Suite 500, Washington, DC 20036, (202) 955–9600, Counsel for Intermedia Communications, Inc.

David F. Smutny,
Counsel for Plaintiff.

[FR Doc. 01–928 Filed 1–11–01; 8:45 am]

BILLING CODE 4410–11–M

[3] 119 Cong. Rec. 24598 (1973). See *United States* v. *Gillette Co.,* 406 F. Supp. 713, 715 (D. Mass. 1975). A ''public interest''determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. 93–1463, 93d Cong. 2d Sess. 8–9 (1974), reprinted in U.S.C.C.A.N 6535, 6538.

[4] *Bechtel,* 648 F.2d at 666 (emphasis added); *see BNS,* 858 F.2d at 463; *United States* v. *National Broadcasting Co.,* 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *Gillettee,* 406 F. Supp. At 716. *See also Microsoft,* 56 F.3d at 1461 (whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' ').

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation, Justice.

Meeting of the Compact Council for the National Crime Prevention and Privacy Compact

AGENCY: Federal Bureau of Investigation, Justice.

ACTION: Meeting notice.

SUMMARY: The purpose of this notice is to announce a meeting of the Compact Council created by the National Crime Prevention and Privacy Compact Act of 1998 (Compact). Thus far, the federal government and eight states are parties to the Compact which governs the exchange of criminal history records for licensing, employment, and similar purposes. The Compact also provides a legal framework for the establishment of a cooperative Federal-state system to exchange such records.

The meeting will be a strategic planning session to devise short and long term goals and to define the mission statement of the Compact Council.

The meeting will be open to the public on a first-come, first-seated basis. Any member of the public wishing to file a written statement with the Compact Council or wishing to address this session of the Compact Council should notify Ms. Cathy L. Morrison at (304) 625–2736, at least 24 hours prior to the start of the session. The notification should contain the requestor's name and corporate designation, consumer affiliation, or government designation, along with a short statement describing the topic to be addressed, and the time needed for the presentation. Requestors will ordinarily be allowed not more than 15 minutes to present a topic.

DATES AND TIMES: The Compact Council will meet in open session from 9 a.m. until 5 p.m. on February 13, 2001.

ADDRESSES: The meeting will take place at the Sheraton Uptown Albuquerque, 2600 Louisiana Boulevard, N.E.,

Albuquerque, New Mexico, telephone (505) 881–0000.

FOR FURTHER INFORMATION CONTACT: Inquiries may be addressed to Ms. Cathy L. Morrison, Management Analyst, Programs Development Section, CJIS Division, FBI, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306–0147, telephone (304) 625–2736, facsimile (304) 625–5388.

Dated: January 4, 2001.

Thomas E. Bush, III,

Section Chief, Programs Development Section, Federal Bureau of Investigation.

[FR Doc. 01–1071 Filed 1–11–01; 8:45 am]

BILLING CODE 4410–02–M

DEPARTMENT OF JUSTICE

Parole Commission

Sunshine Act Notice; Public Announcement

Pursuant To The Government In the Sunshine Act (Public Law 94–409) [5 U.S.C. Section 552b].

AGENCY HOLDING MEETING: Department of Justice, United States Parole Commission.

TIME AND DATE: 9:30 a.m., Wednesday, January 17, 2001.

PLACE: 5550 Friendship Blvd., Fourth Floor, Chevy Chase, MD 20815.

STATUS: Open.

MATTERS TO BE CONSIDERED:

The following matters have been placed on the agenda for the open Parole Commission meeting:

1. Approval of minutes of previous Commission meeting.

2. Reports from the Chairman, Commissioners, Legal, Chief of Staff, Case Operations, and Administrative Sections.

3. Adoption of Rule for attorney qualifications for District of Columbia Code cases similar to Rule adopted for federal cases at 28 CFR § 2.61.

4. Adoption of Final Version of the U.S. Parole Commission Rules and Procedures Manual.

AGENCY CONTACT: Sam Robertson, Case Operations, United States Parole Commission, (301) 492–5962.

Dated: January 9, 2001.

Michael A. Stover,

General Counsel, U.S. Parole Commission.

[FR Doc. 01–1160 Filed 1–10–01; 10:55 am]

BILLING CODE 4410–31–M

DEPARTMENT OF JUSTICE

Parole Commission

Sunshine Act Meeting, Public Announcement

Pursuant To The Government In the Sunshine Act (Public Law 94–409) [5 U.S.C. Section 552b].

AGENCY HOLDING MEETING: Department of Justice, United States Parole Commission.

DATE AND TIME: 10:30 a.m., Wednesday, January 17, 2001.

PLACE: U.S. Parole Commission, 5550 Friendship Boulevard, 4th Floor, Chevy Chase, Maryland 20815.

STATUS: Closed—Meeting.

MATTERS CONSIDERED:

The following matter will be considered during the closed portion of the Commission's Business Meeting:

Appeals to the Commission involving approximately one case decided by the National Commissioners pursuant to a reference under 28 CFR 2.27. This case was originally heard by an examiner panel wherein inmates of Federal prisons have applied for parole and are contesting revocation of parole or mandatory release.

AGENCY CONTACT: Sam Robertson, Case Operations, United States Parole Commission, (301) 492–5962.

Dated January 9, 2001.

Michael A. Stover,

General Counsel, U.S. Parole Commission.

[FR Doc. 01–1161 Filed 1–10–01; 11:08 am]

BILLING CODE 4410–31–M

DEPARTMENT OF LABOR

Employment Standards Administration

Proposed Collection; Comment Request

ACTION: Notice.

SUMMARY: 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/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 requirements on respondents can be properly assessed. Currently, the Employment Standards Administration is soliciting comments concerning the proposed extension collection of the following information collections: (1) Maintenance of Receipts for Benefits Paid by a Coal Mine Operator (CM–200); (2) Claim for Reimbursement-Assisted Reemployment (CA–2231); and (3) Vehicle Mechanical Inspection Report for Transportation Subject to Department of Transportation Requirements (WH–514) and Vehicle Mechanical Inspection Report for Transportation Subject to Department of Labor Safety Standards (WH–514a). Copies of the proposed information collection requests can be obtained by contacting the office listed below in the addressee section of this Notice.

DATES: Written comments must be submitted to the office listed in the addressee section below on or before March 13, 2001.

ADDRESSES: Ms. Patricia A. Forkel, U.S. Department of Labor, 200 Constitution Ave., NW., Room S–3201, Washington, DC 20210, telephone (202) 693–0339 (this is not a toll-free number), fax (202) 693–1451.

SUPPLEMENTARY INFORMATION:

Maintenance of Receipt for Benefits Paid by a Coal Mine Operator (CM–200)

I. Background

The Office of Worker's Compensation Programs (OWCP) administers the Federal Black Lung Benefits Act (FBLBA). Under 20 CFR 725.531, self-insured coal mine operators or insurance carriers must maintain receipts for black lung benefits payments made for five years after the date on which the receipt was executed. This requirement is designated as CM–200, Maintenance of Receipts for Benefits Paid by A Coal Mine Operator. There is no form or format for the receipts; a cancelled check will satisfy the requirement.

II. Review Focus

The Department of Labor is particularly interested in comments which:

- 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;
- 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.

III. Current Actions

The Department of Labor seeks the extension of approval for this information collection in order that coal mine operators and insurers can provide evidence, as necessary, that payment to claimants has been made and received.

Type of Review: Extension.

Agency: Employment Standards Administration.

Title: Maintenance of Receipts for Benefits Paid by a Coal Mine Operator.

OMB Number: 1215–0124.

Affected Public: Business of other for-profit institutions; State, Local, or Tribal Government.

Recordkeeping: On occasion.

No. of Respondents: 140.

No of Responses: 140.

Estimated Total Burden Hours: 1.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $0.

Claim for Reimbursement-Assisted Reemployment (CA–2231)

I. Background

The Office of Workers' Compensation Programs (OWCP) administers the Federal Employees' Compensation Act (FECA). Section 8104(a) of the Act provides vocational rehabilitation services to eligible injured Federal employees which are paid from the Employees' Compensation Fund. Authority has been granted to provide amounts from the fund to reimburse the employer for a portion of the salary of reemployed disabled Federal workers. The information collected on the Form CA–2231 is used to facilitate prompt reimbursement to certain employers who employ such workers.

II. Review Focus

The Department of Labor is particularly interested in comments which:

• 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;

• 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.

III. Current Actions

The Department of Labor seeks the extension of approval to collect information necessary to ensure timely and accurate payments to eligible employers for reimbursement claims.

Type of Review: Extension.

Agency: Employment Standards Administration.

Title: Claim for Reimbursement-Assisted Reemployment.

OMB Number: 1215–0178.

Agency Number: CA–2231.

Affected Public: Business or other for-profit; Not-for-profit institutions; Federal government; State, local or Tribal government.

Total Respondents: 20.

Total Responses: 80.

Average Time per Response: ½ hour.

Estimated Total Burden Hours: 40.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $29.60.

Vehicle Mechanical Inspection Report for Transportation Subject to Department of Transportation Requirements (WH–514); Vehicle Mechanical Inspection Report for Transportation Subject to Department of Labor Safety Standards (WH–514a)

I. Background

Section 401 of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) requires that farm labor contractor, agricultural employers, or agricultural associations who use any vehicle to transport a migrant or seasonal agricultural worker, ensure that such vehicle conforms to vehicle safety standards prescribed by MSPA and other applicable Federal and State safety standards. The use of forms WH–514 and WH–514a enable an applicant to verify to the Department or appropriate State agency that the vehicles used to transport such workers meet these safety standards. The WH–514 is used to verify that Department of Transportation safety standards are set for all vehicles other than passenger automobiles or station wagons, and the WH–514a is used to verify that Department of Labor safety standards are met for all vehicles including passenger automobiles or station wagons.

II. Review Focus

The Department of Labor is particularly interested in comments which:

• 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;

• 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.

III. Current Actions

The Department of Labor seeks the extension of approval to collect information in order to verify that farm labor contractors, agricultural employers, and agricultural associations have complied with the applicable safety standards.

Type of Review: Extension.

Agency: Employment Standards Administration.

Title: Vehicle Mechanical Inspection Report for Transportation Subject to Department of Transportation Requirements (WH–514); Vehicle Mechanical Inspection Report for Transportation Subject to Department of Labor Safety Standards (WH–514a).

OMB Number: 1215–0036.

Agency Numbers: WH–514, WH–514a.

Affected Public: Business or other for-profit; Farms.

Total Respondents: 1,200.

Total Responses: 3,600.

Average Time per Response: 5 min.

Estimated Total Burden Hours: 300.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $165,600.

Comments submitted in response to this notice 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: January 8, 2001.

Margaret J. Sherrill,

Chief, Branch of Management Review and Internal Control, Division of Financial Management, Office of Management, Administration and Planning, Employment Standards Administration.

[FR Doc. 01–1044 Filed 1–11–01; 8:45 am]

BILLING CODE 4510–27–P

DEPARTMENT OF LABOR

Employment Standards Administration, Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR Part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR Part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedes decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR Parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR Part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under The Davis-Bacon and Related Acts,'' shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, N.W., Room S–3014, Washington, D.C. 20210.

Modifications to General Wage Determination Decisions

The number of decisions listed in the Government Printing Office document entitled ''General Wage Determinations Issued Under the Davis-Bacon and related Acts'' being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I

None.

Volume II

None.

Volume III

None.

Volume IV

None.

Volume V

None.

Volume VI

None.

Volume VII

None.

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under The Davis-Bacon and Related Acts.'' This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country.

The general wage determinations issued under the Davis-Bacon and related Acts are available electronically by subscription to the FedWorld Bulletin Board System of the National Technical Information Service (NTIS) of the U.S. Department of Commerce at 1–800–363–2068.

Hard-copy subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, (202) 512–1800.

When ordering hard-copy subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the seven separate volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates are distributed to subscribers.

Signed at Washington, D.C. This 4th day of January 2001.

Carl J. Poleskey,

Chief, Branch of Construction Wage Determinations.

[FR Doc. 01–730 Filed 1–11–01; 8:45 am]

BILLING CODE 4510–27–M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Leadership Initiatives Advisory Panel

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that a meeting of the Leadership

Initiatives Advisory Panel (Creative Communities Initiative section) to the National Council on the Arts will be held from January 29–31, 2001 in Room 716 at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC, 20506.

This meeting is for the purpose of Panel review, discussion, evaluation, and recommendations on financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the Chairman of May 12, 2000, these sessions will be closed to the public pursuant to subsection (c)(4), (6) and (9)(B) of section 552b of Title 5, United States Code.

Further information with reference to this meeting can be obtained from Mr. Michael McLaughlin, Coordinator, Millennium & Leadership Initiatives, National Endowment for the Arts, Washington, DC, 20506, or call 202/682–5457.

Dated: January 9, 2001.

Kathy Plowitz-Worden,

Panel Coordinator, Panel Operations, National Endowment for the Arts.

[FR Doc. 01–1118 Filed 1–11–01; 8:45 am]

BILLING CODE 7537–01–U

NATIONAL SCIENCE FOUNDATION

Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Science Foundation.

ACTION: Notice.

SUMMARY: Under the Paperwork Reduction Act of 1995, Pub. L. 104–13 (44 U.S.C. 3501 *et seq.*), and as part of its continuing effort to reduce paperwork and respondent burden, the National Science Foundation (NSF) is inviting the general public and other Federal agencies to comment on this proposed information collection.

DATES: NSF should receive comments within 60 days from the date of this notice's publication.

ADDRESSES: Submit written comments to Anita Eisenstadt, Assistant General Counsel, through surface mail (National Science Foundation, 4201 Wilson Boulevard, Room 1265, Arlington, Virginia 22230); e:mail (aeisenst@nsf.gov) or fax (703–292–9041).

FOR FURTHER INFORMATION CONTACT: Call or write Anita Eisenstadt, Assistant General Counsel, at the National Science Foundation, 4201 Wilson Boulevard, Room 1265, Arlington, Virginia 22230; call (703) 292–8060, or send e:mail to aeisenst@nsf.gov.

SUPPLEMENTARY INFORMATION:

Title of Collection: Antarctic emergency response plan and environmental protection information.

Abstract: The NSF, pursuant to the Antarctic Conservation Act of 1978 (16 U.S.C. 2401 *et seq.*) (''ACA'') regulates certain non-governmental activities in Antarctica. The ACA was amended in 1996 by the Antarctic Science, Tourism, and Conservation Act. On June 4, 1998, NSF published a proposed rule in the **Federal Register** (63 FR 30438) to implement certain of these statutory amendments. The proposed rule would require non-governmental Antarctic expeditions using non-U.S. flagged vessels to ensure that the vessel owner has an emergency response plan. The proposed rule would also require persons organizing a non-governmental expedition to provide expedition members with information on their environmental protection obligations under the Antarctic Conservation Act. The notice of proposed rule stated that the rule was not subject to the Paperwork Reduction Act because of the small number of U.S. operators subject to the rule. Based upon comments received on the proposed rule and the slight increase in applicable tour operators, NSF has determined that it will issue this information collection notice to satisfy the requirements of the Paperwork Reduction Act of 1995, prior to issuing the final rule.

Expected Respondents. Respondents may include non-profit organizations and small and large businesses. The majority of respondents are anticipated to be U.S. tour operators, currently estimated to number twelve.

Burden on the Public. The Foundation estimates that a one-time paperwork and recordkeeping burden of 40 hours or less, at a cost of $500 to $1400 per respondent, will result from the emergency response plan requirement contained in the proposed rule. Presently, all respondents have been providing expedition members with a copy of the Guidance for Visitors to the Antarctic (prepared and adopted at the Eighteenth Antarctic Treaty Consultative Meeting as Recommendation XVIII–1). Because this Antarctic Treaty System document satisfies the environmental protection information requirements of the proposed rule, no additional burden shall result from the environmental information requirements in the proposed rule.

Dated: January 8, 2001.

Lawrence Rudolph,

General Counsel.

[FR Doc. 01–1072 Filed 1–11–01; 8:45 am]

BILLING CODE 7555–01–M

PENSION BENEFIT GUARANTY CORPORATION

Interest Assumption for Determining Variable-Rate Premium; Interest on Late Premium Payments; Interest on Underpayments and Overpayments of Single-Employer Plan Termination Liability and Multiemployer Withdrawal Liability; Interest Assumptions for Multiemployer Plan Valuations Following Mass Withdrawal

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of interest rates and assumptions.

SUMMARY: This notice informs the public of the interest rates and assumptions to be used under certain Pension Benefit Guaranty Corporation regulations. These rates and assumptions are published elsewhere (or are derivable from rates published elsewhere), but are collected and published in this notice for the convenience of the public. Interest rates are also published on the PBGC's web site (http://www.pbgc.gov).

DATES: The interest rate for determining the variable-rate premium under part 4006 applies to premium payment years beginning in January 2001. The interest assumptions for performing multiemployer plan valuations following mass withdrawal under part 4281 apply to valuation dates occurring in February 2001. The interest rates for late premium payments under part 4007 and for underpayments and overpayments of single-employer plan termination liability under part 4062 and multiemployer withdrawal liability under part 4219 apply to interest accruing during the first quarter (January through March) of 2001.

FOR FURTHER INFORMATION CONTACT: Harold J. Ashner, Assistant General Counsel, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202–326–4024. (For TTY/TDD users, call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION:

Variable-Rate Premiums

Section 4006(a)(3)(E)(iii)(II) of the Employee Retirement Income Security Act of 1974 (ERISA) and § 4006.4(b)(1)

of the PBGC's regulation on Premium Rates (29 CFR part 4006) prescribe use of an assumed interest rate in determining a single-employer plan's variable-rate premium. The rate is the ''applicable percentage'' (currently 85 percent) of the annual yield on 30-year Treasury securities for the month preceding the beginning of the plan year for which premiums are being paid (the ''premium payment year''). The yield figure is reported in Federal Reserve Statistical Releases G.13 and H.15.

The assumed interest rate to be used in determining variable-rate premiums for premium payment years beginning in January 2001 is 4.67 percent (*i.e.,* 85 percent of the 5.49 percent yield figure for December 2000).

The following table lists the assumed interest rates to be used in determining variable-rate premiums for premium payment years beginning between February 2000 and January 2001.

For premium payment years beginning in:	The assumed interest rate is:
February 2000	5.64
March 2000	5.30
IApril 2000	5.14
May 2000	4.97
June 2000	5.23
July 2000	5.04
August 2000	4.97
September 2000	4.86
October 2000	4.96
November 2000	4.93
December 2000	4.91
January 2001	4.67

Late Premium Payments; Underpayments and Overpayments of Single-Employer Plan Termination Liability

Section 4007(b) of ERISA and § 4007.7(a) of the PBGC's regulation on Payment of Premiums (29 CFR part 4007) require the payment of interest on late premium payments at the rate established under section 6601 of the Internal Revenue Code. Similarly, § 4062.7 of the PBGC's regulation on Liability for Termination of Single-employer Plans (29 CFR part 4062) requires that interest be charged or credited at the section 6601 rate on underpayments and overpayments of employer liability under section 4062 of ERISA. The section 6601 rate is established periodically (currently quarterly) by the Internal Revenue Service. The rate applicable to the first quarter (January through March) of 2001, as announced by the IRS, is 9 percent.

The following table lists the late payment interest rates for premiums and employer liability for the specified time periods:

From	Through	Interest rate (percent)
10/1/94	3/31/95	9
4/1/95	6/30/95	10
7/1/95	3/31/96	9
4/1/96	6/30/96	8
7/1/96	3/31/98	9
4/1/98	12/31/98	8
1/1/99	3/31/99	7
4/1/99	3/31/00	8
4/1/00	3/31/01	9

Underpayments and Overpayments of Multiemployer Withdrawal Liability

Section 4219.32(b) of the PBGC's regulation on Notice, Collection, and Redetermination of Withdrawal Liability (29 CFR part 4219) specifies the rate at which a multiemployer plan is to charge or credit interest on underpayments and overpayments of withdrawal liability under section 4219 of ERISA unless an applicable plan provision provides otherwise. For interest accruing during any calendar quarter, the specified rate is the average quoted prime rate on short-term commercial loans for the fifteenth day (or the next business day if the fifteenth day is not a business day) of the month preceding the beginning of the quarter, as reported by the Board of Governors of the Federal Reserve System in Statistical Release H.15 (''Selected Interest Rates''). The rate for the first quarter (January through March) of 2001 (*i.e.,* the rate reported for December 15, 2000) is 9.50 percent.

The following table lists the withdrawal liability underpayment and overpayment interest rates for the specified time periods:

From	Through	Interest rate (percent)
1/1/95	3/31/95	8.50
4/1/95	9/30/95	9.00
10/1/95	3/31/96	8.75
4/1/96	6/30/97	8.25
7/1/97	12/31/98	8.50
1/1/99	9/30/99	7.75
10/1/99	12/31/99	8.25
1/1/00	3/31/00	8.50
4/1/00	6/30/00	8.75
7/1/00	3/31/01	9.50

Multiemployer Plan Valuations Following Mass Withdrawal

The PBGC's regulation on Duties of Plan Sponsor Following Mass Withdrawal (29 CFR part 4281) prescribes the use of interest assumptions under the PBGC's regulation on Allocation of Assets in Single-employer Plans (29 CFR part 4044). The interest assumptions applicable to valuation dates in February 2001 under part 4044 are contained in an amendment to part 4044 published elsewhere in today's **Federal Register**. Tables showing the assumptions applicable to prior periods are codified in appendix B to 29 CFR part 4044.

Issued in Washington, DC, on this 5th day of January 2001.

David M. Strauss

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 01–1024 Filed 1–11–01; 8:45 am]

BILLING CODE 7708–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–27335]

Filings Under the Public Utility Holding Company Act of 1935, as Amended (''Act'')

January 5, 2001.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated under the Act. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) is/are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by January 30, 2001, to the Secretary, Securities and Exchange Commission, Washington, DC 20549–0609, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After January 30, 2001, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

Alliant Energy Corporation, et al. (70–9455)

Alliant Energy Corporation (''Alliant Energy''), a registered holding company, its wholly owned nonutility subsidiary, Alliant Energy Resources, Inc. (''AER''), both of 222 West Washington Avenue,

Madison, Wisconsin 53703, have filed with this Commission a post-effective amendment under sections 6(a), 7, 9(a), 10, 12(b) and 32(h) of the Act and rules 45, 53 and 54 to an application-declaration previously filed under the Act.

Alliant Energy's public utility subsidiaries are Wisconsin Power and Light Company, South Beloit Water, Gas & Electric Company, Interstate Power Company and IES Utilities Inc. Together, these companies provide public utility service to approximately 919,000 electric and 393,000 retail gas customers in parts of Wisconsin, Iowa, Minnesota and Illinois. AER serves as the holding company for most of Alliant Energy's nonutility subsidiaries and investments.

By order dated August 26, 1999 in this proceeding (HCAR No. 27069) (''Financing Order''), Alliant Energy and AER were authorized to engage in a program of external and intrasystem financing and other related transactions for the period through December 31, 2001 (''Authorization Period'').[1] Among other specific approvals granted under the Financing Order, the Commission authorized Alliant Energy to enter into guarantees, obtain letters of credit, enter into expense agreements or otherwise provide credit support (collectively, ''Guarantees'') with respect to the obligations of any of its utility or nonutility subsidiaries (collectively, ''Subsidiaries'') as may be appropriate to enable any Subsidiary to carry on in the ordinary course of business, in an aggregate amount not to exceed $600 million outstanding at any one time.[2]

The Commission also authorized AER or any present or future nonutility subsidiary (''Nonutility Subsidiary'') of AER to acquire or construct in one or more transactions nonutility energy assets in the United States, including natural gas production, gathering, processing, storage and transportation facilities and equipment, liquid oil reserves and storage facilities and associated facilities (collectively, ''Energy Assets''), that would be incidental to the oil and gas exploration and production and energy marketing, brokering and trading operations of AER's subsidiaries. Nonutility Subsidiaries were authorized to invest up to $125 million in Energy Assets during the Authorization Period or in the equity securities of existing or new companies substantially all of whose physical properties consist or would consist of Energy Assets.

Also in the Financing Order, the Commission authorized Alliant Energy and any of its Nonutility Subsidiaries, including AER, to acquire the equity securities of one or more entities (''Financing Subsidiaries'') organized specifically for the purpose of facilitating the financing of the activities of the Nonutility Subsidiaries, but reserved jurisdiction over the transfer of the proceeds of any financing by a Financing Subsidiary to Alliant Energy, pending completion of the record.

Alliant Energy and AER, on behalf of itself and its respective direct and indirect Nonutility Subsidiaries (many of which are held by AER), request (1) an increase from $600 million to $1 billion in the amount of Guarantees Alliant Energy may issue at any one time, (2) authority to invest an additional $220 million in Energy Assets, including gas and oil exploration and production properties in Canada as well as the United States, and (3) a release of jurisdiction previously reserved over the transfer of proceeds of financing by any Financing Subsidiary to Alliant Energy.

Alliant Energy states that it has provided Guarantees for obligations of Subsidiaries in an aggregate principal amount of $291.8 million. Applicants state that as Alliant Energy's nonutility operations continued to expand, Alliant Energy projects the need to provide Guarantees in an aggregate principal amount up to $1 billion at any time outstanding. Alliant Energy asserts that, because of the temporary nature of the Guarantees and the low likelihood that it would be called upon to pay significant amounts under the Guarantees, it does not believe that the requested increase will expose it or its Subsidiaries to improper risks.

AER states that two indirect wholly owned subsidiaries of AER, Whiting Petroleum Corporation (''Whiting Petroleum'') and Alliant Energy Industrial Services, Inc., have invested an aggregate of $106.3 million in Energy Assets. AER anticipates that this level of investment activity in Energy Assets, particularly by Whiting Petroleum's acquisition of oil and gas production properties, will continue for the foreseeable future. Accordingly, during the remainder of the Authorization Period, AER requests authorization to invest, through Nonutility Subsidiaries, an additional $220 million in Energy Assets or in the equity securities of existing or new companies substantially all of whose physical properties consist or would consist of Energy Assets, including oil and gas exploration and production operations in Canada.

SCANA Corporation, et al. (70–9533)

SCANA Corporation (''SCANA''), a registered holding company, SCANA's public utility subsidiary companies, Public Service Company of North Carolina, Inc. (''PSNC''), South Carolina Electric and Gas Company, South Carolina Generating Company, Inc., and SCANA's nonutility subsidiary companies, South Carolina Pipeline Corporation, SCANA Energy Marketing Inc., SCANA Energy Trading, LLC, SCANA Propane Gas, Inc., SCANA Propane Storage, Inc., Servicecare Inc., Primesouth, Inc., Palmark, Inc., Palmetto Lyme, LLC, SCANA Resources, Inc., SCANA Development Corp., SCANA Petroleum Resources, Inc., SCANA Services, Inc., South Carolina Fuel Company, Inc., SCANA Public Service Company LLC, Cardinal Pipeline Company, LLC and Pine Needle LNG Company, LLC, all located at 1426 Main Street, Columbia, South Carolina 29201 (collectively, ''Applicants'') have filed a post-effective amendment under sections 6(a), 7, 9(a), 10, and 12 of the Act and rules 43, 45, 53 and 54 under the Act. The Commission issued a notice of the original application-declaration on August 31, 1999 (HCAR No. 27071).

By order dated February 14, 2000 (HCAR No. 27137) (''Financing Order''), among other things, the Commission authorized SCANA through February 11, 2003 (the ''Authorization Period''), to issue and sell common stock and long-term debt up to an aggregate amount of $1.935 billion and PSNC to issue and sell commercial paper and short-term debt up to an aggregate amount of $125 million.

Applicants now propose to increase: (i) the amount of common stock with no par value (other than for employee benefit plans or stock purchase and dividend reinvestment plans) and long-term debt issued by SCANA in an aggregate principal amount not to exceed $2.45 billion and (ii) the amount of commercial paper and short-term debt that PSNC is authorized to issue an aggregate amount not to exceed $200 million.[3]

In addition, PSNC proposes to issue $150 million in long-term debt through the Authorization Period. The long-term

[1] On February 4, 2000, the Commission issued a supplemental order clarifying the terms of the Financing Order as it relates to the determination of the interest rate on notes issued or guaranteed by Alliant Energy. See Alliant Energy Corp., *et al.,* Holding Co. Act Release No. 27130.

[2] The Guarantees authorized in this proceeding are separate from and in addition to guarantees provided by Alliant Energy in accordance with terms of the Commission's order dated December 18, 1998 (Holding Co. Act Release No. 26956) in SEC File No. 70–9317, which primarily support AER's commercial paper program.

[3] The increase in short-term debt is required to meet PSNC's winter heating season requirements.

debt securities issued by PSNC would be comprised of medium-term notes under an indenture or institutional debt. Any long-term debt security would have the designation, aggregate principal amount, maturity and interest rate(s) or methods of determining the same, terms of payment of interest, redemption provisions, sinking fund terms and other terms and conditions as PSNC may determine at the time of issuance. PSNC states it will not issue any new long-term debt, unless its outstanding long-term debt is rated ''investment grade'' by at least one nationally recognized statistical rating agency.

The requested increases will remain subject to the safeguard parameters set forth in the Financing Order and the order approving the merger between SCANA and PSNC on February 9, 2000 (HCAR No. 27133) (''Merger Order''), which include these limitations: (i) The effective cost of money on long-term debt securities will not exceed 300 basis points over comparable term U.S. Treasury securities and the effective cost of money on short-term securities will not exceed 300 basis point over comparable term London Interbank Offered Rate; (ii) maturity of indebtedness will not exceed 50 years; (iii) the underwriting fees, commissions, or similar remuneration paid in connection with the issue, sale or distribution of a security will not exceed 5% of the principal amount of the financing; and (iv) at all times during the Authorization Period, SCANA's common equity will be at least 30% of its consolidated capitalization.

The proceeds from the sale of securities in external financing transactions will be used for general corporate purposes including: (i) The financing, in part, of the capital expenditures of the SCANA system; (ii) the financing of working capital requirements of the SCANA system; (iii) the acquisition, retirement or redemption under rule 42 of securities previously issued by SCANA or its subsidiaries without the need for prior Commission approval; and (iv) other lawful purposes, including direct or indirect investment in companies authorized under the Merger Order and in companies, the acquisition of which are permitted by rule 58 under the Act and exempt telecommunication companies as defined in section 34 of the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–1007 Filed 1–12–01; 8:45 am]

BILLING CODE 8010–01–M

DEPARTMENT OF STATE

[Public Notice 3536]

Culturally Significant Objects Imported for Exhibition Determinations: ''Treasure From a Lost Civilization: Ancient Chinese Art From Sichuan''

DEPARTMENT: Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236 of October 19, 1999, as amended, I hereby determine that the objects to be included in the exhibition ''Treasure from a Lost Civilization: Ancient Chinese Art from Sichuan,'' imported from abroad for the temporary exhibition without profit within the United States, are of cultural significance. The objects are imported pursuant to a loan agreement with the foreign lender. I also determine that the exhibition or display of the exhibit objects at the Seattle Art Museum, Seattle, WA, from on or about May, 2001 to on or about August 2001, the Kimbell Art Museum, Forth Worth, TX from on or about September 2001 to on or about January 2002, and the Metropolitan Museum of Art, New York, from on or about March 2002 to on or about June 2002, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Carol Epstein, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202/619–6981). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: January 5, 2001.

William B. Bader,

Assistant Secretary for Educational and Cultural Affairs, United States Department of State.

[FR Doc. 01–1084 Filed 1–11–01; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF STATE

[Public Notice 3537]

Culturally Significant Objects Imported for Exhibition; Determinations: ''Vincent van Gogh and the Painters of the Petit Boulevard''

DEPARTMENT: Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236 of October 19, 1999, as amended, I hereby determine that the objects to be included in the exhibition ''Vincent van Gogh and the Painters of the Petit Boulevard'' imported from abroad for the temporary exhibition without profit within the United States, are of cultural significance. These objects are imported pursuant to a loan agreement with a foreign lender. I also determine that the exhibition or display of the exhibit objects at the Saint Louis Art Museum, Saint Louis, MO, from on or about February 17, 2001, through on or about May 13, 2001, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of exhibit objects, contact Jacqueline Caldwell, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202/619–6982). The address is U.S. Department of State, SA–44, 301 4th Street, S.W., Room 700, Washington, D.C. 20547–0001.

Dated: January 5, 2001.

William B. Bader,

Assistant Secretary for Educational and Cultural Affairs, United States Department of State.

[FR Doc. 01–1085 Filed 1–11–01; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Reports, Forms and Recordkeeping Requirements; Agency Information Collection Activity Under OMB Review

AGENCY: Office of the Secretary, DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for renewal and comment. The ICR describes the nature of the information collection and its expected cost and burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on September 12, 2000 [FR 65, page 55072]. No comments were received.

DATES: Comments must be submitted on or before February 12, 2001, to: Attention DOT/OST Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Delores King, Air Carrier Fitness Division, X–56, Office of Aviation Analysis; Office of the Secretary; US Department of Transportation, 400 7th Street, SW., Washington, DC 20590–0002. Telephone (202) 366–2343.

SUPPLEMENTARY INFORMATION:

Office of the Secretary (OST).

Title: Aircraft Accident Liability Insurance.

OMB Control Number: 2106–0030.

Affected Public: All US and foreign direct air carriers must have accident liability insurance coverage to obtain or exercise authority to operate aircraft in interstate or foreign service.

Annual Estimated Burden: 2762.5 hours.

Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued in Washington, DC on January 8, 2001.

Michael Robinson,

Information Resource Management, United States Department of Transportation.

[FR Doc. 01–1096 Filed 1–11–01; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

[CGD08–00–036]

Houston/Galveston Navigation Safety Advisory Committee Meeting

AGENCY: Coast Guard, DOT.

ACTION: Notice of meetings.

SUMMARY: The Houston/Galveston Navigation Safety Advisory Committee (HOGANSAC) and its working committees will meet to discuss waterway improvements, aids to navigation, Houston/Galveston-area projects impacting safety on the Houston Ship Channel, and various other navigation safety matters in the Houston/Galveston area. All meetings will be open to the public.

DATES: The next meeting of HOGANSAC will be held on Thursday, January 25, 2001 from 9 a.m. to approximately 12 p.m. The meeting of the Committee's working groups will be held on Thursday, January 11, 2001 at 9 a.m.

ADDRESSES: The full Committee meeting will be held in the boardroom of the Port of Houston Authority. The Port building is located at 111 East Loop North, Houston, Texas. The working group meeting will be held in the offices of the Galveston/Texas City Pilots, 1301 Pelican Island No. 2, Galveston, Texas.

FOR FURTHER INFORMATION CONTACT: Captain Wayne Gusman, Executive Director of HOGANSAC, telephone (713) 671–5199, or Commander Peter Simons, Executive Secretary of HOGANSAC, telephone (713) 671–5164.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. 2.

Agendas of the Meetings

Houston/Galveston Navigation Safety Advisory Committee (HOGANSAC)

The tentative agenda includes the following:

(1) Opening remarks by the Committee Sponsor (RADM Pluta) (or the Committee Sponsor's representative), Executive Director (CAPT Gusman) and Chairman (Tim Leitzell).

(2) Approval of the September 12, 2000 minutes.

(3) Old Business

(a) Dredging projects.

(b) Barge lanes.

(c) Electronic navigation.

(d) AtoN Knockdown Working Group.

(e) Facility Information Guide.

(f) Recreational boater education initiative.

(4) New Business.

(a) State of the Waterway address.

(b) Update of Port Hurricane Readiness Plan.

Working Committee Meeting

The tentative agenda for the working committee meeting includes the following:

(1) Presentation by each work group of its accomplishments and plans for the future.

(2) Review and discuss the work completed by each work group. Work groups were formed to examine the following issues: hurricane contingency plan, PORTS funding/TCOON operability, dredging and related issues, barge lanes, electronic navigation systems, port emergency communications committee/internet site, AtoN knockdowns, VTS radio frequency congestion. All work groups may not necessarily report out at this session. Further, work group reports may not necessarily include discussions on all issues within the particular work group's area of responsibility. All meetings are open to the public. Please note that the meetings may adjourn early if all business is finished. Members of the public may make presentations, oral or written, at either meeting.

Information on Services for the Handicapped

For information on facilities or services for the handicapped or to request special assistance at the meetings, contact the Executive Director or Executive Secretary.

Dated: 21 December 2000.

Paul J. Pluta,

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

[FR Doc. 01–1095 Filed 1–11–01; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Commercial Routes for the Grand Canyon National Park Special Flight Rules Area

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of availability; extension of comment period.

SUMMARY: This notice extends the comment period on a notice of availability published December 13, 2000, (65 FR 78072) on commercial routes for the Grand Canyon National Park (GCNP) Special Flight Rules Area (SFRA). The commercial routes were not published in the **Federal Register** because they are on very large and very detailed charts, but were available from the FAA by request. The modifications in the routes are related to safety concerns identified by air tour operators and evaluated by the Federal Aviation Administration (FAA). With this notice, the FAA extends the comment period on the modifications of these routes, until January 26, 2001, so that interested persons who were unable to comment on the routes due to the holiday season may do so.

DATES: Comments must be received on or before January 26, 2001.

ADDRESSES: Comments on the proposed commercial air tour routes may be delivered or mailed, in duplicate to: Federal Aviation Administration, Attention: Gary Davis, Air Transportation Division, Flight Standards Service, AFS–201, Rm 831, 800 Independence Avenue SW., Washington, DC 20591. Comments also may be faxed to Mr. Davis at 202–267–5229. Comments may be examined at the above address between 9 a.m. and 4 p.m. weekdays, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Howard Nesbitt, Special Assistant for National Parks, Flight Standards Service, 800 Independence Avenue SW., Washington, DC 20591, Telephone (202) 493–4981.

SUPPLEMENTARY INFORMATION: The FAA did not publish the commercial routes in the original notice of availability in the **Federal Register** because they are on very large and very detailed charts that would not publish well in the **Federal Register**. You may obtain a copy of the commercial routes by contacting Denise Cashmere at (202) 267–3717, by faxing a request to (202) 267–5229, or by sending a request in writing to the Federal Aviation Administration, Air Transportation Division, AFS–200, 800 Independence Avenue SW., Washington, DC 20591. You may comment on the suggested route modifications as you desire, but you must identify that you are commenting on the commercial routes for Grand Canyon National Park. The FAA will consider all comments received on or before January 26, 2001. The FAA will consider late-filed comments to the extent practicable.

History

On April 4, 2000, the Federal Aviation Administration published two final rules, the Modification of the Dimensions of the Grand Canyon National Park Special Flight Rules Area and Flight Free Zones (Air Space Modification), and the Commercial Air Tour Limitation in the Grand Canyon National Park Special Flight Rules Area (Commercial Air Tour Limitation). See 65 FR 17736; 65 FR 17708; April 4, 2000. The FAA also simultaneously published a notice of availability of Commercial Routes for the Grand Canyon National Park (Routes Notice). See 65 FR 17698, April 4, 2000. The Commercial Air Tour Limitations final rule became effective on May 4, 2000. The Air Space Modification final rule and the routes set forth in the Routes Notice were scheduled to become effective December 1, 2000. The effective date of the Air Space Modification final rule and the new routes was extended to provide the air tour operators ample opportunity to train on the new route system during the non-tour season. The Final Supplemental Environmental Assessment for Special Flight Rules in the Vicinity of Grand Canyon National Park (SEA) was completed on February 22, 2000, and the Finding of No Significant Impact was issued on February 25, 2000.

On May 8, 2000, The United States Air Tour Association (USATA) and seven air tour operators (hereinafter collectively referred to as the Air Tour Providers) filed a petition for review of the two final rules before the United States Court of Appeals for the District of Columbia Circuit. The FAA, the Department of Transportation, the Department of Interior, the National Park Service (NPS) and various federal officials were named as respondents in this action. On May 30, 2000, the Air Tour Providers filed a motion for stay pending review before the Court of Appeals. The federal respondents in this case filed a motion for summary denial on grounds that petitioners had not exhausted their administrative remedies. The Court granted the federal respondents summary denial on July 19, 2000. The Grand Canyon Trust, the National Parks and Conservation Association, the Sierra Club, the Wilderness Society, Friends of the Grand Canyon and Grand Canyon River Guides, Inc. (hereinafter will be collectively referred to as The Trust) filed a petition for review of the same rules on May 22, 2000. The Court, by motion of the federal respondents, consolidated that case with that of the Air Tour Providers. The Hualapai Indian Tribe of Arizona filed a motion to intervene in the Air Tour Providers petition for review on June 23, 2000. The Court granted that motion on July 19, 2000.

On July 31, 2000, the Air Tour Providers filed a motion for stay before the FAA. Both the Hualapai Indian Tribe and the Trust filed oppositions to the Air Tour Providers' stay motion. On October 11, 2000, (65 FR 60352) the FAA published a disposition of the stay request, denying the stay. On October 25, 2000, the Air Tour Providers filed a Motion for Stay and Emergency Relief Pending Review of an Agency Order with the Court of Appeals. The federal respondents filed their Opposition to Petitioner's Motion for Stay Pending Review and Notification of Administrative Stay of Route and Airspace Rules on November 2, 2000. The FAA then issued an administrative stay of the routes and airspace until December 28, 2000, so that it could further investigate some new safety allegations raised by the Air Tour Providers during the course of litigation (65 FR 69846 and 65 FR 69848; November 20, 2000). On December 28, 2000, the FAA delayed implementation of changes in the airspace for GCNP SFRA until April 1, 2001, pending resolution of safety issues in the east end of GCNP. A companion document delayed implementation of the new route structure also until April 1, 2001. On December 13, 2000, the FAA published a new Notice of Availability to the Commercial Routes in the Grand Canyon National Park Special Flight Rules Area suggesting some route modifications on the east end to address the concerns raised by the air tour operators (65 FR 78072). The comment period to this Notice expires on January 12, 2001.

Discussion

In response to the Notice of Availability published December 13, 2000, the FAA has received a request from the United States Air Tour Association (USATA) to extend the commend period for 30–60 days. USATA states that ''air tour providers are currently reviewing the proposed route structure and early indications from them are that they still have some significant and substantial concerns with the new routes.'' However, USATA states that ''due to the inevitable disruptions due to the holidays, vacations and the inability of the air tour operators to yet be able to work closely with the Flight Standards

District Office in Las Vegas and actually fly the proposed routes, a full, fair, complete and objective evaluation simply is not possible by the January 12, 2001 deadline.''

The FAA is very interested in receiving the air tour operators' comments to the Notice of Availability and welcomes the operators' interest in aviation safety. Thus, the FAA is extending the comment period to the Notice of Availability until January 26, 2001. The FAA believes that this extension accounts for the time lost due to the holidays and provides the air tour operators with two additional weeks to complete any route reviews and prepare written comments. Given that the suggested route modifications were not extensive (and in fact the modification to the Dragon Corridor reverts the turnaround back to its present location), the FAA believes the additional 15–45 days requested by the air tour operators is unnecessary.

Issued in Washington, DC on January 8, 2001.

Gregory L. Michael,

Acting Director, Flight Standards Service.

[FR Doc. 01–1066 Filed 1–9–01; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

RTCA Special Committee 186; Automatic Dependent Surveillance—Broadcast (ADS–B)

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for Special Committee (SC)–186 meeting to be held February 5–8, 2001, starting at 9 a.m. The meeting will be held at the Sheraton Four Points Barcelo Hotel, 10220 North Metro Parkway East, Phoenix, AZ 85051.

The agenda will include: February 5: Working Group (WG)–4, Airborne Separation Assurance (ASA) Minimum Aviation System Performance Standards (MASPS); February 6, 7: WG–1, Operations and Implementation; WG–4, ASA MASPS; February 8: Plenary Session: (1) Welcome and Introductory Remarks; (2) Review of Meeting Agenda; (3) Review and Approval of the Previous Meeting Minutes, RTCA Paper No. 394–00/SC186–175; (4) Briefing—FAA ADS–B ''Big Picture'' Roadmap; (5) Briefing—ASDE–X Program; (6) Briefing—OCG–3 Memphis Op Eval–PM Status and Plans; (7) Briefing—DOD Requirements Process; (8) Eurocae WG–51 Status Report; (9) SC–186 Activity Reports for the following Working Groups: (a) WG–1, Operations & Implementation; (b) WG–2, Traffic Information Services—Broadcast (TIS–B); (c) WG–3, 1090 MHz Minimum Operational Performance Standards (MOPS); (d) WG–4, Application Technical Requirements; (e) WG–5, Universal Access Transceiver (UAT) MOPS; (f) Ad Hoc MASPS Working Group (DO–242); (10) Review Action Items/Work Program; (11) Other Business; (12) Date and Location of Next Meeting; (13) Closing.

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the RTCA Secretariat, 1140 Connecticut Avenue, NW., Suite 1020, Washington, DC 20036; (202) 833–9339 (phone); (202) 833–9434 (fax); or the on-site contact, Greg Stayton at (602) 436–1234 (phone), (602) 436–5500 (fax) or *greg.stayton@1–3com.com* (email). Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on January 3, 2001.

Janice L. Peters,

Designated Official.

[FR Doc. 01–1094 Filed 1–11–01; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Policy Statement Number ACE–00–23.1155–01]

Issuance of Policy Memorandum, In-Flight Operation of Propellers at Pitch Settings Below the Flight Regime for 14 CFR Part 23/CAR 3 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of policy statement.

SUMMARY: This document announces an FAA general statement of policy for certification of normal, utility, acrobatic, and commuter category turbine powered airplanes with propeller beta mode pitch settings.

FOR FURTHER INFORMATION CONTACT: Randy Griffith, Federal Aviation Administration, Small Airplane Directorate, Regulations and Policy Branch, ACE–111, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone (816) 329–4126; fax (816) 329–4090; email: <randy.griffith@faa.gov>.

SUPPLEMENTARY INFORMATION:

Background

This notice announces the following policy statement, ACE–00–23.1155–01. The purpose of this statement is to address certification of normal, utility, acrobatic, and commuter category turbine powered airplanes with propeller beta mode pitch settings.

What Is the General Effect of This Policy?

The FAA is presenting this information as a set of guidelines suitable for use. However, we do not intend that this policy set up a binding norm; it does not form a new regulation and the FAA would not apply or rely on it as a regulation.

The FAA Aircraft Certification Offices (ACO's) and Flight Standards District Offices (FSDO's) that certify changes in type design and approve alterations in normal, utility, and acrobatic category airplanes should try to follow this policy when appropriate. Applicants should expect the certificating officials would consider this information when making findings of compliance.

As with all advisory material, this statement of policy identifies one way, but not the only way, of compliance.

General Discussion of Comments

Has FAA Taken Any Action to This Point?

We issued a notice of policy statement, request for comments. This proposed policy appeared in the **Federal Register** on September 1, 2000 (65 FR 53340) and the public comment period closed October 2, 2000.

Was the Public Invited To Comment?

The FAA encouraged interested people to join in making this proposed policy. We received comments from 5 different commenters. Commenters included manufacturers and aviation regulatory authorities.

Two commenters did not provide recommendations specific to the policy. The first agreed with the content. The second provided information and safety concerns on the possible rulemaking discussed in the background to the policy. We have noted the second's comment, which will be considered if we determine that rulemaking should be pursued.

Two commenters recommended that FAA consider for part 23 the material that was recently prepared for 14 CFR part 25 under the Powerplant Installation Harmonization Working Group (PPIHWG), as the same risks and considerations apply. We disagree that the same risks and considerations for part 25 airplanes directly relate to part

23 airplanes. The tasking that PPIHWG is working for part 25 airplanes only considered transport category airplane design and operation. The design and operation of part 23 airplanes is different from part 25 airplanes. Therefore, direct adoption of part 25 requirements into part 23 without fully evaluating these operational and design differences could result in lowering the overall safety of part 23 airplanes.

A commenter stated that the proposed policy does not appear to contain new policy material. We disagree. The proposed policy provides new criteria, which has not been applied to all part 23/CAR 3 airplanes.

A commenter wrote that they oppose this policy as it proposes to require new designs to prevent intentional prohibited operations. We disagree. This policy is not requiring new designs to prevent intentional prohibited operations, rather the policy is providing certification considerations for part 23/CAR 3 airplanes that have in-flight beta capability.

A commenter stated that the policy is for regulations that have not been issued or approved. We disagree. The rules applicable to this policy are § 23.1155, which was adopted by Amendment 23–7 effective September 14, 1969, and 14 CFR part 21, §§ 21.21(b)(2) and 21.101(b), which were both effective with the basic part 21 dated February 1, 1965. Therefore, the rules in question are more than 30 years old.

A commenter stated that it is unclear if the section ''Inadvertent In-Flight Operation'' is directed towards existing type certificated airplanes or future type certificated airplanes. Further, the commenter states that the policy can be easily misconstrued as to require a manufacturer to retrofit airplanes to prohibit in-flight beta operations. We disagree in that the section specifically states ''For airplanes with a certification basis before Amendment 23–7 that are modified to add in-flight beta capability * * *'' Therefore, the section obviously applies to existing type certificated airplanes that are modified.

A commenter said the requirement for the flight manual to contain appropriate operational limitations and consequence statements for in-flight beta operation could not be mandated by policy. We agree, but the policy does not mandate such actions. Rather the policy provides certification guidance, which is reflected when the policy is finalized.

A commenter stated that the beta lock-out systems discussion is unclear; specifically, is it directed towards future type certificated airplanes, existing type certificated airplanes undergoing modification, or existing type certificated airplanes not undergoing modification? Also, the commenter requested clarification of which version of § 23.1155 this section applies; before Amendment 23–7, at Amendment 23–7, or the proposed § 23.1155. Further, the commenter states that if the section applies to the proposed § 23.1155, this policy can not enforce a rule that has not been issued. We agree with the commenter's first comment. Therefore, the beginning of the second paragraph of this section was modified to add qualifiers on which airplanes this section applies. We disagree with the commenter's remaining comments in that there is only one version of § 23.1155, the version at Amendment 23–7, which was the amendment level that adopted the rule. Further, the commenter is incorrect in that this policy is not proposing a rule change.

A commenter requested clarification on who does a system safety analysis. We agree and this section was modified by indicating that the applicant performs the analysis.

The Policy

Background

The National Transportation Safety Board (NTSB) has recommended rulemaking action to amend 14 CFR part 23 to require a means to prevent in-flight operation of the propeller at pitch settings below the flight regime (beta mode). For turbine engine installations, § 23.1155, added by Amendment 23–7, requires that operation of the propeller controls for pitch settings below the flight regime have a means to prevent inadvertent operation. The new requirement recommended by the NTSB would be fundamentally different from the current § 23.1155. Unless the airplane is certificated for such use, beta mode could not occur in-flight, even if intentionally commanded. The Small Airplane Directorate is initiating an ARAC, Aviation Rulemaking Advisory Committee, study to determine whether a rulemaking effort should occur.

The FAA has taken actions to address previously certificated airplanes with in-flight beta capability. A fleet wide review of all turbopropeller powered transport, normal, utility, acrobatic, and commuter category airplanes was performed. As a result of the review, the FAA issued Airworthiness Directives that required applicable Flight Manuals to include an operational limitation with consequence statement for in-flight beta operation.

Also, the safety of future type certificated airplanes, with in-flight beta capability, or currently certificated airplanes, which are being modified to add an in-flight beta capability, should be assessed. This assessment should consider both unintentional and intentional operation of propellers in pitch settings below the flight regime.

Inadvertent In-Flight Operation

Regarding inadvertent operation, as previously mentioned, Amendment 23–7 added a requirement (§ 23.1155) that operations of the propeller controls at pitch settings below the flight regime have a means to prevent inadvertent operation. For airplanes with a certification basis before Amendment 23–7 that are modified to add in-flight beta capability, the provisions of § 21.101(b) should be used to evaluate the possible unsafe nature of inadvertent operation of propellers in the beta regime. If it is determined that such operation is unsafe, the issue may be addressed by showing compliance with § 23.1155.

The nature of the regulatory requirement provided by § 23.1155 allows a subjective, qualitative evaluation for compliance determination. The intent is to prevent inadvertent operation in the beta mode, even if the possibility of inadvertent operation is remote. If an operation or feature of the design can allow in-flight, inadvertent placement of the control below the flight regime, the design does not comply with the regulation. In other words, the design should be evaluated considering the types of operations that will be seen in service. Consider items such as hardware wear modes or maintenance issues that may cause the control to be unintentionally placed or creep into the beta regime over time.

Intentional In-Flight Operation

On all future type certification projects, the Flight Manuals should include the appropriate operational limitations and consequence statement for in-flight beta operation.

Beta Lock-Out Systems

To add an assurance that in-flight beta will not occur, some airplanes have incorporated lock-out systems. These systems remove the ability to do this operation in-flight, even if intentionally commanded. It is important to note that the installation of a beta lock-out system cannot be used instead of the design requirements of § 23.1155 compliance. Also, in some cases, propeller beta operation is used to show compliance with stopping distances in part 23, Subpart B. Under Subpart B, when means other than wheel brakes are used for determining stopping distances, the means must be ''safe and reliable.'' If beta operation is used to show

compliance with stopping distances, the reliability of a system that would prevent in-flight beta operation must be such that this capability, when required, will be available to comply with Subpart B, and § 21.21(b)(2) or § 21.101(b). With a system safety analysis, the applicant can determine the required reliability level for the beta lock-out system based on the hazard level (for example, § 23.1309 compliance).

Therefore, for new type certificated airplanes that have a beta lock-out system incorporated or previously certificated airplanes that add a beta lock-out system, the applicant should perform a system safety analysis of the installation of this system. This analysis should consider hazards such as the inability to command beta on one engine on a multiengine airplane. For example, if beta is commanded on both engines during land roll-out, but only one propeller goes into beta mode, this might adversely affect ground controllability.

Issued in Kansas City, Missouri on December 22, 2000.

Marvin R. Nuss,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 01–1088 Filed 1–11–01; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Riverside County, CA

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The FHWA is issuing this notice to advise the public that an Environmental Impact Statement will be prepared for a proposed highway project in Riverside County, California.

FOR FURTHER INFORMATION CONTACT: Mr. Rick Cushing, Environmental Planning Engineer, Federal Highway Administration, 555 Zang Street, Rm 259, Lakewood, Colorado 80228, telephone 303–716–2138.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with San Bernardino National Forest, the California Department of Transportation, and Riverside County, will prepare an Environmental Impact Statement (EIS) on a proposal to improve California Forest Highway (FH) 224, Bautista Canyon Road. The portion that is proposed for improvement begins 10.3 miles southeast of Valle Vista and extends 8.2 miles to a point 3.2 miles northwest of State Highway 371 west of Anza. The FHWA is the lead agency. Riverside County will assist the FHWA in the preparation of the EIS. Improvements are being considered to provide a safe, all-weather facility for existing and projected traffic demand. Alternatives under consideration include (1) taking no action, (2) the improvement of the existing facility to appropriate County, American Association of State Highway and Transportation Officials (AASHTO), or other acceptable design criteria, and (3) other alternatives that may be developed during the environmental process.

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State, and local agencies, and to private organizations and citizens. Public scoping meetings will be held on January 30, 2001 at 7 p.m. in Anza and on January 31, 2001 at 7 p.m. to Valle Vista. A public hearing will also be held in the project area. The draft EIS will be available for public and agency review and comment prior to the public hearing. Information on the time and place of public meetings and hearings will be provided in the local news media and by letter to individuals and agencies that have expressed interest in the proposal.

To ensure that the full range of issues and alternatives related to the proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments and questions concerning the proposed action should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program)

Issued on: January 4, 2001.

Larry C. Smith,

Division Engineer, FHWA Denver, Colorado.

[FR Doc. 01–1006 Filed 1–11–01; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No.'s FRA–2000–6923 and FRA–2000–6924]

Notice of Public Hearing; CSX Transportation, Incorporated

CSX Transportation, Incorporated has petitioned the Federal Railroad Administration (FRA) seeking approval of the proposed discontinuance and removal of the manual block systems (DCS Operating Rules), on the single secondary track, between Weir, milepost 13.3 and Dock, milepost 28.2, near New Bedford, Massachusetts, New Bedford Subdivision, and on the single secondary track, between Swamp, milepost 0.0 and Wharf, milepost 12.0, near Fall River, Massachusetts, Fall River Subdivision, Albany Service Lane, and re-designation of the secondary tracks to industrial tracks.

These proceedings are identified as FRA block signal applications, Docket numbers FRA–2000–6923 and FRA–2000–6924 respectively.

FRA has issued a public notice seeking comments of interested parties and has conducted a field investigation in this matter. After examining the carrier's proposal and the available facts, FRA has determined that a public hearing is necessary before a final decision is made on this proposal.

Accordingly, a public hearing is hereby set for 9 a.m. on Tuesday, February 6, 2001, in the John A. Volpe National Transportation Systems Center, Room 1228, located at 55 Broadway, Cambridge, Massachusetts 02142. Interested parties are invited to present oral statements at the hearing.

The hearing will be an informal one and will be conducted in accordance with Rule 25 of the FRA Rules of Practice (49 CFR 211.25), by a representative designated by the FRA. The hearing will be a non-adversary proceeding and, therefore, there will be no cross-examination of persons presenting statements. The FRA representative will make an opening statement outlining the scope of the hearing. After all initial statements have been completed, those persons wishing to make brief rebuttal statements will be given the opportunity to do so in the same order in which they made their initial statements. Additional procedures, if necessary for the conduct of the hearing, will be announced at the hearing.

Issued in Washington, DC on January 5, 2001.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. 01–1097 Filed 1–11–01; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Marine Transportation System National Advisory Council

ACTION: National Advisory Council public meeting.

SUMMARY: The Maritime Administration announces that the Marine Transportation System National Advisory Council (MTSNAC) will hold a meeting to discuss the Council's White Paper, MTSNAC Web Site, Economic Impact Project, Team Reports, and other issues. A public comment period is scheduled for 2:00 to 2:30 p.m. To provide time for as many people to speak as possible, speaking time for each individual will be limited to three minutes. Members of the public who would like to speak are asked to contact Raymond Barberesi by January 31, 2001. Commenters will be placed on the agenda in the order in which notifications are received. If time allows, additional comments will be permitted. Copies of oral comments must be submitted in writing at the meeting. Additional written comments are welcome and must be filed by February 9, 2001.

DATES: The meeting will be held on Friday, February 2, 2001, from 9 a.m. to 3 p.m.

ADDRESSES: The meeting will be held in the Westin Francis Marion Hotel, 387 King Street, Charleston, SC 29403. The hotel's phone number is (843) 722–0600.

FOR FURTHER INFORMATION CONTACT: Raymond Barberesi, (202) 366–4357; Maritime Administration, MAR 830, Room 7201, 400 Seventh St., SW., Washington, DC 20590; Raymond.Barberesi@marad.dot.gov.

(Authority: 5 U.S.C. App 2, Sec. 9(a)(2); 41 CFR 101–6. 1005; DOT Order 1120.3B)

Dated: January 9, 2001.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 01–1080 Filed 1–11–01; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33987]

Henry G. Hohorst, Bruce Hohorst, Joan D. Hohorst, and Anthony M. Linn—Continuance in Control Exemption—SCTRR, LLC

Henry G. Hohorst, Bruce Hohorst, Joan D. Hohorst, and Anthony M. Linn, individuals (applicants), have filed a verified notice of exemption to continue in control of the SCTRR, LLC (SCTRR), a limited liability company, after it acquires the operating authority on the Centerville Branch between Dickson and Hohenwald, TN.

According to the verified notice of exemption, the parties expected SCTRR to purchase the right to operate over the Centerville Branch after approval or exemption of that transaction. The earliest the transaction could have been consummated was January 2, 2001, the effective date of the exemption (7 days after the exemption was filed).

This transaction is related to STB Finance Docket No. 33986, *SCTRR, LLC—Operation Exemption—South Central Tennessee Railroad Corp.,* wherein SCTRR will acquire the operating authority on the Centerville Branch from the South Central Tennessee Railroad Corp.

Applicants own a controlling interest in South Central Rail Group, Inc., which controls the West Tennessee Railroad Corp., which operates the West Tennessee Railroad line in the State of Tennessee, and the IRW Railway, LLC, which holds title to the West Tennessee Railroad line. Applicants, through South Central Rail Group, Inc., also own a controlling interest in the Tennken Railroad Corp., which operates in the States of Tennessee and Kentucky. According to applicants, the three railroads do not connect and there are no plans to connect them. The transaction does not involve a Class I carrier. Therefore, the transaction is exempt from the prior approval requirements of 49 U.S.C. 11323. *See* 49 CFR 1180.2(d)(2).

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.

If the notice 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. 33987, 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, a copy of each pleading must be served on John F. McHugh, Esq., McHugh & Barnes, P.C., 20 Exchange Place, New York, NY 10005.

Board decisions and notices are available on our website at "*www.stb.dot.gov.*"

Decided: January 5, 2001.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 01–956 Filed 1–11–01; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33986]

SCTRR, LLC—Operation Exemption—South Central Tennessee Railroad Corp.

SCTRR, LLC (SCTRR), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to acquire the operating authority on the Centerville Branch between milepost 1, at Colesbury Yard, Dickson, TN, and the end of the track at milepost 52, at Hohenwald, TN, a distance of about 52 miles (line). Approximately 49 miles of the line is owned by the South Central Tennessee Railroad Authority (Authority) and 2.8 miles of the line is owned by CSX Transportation, Inc.[1]

According to the verified notice of exemption, the parties intended to acquire the operating authority after approval or exemption of the transaction, with operating responsibility to be transferred in mid-January 2001. The earliest the exemption could have been consummated was January 2, 2001, the effective date of the exemption (7 days after the exemption was filed).

This transaction is related to STB Finance Docket No. 33987, *Henry G. Hohorst, Bruce Hohorst, Joan D. Hohorst, and Anthony M. Linn—Continuance in Control Exemption—SCTRR, LLC,* wherein Henry G. Hohorst, Bruce Hohorst, Joan D. Hohorst, and

[1] The line is currently operated by the South Central Tennessee Railroad Corp. pursuant to an operating agreement with Authority. The South Central Rail Management, LLC, as agent for SCTRR, has entered into an agreement with South Central Tennessee Railroad Corp. and its parent, Rail America, Inc., to purchase the operating authority. SCTRR will replace South Central Tennessee Railroad Corp. as the operator of the line. Authority will maintain title to that portion of the land and track it currently owns.

Anthony M. Linn have filed a verified notice of exemption to continue in control of SCTRR after it acquires the operating authority on the Centerville Branch.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to reopen the proceeding 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. 33986, 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, a copy of each pleading must be served on John F. McHugh, Esq., McHugh & Barnes, P.C., 20 Exchange Place, New York, NY 10005.

Board decisions and notices are available on our website at ''*www.stb.dot.gov.*''

Decided: January 5, 2001.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 01–955 Filed 1–11–01; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Revenue Procedure 2001–9

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Revenue Procedure 2001–9, Form 940 e-file Program.

DATES: Written comments should be received on or before March 13, 2001, to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the revenue procedure should be directed to Carol Savage, (202) 622–3945, Internal Revenue Service, room 5242, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Form 940 e-file Program.

OMB Number: 1545–1710.

Revenue Procedure Number: Revenue Procedure 2001–9.

Abstract: Revenue Procedure 2001–9 provides guidance and the requirements for participating in the Form 940 e-file Program.

Current Actions: There are no changes being made to the revenue procedure at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, not-for-profit institutions, and Federal, state, local or tribal governments.

Estimated Number of Respondents: 390,685.

Estimated Time Per Respondent: 32 minutes.

Estimated Total Annual Burden Hours: 207,125.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 4, 2001.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 01–983 Filed 1–11–01; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Tip Rate Determination Agreement (TRDA) for Most Industries

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Tip Rate Determination Agreement (TRDA) for Most Industries.

DATES: Written comments should be received on or before March 13, 2001, to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be directed to Carol Savage, (202) 622–3945, Internal Revenue Service, room 5242, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Tip Rate Determination Agreement (TRDA) for Most Industries.

OMB Number: 1545–1717.

Abstract: Information is required by the Internal Revenue Service in its tax compliance efforts to assist employers and their employees in understanding and complying with Internal Revenue Code section 6053(a), which requires employees to report all their tips monthly to their employers.

Current Actions: There is no change to this existing information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents and/or Recordkeeping: 100.

Estimated Average Time Per Respondent/Recordkeeper: 18 hr., 58 min.

Estimated Total Annual Reporting and/or Recordkeeping Burden Hours: 1,897.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 3, 2001.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 01–984 Filed 1–11–01; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Tip Reporting Alternative Commitment (Hairstyling Industry)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Tip Reporting Alternative Commitment (Hairstyling Industry).

DATES: Written comments should be received on or before March 13, 2001 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be directed to Carol Savage, (202) 622–3945, Internal Revenue Service, room 5242, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Tip Reporting Alternative Commitment (Hairstyling Industry).

OMB Number: 1545–1529.

Abstract: Information is required by the Internal Revenue Service in its tax compliance efforts to assist employers and their employees in understanding and complying with Internal Revenue Code section 6053(a), which requires employees to report all their tips monthly to their employers.

Current Actions: There is no change to this existing information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents and/or Recordkeeping: 4,600.

Estimated Average Time Per Respondent/Recordkeeper: 9 hr., 22 min.

Estimated Total Annual Reporting and/or Recordkeeping Burden Hours: 43,073.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 3, 2001.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 01–985 Filed 1–11–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 990 and Schedules A and B

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 990, Return of Organization Exempt From Income Tax Under Section 501(c) of the Internal Revenue Code (except black lung benefit trust or private foundation) or section 4947(a)(1) nonexempt charitable trust, Schedule A, Organization Exempt Under Section 501(c)(3) (Except Private Foundation), and Section 501(e), 501(f), 501(k), 501(n), or Section 4947(a)(1) nonexempt

charitable trust, and Schedule B, Schedule of Contributors.

DATES: Written comments should be received on or before March 13, 2001 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5244, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the forms and instructions should be directed to Faye Bruce, (202) 622–6665, Internal Revenue Service, room 5244, 1111 Constitution Avenue, NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Return of Organization Exempt From Income Tax Under Section 501(c) of the Internal Revenue Code (except black lung benefit trust or private foundation) or section 4947(a)(1) nonexempt charitable trust (Form 990), Organization Exempt Under Section 501(c)(3) (Except Private Foundation), and Section 501(e), 501(f), 501(k), 501(n), or Section 4947(a)(1) nonexempt charitable trust (Schedule A), and Schedule of Contributors (Schedule B).

OMB Number: 1545–0047.

Form Number: 990, and Schedules A and B (Form 990).

Abstract: Form 990 is needed to determine that Code section 501(a) tax-exempt organizations fulfill the operating conditions of their tax exemption. Schedule A (Form 990) is used to elicit special information from section 501(c)(3) organizations. Schedule B is used by tax-exempt organizations to list contributors and allows the IRS to distinguish and make public disclosure of the contributors list within the requirements of Code section 527. IRS uses the information from these forms to determine if the filers are operating within the rules of their exemption.

Current Actions: There are no changes being made to the forms at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Not-for-profit institutions.

Estimated Number of Respondents: 287,769.

Estimated Time Per Respondent: 164 hrs., 42 min.

Estimated Total Annual Burden Hours: 47,397,875.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 4, 2001.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 01–986 Filed 1–11–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8859

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8859, District of Columbia First-Time Homebuyer Credit.

DATES: Written comments should be received on or before March 13, 2001 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Faye Bruce, (202) 622–6665, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: District of Columbia First-Time Homebuyer Credit.

OMB Number: 1545–1584.

Form Number: 8859.

Abstract: Form 8859 is used to claim the District of Columbia first-time homebuyer credit. The information collected will be used to verify that the credit was computed correctly.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Responses: 1,900.

Estimated Time Per Response: 1 hour, 8 min.

Estimated Total Annual Burden Hours: 2,166.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection

techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 4, 2001.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 01–987 Filed 1–11–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8868

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8868, Application for Extension of Time To File an Exempt Organization Return.

DATES: Written comments should be received on or before March 12, 2001 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Faye Bruce, (202) 622–6665, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Application for Extension of Time To File an Exempt Organization Return.

OMB Number: 1545–1709.

Form Number: 8868.

Abstract: Sections 6081 and 1.6081 of the Internal Revenue Code and regulations permit the Internal Revenue Service to grant a reasonable extension of time to file a return. Form 8868 provides the necessary information for a taxpayer to apply for an extension to file a fiduciary or certain exempt organization return.

Current Actions: There are no changes being made to the form at this time.

Affected Public: Not-for-profit institutions.

Estimated Number of Respondents: 248,932.

Estimated Time Per Respondent: 5 hrs., 31 mins.

Estimated Total Annual Burden Hours: 1,373,335.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 4, 2001.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 01–988 Filed 1–11–01; 8:45 am]

BILLING CODE 4830–01–P

Corrections

Federal Register

Vol. 66, No. 9

Friday, January 12, 2001

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

Announcement of the Foreign Market Development Cooperator Program for Fiscal Year 2002

Correction

In notice document 00–33138 beginning on page 82314 in the issue of Thursday, December 28, 2000, make the following correction:

On page 82314, in the third column, in the second line from the bottom, ''sue'' should read ''use''.

[FR Doc. C0–33138 Filed 1–11–01; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Friday,
January 12, 2001

Part II

Environmental Protection Agency

40 CFR Parts 122 and 412

National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122 and 412

[FRL–6921–4]

RIN 2040–AD19

National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Today the Environmental Protection Agency proposes to revise and update two regulations that address the impacts of manure, wastewater, and other process waters generated by concentrated animal feeding operations (CAFOs) on water quality. These two regulations are the National Pollutant Discharge Elimination System (NPDES) provisions that define which operations are CAFOs and establish permit requirements, and the Effluent Limitations Guidelines for feedlots (beef, dairy, swine and poultry subcategories), which establish the technology-based effluent discharge standards for CAFOs. EPA is proposing revisions to these regulations to address changes that have occurred in the animal industry sectors over the last 25 years, to clarify and improve implementation of CAFO permit requirements, and to improve the environmental protection achieved under these rules.

Environmental concerns being addressed by this rule include both ecological and human health effects. Manure from stockpiles, lagoons, or excessive land application can reach waterways through runoff, erosion, spills, or via groundwater. These discharges can result in excessive nutrients (nitrogen, phosphorus, and potassium), oxygen-depleting substances, and other pollutants in the water. This pollution can kill fish and shellfish, cause excess algae growth, harm marine mammals, and contaminate drinking water.

Today's action co-proposes two alternatives for how to structure the revised NPDES program for CAFOs; the alternatives offer comparable environmental benefits but differ in their administrative approach. EPA also requests comment on two other alternatives that the Agency is considering and may pursue after evaluating the comments.

EPA is also proposing to revise effluent guidelines applicable to beef, dairy, swine, and poultry operations that are defined as CAFOs, pursuant to the NPDES revisions. The proposed effluent guidelines include regulations for both new and existing animal feeding operations that meet the definition of a CAFO. Today's effluent guidelines revisions do not alter the requirements for horses, ducks, sheep or lambs.

DATES: Comments must be received or postmarked on or before midnight May 2, 2001.

ADDRESSES: Public comments regarding this proposed rule should be submitted by mail to: Concentrated Animal Feeding Operation Proposed Rule, Office of Water, Engineering and Analysis Division (4303), USEPA, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Hand deliveries (including overnight mail) should be submitted to the Concentrated Animal Feeding Operation Proposed Rule, USEPA, Waterside Mall, West Tower, Room 611, 401 M Street, SW., Washington, DC 20460. You also may submit comments electronically to CAFOS.comments@epa.gov. Please submit any references cited in your comments. Please submit an original and three copies of your written comments and enclosures. For additional information on how to submit comments, see ''**SUPPLEMENTARY INFORMATION**, How May I Submit Comments?''

FOR FURTHER INFORMATION CONTACT: For additional technical information contact Karen Metchis or Jan Goodwin at (202) 564–0766.

SUPPLEMENTARY INFORMATION:

What Entities Are Potentially Regulated by This Action?

This proposed rule would apply to new and existing animal feeding operations that meet the definition of a concentrated animal feeding operation, or which are designated by the permitting authority as such. Concentrated animal feeding operations are defined by the Clean Water Act as point sources for the purposes of the NPDES program. (33 U.S.C. § 1362).

The following table lists the types of entities that are potentially subject to this proposed rule. This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your facility would be regulated by this action, you should carefully examine the applicability criteria proposed at § 122.23(a)(2) of the rule. If you have questions regarding the applicability of this action to a particular entity, consult one of the persons listed for technical information in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Category	Examples of regulated entities	North American Industry Code (NAIC)	Standard Industrial Classification Codes
Federal, State and Local Government Industry		See below	See below
	Operators of animal production operations that meet the definition of a concentrated animal feeding operation.		
	Beef cattle feedlots	112112	0211
	Hogs	11221	0213
	Sheep and goats	1241, 11242	0214
	General livestock, except dairy and poultry	11299	0219
	Dairy farms	112111, 11212	0241
	Broilers, fryers, and roaster chickens	11232	0251
	Chicken eggs	11231	0252
	Turkey and turkey eggs	11233	0253
	Poultry hatcheries	11234	0254
	Poultry and eggs, NEC	11239	0259
	Ducks	112390	0259
	Horses and other equines	11292	0272

Category	Examples of regulated entities	North American Industry Code (NAIC)	Standard Industrial Classification Codes
	Meat packing or poultry processing companies that may be a potential co-permittee because of substantial operational control over a CAFO.		
	Animal Slaughtering and Processing	3116	02
	Owners or operators of crop production operations that may receive CAFO manure for use as a fertilizer substitute.		
	Crop Production	111	01

How May I Review the Public Record?

The record (including supporting documentation) for this proposed rule is filed under docket number OW–00–27 (proposed rule). The record is available for inspection from 9 a.m. to 4 p.m. on Monday through Friday, excluding legal holidays, at the Water Docket, Room EB 57, USEPA Headquarters, 401 M Street, SW, Washington, DC 20460. For access to docket materials, please call (202) 260–3027 to schedule an appointment during the hours of operation stated above.

How May I Submit Comments?

To ensure that EPA can read, understand, and therefore properly respond to comments, the Agency requests that you cite, where possible, the paragraph(s) or sections in the preamble, rule, or supporting documents to which each comment refers. You should use a separate paragraph for each issue discussed.

If you want EPA to acknowledge receipt of your comments, enclose a self-addressed, stamped envelope. No faxes will be accepted. Comments may also be submitted electronically to CAFOS.comments@epa.gov. Electronic comments must be submitted as an ASCII, WordPerfect 5.1, WP6.1, or WP8 file avoiding the use of special characters and forms of encryption. Electronic comments must be identified by the docket number OW–00–27. EPA will accept comments and data on disks in WordPerfect 5.1, 6.1, or 8 format or in ASCII file format. Electronic comments on this notice may be filed on-line at many Federal depository libraries.

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I. Legal Authority

Today's proposed rule is issued under the authority of sections 301, 304, 306, 307, 308, 402, and 501 of the Clean

Water Act (CWA), 33 U.S.C. 1311, 1314, 1316, 1317, 1318, 1342, and 1361.

II. Purpose and Summary of the Proposed Regulation

Today, the Environmental Protection Agency proposes to revise and update two regulations that address the impacts on water quality from manure, wastewater, and other process waters generated by concentrated animal feeding operations (CAFOs). The National Pollutant Discharge Elimination System (NPDES) provisions in 40 CFR Part 122 define which operations are CAFOs and establish permit requirements for those operation. The Effluent Limitations Guidelines (ELG), or effluent guidelines, for feedlots in 40 CFR Part 412 establish technology-based effluent discharge standards that are applied to CAFOs. Both regulations were originally promulgated in the 1970s. EPA is proposing revisions to these regulations to address changes that have occurred in the animal industry sectors over the last 25 years, to clarify and improve implementation of CAFO permit requirements, and to improve the environmental protection achieved under these rules.

Environmental concerns being addressed by this rule include both ecological and human health effects. Manure from stockpiles, lagoons, or excessive land application rates can reach waterways through runoff, erosion, spills, or via groundwater. These discharges can result in excessive nutrients (nitrogen, phosphorus, and potassium), oxygen-depleting substances, and other pollutants in the water. This pollution can kill fish and shellfish, cause excess algae growth, harm marine mammals, and contaminate drinking water.

On October 30, 1989, Natural Resources Defense Council, Inc., and Public Citizen, Inc., filed an action against EPA in which they alleged, among other things, that EPA had failed to comply with CWA section 304(m). *Natural Resources Defense Council, Inc., et al.* v. *Reilly,* Civ. No. 89–2980 (RCL) (D.D.C.). Plaintiffs and EPA agreed to a settlement of that action in a consent decree entered on January 31, 1992. The consent decree, which has been modified several times, established a schedule by which EPA is to propose and take final action for eleven point source categories identified by name in the decree and for eight other point source categories identified only as new or revised rules, numbered 5 through 12. After completing a preliminary study of the feedlots industry under the decree, EPA selected the swine and poultry portion of the feedlots industry as the subject for New or Revised Rule #8, and the beef and dairy portion of that industry as the subject for New or Revised Rule #9. Under the decree, as modified, the Administrator was required to sign a proposed rule for both portions of the feedlots industry on or before December 15, 2000, and must take final action on that proposal no later than December 15, 2002. As part of EPA's negotiations with the plaintiffs regarding the deadlines for this rulemaking, EPA entered into a settlement agreement dated December 6, 1999, under which EPA agreed, by December 15, 2000, to also propose to revise the existing NPDES permitting regulations under 40 C.F.R. part 122 for CAFOs. EPA also agreed to perform certain evaluations, analyses or assessments and to develop certain preliminary options in connection with the proposed CAFO rules. (The Settlement Agreement expressly provides that nothing in the Agreement requires EPA to select any of these options as the basis for its proposed rule.)

The existing regulation defines facilities with 1,000 animal units (''AU'') or more as CAFOs. The regulation also states that facilities with 300–1000 AU are CAFOs if they meet certain conditions. The term AU is a measurement established in the 1970 regulations that attempted to equalize the characteristics of the wastes among different animal types.

Today's proposals presents two alternatives for how to structure the revised NPDES program for CAFOs. The first alternative is a ''two-tier structure'' that simplifies the definition of CAFOs by establishing a single threshold for each animal sector. This alternative would establish a single threshold at the equivalent of 500 AU above which operations would be defined as CAFOs and below which facilities would become CAFOs only if designated by the permit authority. The 500 AU equivalent for each animal sector would be as follows.

500 cattle excluding mature dairy or veal cattle
500 veal cattle
350 mature dairy cattle (whether milked or dry)
1,250 mature swine weighing over 55 pounds
5,000 immature swine weighing 55 pounds or less
50,000 chickens
27,500 turkeys
2,500 ducks
250 horses
5,000 sheep or lambs

The second proposal would retain the ''three-tier structure'' of the existing regulation. Under this alternative, all operations with 1,000 AU or more would be defined as CAFOs; those with 300 AU to 1,000 AU would be CAFOs only if they meet certain conditions or if designated by the permit authority; and those with fewer than 300 AU would only be CAFOs if designated by the permit authority. These conditions are detailed in section VII of this preamble and differ from those in the current rule. Facilities with 300 AU to 1,000 AU would certify that they do not meet the conditions for being defined as a CAFO or apply for a permit. The 300 AU and 1,000 AU equivalent number of animals for each sector would be as follows:

Animal type	1,000 AU equivalent (no. of animals)	300 AU equivalent (no. of animals)
Cattle excluding mature dairy or veal cattle	1,000	300
Veal	1,000	300
Mature Dairy Cattle	700	200
Swine weighing more than 55 pounds	2,500	750
Swine weighing 55 pounds or less	10,000	3,000
Chickens	100,000	30,000
Turkeys	55,000	16,500
Ducks	5,000	1,500
Horses	500	150
Sheep or Lambs	10,000	3,000

The Agency is also taking comment on two other alternatives that the Agency is considering and may pursue after evaluating comments.

Today's proposal would also expand the regulatory definition of CAFOs to include all types of poultry operations regardless of the type of manure handling system or watering system they use, and also would include standalone immature swine and heifer operations.

Under the two-tier proposal, EPA is proposing to simplify the criteria for being designated as a CAFO by eliminating two specific criteria that have proven difficult to implement, the ''direct contact'' criterion and the ''man made device'' criterion. Under the three-tier proposal, EPA is proposing to retain those criteria for designating operations which have less than 300 AU. Both proposals retain the existing requirement for the permit authority to consider a number of factors to determine whether the facility is a significant contributor of pollution to waters of the U.S., and the requirement for an on-site inspection prior to designation. EPA is also proposing to clarify that EPA has the authority to designate CAFOs both in states where EPA is the permit authority and in States with NPDES authorized programs.

EPA is proposing to eliminate the 25-year, 24-hour storm event permit exclusion and to impose a broader, more explicit duty for all CAFOs to apply for a permit (with one exception as described below). Under the current regulations, facilities are excluded from being defined as, and thus subject to permitting as, CAFOs if they discharge only in the event of a 25-year, 24-hour storm. This exclusion has proven to be problematic in practice, as described below, and ultimately unnecessary. There are many operations that currently may be avoiding permitting by an inappropriate reliance on this exclusion. The Agency believes there is no reason to retain this exclusion from the definition of a CAFO. However, EPA is proposing to retain the 25-year, 24-hour storm standard as a *design standard* in the effluent guidelines for certain sectors (specifically, the beef and dairy sectors). CAFOs in those sectors would need to obtain permits, but the permits would allow certain discharges as long as the facility met the 25-year, 24-hour storm design standard.

In sum, under today's proposal, all operations that meet the definition of a CAFO under either of the two alternative structures (as well as all operations that are designated as CAFOs) would be required to apply for a permit. There would, however, be one exception to this requirement, as described in more detail below: If the operator could demonstrate to the permitting authority that the facility has ''no potential to discharge,'' then a permit application and a permit would not be required.

Under the two-tier structure, the net effect of the revisions for determining which facilities are CAFOs is to require approximately 26,000 operations to apply for a NPDES permit. Under the three-tier structure, EPA estimates that approximately 13,000 operations would be required to apply for a permit, and an additional 26,000 operations could either certify that they are not a CAFO or apply for a permit. Under the existing regulation, EPA estimates that about 12,000 facilities should be permitted but only 2,530 have actually applied for a permit.

Today's proposal would clarify the definition of a CAFO as including both the production areas (animal confinement areas, manure storage areas, raw materials storage areas and waste containment areas) and the land application areas that are under the control of the CAFO owner or operator. As the industry trend is to larger, more specialized feedlots with less cropland needing the manure for fertilizer, EPA is concerned that manure is being land applied in excess of agricultural uses and, therefore, being managed as a waste product, and that this practice is causing runoff or leaching to waters of the U.S. The permit would address practices at the production area as well as the land application area, and would impose record keeping and other requirements with regard to transfer of manure off-site.

EPA is further proposing to clarify that entities that exercise ''substantial operational control'' over the CAFO are ''operators'' of the CAFO and thus would need to obtain a permit along with the CAFO owner or operator. The trend toward specialized animal production under contract with processors, packers and other integrators has increasingly resulted in concentrations of excess manure beyond agricultural needs in certain geographic areas. Especially in the poultry and swine sector, the processor provides the animals, feed, medication and/or specifies growing practices. EPA believes that clarifying that both parties are liable for compliance with the terms of the permit as well as responsible for the excess manure generated by CAFOs will lead to better management of manure.

The proposed effluent guidelines revisions would apply only to beef, dairy, swine, poultry and veal operations that are defined or designated as CAFOs under either of the two alternative structures and that are above the threshold for the effluent guideline. For those CAFOs below the threshold for being subject to the effluent guidelines, the permit writer would use best professional judgment (BPJ) to develop the site-specific permit conditions.

Today's proposed effluent guidelines revisions would not alter the existing effluent guideline regulations for horses, ducks, sheep or lambs. In these sectors, only facilities with 1,000 AU or more are subject to the effluent guidelines. Permits for operations in these subcategories with fewer than 1,000 AU would continue to be developed based on the best professional judgement of the permit writer.

The proposed effluent guidelines regulations for beef, dairy, swine, poultry and veal operations will establish the Best Practicable Control Technology (BPT), Best Conventional Pollutant Control Technology (BCT), and the Best Available Technology (BAT) limitations as well as New Source Performance Standards, including specific best management practices which ensure that manure storage and handling systems are inspected and maintained adequately. A description of these requirements is in Section III.

Under the BPT requirements for all of the subcategories, EPA is proposing to require zero discharge from the production area except that an overflow due to catastrophic or chronic storms would be allowed if the CAFO met a certain design standard for its containment structures. If a CAFO uses a liquid manure handling system, the storage structure or lagoon would be required to be designed, constructed and maintained to capture all process wastewater and manure, plus all the storm water runoff from the 25-year, 24-hour storm.

The proposed BPT limitations also include specific requirements on the application of manure and wastewater to land that is owned or under the operational control of the CAFO. EPA is proposing to require that CAFOs apply their manure at a rate calculated to meet the requirements of the crop for either nitrogen or phosphorus (depending on the soil conditions for phosphorus). Livestock manure tends to be phosphorus rich, meaning that if manure is applied to meet the nitrogen requirements of a crop, then phosphorus is being applied at rates higher than needed by the crop. Repeated application of manure on a nitrogen basis may build up phosphorus levels in

the soil, and potentially result in saturation, thus contributing to the contamination of surface waters through erosion, snow melt and rainfall events. Therefore, EPA is also proposing that manure must be applied to cropland at rates not to exceed the crop requirements for nutrients and the ability of the soil to absorb any excess phosphorus. BPT establishes specific record keeping requirements associated with ensuring the achievement of the zero discharge limitation for the production area and that the application of manure and wastewater is done in accordance with land application requirements. EPA also proposes to require the CAFO operator to maintain records of any excess manure that is transported off-site.

BAT limitations for the beef and dairy subcategories would include all of the BPT limitations described above and, in addition, would require CAFOs to achieve zero discharge to ground water beneath the production area that has a direct hydrologic connection to surface water. In addition, the proposed BAT requirements for the swine, veal and poultry subcategories would eliminate the provision for overflow in the event of a chronic or catastrophic storm. CAFOs in the swine, veal and poultry subcategories typically house their animals under roof instead of in open areas, thus avoiding or minimizing the runoff of contaminated storm water and the need to contain storm water.

EPA is also proposing to revise New Source Performance Standards (NSPS) based on the same technology requirements as BAT for the beef and dairy subcategories. For the swine, veal and poultry subcategories, EPA proposes revised NSPS based on the same technology as BAT with the additional requirement that there be no discharge of pollutants through ground water beneath the production area that has a direct hydrological connection to surface waters. Both the BAT and NSPS requirements have the same land application and record keeping requirements as proposed for BPT.

Today's proposal would make several other changes to the existing regulation, which would:

- require the CAFO operator to develop a Permit Nutrient Plan for managing manure and wastewater at both the production area and the land application area;
- require certain record keeping, reporting, and monitoring;
- revise the definition of an animal feeding operation (AFO) to more clearly exclude areas such as pastures and rangeland that sustain crops or forage during the entire time that animals are present;
- eliminate the mixed-animal type calculation for determining which AFOs are CAFOs; and
- require permit authorities to include the following conditions in permits to:

(1) require retention of a permit until proper facility closure; (2) establish the method for operators to calculate the allowable manure application rate; (3) specify restrictions on timing and methods of application of manure and wastewater to assure use for an agricultural purpose (e.g., certain applications to frozen, snow covered or saturated land) to prevent impairment of water quality; (4) address risk of contamination via groundwater with a direct hydrological connection to surface water; (5) address the risk of improper manure application off-site by either requiring that the CAFO operator obtain from off-site recipients a certification that they are land applying CAFO manure according to proper agricultural practices or requiring the CAFO to provide information to manure recipients and keep appropriate records of off-site transfers, or both; and (6) establish design standards to account for chronic storm events.

Today's proposal would also:

- clarify EPA's interpretation of the agricultural storm water exemption and its implications for land application of manure both at the CAFO and off-site; and
- clarify application of the CWA to dry weather discharges at AFOs.

EPA is seeking comment on the entire proposal. Throughout the preamble, EPA identifies specific components of the proposed rule on which comment is particularly sought.

III. Background

A. The Clean Water Act

Congress passed the Federal Water Pollution Control Act (1972), also known as the Clean Water Act (CWA), to ''restore and maintain the chemical, physical, and biological integrity of the nation's waters.'' (33 U.S.C. § 1251(a)). The CWA establishes a comprehensive program for protecting our nation's waters. Among its core provisions, the CWA prohibits the discharge of pollutants from a point source to waters of the U.S. except as authorized by a National Pollutant Discharge Elimination System (NPDES) permit. The CWA establishes the NPDES permit program to authorize and regulate the discharges of pollutants to waters of the U.S. EPA has issued comprehensive regulations that implement the NPDES program at 40 CFR Part 122. The CWA also provides for the development of technology-based and water quality-based effluent limitations that are imposed through NPDES permits to control discharges of pollutants.

1. The National Pollutant Discharge Elimination System (NPDES) Permit Program

Under the NPDES permit program, all point sources that directly discharge pollutants to waters of the U.S. must apply for a NPDES permit and may only discharge pollutants in compliance with the terms of that permit. Such permits must include any nationally established, technology based effluent discharge limitations (i.e., effluent guidelines) (discussed below, in subsection III.A.2). In the absence of national effluent limitations, NPDES permit writers must establish technology based limitations and standards on a case-by-case basis, based on their ''best professional judgement (BPJ).''

Water quality-based effluent limits also are included in a permit where technology-based limits are not sufficient to ensure compliance with State water quality standards that apply to the receiving water or where required to implement a Total Maximum Daily Load (TMDL). Permits may also include specific best management practices to achieve effluent limitations and standards, typically included as special conditions. In addition, NPDES permits normally include monitoring and reporting requirements, and standard conditions (i.e., conditions that apply to all NPDES permits, such as the duty to properly operate and maintain equipment and treatment systems).

NPDES permits may be issued by EPA or a State, Territory, or Tribe authorized by EPA to implement the NPDES program. Currently, 43 States and the Virgin Islands are authorized to administer the base NPDES program (the base program includes the federal requirements applicable to AFOs and CAFOs). Alaska, Arizona, the District of Columbia, Idaho, Maine, Massachusetts, New Hampshire, and New Mexico are not currently authorized to implement the NPDES program. In addition, Oklahoma, while authorized to administer the NPDES program, does not have CAFO regulatory authority. No tribe is currently authorized.

A NPDES permit may be either an individual permit tailored for a single facility or a general permit applicable to multiple facilities within a specific category. Prior to the issuance of an individual permit, the owner or operator submits a permit application with facility-specific information to the

permit authority, who reviews the information and prepares a draft permit. The permit authority prepares a fact sheet explaining the draft permit, and publishes the draft permit and fact sheet for public review and comment. Following consideration of public comments by the permit authority, a final permit is issued. Specific procedural requirements apply to the modification, revocation and reissuance, and termination of a NPDES permit. NPDES permits are subject to a maximum 5-year term.

General NPDES permits are available to address a category of discharges that involve similar operations with similar wastes. General permits are not developed based on facility-specific information. Instead, they are developed based on data that characterize the type of operations being addressed and the pollutants being discharged. Once a general permit is drafted, it is published for public review and comment accompanied by a fact sheet that explains the permit. Following EPA or State permit authority consideration of public comments, a final general permit is issued. The general permit specifies the type or category of facilities that may obtain coverage under the permit. Those facilities that fall within this category then must submit a ''notice of intent'' (NOI) to be covered under the general permit to gain permit coverage. [Under 40 CFR 122.28(b)(2)(vi), the permit authority also may notify a discharger that it is covered under a general permit even where that discharger has not submitted a notice of intent to be covered by the permit.] EPA anticipates that the Agency and authorized States will use general NPDES permits to a greater extent than individual permits to address CAFOs.

2. Effluent Limitation Guidelines and Standards

Effluent limitation guidelines and standards (which we also refer to today as ''effluent guidelines'' or ''ELG'') are national regulations that establish limitations on the discharge of pollutants by industrial category and subcategory. These limitations are subsequently incorporated into NPDES permits. The effluent guidelines are based on the degree of control that can be achieved using various levels of pollution control technology, as outlined below. The effluent guidelines may also include non-numeric effluent limitations in the form of best management practices requirements or directly impose best management practices as appropriate.

a. *Best Practicable Control Technology Currently Available (BPT)—Section 304(b)(1) of the CWA.* In the guidelines for an industry category, EPA defines BPT effluent limits for conventional, toxic, and non-conventional pollutants. In specifying BPT, EPA looks at a number of factors. EPA first considers the cost of achieving effluent reductions in relation to the effluent reduction benefits. The Agency also considers the age of the equipment and facilities, the processes employed and any required process changes, engineering aspects of the control technologies, non-water quality environmental impacts (including energy requirements), and such other factors as the Agency deems appropriate (CWA 304(b)(1)(B)). Traditionally, EPA establishes BPT effluent limitations based on the average of the best performances of facilities within the industry of various ages, sizes, processes or other common characteristics. Where existing performance is uniformly inadequate, EPA may require higher levels of control than currently in place in an industrial category if the Agency determines that the technology can be practically applied.

b. *Best Available Technology Economically Achievable (BAT)—Section 304(b)(2) of the CWA.* In general, BAT effluent limitations represent the best existing economically achievable performance of direct discharging plants in the industrial subcategory or category. The factors considered in assessing BAT include the cost of achieving BAT effluent reductions, the age of equipment and facilities involved, the processes employed, engineering aspects of the control technology, potential process changes, non-water quality environmental impacts (including energy requirements), and such factors as the Administrator deems appropriate. The Agency retains considerable discretion in assigning the weight to be accorded to these factors. An additional statutory factor considered in setting BAT is economic achievability. Generally, the achievability is determined on the basis of the total cost to the industrial subcategory and the overall effect of the rule on the industry's financial health. BAT limitations may be based on effluent reductions attainable through changes in a facility's processes and operations. As with BPT, where existing performance is uniformly inadequate, BAT may be based on technology transferred from a different subcategory within an industry or from another industrial category. BAT may be based on process changes or internal controls, even when these technologies are not common industry practice.

c. *Best Conventional Pollutant Control Technology (BCT)—Section 304(b)(4) of the CWA.* The 1977 amendments to the CWA required EPA to identify effluent reduction levels for conventional pollutants associated with BCT technology for discharges from existing industrial point sources. BCT is not an additional limitation, but replaces Best Available Technology (BAT) for control of conventional pollutants. In addition to other factors specified in Section 304(b)(4)(B), the CWA requires that EPA establish BCT limitations after consideration of a two part ''cost-reasonableness'' test. EPA explained its methodology for the development of BCT limitations in July 1986 (51 FR 24974). Section 304(a)(4) designates the following as conventional pollutants: biochemical oxygen demand (BOD_5), total suspended solids (TSS), fecal coliform, pH, and any additional pollutants defined by the Administrator as conventional. The Administrator designated oil and grease as an additional conventional pollutant on July 30, 1979 (44 FR 44501).

d. *New Source Performance Standards (NSPS)—Section 306 of the CWA.* NSPS reflect effluent reductions that are achievable based on the best available demonstrated control technology. New facilities have the opportunity to install the best and most efficient production processes and wastewater treatment technologies. As a result, NSPS should represent the greatest degree of effluent reduction attainable through the application of the best available demonstrated control technology for all pollutants (i.e., conventional, non-conventional, and priority pollutants). In establishing NSPS, EPA is directed to take into consideration the cost of achieving the effluent reduction and any non-water quality environmental impacts and energy requirements.

B. History of EPA Actions to Address CAFOs

EPA's regulation of wastewater and manure from CAFOs dates to the 1970s. The existing NPDES CAFO regulations were issued on March 18, 1976 (41 FR 11458). The existing national effluent limitations guideline and standards for feedlots were issued on February 14, 1974 (39 FR 5704).

By 1992, it became apparent that the regulation and permitting of CAFOs needed review due to changes in the livestock industry, specifically the consolidation of the industry into fewer, but larger operations. In 1992, the Agency established a workgroup

composed of representatives of State agencies, EPA regional staff and EPA headquarters staff to address issues related to CAFOs. The workgroup issued The Report of the EPA/State Feedlot Workgroup in 1993. One of the workgroup's recommendations was that the Agency should provide additional guidance on how CAFOs are regulated under the NPDES permit program. The Agency issued such guidance, entitled Guide Manual On NPDES Regulations For Concentrated Animal Feeding Operations, in December 1995.

Massive spills of hog manure (see Section V.B.1.c) and Pfiesteria outbreaks (see Section V.C.1.a.), continued industry consolidation, and increased public awareness of the potential environmental and public health impacts of animal feeding operations resulted in EPA taking more comprehensive actions to improve existing regulatory and voluntary programs. In 1997, dialogues were initiated between EPA and the poultry and pork livestock sectors. On December 12, 1997, the Pork Dialogue participants, including representatives from the National Pork Producers Council (NPPC) and officials from EPA, U.S. Department of Agriculture (USDA), and several States, issued a Comprehensive Environmental Framework for Pork Production Operations. Continued discussions between EPA and the NPPC led to development of a Compliance Audit Program Agreement (CAP Agreement) that is available to any pork producer who participates in NPPC's environmental assessment program. The CAP Agreement for pork producers was issued by the Agency on November 24, 1998. Under the agreement, pork producers that voluntarily have their facilities inspected are eligible for reduced penalties for any CWA violations discovered and corrected. The Poultry Dialogue produced a report in December 1998 that established a voluntary program focused on promoting protection of the environment and water quality through implementation of litter management plans and other actions: Environmental Framework and Implementation Strategy: A Voluntary Program Developed and adopted by the Poultry Industry, Adopted at the December 8–9, 1998 meeting of the Poultry Industry Environmental Dialogue (U.S. Poultry and Egg Association).

President Clinton and Vice President Gore announced the Clean Water Action Plan (CWAP) on February 19, 1998. The CWAP describes the key water quality problems our nation faces today and suggests both a broad plan and specific actions for addressing these problems. The CWAP indicated that polluted runoff is the greatest source of water quality problems in the United States today and that stronger polluted runoff controls are needed. The CWAP goes on to state that one important aspect of such controls is the expansion of CWA permit controls, including those applicable to large facilities such as CAFOs.

The CWAP included two key action items that address animal feeding operations (AFOs). First, it stated that EPA should publish and, upon considering public comments, implement an AFO strategy for important and necessary EPA actions on standards and permits. EPA published a Draft Strategy for Addressing Environmental and Public Health Impacts from Animal Feeding Operations in March 1998 (draft AFO Strategy). In accordance with EPA's draft AFO Strategy, EPA's Office of Enforcement and Compliance Assurance (OECA) also issued the Compliance Assurance Implementation Plan for Animal Feeding Operations in March 1998. This plan describes compliance and enforcement efforts being undertaken to ensure that CAFOs comply with existing CWA regulations. Second, the CWAP stated that EPA and USDA should jointly develop a unified national strategy to minimize the water quality and public health impacts of AFOs. EPA and USDA jointly published a draft Unified National Strategy for Animal Feeding Operations (hereinafter Unified National AFO Strategy) on September 21, 1998 and, after sponsoring and participating in 11 public listening sessions and considering public comments on the draft strategy, published a final Unified National AFO Strategy on March 9, 1999. This joint strategy was generally consistent with and superceded EPA's draft AFO Strategy.

The Unified National AFO Strategy establishes national goals and performance expectations for all AFOs. The general goal is for AFO owners and operators to take actions to minimize water pollution from confinement facilities and land where manure is applied. To accomplish this goal, the AFO Strategy established a national performance expectation that all AFOs should develop and implement technically sound, economically feasible, and site-specific comprehensive nutrient management plans (CNMPs) to minimize impacts on water quality and public health.

The Unified National AFO Strategy identified seven strategic issues that should be addressed to better resolve concerns associated with AFOs. These include: (1) fostering CNMP development and implementation; (2) accelerating voluntary, incentive-based programs; (3) implementing and improving the existing regulatory program; (4) coordinating research, technical innovation, compliance assistance, and technology transfer; (5) encouraging industry leadership; (6) increasing data coordination; and (7) establishing better performance measures and greater accountability. Today's proposed rule primarily addresses strategic issue three: implementing and improving the existing AFO regulatory program.

The Unified National AFO Strategy observed that, for the majority of AFOs (estimated in the AFO Strategy as 95 percent), voluntary efforts founded on locally led conservation, education, and technical and financial assistance would be the principal approach for assisting owners and operators in developing and implementing site-specific CNMPs and reducing water pollution and public health risks. Future regulatory programs would focus permitting and enforcement priorities on high risk operations, which were expected to constitute the remaining 5 percent. EPA estimates that today's proposal would result in permit coverage for approximately 7 percent of AFOs under the two-tier structure, and between 4.5 percent and 8.5 percent of AFOs under the three-tier structure.

Following publication of the Unified National AFO Strategy, EPA issued on August 6, 1999 the Draft Guidance Manual and Example NPDES Permit for CAFOs for a 90-day public comment period. EPA undertook development of this new guidance manual in order to provide permit writers with improved guidance on applying the existing regulations to a changing industry. While the guidance manual has not been finalized, many of the issues discussed in the draft guidance manual are also addresses in today's preamble. EPA expects to issue final, revised permitting guidance to reflect the revised CAFO regulations when they are published in final form.

C. What Requirements Apply to CAFOs?

The discussion below provides an overview of the scope and requirements imposed under the existing NPDES CAFO regulations and feedlot effluent limitations guidelines. It also explains the relationship of these two regulations, and summarizes other federal and State regulations that potentially affect AFOs.

1. What are the Scope and Requirements of the Existing NPDES Regulations for CAFOs?

Under existing 40 CFR 122.23, an operation must be defined as an animal feeding operation (AFO) before it can be defined as a concentrated animal feeding operation (CAFO). The term ''animal feeding operation'' is defined in EPA regulations as a ''lot or facility'' where animals ''have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12 month period and crops, vegetation[,] forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.'' This definition is intended to enable the NPDES authorized permitting authority to regulate facilities where animals are stabled or confined and waste is generated.

Once a facility meets the AFO definition, its size, based upon the total numbers of animals confined, is a key factor in determining whether it is a CAFO. To define these various livestock sectors, EPA established the concept of an ''animal unit'' (AU), which varies according to animal type. Each livestock type, except poultry, is assigned a multiplication factor to facilitate determining the total number of AU at a facility with more than one animal type. These multiplication factors are as follows: Slaughter and feeder cattle—1.0, Mature dairy cattle—1.4, Swine weighing over 25 kilograms (approximately 55 pounds)—0.4, Sheep—0.1, Horses—2.0. There are currently no animal unit conversions for poultry operations. The regulations, however, define the total number of animals (subject to waste handling technology restrictions) for specific poultry types that make these operations subject to the regulation. (40 CFR Part 122, Appendix B).

Under the existing regulations, an animal feeding operation is a concentrated animal feeding operation if it meets the regulatory CAFO definition or if it is designated as a CAFO. The regulations automatically define an AFO to be a CAFO if either more than 1,000 AU are confined at the facility, or more than 300 AU are confined at the facility and: (1) pollutants are discharged into navigable waters through a manmade ditch, flushing system, or other similar man-made device; or (2) pollutants are discharged directly into waters that originate outside of and pass over, across, or through the facility or come into direct contact with the confined animals. However, no animal feeding operation is defined as a CAFO if it discharges only in the event of a 25-year, 24-hour storm event (although it sill may be designated as a CAFO). Although they are not automatically defined as a CAFO, facilities still may be designated as a CAFO even if they discharge only in a 25-year, 24-hour storm event.

An AFO can also become a CAFO through designation. The NPDES permitting authority may, on a case-by-case basis, after conducting an on-site inspection, designate any AFO as a CAFO based on a finding that the facility ''is a significant contributor of pollution to the waters of the United States.'' (40 CFR 122.23(c)). Pursuant to 40 CFR 122.23(c)(1)(i)-(v) the permitting authority shall consider several factors making this determination, including: (1) the size of the operation, and amount of waste reaching waters of the U.S.; (2) the location of the operation relative to waters of the U.S.; (3) the means of conveyance of animal waste and process waste waters into waters of the U.S.; and (4) the slope, vegetation, rainfall and other factors affecting frequency of discharge. A facility with 300 animal units or less, however, may not be designated as a CAFO unless pollutants are discharged into waters of the U.S. through a man-made ditch, flushing system, or other similar man-made device, or are discharged directly into waters of the U.S. which originate outside of the facility and pass over, across or through the facility or otherwise come into direct contact with the animals confined in the operation.

Once defined or designated as a CAFO, the operation is subject to NPDES permitting. As described above, a permit contains the specific technology-based effluent limitations (whether based on the effluent guidelines or BPJ); water quality-based limits if applicable; specific best management practices; monitoring and reporting requirements; and other standard NPDES conditions.

2. What are the Scope and Requirements of the Existing Feedlot Effluent Guidelines?

In 1974, EPA promulgated effluent limitations guidelines applicable to CAFOs (40 CFR Part 412) and established in those regulations the technology-based effluent discharge standards for the facilities covered by the guidelines. The effluent guidelines for the feedlots point source category have two subparts: Subpart B for ducks, and Subpart A for all other feedlot animals. Under the existing regulation, Subpart A covers: beef cattle; dairy cattle; swine; poultry; sheep; and horses. Further, the effluent guidelines apply only to facilities with 1,000 AU or greater. Today's revisions to the effluent guidelines affect only the guidelines for the beef, dairy, swine, poultry and veal subcategories, while the NPDES revisions are applicable to all confined animal types.

The current feedlot effluent guidelines based on BAT prohibit discharges of process wastewater pollutants to waters of the U.S. except when chronic or catastrophic storm events cause an overflow from a facility designed, constructed, and operated to hold process-generated wastewater plus runoff from a 25-year, 24-hours storm event. Animal wastes and other wastewater that must be controlled include: (1) spillage or overflow from animal or poultry watering systems, washing, cleaning, or flushing pens, barns, manure pits, or other feedlot facilities, direct contact swimming, washing, or spray cooling of animals, and dust control; and (2) precipitation (rain or snow) which comes into contact with any manure, litter, or bedding, or any other raw material or intermediate or final material or product used in or resulting from the production of animals or poultry or direct products (e.g., milk or eggs). 40 CFR 412.11.

As described above, in those cases where the feedlot effluent guidelines do not apply to a CAFO (i.e., the operation confines fewer than 1,000 animal units), the permit writer must develop, for inclusion in the NPDES permit, technology-based limitations based on best professional judgement (BPJ).

3. What Requirements May be Imposed on AFOs Under the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA)?

In the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA), Congress required States with federally-approved coastal zone management programs to develop and implement coastal nonpoint pollution control programs. Thirty-three (33) States and Territories currently have federally approved Coastal Zone Management programs. Section 6217(g) of CZARA called for EPA, in consultation with other federal agencies, to develop guidance on ''management measures'' for sources of nonpoint source pollution in coastal waters. In January 1993, EPA issued its Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters which addresses five major source categories of nonpoint pollution: urban runoff, agriculture runoff, forestry runoff, marinas and recreational boating, and hydromodification.

Within the agriculture runoff nonpoint source category, the EPA guidance specifically included management measures applicable to all new and existing ''confined animal facilities.'' The guidance identifies which facilities constitute large and small confined animal facilities based solely on the number of animals or animal units confined (the manner of discharge is not considered). Under the CZARA guidance: a large beef feedlot contains 300 head or more, a small feedlot between 50–299 head; a large dairy contains 70 head or more, a small dairy between 20–69 head; a large layer or broiler contains 15,000 head or more, a small layer or broiler between 5,000–14,999 head; a large turkey facility contains 13,750 head or more, a small turkey facility between 5,000–13,749 head; and a large swine facility contains 200 head or more, a small swine facility between 100–199 head.

The thresholds in the CZARA guidance for identifying large and small confined animal facilities are lower than those established for defining CAFOs under the current NPDES regulations. Thus, in coastal States the CZARA management measures potentially apply to a greater number of small facilities than the existing CAFO definition. Despite the fact that both the CZARA management measures for confined animal facilities and the NPDES CAFO regulations address similar operations, these programs do not overlap or conflict with each other. Any CAFO facility, defined by 40 CFR Part 122, Appendix B, that has a NPDES CAFO permit is exempt from the CZARA program. If a facility subject to CZARA management measures is later designated a CAFO by a NPDES permitting authority, the facility is no longer subject to CZARA. Thus, an AFO cannot be subject to CZARA and NPDES permit requirements at the same time.

EPA's CZARA guidance provides that new confined animal facilities and existing large confined animal facilities should limit the discharge of facility wastewater and runoff to surface waters by storing such wastewater and runoff during storms up to and including discharge caused by a 25-year, 24-hour frequency storm. Storage structures should have an earthen or plastic lining, be constructed with concrete, or constitute a tank. All existing small facilities should design and implement systems that will collect solids, reduce contaminant concentrations, and reduce runoff to minimize the discharge of contaminants in both facility wastewater and in runoff caused by storms up to and including a 25-year, 24-hour frequency storm. Existing small facilities should substantially reduce pollutant loadings to ground water. Both large and small facilities should also manage accumulated solids in an appropriate waste utilization system. Approved State CZARA programs have management measures in conformity with this guidance and enforceable policies and mechanisms as necessary to assure their implementation.

In addition to the confined animal facility management measures, the CZARA guidance also includes a nutrient management measure that is intended to be applied by States to activities associated with the application of nutrients to agricultural lands (including the application of manure). The goal of this management measure is to minimize edge of field delivery of nutrients and minimize the leaching of nutrients from the root zone.

The nutrient management measures provide for the development, implementation, and periodic updating of a nutrient management plan. Such plans should address: application of nutrients at rates necessary to achieve realistic crop yields; improved timing of nutrient application; and the use of agronomic crop production technology to increase nutrient use efficiency. Under this management measure, nutrient management plans include the following core components: farm and field maps showing acreage, crops, and soils; realistic yield expectations for the crops to be grown; a summary of the nutrient resources available to the producer; an evaluation of field limitations based on environmental hazards or concerns; use of the limiting nutrient concept to establish the mix of nutrient sources and requirements for the crop based on realistic crop expectations; identification of timing and application methods for nutrients; and provisions for proper calibration and operation of nutrient application equipment.

4. How Are CAFOs Regulated By States?

NPDES permits may be issued by EPA or a State authorized by EPA to implement the NPDES program. Currently, 43 States and the Virgin Islands are authorized to administer the NPDES program. Oklahoma, however, has not been authorized to administer the NPDES program for CAFOs.

To become an authorized NPDES state, the State's requirements must, at a minimum, be as stringent as the requirements imposed under the federal NPDES program. States, however, may impose requirements that are broader in scope or more stringent than the requirements imposed at the federal level. In States not authorized to implement the NPDES program, the appropriate EPA Regional office is responsible for implementing the program.

State efforts to control pollution from CAFOs have been inconsistent to date for a variety of reasons. Many States have only recently focused attention on the environmental challenges posed by the emergence of increasing consolidation of CAFOs into larger and larger operations. Others have traditionally viewed AFOs as agriculture, and the reluctance to regulate agriculture has prevented programs from keeping pace with a changing industry. Many states have limited resources for identifying which facilities are CAFOs, or which may be inappropriately claiming the 25-year, 24-hour storm permit exclusion. Some states with a large number of broiler and laying operations do not aggressively try to permit these facilities under NPDES because the technology requirements for these operations in the existing regulation are outdated.

Another reason States may not have issued NPDES permits to CAFOs is the concern over potentially causing operations to lose cost-share money available under EPA's Section 319 Nonpoint Source Program and other assistance under USDA's Environmental Quality Incentive Program (EQIP). Once a facility is considered a point source under NPDES, the operation is not eligible for cost sharing under the Section 319 nonpoint source program. The USDA EQIP program, however, is available to most facilities, and being a permitted CAFO is not a reason for exclusion from the EQIP program. Although EQIP funds may not be used to pay for construction of storage facilities at operations with greater than 1,000 USDA animal units (USDA uses a different definition of animal units than EPA); EQIP is available to these facilities for technical assistance and financial assistance for other practices.

To gather information on State activities concerning AFOs, EPA assembled information into a report entitled, ''State Compendium: Programs and Regulatory Activities Related to Animal Feeding Operations, Final Report,'' dated December 1999, and continues to update information concerning state operations (see ''Profile of NPDES Permits and CNMP Permit Requirements for CAFOs,'' updated periodically). The following discussion draws on information from these reports.

EPA estimates that, under the existing EPA regulations, approximately 9,000 operations with more than 1,000 AU are CAFOs and should be permitted, and

approximately 4,000 operations with 300 AU to 1,000 AU should be permitted. However, only an estimated 2,520 CAFOs are currently covered under either a general permit or an individual permit. The 43 states authorized to implement the NPDES program for CAFOs have issued coverage for approximately 2,270 facilities, of which about 1,150 facilities are under general permits and about 1,120 facilities are under individual permits. Of these states, 32 states administer their NPDES CAFO program in combination with some other State permit, license, or authorization program. Often, this additional State authorization is a construction or operating permit. Eight of the states regulate CAFOs exclusively under their State NPDES authority, while three others have chosen to regulate CAFOs solely under State non-NPDES programs. EPA information indicates that, as of December, 1999, seventeen of the 43 states authorized to administer the NPDES program for CAFOs have never issued an NPDES permit to a CAFO.

Of the seven states not authorized to administer the NPDES program, four rely solely on federal NPDES permits to address CAFOs. As of December 1998, EPA has issued coverage for approximately 250 facilities under general NPDES permits.

Virtually all NPDES authorized states use the federal CAFO definition in their State NPDES CAFO program. Most states also use the federal definition for State non-NPDES CAFO programs. Five States, however, have developed unique definitions for their non-NPDES livestock regulatory programs that do not follow the federal definition. These five States typically base their definition on the number of animals confined, weight of animals and design capacity of waste control system, or gross income of agricultural operation. For example, Alabama's new general State NPDES permit covers all operations with at least 250 animal units. Similarly, Minnesota issues State (non-NPDES) feedlot permits to facilities with more than 10 animal units. Minnesota also issues individual NPDES permits to CAFOs as defined under the existing federal regulations.

The regulation of CAFOs is challenging, in part, because of the large number of facilities across the country. There are approximately 376,000 AFOs. Regulating, for example, 5 percent of AFOs would result in some 18,800 permittees. One way of reducing the administrative burden associated with permitting such large numbers of facilities is through the use of general permits. NPDES regulations provide that general permits may be issued to cover a category of dischargers that involves similar operations with similar wastes. Operations subject to the same effluent limitations and operating conditions, and requiring similar monitoring are the types of facilities most appropriately regulated under a general permit. EPA and some authorized States are using general permits to regulate CAFOs, and this trend appears to be increasing.

As mentioned, seventeen of the 43 States authorized to issue NPDES CAFO permits have never issued an NPDES permit to a CAFO, although many regulate CAFOs under non-NPDES programs. Under current regulations, an animal feeding operation that discharges only in the event of a 25-year, 24-hour storm event is not considered to meet the definition of a CAFO (although it may still be designated as a CAFO). EPA believes that many of these facilities have in fact discharged in circumstance other than the 25-year/24-hour storm and should be required to obtain a permit.

The number of non-NPDES permits issued to AFOs greatly exceeds the number of NPDES permits issued. Although the information may be incomplete on the number of state permits issued, more than 45,000 non-NPDES permits or formal authorizations are known to have been issued through state AFO programs. The non-NPDES State authorizations often are only operating permits or approvals required for construction of waste disposal systems. While some impose terms and conditions on discharges from the CAFO, EPA believes that many would not meet the standards for approval as NPDES permits. Because these are not NPDES permits, none meet the requirement for federal enforceability.

Minnesota alone has issued nearly 25,000 State feedlot permits. Kansas has issued more than 2,400 State permits, of which 1,500 have been to facilities with more than 300 animal units. Indiana has issued more than 4,000 letters of approval to AFOs within the State. South Carolina has issued 2,000 construction permits.

With regard to the discharge standards included in permits, 28 NPDES authorized States have adopted the federal feedlot effluent guidelines, while five authorized States use a more stringent limit. These more stringent limits partially or totally prohibit discharges related to storm events. For example, Arkansas regulations prohibit discharges from liquid waste management systems, including those resulting from periods of precipitation greater than the 25-year, 24-hour storm event. In addition, California and North Carolina rules provide for no discharge from new waste control structures even during 100 year storms. Numerous State CAFO permit programs also impose requirements that are broader in scope than the existing federal CAFO regulations.

Twenty-two States have adopted laws that their environmental regulations cannot be more restrictive than the specific requirements in the federal regulations. Should any of these states experience environmental problems with CAFOs, they must rely on appropriate state regulations no more stringent than the federal rules.

Thirty-four States explicitly impose at least some requirements that address land application of manure and wastewater as part of either their NPDES or non-NPDES program. The most common requirements among these States is that CAFO manure and wastewater, when managed through land application, be land applied in accordance with agronomic rates and that the operator develop and use a waste management plan. Although some States do not address how agronomic rates should be determined, many base it on the nitrogen needs of crops, while some require consideration of phosphorus as well. The complexity of waste management plans also varies between states. Some states have very detailed requirements for content of waste management plans, while others do not. Generally, CAFO operators are asked to address estimates of annual nutrient value of waste, schedules for emptying and applying wastes, rates and locations for applying wastes, provisions for determining agronomic rates, and provisions for conducting required monitoring and reporting.

Although data was not available for all States, State agency staff dedicated to AFOs has increased over the last five years. In general, State staff dedicated to AFOs is relatively small, with average staff numbers being below four full-time employees. Several States do not have any staff specifically assigned to manage water quality impacts from AFOs. However, States such as Arkansas, Minnesota, Wisconsin, and Nebraska doubled their staff commitment to AFOs within the last five years. The most notable increases in State staff assigned to address AFOs were in Iowa and North Carolina. Kansas, Minnesota, and North Carolina have the largest AFO staffs in the country, with each having more than 20 full time employees.

One indication that States have an increasing interest in expanding their efforts to control water quality impacts from AFOs is the promulgation of new

State AFO regulations and program initiatives. At least twelve states have developed new regulations related to AFOs since 1996. (AL, IN, KS, KY, MD, MS, NC, OK, PA, VT, WA, WY). Kansas, Kentucky, North Carolina, and Wyoming passed legislation regarding swine facilities, with Kentucky and North Carolina imposing moratoriums on the expansion of hog AFOs until State management/regulatory plans could be developed. Similarly, Mississippi also has imposed a 2-year moratorium on any new CAFOs. Alabama's recent efforts include developing an NPDES general permitting rule and a Memorandum of Agreement with EPA outlining State agency responsibilities as they relate to CAFOs. Washington's Dairy Law subjects all dairy farms with more than 300 animal units to permitting and requires each facility to develop nutrient management plans approved by the National Conservation Resource Service. Indiana's Confined Feeding Control Law also requires AFOs to develop waste management plans and receive State approval for operating AFOs.

In conclusion, the implementation of CAFO programs varies from state-to-state, as does the implementation of NPDES programs for CAFOs by NPDES authorized states. As animal production continues to become more industrialized nationwide, a coherent and systematic approach to implementing minimum standards is needed to ensure consistent protection of water quality. Today's proposal will continue to promote a systematic approach to establishing industry standards that are protective of human health and the environment.

D. How Do Today's Proposed Revisions Compare to the Unified National AFO Strategy?

As described in section III.B, on March 9, 1999, EPA and the U.S. Department of Agriculture jointly issued the Unified National Strategy for Animal Feeding Operations (Unified AFO Strategy), which outlined USDA and EPA's plans for achieving better control of pollution from animal agriculture under existing regulations. The following is a comparison chart that illustrates how the proposed rule compares to the Unified AFO Strategy. Table 3–1 compares the proposed CAFO rule requirements with the Unified AFO Strategy and identifies whether the proposed requirements are consistent with or not addressed by the Unified AFO Strategy. The table further shows that, overall, the proposed rule meets the intent of the Unified AFO Strategy.

TABLE 3–1.—PROPOSED RULE/UNIFIED NATIONAL AFO STRATEGY COMPARISON

Summary of proposed rule	Consistent with Unified AFO Strategy	Not addressed in Unified AFO Strategy	Comment
Proposed Revisions to NPDES Regulations			
Definition of AFO (122.23(a)(2))—AFO includes land application area; Clarifies crop language.	✔	✔	The Unified AFO Strategy states CNMPs should address land application of manure. (Sec. 3.1 and 3.2) Crop language not explicitly addressed in Unified AFO Strategy.
Definition of CAFO (122.23(a)(3))—Change 1,000 animal unit threshold to 500.	.....	✔	Alternative thresholds not explicitly addressed in Unified AFO Strategy, although Strategy does state EPA will explore alternative ways of defining CAFOs. (Sec. 5, Issue 3, Item 2.B.). The Unified AFO Strategy states that regulatory revisions will consider risk, burden, statutory requirements, enforceability, and ease of implementation (i.e., clarity of requirements). (Sec. 5, Issue 3, Item 2). The Unified AFO Strategy states that 5 percent of the AFOs will be subject to the regulatory program, however, this estimate is provided for the *existing* regulatory program (see Figure 2). No specific percentage is specified in the Strategy for the revised regulations.
Definition of CAFO (122.23(a)(3))—Include dry poultry operations.	✔	.....	The Unified AFO Strategy states that in revising regulations EPA intends to consider defining ''...large poultry operations, consistent with the size for other animal sectors, as CAFOs, regardless of the type of watering or manure handling system.'' (Sec. 5, Issue 3, Item 2.B.).
Definition of CAFO (122.23(a)(3))—Include immature animals.	.....	✔	Immature animals not explicitly addressed in Unified AFO Strategy.
Definition of CAFO (122.23)—Removes 25 year/24-hour storm provision from definition of CAFO.	✔	.....	The Unified AFO Strategy states EPA will consider ''requiring CAFOs to have an NPDES permit even if they only discharge during a 25-year, 24-hour or larger storm event.'' (Sec. 5, Issue 3, Item 2.B.).
Definition of Operation (122.23(a)(5))—Includes a person who exercises substantial operational control over a CAFO.	✔	.....	The Unified AFO Strategy states EPA will ''explore alternative approaches to ensuring that corporate entities support the efforts of individual CAFOs to comply with permits and develop and implement CNMPs.'' (Sec. 5, Issue 3, Item 2.B.).
Designation as a CAFO (122.23(b))—In authorized States EPA may designate an AFO as a CAFO. No inspection required a designate facility that was previously defined or designated as a CAFO.	✔	.....	The Unified AFO Strategy states EPA will consider ''who may designate and the criteria for designating certain AFOs as CAFOs.'' (Sec. 5, Issue 3, Item 2.B.).
Who must apply for an NPDES permit (122.23(c))—CAFOs must either apply for a permit or seek a determination of no potential to discharge.	✔	.....	The Unified AFO Strategy states ''the NPDES authority will issue a permit unless it determines that the facility does not have a potential to discharge. (Sec. 4.2).

TABLE 3–1.—PROPOSED RULE/UNIFIED NATIONAL AFO STRATEGY COMPARISON—Continued

Summary of proposed rule	Consistent with Unified AFO Strategy	Not addressed in Unified AFO Strategy	Comment
Co-Permitting (122.23(c)(3))—Operators, including any person who exercises substantial operational control over a CAFO, must either apply for a permit or seek a determination of no potential to discharge.	✔	.....	The Unified AFO Strategy states EPA will ''explore alternative approaches to ensuring that corporate entities support the efforts of individual CAFOs to comply with permits and develop and implement CNMPs.'' (Sec. 5, Issue 3, Item 2.B.).
Issuance of permit (122.23(d))—Director must issue permit unless s/he determines no potential to discharge.	✔	.....	The Unified AFO Strategy states ''the NPDES authority will issue a permit unless it determines that the facility does not have a potential to discharge. (Sec. 4.2.).
No potential to discharge (122.23(e))—Determination must consider discharge from production area, land application area, and via ground waters that have a direct hydrologic connection to surface waters.	✔	.....	The Unified AFO Strategy establishes a national performance expectation that all AFOs should develop and implement CNMPs, and that such CNMPs should address land application of manure. (Sec. 3.1 and 3.2). The Unified AFO Strategy states ''EPA believes that pollution of groundwater may be a concern around CAFOs. EPA has noted in other documents that a discharge via hydrologically connected groundwater to surface waters may be subject to NPDES requirements.'' (Sec. 4.2.). The Unified AFO Strategy states EPA will consider protecting ''sensitive or highly valuable water bodies such as Outstanding Natural Resources, sole source aquifers, wetlands, ground water recharge areas, zones of significant ground/surface water interaction, and other areas.'' (Sec. 5, Issue 3, Item 2.B.).
AFOs not defined or designated (122.23(g))—AFOs subject to NPDES permitting requirements if they have a discrete conveyance (i.e., point source) discharge from production or land application that is not entirely storm water.	.....	✔	The Unified AFO Strategy states EPA will consider ''clarifying whether and under what conditions AFOs may be subject to NPDES requirements.'' (Sec. 5, Issue 3, Item 2.B.).
Non-AFO land application (122.23(h))—Land application inconsistent with practices in 412.31(b) and that result in point source discharge of pollutants to Waters of the US may be designated under 122.26(a)(1)(v).	✔	.....	The Unified AFO Strategy states EPA will consider ''clarifying requirements for effective management of manure and wastewater from CAFOs whether they are handled on-site or off-site.'' (Sec. 5, Issue 3, Item 2. B.).
Agricultural Storm Water Exemption—Discharges from land application area if manure is not applied in quantities that exceed the land application rates calculated using one of the methods specified in 40 CFR 412.31(b)(1)(iv).	✔	.....	The Unified AFO Strategy states EPA has in the past and will in the future assume that discharges from the majority of agricultural operations are exempt, but that the agricultural storm water exemption would not apply where the discharge is associated with the land disposal of manure or wastewater from a CAFO and the discharge is not the result of proper agricultural practices. (Sec. 4.4).
CAFO permit requirement (122.23(i)(2))—CAFOs subject to effluent guidelines if applicable.	✔	.....	The Unified AFO Strategy states the effluent guidelines revisions will be closely coordinated with any charges to the NPDES permitting regulations. (Sec. 5, Issue 3, Item 2. A.).
CAFO permit requirement (122.23(j))—Prohibits land application of manure that would not serve agricultural purpose and would likely result in pollutant discharge to waters of the U.S.	✔	.....	The Unified AFO Strategy provides that all AFOs should develop and implement CNMPs, and that such CNMPs should address land application of manure to minimize impacts on water quality and public health. (Sec. 3.1 and 3.2).
CAFO permit requirement (122.23(j)(4))—Permittee must either provide information to recipient or, under one co-proposal option, obtain certification that recipient will land apply per Permit Nutrient Plan (PNP), obtain permit, use for other purpose, or transfer to 3rd party.	.....	✔	The Unified AFO Strategy states EPA will consider ''clarifying requirements for effective management of manure and wastewater from CAFOs whether they are handled on-site or off-site.'' (Sec. 5, Issue 3, Item 2. B.).
CAFO permit requirement (122.23(j)(5))—Permit must require specified recordkeeping.	.....	✔	The Unified AFO Strategy states EPA will consider ''establishing specific monitoring and reporting requirements for permitted facilities.'' (Sec. 5, Issue 3, Item 2. B.). The Unified AFO Strategy provides records should be kept when manure leaves the CAFO. (Sec.3.3).
Closure (122.23(i)(3))—AFO must maintain permit until it no longer has wastes generated while it was a CAFO.	.....	✔	Not explicitly addressed in Unified AFO Strategy.

TABLE 3–1.—PROPOSED RULE/UNIFIED NATIONAL AFO STRATEGY COMPARISON—Continued

Summary of proposed rule	Consistent with Unified AFO Strategy	Not addressed in Unified AFO Strategy	Comment
Public access (122.23(l)—Requires public access to list of NOIs, list of CAFOs that have prepared PNPs, and access to executive summary of PNP upon request.	.....	✔	Not explicitly addressed in Unified AFO Strategy.
General Permits (122.28)—Notice of Intent must include topographic map and statement re PNP; additional criteria specified for when individual permits may be required.	✔	✔	NOI requirements not explicitly addressed in Unified AFO Strategy. The Unified AFO Strategy states EPA will consider ''requiring individual permits for CAFOs in some situations.'' (Sec. 5, Issue 3, Item 2. B.).
Proposed Revisions to Feedlot Effluent Guidelines Regulations			
Production Area—Beef/Dairy (412.33(a): No discharge except when designed for 25 year, 24-hour storm, also inspect/ correct/ pump-out, manage mortalities. Swine/Poultry (412.43(a)): No discharge.	✔	✔	The Unified AFO Strategy indicates the existing effluent guidelines is no discharge when designed for 25 year, 24-hour storm. (Sec. 5, Issue 3, Item 2. A). Strategy states that in developing the revised effluent guidelines EPA is to assess different management practices that minimize the discharge of pollutants. (Sec. 5, Issue 3, Item 2. A).
Land Application (412.33(b) and 412.43(b))—Develop and Implement PNP covering the land application areas under the control of the CAFO. Also include Best Management Practices.	✔	.....	PNP has been identified as a specific subset of a CNMP applicable to AFOs subject to the regulation. In this manner it is consistent with the Strategy. It also reinforces that the CNMP is applicable to all AFOs (regulatory/voluntary) while the PNP is only applicable to those that fall under the regulatory program. It makes a clear distinction between the regulatory and voluntary programs addressed in the Strategy.
Land Application (412.31(b)(1)(ii))—PNP Approved by Certified Specialist.	✔	.....	The PNP is a subset of the CNMP. The Strategy identified that CNMPs ''developed to meet the requirements of the NPDES program in general must be developed by a certified specialist, ...''. (Sec. 4.6).
New Source Performance Standards (412.35/45): Various additional requirements.	✔	.....	Strategy states that in developing the revised effluent guidelines EPA is to evaluate the need for different requirements for new or expanding operations. (Sec. 5, Issue 3, Item 2. A).
Additional Measures (412.37)—Inspect/ correct/ pump-out, manage mortalities; Land application BMPs, sampling, training, recordkeeping.	✔	.....	Strategy states that in developing the revised effluent guidelines EPA is to assess different management practices that minimize the discharge of pollutants. (Sec. 5, Issue 3, Item 2. A). Strategy states that the regulatory revision process will include the establishment of specific monitoring and reporting requirements for permitted facilities.

IV. Why is EPA Changing the Effluent Guidelines for Feedlots and the NPDES CAFO Regulations?

A. Main Reasons For Revising the Existing Regulations

Despite more than twenty years of regulation, there are persistent reports of discharge and runoff of manure and manure nutrients from livestock and poultry operations. While this is partly due to inadequate compliance with existing regulations, EPA believes that the regulations themselves also need revision. Today's proposed revisions to the existing effluent guidelines and NPDES regulations for CAFOs are expected to mitigate future water quality impairment and the associated human health and ecological risks by reducing pollutant discharges from the animal production industry.

EPA's proposed revisions also address the changes that have occurred in the animal production industries in the United States since the development of the existing regulations. The continued trend toward fewer but larger operations, coupled with greater emphasis on more intensive production methods and specialization, is concentrating more manure nutrients and other animal waste constituents within some geographic areas. This trend has coincided with increased reports of large-scale discharges from these facilities, and continued runoff that is contributing to the significant increase in nutrients and resulting impairment of many U.S. waterways.

EPA's proposed revisions of the existing regulations will make the regulations more effective for the purpose of protecting or restoring water quality. The revisions will also make the regulations easier to understand and better clarify the conditions under which an AFO is a CAFO and, therefore, subject to the regulatory requirements of today's proposed regulations.

B. Water Quality Impairment Associated with Manure Discharge and Runoff

EPA has made significant progress in implementing CWA programs and in reducing water pollution. Despite such progress, however, serious water quality problems persist throughout the country. Agricultural operations, including CAFOs, are considered a significant source of water pollution in the United States. The recently released National Water Quality Inventory: 1998 Report to Congress was prepared under Section 305(b) of the Clean Water Act. Under this section of the Act, States report their impaired water bodies to EPA, including the suspected sources of those impairments. The most recent report indicates that the agricultural sector (including crop production, pasture and range grazing, concentrated and confined animal feeding operations, and aquaculture) is the leading contributor to identified water quality impairments in the nation's rivers and

streams, and also the leading contributor in the nation's lakes, ponds, and reservoirs. Agriculture is also identified as the fifth leading contributor to identified water quality impairments in the nation's estuaries. 1998 National Water Quality Inventory results are illustrated in table 4–1 below.

TABLE 4–1.—FIVE LEADING SOURCES OF WATER QUALITY IMPAIRMENT IN THE UNITED STATES

Rank	Rivers	Lakes	Estuaries
1	Agriculture (59%)	Agriculture (31%)	Municipal Point Sources (28%)
2	Hydro modification (20%)	Hydro modification (15%)	Urban Runoff / Storm Sewers (28%)
3	Urban Runoff / Storm Sewers (11%)	Urban Runoff/Storm Sewers (12%)	Atmospheric Deposition (23%)
4	Municipal Point Sources (10%)	Municipal Point Sources (11%)	Industrial Discharges (15%)
5	Resource Extraction (9%)	Atmospheric Deposition (8%)	Agriculture (15%)

Source: National Water Quality Inventory: 1998 Report to Congress, USEPA, 2000. Percentage of impairment attributed to each source is shown in parentheses. For example, agriculture is listed as a source of impairment in 59 percent of impaired river miles. The portion of 'agricultural'' impairment attributable to animal waste (as compared to crop production, pasture grazing, range grazing, and aquaculture) is not specified in this value. Figure totals exceed 100 percent because water bodies may be impaired by more than one source.

Table 4–2 presents additional summary statistics of the 1998 National Water Quality Inventory. These figures indicate that the agricultural sector contributes to the impairment of at least 170,000 river miles, 2.4 million lake acres, and almost 2,000 estuarine square miles. Twenty-eight states and tribes identified specific agricultural sector activities contributing to water quality impacts on rivers and streams, and 16 states and tribes identified specific agricultural sector activities contributing to water quality impacts on lakes, ponds, and reservoirs. CAFOs are a subset of the agriculture category. For rivers and streams, estimates from these states indicate that 16 percent of the total reported agricultural sector impairment is from the animal feeding operation industry (including feedlots, animal holding areas, and other animal operations), and 17 percent of the agricultural sector impairment is from both range and pasture grazing. For lakes, ponds, and reservoirs, estimates from these states indicate that 4 percent of the total reported agricultural sector impairment is from the animal feeding operation industry, and 39 percent of the agricultural sector impairment is from both range and pasture grazing. Impairment due specifically to land application of manure was not reported.

TABLE 4–2.—SUMMARY OF U.S. WATER QUALITY IMPAIRMENT SURVEY

Total quantity in U.S.	Waters assessed	Quantity impaired by all sources	Quantity impaired by agriculture [a]
Rivers 3,662,255 miles	23% of total 840,402 miles	35% of assessed 291,263 miles	59% of impaired. 170,750 miles.
Lakes, Ponds, and Reservoirs 41.6 million acres	42% of total 17.4 million acres	45% of assessed 7.9 million acres	31% of impaired. 2,417,801 acres.
Estuaries 90,465 square miles	32% of total 28,687 square miles	44% of assessed 12,482 square miles	15% of impaired. 1,827 square miles.

Source: National Water Quality Inventory: 1998 Report to Congress, USEPA, 2000.
[a]CAFOs are a subset of the agriculture category.

Table 4–3 below lists the leading pollutants impairing surface water quality in the United States as identified in the 1998 National Water Quality Inventory. The animal production industry is a potential source of all of these, but is most commonly associated with nutrients, pathogens, oxygen-depleting substances, and solids (siltation). Animal production facilities are also a potential source of the other leading causes of water quality impairment, such as metals and pesticides, and can contribute to the growth of noxious aquatic plants due to the discharge of excess nutrients. Animal production facilities may also contribute loadings of priority toxic organic chemicals and oil and grease, but to a lesser extent than other pollutants.

TABLE 4–3.—FIVE LEADING CAUSES OF WATER QUALITY IMPAIRMENT IN THE UNITED STATES

Rank	Rivers	Lakes	Estuaries
1	Siltation (38%)	Nutrients (44%)	Pathogens (47%)
2	Pathogens (36%)	Metals (27%)	Oxygen-Depleting Substances (42%)
3	Nutrients (29%)	Siltation (15%)	Metals (27%)
4	Oxygen-Depleting Substances (23%)	Oxygen-Depleting Substances (14%)	Nutrients (23%)
5	Metals (21%)	Suspended Solids (10%)	Thermal Modifications (18%)

Source: National Water Quality Inventory: 1998 Report to Congress, USEPA, 2000. Percent impairment attributed to each pollutant is shown in parentheses. For example, siltation is listed as a cause of impairment in 51 percent of impaired river miles. All of these pollutants except thermal modifications are commonly associated with animal feeding operations to varying degrees, though they are also attributable to other sources. Figure totals exceed 100 percent because water bodies may be impaired by more than one source.

Pollutants associated with animal production can also originate from a variety of other sources, such as cropland, municipal and industrial wastewater discharges, urban runoff, and septic systems. The national analyses described in Section V of this preamble are useful in assessing the significance of animal waste as a potential or actual contributor to water quality degradation across the United States. Section V also discusses the environmental impacts and human health effects associated with the pollutants found in animal manure.

C. Recent Changes in the Livestock and Poultry Industry

EPA's proposed revisions of the existing effluent guidelines and NPDES regulations take into account the major structural changes that have occurred in the livestock and poultry industries since the 1970s when the regulatory controls for CAFOs were first instituted. These changes include:

- Increased number of animals produced annually;
- Fewer animal feeding operations and an increase in the share of larger operations that concentrate more animals, manure and wastewater in a single location;
- Geographical shifts in where animals are produced; and
- Increased coordination between animal feeding operations and processing firms.

1. Increased Livestock and Poultry Production

Since the 1970s, total consumer demand for meat, eggs, milk and dairy products has continued to increase. To meet this demand, U.S. livestock and poultry production have risen sharply, resulting in an increase in the number of animals produced and the amount of manure and wastewater generated annually.

Increased sales from U.S. farms is particularly dramatic in the poultry sectors, as reported in the Census of Agriculture (various years). In 1997, turkey sales totaled 299 million birds. In comparison, 141 million turkeys were sold for slaughter in 1978. Broiler sales totaled 6.4 billion chickens in 1997, up from 2.5 billion chickens sold in 1974. The existing CAFO regulations effectively do not cover broiler operations because they exclude operations that use dry manure management systems. Red meat production also rose during the 1974–1997 period. The number of hogs and pigs sold increased from 79.9 million hogs in 1974 to 142.6 million hogs in 1997. Sales data for fed cattle (i.e., USDA's data category on ''cattle fattened on grain and concentrates'') for 1975 show that 20.5 million head were marketed. By 1997, fed cattle marketings totaled 22.8 million head. The total number of egg laying hens rose from 0.3 million birds in 1974 to 0.4 million birds in 1997. The number of dairy cows on U.S. farms, however, dropped from more than 10.7 million cows to 9.1 million cows over the same period.

Not only are more animals produced and sold each year, but the animals are also larger in size. Efficiency gains have raised animal yields in terms of higher average slaughter weight. Likewise, production efficiency gains at egg laying and dairy operations have resulted in higher per-animal yields of eggs and milk. USDA reports that the average number of eggs produced per egg laying hen was 218 eggs per bird in 1970 compared to 255 eggs per bird in 1997. The National Milk Producers Federation reports that average annual milk production rose from under 10,000 pounds per cow in 1970 to more than 16,000 pounds per cow in 1997. In the case of milk production, these efficiency gains have allowed farmers to maintain or increase production levels with fewer animals. Although animal inventories at dairy farms may be lower, however, this may not necessarily translate to reduced manure volumes generated because higher yields are largely attributable to improved and often more intensive feeding strategies that may exceed the animal's ability for uptake. This excess is not always incorporated by the animal and may be excreted.

2. Increasing Share of Larger, More Industrialized Operations

The number of U.S. livestock and poultry operations is declining due to ongoing consolidation in the animal production industry. Increasingly, larger, more industrialized, highly specialized operations account for a greater share of all animal production. This has the effect of concentrating more animals, and thus more manure and wastewater, in a single location, and raising the potential for significant environmental damages unless manure is properly stored and handled.

USDA reports that there were 1.1 million livestock and poultry farms in the United States in 1997, about 40 percent fewer than the 1.7 million farms reported in 1974. Farms are closing, especially smaller operations that cannot compete with large-scale, highly specialized, often lower cost, producers. Consequently, the livestock and poultry industries are increasingly dominated by larger operations. At the same time, cost and efficiency considerations are pushing farms to become more specialized and intensive. Steep gains in production efficiency have allowed farmers to produce more with fewer animals because of higher per-animal yields and quicker turnover of animals between farm production and consumer market. As a result, annual production and sales have increased, even though the number of animals on farms at any one time has declined (i.e., an increase in the number of marketing cycles over the course of the year allows operators to maintain production levels with fewer animals at any given time, although the total number of animals produced by the facility over the year may be greater).

The increase in animal densities at operations is evident by comparing the average number of animals per operation between 1974 and 1997, as derived from Census of Agriculture data. In the poultry sectors, the average number of birds across all operations is four to five times greater in 1997 than in 1974. In 1997, the number of broilers per operation averaged 281,700 birds, up from 73,300 birds in 1974. Over the same period, the average number of egg laying hens per operation rose from 1,100 layers to 5,100 layers per farm, and the average number of turkeys per operation rose from 2,100 turkeys to 8,600 turkeys. The average number of hogs raised per operation rose from under 100 hogs to more than 500 hogs between 1974 and 1997. The average number of fed cattle and dairy cows per operation more than doubled during the period, rising to nearly 250 fed cattle and 80 milking cows by 1997.

This trend toward fewer, larger, and more industrialized operations has contributed to large amounts of manure being produced at a single geographic location. The greatest potential risk is from the largest operations with the most animals given the sheer volume of manure generated at these facilities. Larger, specialized facilities often do not have an adequate land base for manure disposal through land application. A USDA analysis of 1997 Census data shows that animal operations with more than 1,000 AU account for more than 42 percent of all confined animals but only 3 percent of cropland held by livestock and poultry operations. As a result, large facilities need to store significant volumes of manure and wastewater which have the potential, if not properly handled, to cause significant water quality impacts. By comparison, smaller operations manage fewer animals and tend to concentrate less manure at a single farming location. Smaller operations also tend to be more diversified, engaging in both animal and

crop production. These operations often have sufficient cropland and fertilizer needs to land apply manure generated by the farm's livestock or poultry business, without exceeding that land's nutrient requirements.

Another recent analysis from USDA confirms that as animal production operations have become larger and more specialized operations, the opportunity to jointly manage animal waste and crop nutrients has decreased. Larger operations typically have inadequate land available for utilizing manure nutrients. USDA estimates that the amount of nitrogen from manure produced by confinement operations increased about 20 percent between 1982 and 1997, while average acreage on livestock and poultry farms declined. Overall, USDA estimates that cropland controlled by operations with confined animals has the assimilative capacity to absorb about 40 percent of the calculated manure nitrogen generated by these operations. EPA expects this excess will need to be transported offsite.

3. Geographic Shifts in Where Animals are Raised

During the 1970s, the majority of farming operations were concentrated in rural, agricultural areas and manure nutrients generated by animal feeding operations were readily incorporated as a fertilizer for crop production. In an effort to reduce transportation costs and streamline distribution between the animal production and food processing sectors, livestock and poultry operations have tended to cluster near slaughtering and manufacturing plants as well as near end-consumer markets. Ongoing structural and technological change in these industries also influences where facilities operate and contributes to locational shifts from the more traditional farm production regions to the more emergent regions.

Operations in more traditional producing states tend to grow both livestock and crops and tend to have adequate cropland for land application of manure. Operations in these regions also tend to be smaller in size. In contrast, confinement operations in more emergent areas, such as hog operations in North Carolina or dairy operations in the Southwest, tend to be larger in size and more intensive types of operations. These operations tend to be more specialized and often do not have adequate land for application of manure nutrients. Production is growing rapidly in these regions due to competitive pressures from more specialized producers who face lower per-unit costs of production. This may be shifting the flow of manure nutrients away from more traditional agricultural areas, often to areas where these nutrients cannot be easily absorbed.

As reported by Census data, shifts in where animals are grown is especially pronounced in the pork sector. Traditionally, Iowa has been the top ranked pork producing state. Between 1982 and 1997, however, the number of hogs raised in that state remained relatively constant with a year-end inventory average of about 14.2 million pigs. In comparison, year-end hog inventories in North Carolina increased from 2.0 million pigs in 1982 to 9.6 million pigs in 1997. This locational shift has coincided with reported nutrient enrichment of the waters of the Pamlico Sound in North Carolina. Growth in hog production also occurred in other emergent areas, including South Dakota, Oklahoma, Wyoming, Colorado, Arizona, and Utah. Meanwhile, production dropped in Illinois, Indiana, Wisconsin, and Ohio.

The dairy industry has seen similar shifts in where milk is produced, moving from the more traditional Midwest and Northeast states to the Pacific and Southwestern states. Between 1982 and 1997, the number of milk cows in Wisconsin dropped from 1.9 million to 1.3 million. Milk cow inventories have also declined in other traditional states, including Illinois, Indiana, Iowa, Minnesota, Missouri, New York, Pennsylvania, Ohio, Connecticut, Maryland, and Vermont. During the same period, milk cow inventories in California rose from 0.9 million in 1982 to 1.4 million in 1997. In 1994, California replaced Wisconsin as the top milk producing state. Milk cow inventories have also increased in Texas, Idaho, Washington, Oregon, Colorado, Arizona, Nevada, and Utah. These locational shifts have coincided with reported nutrient enrichment of waters, including the Puget Sound and Tillamook Bay in the northwest, the Everglades in Florida, and Erath County in Texas, and also elevated salinity levels due to excess manure near milk production areas in southern California's Chino Basin.

4. Increased Linkages between Animal Production Facility and Food Processors

Over the past few decades, closer ties have been forged between growers and various industry middlemen, including packers, processors, and cooperatives. Increased integration and coordination is being driven by the competitive nature of agricultural production and the dynamics of the food marketing system, in general, as well as seasonal fluctuations of production, perishability of farm products, and the inability to store and handle raw farm output. Closer ties between the animal production facility and processing firms—either through contractual agreement or through corporate ownership of CAFOs—raises questions of who is responsible for ensuring proper manure disposal and management at the animal feeding site. This is especially true given the current trend toward larger animal confinement operations and the resultant need for increased animal waste management. As operations become larger and more specialized, they may contract out some phases of the production process.

Farmers and ranchers have long used contracts to market agricultural commodities. However, increased use of production contracts is changing the organizational structure of the individual industries. Under a production contract, a business other than the feedlot where the animals are raised and housed, such as a processing firm, feed mill, or animal feeding operation, may own the animals and may exercise further substantial operational control over the operations of the feedlot. In some cases, the processor may specify in detail the production inputs used, including the genetic material of the animals, the types of feed used, and the production facilities where the animals are raised. The processor may also influence the number of animals produced at a site. In general, these contracts do not deal with management of manure and waste disposal. Recently, however, some processors have become increasingly involved in how manure and waste is managed at the animal production site.

The use of production contracts in the livestock and poultry industries varies by commodity group. Information from USDA indicates that production contracts are widely used in the poultry industry and dominate broiler production. Production contracting is becoming increasingly common in the hog sector, particularly for the finishing stage of production in regions outside the Corn Belt.

Production contracting has played a critical role in the growth of integrators in the poultry sectors. Vertical integration has progressed to the point where large, multifunction producer-packer-processor-distributor firms are the dominant force in poultry and egg production and marketing. Data from USDA on animal ownership at U.S. farms illustrates the use of production contracts in these sectors. In 1997, USDA reported that 97 percent of all broilers raised on U.S. farms were not owned by the farmer. In the turkey and

egg laying sectors, use of production contracts is less extensive since 70 percent and 43 percent of all birds in these sectors, respectively, were not owned by the farmer. In the hog sector, data from USDA indicate that production contracting may account for 66 percent of hog production among larger producers in the Southern and Mid-Atlantic states. This differs from the Midwest, where production contracting accounted for 18 percent of hog production in 1997.

By comparison, production contracts are not widely used in the beef and dairy sectors. Data from USDA indicate that less than 4 percent of all beef cattle and 1 percent of all milking cows were not owned by the farmer in 1997. However, production contracts are used in these industries that specialize in a single stage of livestock production, such as to ''finish'' cattle prior to slaughter or to produce replacement breeding stock. However, this use constitutes a small share of overall production across all producers.

To further examine the linkages between the animal production facility and the food processing firms, and to evaluate the geographical implications of this affiliation, EPA conducted an analysis that shows a relationship between areas of the country with an excess of manure nutrients from animal production operations and areas with a large number of meat packing and poultry slaughtering facilities. This manure—if land applied—would be in excess of crop uptake needs and result in over application and enrichment of nutrients. Across the pork and poultry sectors, this relationship is strongest in northwest Arkansas, where EPA estimates a high concentration of excess manure nutrients and a large number of poultry and hog processing facilities. By sector, EPA's analysis shows that there is excess poultry manure nutrients and a large number of poultry processing plants in the Delmarva Peninsula in the mid-Atlantic, North Carolina, northern Alabama, and also northern Georgia. In the hog sector, the analysis shows excess manure nutrients and a large number of meat packing plants in Iowa, Nebraska and Alabama. The analysis also shows excess manure nutrients from hogs in North Carolina, but relatively fewer meat packing facilities, which is likely explained by continuing processing plant closure and consolidation in that state. More information on this analysis is provided in the rulemaking record.

D. Improve Effectiveness of Regulations

As noted in Section IV.B, reports of continued discharges and runoff from animal production facilities have persisted in spite of regulatory controls that were first instituted in the 1970s. EPA is proposing to revise the effluent guidelines and NPDES regulations to improve their effectiveness by making the regulations simpler and easier to understand and implement. Another change intended to improve the effectiveness of the regulations is clarification of the conditions under which an AFO is a CAFO and is, therefore, subject to the NPDES regulatory requirements. In addition, EPA is revising the existing regulation to remove certain provisions that are no longer appropriate.

The existing regulations were designed to prohibit the release of wastewater from the feedlot site, but did not specifically address discharges that may occur when wastewater or solid manure mixtures are applied to crop, pasture, or hayland. The proposed regulations address the environmental risks associated with manure management. The proposed revisions also are more reflective of current farm production practices and waste management controls.

Today's proposed revised regulations also seek to improve the effectiveness of the existing regulations by focusing on those operations that produce the majority of the animal manure and wastewater generated annually. EPA estimates that the proposed regulations will regulate, as CAFOs, about 7 to 10 percent of all animal confinement operations nationwide, and will capture between 64 percent and 70 percent of the total amount of manure generated at CAFOs annually, depending on the proposed regulatory alternative (discussed in more detail in Section VI.A). Under the existing regulations, few operations have obtained NPDES permits. Presently, EPA and authorized States have issued approximately 2,500 NPDES permits. This is less than 1 percent of the estimated 376,000 animal confinement operations in the United States. EPA's proposed revisions are intended to ensure that all CAFOs, as defined under the proposed regulations, will apply for and obtain a permit.

V. What Environmental and Human Health Impacts Are Potentially Caused by CAFOs?

The 1998 National Water Quality Inventory, prepared under Section 305(b) of the Clean Water Act, presents information on impaired water bodies based on reports from the States. This recent report indicates that the agricultural sector (which includes concentrated and confined animal feeding operations, along with aquaculture, crop production, pasture grazing, and range grazing) is the leading contributor to identified water quality impairments in the nation's rivers and lakes, and the fifth leading contributor in the nation's estuaries. The leading pollutants or stressors of rivers and streams include (in order of rank) siltation, pathogens (bacteria), nutrients, and oxygen depleting substances. For lakes, ponds, and reservoirs, the leading pollutants or stressors include nutrients (ranked first), siltation (ranked third), oxygen depleting substances (ranked fourth), and suspended solids (ranked fifth). For estuaries, the leading pollutants or stressors include pathogens (bacteria) as the leading cause, oxygen depleting substances (ranked second), and nutrients (ranked fourth).

The sections which follow present the pollutants associated with livestock and poultry operators, of which CAFOs are a subset, the pathways by which the pollutants reach surface water, and their impacts on the environment and human health. Detailed information can be found in the Environmental Assessment of the Proposed Revisions to the National Pollutant Discharge Elimination System Regulation and Effluent Guidelines for Concentrated Animal Feeding Operations. The Environmental Assessment and the supporting references mentioned here are included in Section 8.1 of the Record for this proposal.

A. Which Pollutants Do CAFOs Have the Potential to Discharge and Why Are They of Concern?

The primary pollutants associated with animal waste are nutrients (particularly nitrogen and phosphorus), organic matter, solids, pathogens, and odorous/volatile compounds. Animal waste is also a source of salts and trace elements, and to a lesser extent, antibiotics, pesticides, and hormones. Each of these types of pollutants is discussed in the sections which follow. The actual composition of manure depends on the animal species, size, maturity, and health, as well as on the composition (*e.g.,* protein content) of animal feed.

1. Nutrients (Nitrogen, Phosphorus, and Potassium)

The 1998 National Water Quality Inventory indicates that nutrients are the leading stressor in impaired lakes, ponds, and reservoirs. They are the third most frequent stressor in impaired rivers and streams, and the fourth greatest stressor in impaired estuaries. The three primary nutrients in manure are nitrogen, phosphorus, and

potassium. (Potassium also contributes to salinity.)

Nitrogen in fresh manure exists in both organic forms (including urea) and inorganic forms (including ammonium, ammonia, nitrate, and nitrite). In fresh manure, 60 to 90 percent of total nitrogen is present in organic forms. Organic nitrogen is transformed via microbial processes to inorganic forms, which are bioavailable and therefore have fertilizer value. As an example of the quantities of nutrients discharged from AFOs, EPA estimates that hog operations in eastern North Carolina generated 135 million pounds of nitrogen per year as of 1995.

Phosphorus exists in solid and dissolved phases, in both organic and inorganic forms. Over 70 percent of the phosphorus in animal manure is in the organic form. As the waste ages, phosphorus mineralizes to inorganic phosphate compounds which are available to plants. Organic phosphorus compounds are generally water soluble and may leach through soil to groundwater and run off into surface waters. Inorganic phosphorus tends to adhere to soils and is less likely to leach into groundwater. Animal wastes typically have lower nitrogen:phosphorus ratios than crop requirements. The application of manure at a nitrogen-based agronomic rate can, therefore, result in application of phosphorus at several times the agronomic rate. Soil test data in the United States confirm that many soils in areas dominated by animal-based agriculture have elevated levels of phosphorus.

Potassium contributes to the salinity of animal manure which may in turn contribute salinity to surface water polluted by manure. Actual or anticipated levels of potassium in surface water and groundwater are unlikely to pose hazards to human health or aquatic life. However, applications of high salinity manure are likely to decrease the fertility of the soil.

In 1998, USDA studied the amount of manure nitrogen and phosphorus production for confined animals relative to crop uptake potential. USDA evaluated the quantity of nutrients available from recoverable livestock manure relative to crop growth requirements, by county, based on data from the 1997 Census of Agriculture. The analyses were intended to determine the amount of manure that can be recovered and used. The analyses did not consider manure from grazing animals in pasture, excluded manure lost to the environment, and also excluded manure lost in dry storage and treatment. It is not currently possible to completely recover all manure.

Losses to the environment can occur through runoff, erosion, leaching to groundwater, and volatilization (especially for nitrogen in the form of ammonia). These losses can be significant. Considering typical management systems, the 1998 USDA study reported that average manure nitrogen losses range from 31 to 50 percent for poultry, 60 to 70 percent for cattle (including the beef and dairy categories), and 75 percent for swine. The typical phosphorus loss is 15 percent.

The USDA study also looked at the potential for available manure nitrogen and phosphorus generated in a county to meet or exceed plant uptake and removal in each of the 3,141 mainland counties. Based on this analysis of 1992 conditions, available manure nitrogen exceeds crop system needs in 266 counties, and available manure phosphorus exceeds crop system needs in 485 counties. The relative excess of phosphorus compared to nitrogen is not surprising, since manure is typically nitrogen-deficient relative to crop needs. Therefore, when manure is applied to meet a crop's nitrogen requirement, phosphorus is typically over-applied.

USDA's analyses do not evaluate environmental transport of applied manure nutrients. Therefore, an excess of nutrients in a particular county does not necessarily indicate that a water quality problem exists. Likewise, a lack of excess nutrients does not imply the absence of water quality problems. Nevertheless, the analyses provide a general indicator of excess nutrients on a broad basis.

2. Organic Matter

Livestock manures contain many carbon-based, biodegradable compounds. Once these compounds reach surface water, they are decomposed by aquatic bacteria and other microorganisms. During this process dissolved oxygen is consumed, which in turn reduces the amount of oxygen available for aquatic animals. The 1998 National Water Quality Inventory indicates that oxygen-depleting substances are the second leading stressor in estuaries. They are the fourth greatest stressor both in impaired rivers and streams, and in impaired lakes, ponds, and reservoirs. Biochemical oxygen demand (BOD) is an indirect measure of the concentration of biodegradable substances present in an aqueous solution.

3. Solids

The 1998 National Water Quality Inventory indicates that suspended solids are the fifth leading stressor in lakes, ponds, and reservoirs. Solids are measured as total suspended solids, or TSS. (Solids can also be measured as total dissolved solids, or TDS.) Solids from animal manure include the manure itself and any other elements that have been mixed with it. These elements can include spilled feed, bedding and litter materials, hair, feathers, and corpses. In general, the impacts of solids include increasing the turbidity of surface waters, physically hindering the functioning of aquatic plants and animals, and providing a protected environment for pathogens.

4. Pathogens

Pathogens are disease-causing organisms including bacteria, viruses, protozoa, fungi, and algae. The 1998 National Water Quality Inventory indicates that pathogens (specifically bacteria) are the leading stressor in impaired estuaries and the second most prevalent stressor in impaired rivers and streams. Livestock manure contains countless microorganisms, including bacteria, viruses, protozoa, and parasites. Multiple species of pathogens may be transmitted directly from a host animal's manure to surface water, and pathogens already in surface water may increase in number due to loadings of animal manure nutrients and organic matter. In 1998, the Centers for Disease Control and Prevention reported on an Iowa investigation of chemical and microbial contamination near large scale swine operations. The investigation demonstrated the presence of pathogens not only in manure lagoons used to store swine waste before it is land applied, but also in drainage ditches, agricultural drainage wells, tile line inlets and outlets, and an adjacent river.

Over 150 pathogens found in livestock manure are associated with risks to humans. The protozoa *Cryptosporidium parvum* and *Giardia species* are frequently found in animal manure and relatively low doses can cause infection in humans. Bacteria such as *Escherichia coli* O157:H7 and *Salmonella species* are also often found in livestock manure and have also been associated with waterborne disease. A recent study by USDA revealed that about half the cattle at the nation's feedlots carry *E. coli.* The bacteria *Listeria monocytogenes* is ubiquitous in nature, and is commonly found in the intestines of wild and domestic animals without causing illness. *L. monocytogenes* is commonly associated

with foodborne disease. The pathogens *C. parvum, Giardia, E. coli* O157:H7, and *L. monocytogenes* are able to survive and remain infectious in the environment for long periods of time.

Although the pathogen *Pfiesteria piscicida* is not found in manure, researchers have documented stimulation of *Pfiesteria* growth by swine effluent discharges, and have strong field evidence that the same is true for poultry waste. Research has also shown that this organism's growth can be highly stimulated by both inorganic and organic nitrogen and phosphorus enrichments. Discussions of *Pfiesteria* impacts on the environment and on human health are presented later in this section.

5. Salts

The salinity of animal manure is directly related to the presence of dissolved mineral salts. In particular, significant concentrations of soluble salts containing sodium and potassium remain from undigested feed that passes unabsorbed through animals. Other major cations contributing to manure salinity are calcium and magnesium; the major anions are chloride, sulfate, bicarbonate, carbonate, and nitrate. Salinity tends to increase as the volume of manure decreases during decomposition and evaporation. Salt buildup deteriorates soil structure, reduces permeability, contaminates groundwater, and reduces crop yields.

In fresh waters, increasing salinity can disrupt the balance of the ecosystem, making it difficult for resident species to remain. In laboratory settings, drinking water high in salt content has inhibited growth and slowed molting of mallard ducklings. Salts also contribute to degradation of drinking water supplies.

6. Trace Elements

The 1998 National Water Quality Inventory indicates that metals are the fifth leading stressor in impaired rivers, the second leading stressor in impaired lakes, and the third leading stressor in impaired estuaries. Trace elements in manure that are of environmental concern include arsenic, copper, selenium, zinc, cadmium, molybdenum, nickel, lead, iron, manganese, aluminum, and boron. Of these, arsenic, copper, selenium, and zinc are often added to animal feed as growth stimulants or biocides. Trace elements may also end up in manure through use of pesticides, which are applied to livestock to suppress houseflies and other pests. Trace elements have been found in manure lagoons used to store swine waste before it is land applied, and in drainage ditches, agricultural drainage wells, and tile line inlets and outlets. They have also been found in rivers adjacent to hog and cattle operations.

Several of the trace elements in manure are regulated in treated municipal sewage sludge (but not manure) by the Standards for the Use or Disposal of Sewage Sludge, promulgated under the Clean Water Act and published in 40 C.F.R. Part 503. These include arsenic, cadmium, chromium, copper, lead, mercury, molybdenum, nickel, selenium, and zinc. Total concentrations of trace elements in animal manures have been reported as comparable to those in some municipal sludges, with typical values well below the maximum concentrations allowed by Part 503 for land-applied sewage sludge. Based on this information, trace elements in agronomically applied manures should pose little risk to human health and the environment. However, repeated application of manures above agronomic rates could result in exceedances of the cumulative metal loading rates established in Part 503, thereby potentially impacting human health and the environment. There is some evidence that this is happening. For example, in 1995, zinc and copper were found building to potentially harmful levels on the fields of a hog farm in North Carolina.

7. Odorous/Volatile Compounds

Sources of odor and volatile compounds include animal confinement buildings, manure piles, waste lagoons, and land application sites. As animal wastes are degraded by microorganisms, a variety of gases are produced. The four main gases generated are carbon dioxide, methane, hydrogen sulfide, and ammonia. Over 150 other odorous compounds have also been identified with animal manure. Aerobic conditions yield mainly carbon dioxide, while anaerobic conditions generate both methane (60 percent to 70 percent) and carbon dioxide (30 percent). Anaerobic conditions, which dominate in typical, unaerated animal waste lagoons, are also associated with the generation of hydrogen sulfide and about 40 other odorous compounds, including volatile fatty acids, phenols, mercaptans, aromatics, sulfides, and various esters, carbonyls, and amines. Once airborne, these volatile pollutants have the potential to be deposited onto nearby streams, rivers, and lakes.

Up to 50 percent or more of the nitrogen in fresh manure may be in ammonia form or converted to ammonia relatively quickly once manure is excreted. Ammonia is volatile and ammonia losses from animal feeding operations can be considerable. A study of atmospheric nitrogen published in 1998 reported that, in North Carolina, animal agriculture is responsible for over 90 percent of all ammonia emissions. Ammonia from manure comprises more than 40 percent of the total estimated nitrogen emissions from all sources.

8. Antibiotics

Antibiotics are used in animal feeding operations and can be expected to appear in animal wastes. The practice of feeding antibiotics to poultry, swine, and cattle evolved from the 1949 discovery that very low levels usually improved growth. Antibiotics are used both to treat illness and as feed additives to promote growth or to improve feed conversion efficiency. In 1991, an estimated 19 million pounds of antibiotics were used for disease prevention and growth promotion in animals. Between 60 and 80 percent of all livestock and poultry receive antibiotics during their productive lifespan. The primary mechanisms of elimination are in urine and bile. Essentially all of an antibiotic administered is eventually excreted, whether unchanged or in metabolite form. Little information is available regarding the concentrations of antibiotics in animal wastes, or on their fate and transport in the environment.

Of greater concern than the presence of antibiotics in animal manure is the development of antibiotic resistant pathogens. Use of antibiotics in raising animals, especially broad spectrum antibiotics, is increasing. As a result, more strains of antibiotic resistant pathogens are emerging, along with strains that are growing more resistant. Normally, about 2 percent of a bacterial population are resistant to a given antibiotic; however, up to 10 percent of bacterial populations from animals regularly exposed to antibiotics have been found to be resistant. In a study of poultry litter suitable for land application, about 80 to 100 percent of bacterial populations isolated from the litter were found to be resistant to multiple antibiotics. Antibiotic-resistant forms of *Salmonella, Campylobacter, E. coli,* and *Listeria* are known or suspected to exist. An antibiotic-resistant strain of the bacteria *Clostridium perfringens* was detected in the groundwater below plots of land treated with pig manure, while it was nearly absent beneath unmanured plots.

9. Pesticides and Hormones

Pesticides and hormones are compounds which are used in animal feeding operations and can be expected

to appear in animal wastes. Both of these types of pollutants have been linked with endocrine disruption.

Pesticides are applied to livestock to suppress houseflies and other pests. There has been very little research on losses of pesticides in runoff from manured lands. A 1994 study showed that losses of cyromazine (used to control flies in poultry litter) in runoff increased with the rate of poultry manure applied and the intensity of rainfall.

Specific hormones are used to increase productivity in the beef and dairy industries. Several studies have shown hormones are present in animal manures. Poultry manure has been shown to contain both estrogen and testosterone. Runoff from fields with land-applied manure has been reported to contain estrogens, estradiol, progesterone, and testosterone, as well as their synthetic counterparts. In 1995, an irrigation pond and three streams in the Conestoga River watershed near the Chesapeake Bay had both estrogen and testosterone present. All of these sites were affected by fields receiving poultry litter.

B. How Do These Pollutants Reach Surface Waters?

Pollutants found in animal manures can reach surface water by several mechanisms. These can be categorized as either surface discharges or other discharges. Surface discharges can occur as the result of runoff, erosion, spills, and dry-weather discharges. In surface discharges, the pollutant travels overland or through drain tiles with surface inlets to a nearby stream, river, or lake. Direct contact between confined animals and surface waters is another means of surface discharge. For other types of discharges, the pollutant travels via another environmental medium (groundwater or air) to surface water.

1. Surface Discharges

a. *Runoff.* Water that falls on man-made surfaces or soil and fails to be absorbed will flow across the surface and is called runoff. Surface discharges of manure pollutants can originate from feedlots and from overland runoff at land application sites. Runoff is especially likely at open-air feedlots if rainfall occurs soon after application, or if manure is over-applied, or misapplied. For example, experiments by Edwards and Daniels in the early 1990s show that, for all animal wastes, the application rate had a significant effect on the runoff concentration. In addition, manure applied to water-saturated or frozen soils is more likely to run off the soil surface. Other factors that promote runoff to surface waters are steep land slope, high rainfall, low soil porosity or permeability, and close proximity to surface waters. Runoff of pollutants dissolved into rainwater is a significant transport mechanism for water soluble pollutants, which includes nitrate, nitrite, and organic forms of phosphorus.

Runoff of manure pollutants has been identified by states, citizen's groups, and the media as a factor in a number of documented impacts from AFOs, including hog, cattle, and chicken operations. For example, in 1994, multiple runoff problems were cited for a hog operation in Minnesota, and in 1996 runoff from manure spread on land was identified at hog and chicken operations in Ohio. In 1997, runoff problems were identified for several cattle operations in numerous counties in Minnesota. More discussion of runoff and its impacts on the environment and human health is provided later in this section.

b. *Erosion.* In addition to runoff, surface discharges can occur by erosion, in which the soil surface is worn away by the action of water or wind. Erosion is a significant transport mechanism for land-applied pollutants that are strongly sorbed to soils, of which phosphorus is one example. A 1999 report by the Agricultural Research Service (ARS) noted that phosphorus bound to eroded sediment particles makes up 60 to 90 percent of phosphorus transported in surface runoff from cultivated land. For this reason, most agricultural phosphorus control measures have focused on soil erosion control to limit transport of particulate phosphorus. However, soils do not have infinite adsorption capacity for phosphate or any other adsorbing pollutant, and dissolved pollutants including phosphates can still enter waterways via runoff and leachate even if soil erosion is controlled.

In 1998, the USDA Natural Resources Conservation Service (NRCS) reviewed the manure production of a watershed in South Carolina. Agricultural activities in the project area are a major influence on the streams and ponds in the watershed, and contribute to nutrient-related water quality problems in the headwaters of Lake Murray. NRCS found that bacteria, nutrients, and sediment from soil erosion are the primary contaminants affecting these resources. The NRCS has calculated that soil erosion, occurring on over 13,000 acres of cropland in the watershed, ranges from 9.6 to 41.5 tons per acre per year.

c. *Spills and Dry-Weather Discharges.* Surface discharges can occur through spills or other discharges from lagoons. Some causes of spills include malfunctions such as pump failures, manure irrigation gun malfunctions, and pipes or retaining walls breaking. Manure entering tile drains has a direct route to surface water. (Tile drains are a network of pipes buried in fields below the root zone of plants to remove subsurface drainage water from the root zone to a stream, drainage ditch, or evaporation pond. EPA does not regulate most tile fields.) In 1997, the Ohio Department of Natural Resources documented chicken manure traveling through tile drains into a nearby stream. In addition, spills can occur as a result of lagoon overflows and washouts from floodwaters when lagoons are sited on floodplains. There are also indications that discharges from siphoning lagoons occur deliberately as a means to reduce the volume in overfull lagoons. Acute discharges of this kind frequently result in dramatic fish kills. In 1997, an independent review of Indiana Department of Environmental Management records indicated that the most common causes of waste releases in that state were intentional discharge and lack of operator knowledge, rather than spills due to severe rainfall conditions.

Numerous such dry-weather discharges have been identified. For example, in 1995, two separate discharges of 25 million gallons of manure from hog farms in North Carolina were documented, and both resulted in fish kills. Subsequent discharges of hundreds of thousands of gallons of manure were documented from hog operations in Iowa (1996), Illinois (1997), and Minnesota (1997). Fish kills were also reported as a result of two of these discharges. Discharges of over 8 million gallons of manure from a poultry operation in North Carolina in 1995 likewise resulted in a fish kill. Between 1994 and 1996, half a dozen discharges from poultry operations in Ohio resulted when manure entered field tiles. In 1998, 125,000 gallons of manure were discharged from a dairy feedlot in Minnesota.

d. *Direct Contact between Confined Animals and Surface Water.* Finally, surface discharges can occur as a result of direct contact between confined animals and the rivers or ponds that are located within their reach. Historically, farms were located near waterways for both water access for animals and discharge of wastes. This practice is now restricted for CAFOs; however, despite this restriction, enforcement actions are the primary means for reducing direct access.

In the more traditional farm production regions of the Midwest and Northeast, dairy barns and feedlots are often in close proximity to streams or other water sources. This close proximity to streams was necessary in order to provide drinking water for the dairy cows, direct access to cool the animals in hot weather, and to cool the milk prior to the wide-spread use of refrigeration. For CAFO-size facilities this practice is now replaced with more efficient means of providing drinking water for the dairy herd. In addition, the use of freestall barns and modern milking centers minimizes the exposure of dairy cows to the environment. For example, in New York direct access is more of a problem for the smaller traditional dairy farms that use older methods of housing animals.

In the arid west, feedlots are typically located near waterbodies to allow for cheap and easy stock watering. Many existing lots were configured to allow the animals direct access to the water. Certain animals, particularly cattle, will wade into the water, linger to drink, and will often urinate and defecate there as well. This direct deposition of manure and urine contributes greatly to water quality problems. Environmental problems associated with allowing farm animals access to waters that are adjacent to the production area are well documented in the literature. EPA Region X staff have documented dramatically elevated levels of Escherichia coli in rivers downstream of AFOs (including CAFOs) with direct access to surface water. Recent enforcement actions against direct access facilities have resulted in the assessment of tens of thousands of dollars in civil penalties.

2. Other Discharges to Surface Waters

a. *Leaching to Groundwater.* Leaching of land-applied pollutants such as nitrate dissolved into rainwater is a significant transport mechanism for water soluble pollutants. In addition, leaking lagoons are a source of manure pollutants to ground water. Although manure solids purportedly ''self-seal'' lagoons to prevent groundwater contamination, some studies have shown otherwise. A study for the Iowa legislature published in 1999 indicates that leaking is part of design standards for earthen lagoons and that all lagoons should be expected to leak. A 1995 survey of hog and poultry lagoons in the Carolinas found that nearly two-thirds of the 36 lagoons sampled had leaked into the groundwater. Even clay-lined lagoons have the potential to leak, since they can crack or break as they age, and can be susceptible to burrowing worms. In a three-year study (1988–1990) of clay-lined swine lagoons on the Delmarva Peninsula, researchers found that leachate from lagoons located in well-drained loamy sand had a severe impact on groundwater quality.

Pollutant transport to groundwater is also greater in areas with high soil permeability and shallow water tables. Percolating water can transport pollutants to groundwater, as well as to surface waters via interflow. Contaminated groundwater can deliver pollutants to surface waters through hydrologic connections. Nationally, about 40 percent of the average annual stream flow is from groundwater. In the Chesapeake Bay watershed, the U.S. Geological Survey (USGS) estimates that about half of the nitrogen loads from all sources to nontidal streams and rivers originate from groundwater.

b. *Discharge to the Air and Subsequent Deposition.* Discharges to air can occur as a result of volatilization of both pollutants already present in the manure and pollutants generated as the manure decomposes. Ammonia is very volatile, and can have significant impacts on water quality through atmospheric deposition. Other ways that manure pollutants can enter the air is from spray application methods for land applying manure and as particulates wind-borne in dust. Once airborne, these pollutants can find their way into nearby streams, rivers, and lakes. The 1998 National Water Quality Inventory indicates that atmospheric deposition is the third greatest cause of water quality impairment for estuaries, and the fifth greatest cause of water quality impairment for lakes, ponds, and reservoirs.

The degree of volatilization of manure pollutants is dependent on the manure management system. For example, losses are greater when manure remains on the land surface rather than being incorporated into the soil, and are particularly high when spray application is performed. Environmental conditions such as soil acidity and moisture content also affect the extent of volatilization. Losses are reduced by the presence of growing plants. Ammonia also readily volatilizes from lagoons.

Particulate emissions from AFOs may include dried manure, feed, epithelial cells, hair, and feathers. The airborne particles make up an organic dust, which includes endotoxin (the toxic protoplasm liberated when a microorganism dies and disintegrates), adsorbed gases, and possibly steroids. At least 50 percent of dust emissions from swine operations are believed to be respirable (small enough to be inhaled deeply into the lungs).

3. A National Study of Nitrogen Sources to Watersheds

In 1994, the USGS analyzed nitrogen sources to 107 watersheds. Potential sources included manure (both point and nonpoint sources), fertilizers, point sources, and atmospheric deposition. The ''manure'' source estimates include waste from both confined and unconfined animals. As may be expected, the USGS found that proportions of nitrogen originating from various sources differ according to climate, hydrologic conditions, land use, population, and physical geography. Results of the analysis for selected watersheds for the 1987 base year show that in some instances, manure nitrogen is a large portion of the total nitrogen added to the watershed. The study showed that, for following nine watersheds, more than 25 percent of nitrogen originates from manure: Trinity River, Texas; White River, Arkansas; Apalachicola River, Florida; Altamaha River, Georgia; Potomac River, Washington, D.C.; Susquehanna River, Pennsylvania; Platte River, Nebraska; Snake River, Idaho; and San Joaquin River, California. Of these, California, Texas, Florida, Arkansas, and Idaho have large populations of confined animals.

4. State Level Studies of Feedlot Pollutants Reaching Surface Waters

There are many studies demonstrating surface water impacts from animal feeding operations. These impacts have been documented for at least the past decade. For example, in 1991, the U.S. Fish and Wildlife Service (FWS) reported on suspected impacts from a large number of cattle feedlots on Tierra Blanca Creek, upstream of the Buffalo Lake National Wildlife Refuge in the Texas Panhandle. FWS found elevated aqueous concentrations of ammonia, chemical oxygen demand, coliform bacteria, chloride, nitrogen, and volatile suspended solids; they also found elevated concentrations of the feed additives copper and zinc in the creek sediment.

According to Arkansas' 1996 Water Quality Inventory Report, a publication of the Arkansas Department of Environmental Protection, water in the Grand Neosho basin only partially supports aquatic life. Land uses there, primarily confined animal feeding operations including poultry production and pasture management, are major sources of nutrients and chronic high turbidity. Pathogens sampled in the Muddy Fork Hydrologic Unit Area, in

the Arkansas River basin, also exceed acceptable limits for primary contact recreation (swimming). This problem was reported in the 1994 water quality inventory, and it, too, was traced to extensive poultry, swine, and dairy operations in the Moore's Creek basin. Essentially, all parts of the subwatershed are impacted by these activities. Currently, the Muddy Fork Hydrologic Unit Area Project is a USDA agricultural assistance, technology transfer, and demonstration project. A section 319 water quality monitoring operation is also ongoing in the hydrologic unit area.

In 1997, the Hoosier Environmental Council documented the reduction in biodiversity due to AFOs in a study of three Indiana stream systems. That study found that waters downstream of animal feedlots (mainly hog and dairy operations) contained fewer fish and a limited number of species of fish in comparison with reference sites. It also found excessive algal growth, altered oxygen content, and increased levels of ammonia, turbidity, pH, and total dissolved solids.

C. What Are the Potential and Observed Impacts?

Pollutants in animal manures can impair surface waters. Such impairments have resulted in fish kills; eutrophication and algal blooms; contamination of shellfish, and subsequent toxin and pathogen transmission up the food chain; increased turbidity and negative impacts to benthic organisms; and reduced biodiversity when rivers and streams become uninhabitable by resident species. These manure pollutants can also deteriorate soil quality and make it toxic to plants. In addition to these ecological impacts, pollutants in animal manures can present a range of risks to human health when they contaminate drinking water or shellfish, and when they are present in recreational waters.

1. Ecological Impacts

a. *Fish Kills and Other Fishery Impacts.* Fish kills are one of the most dramatic impacts associated with manure reaching surface water. Spills, dry-weather discharges, and runoff can carry pollutants in manure to rivers and streams and can result in serious fish kills. During the years 1987 through 1997, at least 47 incidents of fish kills have been associated with hog manure. Another 8 fish kills were attributed to poultry waste, and 2 with beef/dairy manure. An additional 20 fish kills were associated with animal manure for which one specific animal type was not identified. These incidents were reported by the Iowa Department of Natural Resources, the Maryland Department of the Environment, the Natural Resources Defense Council, several citizen's groups, and numerous newspapers. These incidents are not reflective of all states. In Illinois alone, records indicate that 171 fish kills attributable to manure discharges were investigated by Illinois Environmental Protection Agency personnel between 1979 and 1998. Thousands of fish are typically killed by one of these events.

Ammonia is highly toxic to aquatic life and is a leading cause of fish kills. In a May 1997 incident in Wabasha County, Minnesota, ammonia in a dairy cattle manure discharge killed 16,500 minnows and white suckers. Ammonia and other pollutants in manure exert a direct biochemical oxygen demand (BOD) on the receiving water. As ammonia is oxidized, dissolved oxygen is consumed. Moderate depressions of dissolved oxygen are associated with reduced species diversity, while more severe depressions can produce fish kills.

Nitrites pose additional risks to aquatic life: if sediments are enriched with nutrients, the concentrations of nitrites on the overlying water may be raised enough to cause nitrite poisoning or ''brown blood disease'' in fish.

Excess nutrients result in eutrophication (see section V.C.1.b, which follows). Eutrophication is associated with blooms of a variety of organisms that are toxic to both fish and humans. This includes the estuarine dinoflagellate Pfiesteria piscicida, which is implicated in several fish kills and fish disease events. Pfiesteria has been implicated as the primary causative agent of many major fish kills and fish disease events in North Carolina estuaries and coastal areas, as well as in Maryland and Virginia tributaries to the Chesapeake Bay. In 1997, hog operations were identified as a potential cause of a Pfiesteria outbreak in North Carolina rivers that resulted in 450,000 fish killed. Also that same year, poultry operations were linked to Pfiesteria outbreaks in the Pokomoke River and Kings Creek (both in Maryland) and in the Chesapeake Bay, in which tens of thousands of fish were killed.

The presence of estrogen and estrogen-like compounds in surface water has caused much concern. These hormones have been found in animal manures and runoff from fields where manure has been applied. The ultimate fate of hormones in the environment is unknown, although early studies indicate that common soil or fecal bacteria cannot metabolize estrogen. When present in high enough concentrations in the environment, hormones and other endocrine disruptors including pesticides are linked to reduced fertility, mutations, and the death of fish. Estrogen hormones have been implicated in widespread reproductive disorders in a variety of wildlife. There is evidence that fish in some streams are experiencing endocrine disruption and that contaminants including pesticides may be the cause, though there is no evidence linking these effects to CAFOs.

b. *Eutrophication and Algal Growth.* Eutrophication is the process in which phosphorus and nitrogen over-enrich water bodies and disrupt the balance of life in that water body. As a result, the excess nutrients cause fast-growing algae blooms. The 1998 National Water Quality Inventory indicates that excess algal growth is the seventh leading stressor in lakes, ponds, and reservoirs. Rapid growth of algae can lower the dissolved oxygen content of a water body to levels insufficient to support fish and invertebrates. Eutrophication can also affect phytoplankton and zooplankton population diversity, abundance, and biomass, and increase the mortality rates of aquatic species. Floating algal mats can reduce the penetration of sunlight in the water column and thereby limit growth of seagrass beds and other submerged vegetation. This in turn reduces fish and shellfish habitat. This reduction in submerged aquatic vegetation adversely affects both fish and shellfish populations.

Increased algal growth can also raise the pH of waterbodies, as algae consume dissolved carbon dioxide to support photosynthesis. This elevated pH can harm the gill epithelium of aquatic organisms. The pH may then drop rapidly at night, when algal photosynthesis stops. In extreme cases, such pH fluctuations can severely stress aquatic organisms.

Eutrophication is also a factor in the growth of toxic microorganisms, such as cyanobacteria (a toxic algae) and Pfiesteria piscicida, which can affect human health as well. Decay of algal blooms and night-time respiration can further depress dissolved oxygen levels, potentially leading to fish kills and reduced biodiversity. In addition, toxic algae such as cyanobacteria release toxins as they die, which can severely impact wildlife as well as humans. Researchers have documented stimulation of Pfiesteria growth by swine effluent discharges, and have shown that the organism's growth can be highly stimulated by both inorganic

and organic nitrogen and phosphorus enrichments.

c. *Wildlife Impacts.* As noted earlier, reduction in submerged aquatic vegetation due to algal blooms is the leading cause of biological decline in Chesapeake Bay, adversely affecting both fish and shellfish populations. In marine ecosystems, blooms known as red or brown tides have caused significant mortality in marine mammals. In freshwater, cyanobacterial toxins have caused many incidents of poisoning of wild and domestic animals that have consumed impacted waters.

Even with no visible signs of the algae blooms, shellfish such as oysters, clams and mussels can carry the toxins produced by some types of algae in their tissue. Shellfish are filter feeders which pass large volumes of water over their gills. As a result, they can concentrate a broad range of microorganisms in their tissues. Concentration of toxins in shellfish provides a pathway for pathogen transmission to higher trophic organisms. Information is becoming available to assess the health effects of contaminated shellfish on wildlife receptors. Earlier this year, the death of over 400 California sea lions was linked to ingestion of mussels contaminated by a bloom of toxic algae. Previous incidents associated the deaths of manatees and whales with toxic and harmful algae blooms.

In August 1997, the National Oceanic and Atmospheric Administration (NOAA) released The 1995 National Shellfish Register of Classified Growing Waters. The register characterizes the status of 4,230 shellfish-growing water areas in 21 coastal states, reflecting an assessment of nearly 25 million acres of estuarine and non-estuarine waters. NOAA found that 3,404 shellfish areas had some level of impairment. Of these, 110 (3 percent) were impaired to varying degrees by feedlots, and 280 (8 percent) were impaired by ''other agriculture'' which could include land where manure is applied.

Avian botulism and avian cholera have killed hundreds of thousands of migratory waterfowl in the past. Although outbreaks of avian botulism have occurred since the beginning of the century, most occurrences have been reported in the past twenty years, which coincides with the trend toward fewer and larger AFOs. The connection between nutrient runoff, fish kills, and subsequent outbreaks of avian botulism was made in 1999 at California's Salton Sea, when almost 8 million fish died in one day. The fish kill was associated with runoff from surrounding farms, which carried nutrients and salts into the Salton Sea. Those nutrients caused algae blooms which in turn lead to large and sudden fish kills. Since the 1999 die off, the number of endangered brown pelicans infected with avian botulism increased to about 35 birds a day. In addition, bottom feeding birds can be quite susceptible to metal toxicity, because they are attracted to shallow feedlot wastewater ponds and waters adjacent to feedlots. Metals can remain in aquatic ecosystems for long periods of time because of adsorption to suspended or bed sediments or uptake by aquatic biota.

Reduction in biodiversity due to AFOs has been documented in a 1997 study of three Indiana stream systems. That study shows that waters downstream of animal feedlots (mainly hog and dairy operations) contained fewer fish and a limited number of species of fish in comparison with reference sites. The study also found excessive algal growth, altered oxygen content, and increased levels of ammonia, turbidity, pH, and total dissolved solids. Multi-generation animal studies have found decreases in birth weight, post-natal growth, and organ weights among mammals prenatally exposed to nitrite. Finally, hormones and pesticides have been implicated in widespread reproductive disorders in a variety of wildlife.

d. *Other Aquatic Ecosystem Imbalances.* Changes to the pH balance of surface water also threaten the survival of the fish and other aquatic organisms. Data from Sampson County, North Carolina show that ''ammonia rain'' has increased as the hog industry has grown, with ammonia levels in rain more than doubling between 1985 and 1995. In addition, excess nitrogen can contribute to water quality decline by increasing the acidity of surface waters.

In fresh waters, increasing salinity can also disrupt the balance of the ecosystem, making it difficult for resident species to remain. Salts also contribute to the degradation of drinking water supplies.

Trace elements (e.g., arsenic, copper, selenium, and zinc) may also present ecological risks. Antibiotics, pesticides, and hormones may have low-level, long-term ecosystem effects.

2. Drinking Water Impacts

Nitrogen in manure is easily transformed into nitrate form, which can be transported to drinking water sources and present a range of health risks. In 1990, PA found that nitrate is the most widespread agricultural contaminant in drinking water wells, and estimated that 4.5 million people are exposed to elevated nitrate levels from wells. In 1995, several private wells in North Carolina were found to be contaminated with nitrates at levels 10 times higher than the State's health standard; this contamination was linked with a nearby hog operation. The national primary drinking water standard (Maximum Contaminant Level, or MCL) for nitrogen (nitrate, nitrite) is 10 milligrams per liter (mg/L). In 1982, nitrate levels greater than 10 mg/L were found in 32 percent of the wells in Sussex County, Delaware; these levels were associated with local poultry operations. In southeastern Delaware and the Eastern Shore of Maryland, where poultry production is prominent, over 20 percent of wells were found to have nitrate levels exceeding 10 mg/L. Nitrate is not removed by conventional drinking water treatment processes. Its removal requires additional, relatively expensive treatment units.

Algae blooms triggered by nutrient pollution can affect drinking water by clogging treatment plant intakes, producing objectionable tastes and odors, and increasing production of harmful chlorinated byproducts (e.g., trihalomethanes) by reacting with chlorine used to disinfect drinking water. As aquatic bacteria and other microorganisms degrade the organic matter in manure, they consume dissolved oxygen. This can lead to foul odors and reduce the water's value as a source of drinking water. Increased organic matter in drinking water sources can also lead to excessive production of harmful chlorinated byproducts, resulting in higher drinking water treatment costs.

Pathogens can also threaten drinking water sources. Surface waters are typically expected to be more prone than groundwater to contamination by pathogens such as Escherichia coli and Cryptosporidium parvum. However, groundwater in areas of sandy soils, limestone formations, or sinkholes are particularly vulnerable. In a 1997 survey of drinking water standard violations in six states over a four-year period, the U.S. General Accounting Office noted in its 1997 report Drinking Water: Information on the Quality of Water Found at Community Water Systems and Private Wells that bacterial standard violations occurred in up to 6 percent of community water systems each year and in up to 42 percent of private wells. (Private wells are more prone than public wells to contamination, since they tend to be shallower and therefore more susceptible to contaminants leaching from the surface.) In cow pasture areas of Door County, Wisconsin, where a thin topsoil layer is underlain by fractured limestone bedrock, groundwater wells have

commonly been shut down due to high bacteria levels.

Each of these impacts can result in increased drinking water treatment costs. For example, California's Chino Basin estimates a cost of over $1 million per year to remove the nitrates from drinking water due to loadings from local dairies. Salt load into the Chino Basin from local dairies is over 1,500 tons per year, and the cost to remove that salt by the drinking water treatment system ranges from $320 to $690 for every ton. In Iowa, Des Moines Water Works planned to spend approximately $5 million in the early 1990's to install a treatment system to remove nitrates from their main sources of drinking water, the Raccoon and Des Moines Rivers. Agriculture was cited as a major source of the nitrate contamination, although the portion attributable to animal waste is unknown. In Wisconsin, the City of Oshkosh has spent an extra $30,000 per year on copper sulfate to kill the algae in the water it draws from Lake Winnebago. The thick mats of algae in the lake have been attributed to excess nutrients from manure, commercial fertilizers, and soil. In Tulsa, Oklahoma, excessive algal growth in Lake Eucha is associated with poultry farming. The city spends $100,000 per year to address taste and odor problems in the drinking water.

3. Human Health Impacts

Human and animal health impacts are primarily associated with drinking contaminated water, contact with contaminated water, and consuming contaminated shellfish.

a. *Nutrients.* The main hazard to human health from nutrients is elevated nitrate levels in drinking water. In particular, infants are at risk from nitrate poisoning (also referred to as methemoglobinemia or ''blue baby syndrome''), which results in oxygen starvation and is potentially fatal. Nitrate toxicity is due to its metabolite nitrite, which is formed in the environment, in foods, and in the human digestive system. In addition to blue baby syndrome, low blood oxygen due to methemoglobinemia has also been linked to birth defects, miscarriages, and poor health in humans and animals. These effects are exacerbated by concurrent exposure to many species of bacteria in water.

Studies in Australia compiled in a 1993 review by Bruning-Fann and Kaneene showed an increased risk of congenital malformations with consumption of high-nitrate groundwater. Multi-generation animal studies have found decreases in birth weight and post-natal growth and organ weights associated with nitrite exposure among prenatally exposed mammals. Nitrate-and nitrite-containing compounds also have the ability to cause hypotension or circulatory collapse. Nitrate metabolites such as N-nitroso compounds (especially nitrosamines) have been linked to severe human health effects such as gastric cancer.

Eutrophication can also affect human health by enhancing growth of harmful algal blooms that release toxins as they die. In marine ecosystems, harmful algal blooms such as red tides can result in human health impacts via shellfish poisoning and recreational contact. In freshwater, blooms of cyanobacteria (blue-green algae) may pose a serious health hazard to humans via water consumption. When cyanobacterial blooms die or are ingested, they release water-soluble compounds that are toxic to the nervous system and liver. Algal blooms can also increase production of harmful chlorinated byproducts (e.g., trihalomethanes) by reacting with chlorine used to disinfect drinking water. These substances can result in increased health risks.

b. Pathogens. Livestock manure has been identified as a potential source of pathogens by public health officials. Humans may be exposed to pathogens via consumption of contaminated drinking water and shellfish, or by contact and incidental ingestion during recreation in contaminated waters. Relatively few microbial agents are responsible for the majority of human disease outbreaks from water-based exposure routes. Intestinal infections are the most common type of waterborne infection, and affect the most people. A May, 2000 outbreak of Escherichia coli O157:H7 in Walkerton, Ontario resulted in at least seven deaths and 1,000 cases of intestinal problems; public health officials theorize that flood waters washed manure contaminated with E. coli into the town's drinking water well.

A study for the period 1989 to 1996 revealed that infections caused by the protozoa Giardia sp. and Cryptosporidium parvum were the leading cause of infectious water-borne disease outbreaks in which an agent was identified. C. parvum is particularly associated with cows, and can produce gastrointestinal illness, with symptoms such as severe diarrhea. Healthy people typically recover relatively quickly from gastrointestinal illnesses such as cryptosporidiosis, but such diseases can be fatal in people with weakened immune systems. This subpopulation includes children, the elderly, people with HIV infection, chemotherapy patients, and those taking medications that suppress the immune system. In Milwaukee, Wisconsin in 1993, C. parvum contamination of a public water supply caused more than 100 deaths and an estimated 403,000 illnesses. The source was not identified, but possible sources include runoff from cow manure application sites.

In 1999, an E. coli outbreak occurred at the Washington County Fair in New York State. This outbreak, possibly the largest waterborne outbreak of E. coli O157:H7 in U.S. history, took the lives of two fair attendees and sent 71 others to the hospital. An investigation identified 781 persons with confirmed or suspected illness related to this outbreak. The outbreak is thought to have been caused by contamination of the Fair's Well 6 by either a dormitory septic system or manure runoff from the nearby Youth Cattle Barn.

Contact with pathogens during recreational activities in surface water can also result in infections of the skin, eye, ear, nose, and throat. In 1989, ear and skin infections and intestinal illnesses were reported in swimmers as a result of discharges from a dairy operation in Wisconsin.

As discussed in the previous section, excess nutrients result in eutrophication, which is associated with the growth of a variety of organisms that are toxic to humans either through ingestion or contact. This includes the estuarine dinoflagellate Pfiesteria piscicida. While Pfiesteria is primarily associated with fish kills and fish disease events, the organism has also been linked with human health impacts through dermal exposure. Researchers working with dilute toxic cultures of Pfiesteria exhibited symptoms such as skin sores, severe headaches, blurred vision, nausea/vomiting, sustained difficulty breathing, kidney and liver dysfunction, acute short-term memory loss, and severe cognitive impairment. People with heavy environmental exposure have exhibited symptoms as well. In a 1998 study, such environmental exposure was definitively linked with cognitive impairment, and less consistently linked with physical symptoms.

Even with no visible signs of the algae blooms, shellfish such as oysters, clams and mussels can carry the toxins produced by some types of algae in their tissue. These can then affect people who eat the contaminated shellfish. The 1995 National Shellfish Register of Classified Growing Waters published by the National Oceanic and Atmospheric Administration (NOAA) identifies over 100 shellfish bed impairments (shellfish not approved for harvest) due to feedlots.

c. Trace Elements. Some of the trace elements in manure are essential nutrients for human physiology; however, they can induce toxicity at elevated concentrations. These elements include the feed additives zinc, arsenic, copper, and selenium. Although these elements are typically present in relatively low concentrations in manure, they are of concern because of their ability to persist in the environment and to bioconcentrate in plant and animal tissues. These elements could pose a hazard if manure is overapplied to land.

Trace elements are associated with a variety of illnesses. For example, arsenic is carcinogenic to humans, based on evidence from human studies; some of these studies have found increased skin cancer and mortality from multiple internal organ cancers in populations who consumed drinking water with high levels of inorganic arsenic. Arsenic is also linked with noncancer effects, including hyperpigmentation and possible vascular complications. Selenium is associated with liver dysfunction and loss of hair and nails, and zinc can result in changes in copper and iron balances, particularly copper deficiency anemia.

d. Odors. Odor is a significant concern because of its documented effect on moods, such as increased tension, depression, and fatigue. Odor also has the potential for vector attraction, and has been associated with a negative impact on property values. Additionally, many of the odor-causing compounds in manure can cause physical health impacts. For example, hydrogen sulfide is toxic, and ammonia gas is a nasal and respiratory irritant.

4. Recreational Impacts

As discussed above, CAFO pollutants contribute to the increase in turbidity, increase in eutrophication and algal blooms, and reduction of aquatic populations in rivers, lakes, and estuaries. Impaired conditions interfere with recreational activities and aesthetic enjoyment of these water bodies. Recreational activities include fishing, swimming, and boating. Fishing is reduced when fish populations decrease. Swimming is limited by increased risk of infection when pathogens are present. Boating and aesthetic enjoyment decline with the decreased aesthetic appeal caused by loss of water clarity and water surfaces clogged by algae. These impacts are more fully discussed in Section XI of this preamble.

VI. What Are Key Characteristics of the Livestock and Poultry Industries?

A. Introduction and Overview

1. Total Number and Size of Animal Confinement Operations

USDA reports that there were 1.1 million livestock and poultry farms in the United States in 1997. This number includes all operations that raise beef, dairy, pork, broilers, egg layers, and turkeys, and includes both confinement and non-confinement (grazing and rangefed) production. Only operations that raise animals in confinement will be subject to today's proposed regulations.

For many of the animal sectors, it is not possible to precisely determine what proportion of the total livestock operations are confinement operations and what proportion are grazing operations only. Data on the number of beef and hog operations that raise animals in confinement are available from USDA. Since most large dairies have milking parlors, EPA assumes that all dairy operations are potentially confinement operations. In the poultry sectors, there are few small non-confinement operations and EPA assumes that all poultry operations confine animals. EPA's analysis focuses on the largest facilities in these sectors only.

Using available 1997 data from USDA, EPA estimates that there are about 376,000 AFOs that raise or house animals in confinement, as defined by the existing regulations (Table 6–1). Table 6–1 presents the estimated number of AFOs and the corresponding animal inventories for 1997 across select size groupings. These estimates are based on the number of ''animal units'' (AU) as defined in the existing regulations at 40 CFR 122, with the addition of the revisions that are being proposed for immature animals and chickens. Data shown in Table 6–1 are grouped by operations with more than 1,000 AU and operations with fewer than 300 AU.

As shown in Table 6–1, there were an estimated 12,660 AFOs with more that 1,000 AU in 1997 that accounted for about 3 percent of all confinement operation. In most sectors, these larger-sized operations account for the majority of animal production. For example, in the beef, turkey and egg laying sectors, operations with more than 1,000 AU accounted for more than 70 percent of all animal inventories in 1997; operations with more than 1,000 AU accounted for more than 50 percent of all hog, broiler, and heifer operations (Table 6–1). In contrast, operations with fewer than 300 AU accounted for 90 percent of all operations, but a relatively smaller share of animal production.

USDA personnel have reviewed the data and assumptions used to derive EPA's estimates of the number of confinement operations. Detailed information on how EPA estimated the number of AFOs that may be subject to today's proposed regulations can be found in the Development Document for the Proposed Revisions to the National Pollutant Discharge Elimination System Regulation and the Effluent Guidelines for Concentrated Animal Feeding Operations (referred to as the ''Development Document'').

TABLE 6–1.—NUMBER OF AFOS AND ANIMAL ON-SITE, BY SIZE GROUP, 1997

Sector/Size category	Total AFOs	>1000 AU [1]	<300 AU	Total	>1000 AU	<300 AU
	(Number of operations)			(Number of animals, 1000's)		
Cattle	106,080	2,080	102,000	26,840	22,790	2,420
Veal	850	10	640	270	10	210
Heifers	1,250	300	200	850	450	80
Dairy	116,870	1,450	109,740	9,100	2.050	5,000
Hogs: GF [2]	53,620	1,670	48,700	18,000	9,500	2,700
Hogs: FF [2]	64,260	2,420	54,810	38,740	21,460	5,810
Broilers	34,860	3,940	20,720	1,905,070	1,143,040	476,270
Layers: wet [3]	3,110	50	2,750	392,940	275,060	58,940
Layers: dry [3]	72,060	590	70,370	392,940	275,060	58,940
Turkeys	13,720	370	12,020	112,800	95,880	2,260

TABLE 6–1.—NUMBER OF AFOS AND ANIMAL ON-SITE, BY SIZE GROUP, 1997—Continued

Sector/Size category	Total AFOs	>1000 AU [1]	<300 AU	Total	>1000 AU	<300 AU
Total [4]	375,700	12,660	336,590	NA	NA	NA

Source: Derived by USDA from published USDA/NASS data, including 1997 Census of Agriculture. In some cases, available data are used to interpolate data for some AU size categories (see EPA's Development Document). Data for veal and heifer operations are estimated by USDA. Totals may not add due to rounding.
[1] As defined for the proposed CAFO regulations, one AU is equivalent to: one slaughter or feeder cattle, calf or heifer; 0.7 mature dairy cattle; 2.5 hogs (over 55 pounds) or 5 nursery pigs; 55 turkeys; and 100 chickens regardless of the animal waste system used.
[2] "Hogs: FF" are farrow-finish (includes breeder and nursery pigs); "Hogs: GF" are grower-finish only.
[3] "Layers: wet" are operations with liquid manure systems; "Layers: dry" are operations with dry systems.
[4] "Total AFOs" eliminates double counting of operations with mixed animal types. Based on survey level Census data for 1992, operations with mixed animal types account for roughly 25 percent of total AFOs.

2. Total Number of CAFOs Subject to the Proposed Regulations

Table 6–2 presents the estimated number of operations that would be defined as a CAFO under each of the two regulatory alternatives being proposed. The "two-tier structure" would define as CAFOs all animal feeding operations with more than 500 AU. The "three-tier structure" would define as CAFOs all animal feeding operations with more than 1,000 AU and any operation with more than 300 AU, if they meet certain "risk-based" conditions, as defined in Section VII. Table 6–2 presents the estimated number of CAFOs in terms of number of operations with more than 1,000 AU and operations for each co-proposed middle category (operations with between 500 and 1,000 AU and between 300 and 1,000 AU, respectively).

Based on available USDA data for 1997, EPA estimates that both proposed alternative structures would regulate about 12,660 operations with more than 1,000 AU. This estimate adjusts for operations with more than a single animal type. The two alternatives differ in the manner in which operations with less than 1,000 AU would be defined as CAFOs and, therefore, subject to regulation, as described in Section VII. As shown in Table 6–2, in addition to the 12,660 facilities with more than 1,000 AU, the two-tier structure at 500 AU threshold would regulate an additional 12,880 operations with between 500 and 1,000 AU. Including operations with more than 1,000 AU, the two-tier structure regulates a total of 25,540 AFOs that would be subject to the proposed regulations (7 percent of all AFOs).

Under the three-tier structure, an estimated 39,330 operations would be subject to the proposed regulations (10 percent of all AFOs), estimated as the total number of animal confinement operations with more than 300 AU. See Table 6–1. Of these, EPA estimates that a total of 31,930 AFOs would be defined as CAFOs (9 percent of all AFOs) and would need to obtain a permit (Table 6–2), while an estimated 7,400 operations would certify that they do not need to obtain a permit. Among those operations needing a permit, an estimated 19,270 operations have between 300 to 1,000 AU. For more information, see the Economic Analysis.

TABLE 6–2. NUMBER OF POTENTIAL CAFOS BY SELECT REGULATORY ALTERNATIVE, 1997

Sector/Size category	"Two-tier"						"Three-Tier"	
	>300 AU	>500 AU	>750 AU	>300 AU	>500 AU	>750AU	>300 AU	
	(#Operations)			(%Total)			(#)	(%Total)
Cattle	4,080	3,080	2,480	4	3	2	3,210	3
Veal	210	90	40	25	10	4	140	16
Heifers	1,050	800	420	84	64	34	980	78
Dairy	7,140	3,760	2,260	6	3	2	6,480	6
Hogs: GF [1]	4,920	2,690	2,300	9	5	4	2,650	5
Hogs: FF [1]	9,450	5,860	3,460	15	9	5	5,700	9
Broilers	14,140	9,780	7,780	41	28	22	13,740	39
Layers: wet [2]	360	360	210	12	12	7	360	12
Layers: dry [2]	1,690	1,280	1,250	2	2	2	1,650	2
Turkeys	2,100	1,280	740	15	9	5	2,060	15
Total [3]	39,320	25,540	19,100	10.5	6.8	5.1	31,930	8.5

Source: See Table 6–1.
[1] FF =farrow-finish (includes breeder and nursery pigs); GF=grower finish.
[2] "Layers: wet" are operations with liquid manure systems. "Layers: dry" are operations with dry systems.
[3] "Total" eliminates double counting of operations with mixed animal types (see Table 6–1).

EPA estimated the number of operations that may be defined as CAFOs under the three-tier structure using available information and compiled data from USDA, State Extension experts, and agricultural professionals. These estimates rely on information about the percentage of operations in each sector that would be impacted by the "risk-based" criteria described in Section VII. In some cases, this information is available on a state or regional basis only and is extrapolated to all operations nationwide. EPA's estimates reflect information from a majority of professional experts in the field. Greater weight is given to information obtained by State Extension agents, since they have broader knowledge of the industry in their state. More detailed information on how EPA estimated the number of operations that may be affected by the proposed regulations under the three-

tier structure is available in the rulemaking record and in the Development Document.

EPA is also requesting comment on two additional options for the scope of the rule. One of these is an alternative two-tier structure with a threshold of 750 AU. Under this option, an estimated 19,100 operations, adjusting for operations with more than a single animal type, would be defined as CAFOs. This represents about 5 percent of all CAFOs, and would affect an estimated 2,930 beef, veal, and heifer operations, 2,260 dairies, and 5,750 swine and 9,980 poultry operations (including mixed operations). Under the other alternative, a variation of the three-tier structure being co-proposed today, the same 39,320 operations with 300 AU or greater would potentially be defined as CAFOs. However, the certification conditions for being defined as a CAFO would be different for operations with 300 to 1,000 AU (as described later in Section VII). EPA has not estimated how many operations would be defined as CAFOs under this alternative three-tier approach, although EPA expects that it would be fewer than the 31,930 estimated for the three-tier approach being proposed today. If after considering comments, EPA decides to further explore this approach, it will conduct a full analysis of the number of potentially affected operations.

EPA does not anticipate that many AFOs with less than 500 AU (two-tier structure) or 300 AU (three-tier structure) will be subject to the proposed requirements. In the past 20 years, EPA is aware of very few AFOs that have been designated as CAFOs. Based on available USDA analyses that measure excessive nutrient application on cropland in some production areas and other farm level data by sector, facility size and region, EPA estimates that designation may bring an additional 50 operations under the proposed two-tier structure each year nationwide. EPA assumed this estimate to be cumulative such that over a 10-year period approximately 500 AFOs may become designated as CAFOs and therefore subject to the proposed regulations. EPA expects these operations to consist of beef, dairy, farrow-finish hog, broiler and egg laying operations that are determined to be significant contributors to water quality impairment. Under the three-tier structure, EPA estimates that fewer operations would be designated as CAFOs, with 10 dairy and hog operations may be designated each year, or 100 operations over a 10-year period. Additional information is provided in the Economic Analysis.

EPA expects that today's proposed regulations would mainly affect livestock and poultry operations that confine animals. In addition to CAFOs, however, the proposed regulations would also affect businesses that contract out the raising or finishing production phase to a CAFO but exercise ''substantial operational control'' over the CAFO (as described in Section VII.C.6).

EPA expects that affected businesses may include packing plants and slaughtering facilities that enter into a production contract with a CAFO. Under a production contract, a contractor (such as a processing firm, feed mill, or other animal feeding operation) may either own the animals and/or may maintain control over the type of production practices used by the CAFO. Processor firms that enter into a marketing contract with a CAFO are not expected to be subject to co-permitting requirements since the mechanism for ''substantial operational control'' generally do not exist. Given the types of contract arrangements that are common in the hog and poultry industries, EPA expects that packers/slaughterers in these sectors may be subject to the proposed co-permitting requirements.

As discussed later in Sections VI.D.1 and VI.E.1, EPA estimates that 94 meat packing plants that slaughter hogs and 270 poultry processing facilities may be subject to the proposed co-permitting requirements. Other types of processing firms, such as further processors, food manufacturers, dairy cooperatives, and renderers, are not expected to be affected by the co-permitting requirements since these operations are further up the marketing chain and do not likely contract with CAFOs to raise animals. Fully vertically integrated companies (e.g., where the packer owns the CAFO) are not expected to require a co-permit since the firm as the owner of the CAFO would require only a single permit. EPA solicits comment on these assumptions as part of today's rulemaking proposal. EPA also expects that non-CAFO, crop farmers who receive manure from CAFOs would be affected under one of the two co-proposed options relating to offsite management of manure (see Section VII).

Additional information is provided in the Economic Impact Analysis of Proposed Effluent Limitations Guidelines and National Pollutant Discharge Elimination System for Concentrated Animal Feeding Operations (referred to as ''Economic Impact Analysis'').

3. Manure and Manure Nutrients Generated Annually at AFOs

USDA's National Resources Conservation Service (NRCS) estimates that 128.2 billion pounds of manure are ''available for land application from confined AU'' from the major livestock and poultry sectors. EPA believes these estimates equate to the amount of manure that is generated at animal feeding operations since USDA's methodology accounts for all manure generated at confinement facilities. USDA reports that manure nutrients available for land application totaled 2.6 billion pounds of nitrogen and 1.4 billion pounds of phosphorus in 1997 (Table 6–3). USDA's estimates do not include manure generated from other animal agricultural operations, such as sheep and lamb, goats, horses, and other farm animal species.

TABLE 6–3. MANURE AND MANURE NUTRIENTS ''AVAILABLE FOR LAND APPLICATION'', 1997

Sector	USDA estimates: ''available for application'' from confined AU'' [a]			EPA estimates: Percentage share by facility size group [b]			
	Total manure	Total nitrogen	Total phosphorus	>1000 AU	>750 AU	>500 AU	>300AU
	(bill. lbs)	(Million pounds)		(Percent of total manure nutrients applied)			
Cattle [c]	32.9	521	362	83	85	86	90
Dairy	45.5	636	244	23	31	37	43
Hogs	16.3	274	277	55	63	69	78
All Poultry	33.5	1,153	554	49	66	77	90

TABLE 6–3. MANURE AND MANURE NUTRIENTS ''AVAILABLE FOR LAND APPLICATION'', 1997—Continued

Sector	USDA estimates: ''available for application'' from confined AU'' [a]			EPA estimates: Percentage share by facility size group [b]			
	Total manure	Total nitrogen	Total phos-phorus	>1000 AU	>750 AU	>500 AU	>300AU
Total	128.2	2,583	1,437	49	58	64	72

Source:
[a] Manure and nutrients are from USDA/NRCS using 1997 Census of Agriculture and procedures documented developed by USDA. Numbers are ''dry state'' and reflect the amount of manure nutrient ''available for application from confined AU'' and are assumed by EPA to coincide with manure generated at confined operations.
[b] Percentage shares are based on the share of animals within each facility size group for each sector (shown in Table 6–1) across three facility size groups.
[c] ''Cattle'' is the sum of USDA's estimate for livestock operations ''with fattened cattle'' and ''with cattle other than fattened cattle and milk cows.''

The contribution of manure and manure nutrients varies by animal type. Table 6–3 shows that the poultry industry was the largest producer of manure nutrients in 1997, accounting for 45 percent (1.2 billion pounds) of all nitrogen and 39 percent (0.6 billion pounds) of all phosphorus available for land application that year. Among the poultry sectors, EPA estimates that approximately 55 percent of all poultry manure was generated by broilers, while layers generated 20 percent and turkeys generated 25 percent. The dairy industry was the second largest producer of manure nutrients, generating 25 percent (0.6 billion pounds) of all nitrogen and 17 percent (0.2 billion pounds) of all phosphorus (Table 6–3). Together, the hog and beef sectors accounted for about one-fourth of all nitrogen and nearly 40 percent of all phosphorus from manure.

Table 6–3 shows EPA's estimate of the relative contribution of manure generated by select major facility size groupings, including coverage for all operations with more than 1,000 AU, all operations with more than 750 AU or 500 AU (two-tier structure), and all operations with more than 300 AU (three-tier structure). EPA estimated these shares based on the share of animals within each facility size group for each sector, as shown in Table 6–1. Given the number of AFOs that may be defined as CAFOs and subject to the proposed regulations (Table 6–1), EPA estimates that the proposed effluent guidelines and NPDES regulations will regulate 5 to 7 percent (two-tier structure) to 10 percent (three-tier structure) percent of AFOs nationwide. Coverage in terms of manure nutrients generated will vary by the proposed regulatory approach. As shown in Table 6–3, under the 500 AU two-tier structure, EPA estimates that the proposed requirements will capture 64 percent of all CAFO manure; under the 750 AU two-tier structure, EPA estimates that the proposed requirements will capture 58 percent of all CAFO manure. Under the three-tier structure, EPA estimates that the proposed requirements will capture 72 percent of all CAFO manure generated annually (Table 6–3). The majority of this coverage (49 percent) is attributable to regulation of operations with more than 1,000 AU.

Additional information on the constituents found in livestock and poultry manure and wastewater is described in Section V. Information on USDA's estimates of nutrients available for land application and on the relative consistency of manure for the main animal types is provided in the Development Document.

B. Beef Subcategory

1. General Industry Characteristics

Cattle feedlots are identified under NAICS 112112 (SIC 0211, beef cattle feedlots) and NAICS 112111, beef cattle ranching and farming (SIC 0212, beef cattle, except feedlots). This sector comprises establishments primarily engaged in feeding cattle and calves for fattening, including beef cattle feedlots and feed yards (except stockyards for transportation).

The beef cattle industry can be divided into four separate producer segments:

- *Feedlot operations* fatten or ''finish'' feeder cattle prior to slaughter and constitute the final phase of fed cattle production. Calves usually begin the finishing stage after 6 months of age or after reaching at least 400 pounds. Cattle are typically held for 150 to 180 days and weigh between 1,150 to 1,250 pounds (for steers) or 1,050 to 1,150 pounds (for heifers) at slaughter.
- *Veal operations* raise male dairy calves for slaughter. The majority of calves are ''special fed'' or raised on a low-fiber diet until about 16 to 20 weeks of age, when they weigh about 450 pounds.
- *Stocker or backgrounding operations* coordinate the flow of animals from breeding operations to feedlots by feeding calves after weaning and before they enter a feedlot. Calves are kept between 60 days to 6 months or until they reach a weight of about 400 pounds.
- *Cow-calf producers* typically maintain a herd of mature cows, some replacement heifers, and a few bulls, and breed and raise calves to prepare them for fattening at a feedlot. Calves typically reach maturity on pasture and hay and are usually sold at weaning. Cow-calf operators may also retain the calves and continue to raise them on pasture until they reach 600 to 800 pounds and are ready for the feedlot.

Animal feeding operations in this sector that may be affected by today's proposed regulations include facilities that confine animals. Information on the types of facilities in this sector that may be covered by the proposed regulations is provided in Section VII.

USDA reports that there were more than 106,000 beef feedlots in 1997, with a total inventory of 26.8 million cattle (Table 6.1). Due to ongoing consolidation in the beef sector, the total number of operations has dropped by more than one-half since 1982, when there were 240,000 operations raising fed cattle. EPA also estimates that there were 850 veal operations raising 0.3 million head and 1,250 stand-alone heifer operations raising 0.9 million head in 1997. Only a portion of these operations would be subject to the proposed regulations.

As shown in Table 6–2, under the two-tier structure, EPA estimates that there are 3,080 beef feedlots with more than 500 head (500 AU of beef cattle). EPA also estimates that there are about 90 veal operations and 800 heifer operations that may be subject to the proposed regulations. Under the three-tier structure, EPA estimates that 3,210 beef feedlots, 140 veal and 980 heifer

operations with more than 300 head (300 AU) would meet the ''risk-based'' conditions described in Section VII and thus require a permit.

EPA expects that few operations that confine fewer than 500 AU of beef, veal, or heifers, would be designated by the permit authority. For the purpose of estimating costs, EPA assumes that no beef, veal, or heifer operations would be designated as CAFOs and subject to the proposed regulations under the three-tier structure. Under the two-tier structure, EPA assumes that about four beef feedlots located in the Midwest would be designated annually, or 40 beef feedlots projected over a 10-year period.

The cattle feeding industry is concentrated in the Great Plains and Midwestern states. The majority of feedlots are located in the Midwest. However, the majority of large feedlots (*i.e.,* operations with more than 1,000 head) are located in four Great Plains states—Texas, Kansas, Nebraska, and Colorado—accounting for nearly 80 percent of annual fed cattle marketings. Table 6–1 shows that, although the majority of beef feedlots (over 98 percent) have capacity below 1,000 head, larger feedlots with more than 1,000 head accounted for the majority of animal production. In 1997, feedlots with more than 1,000 head accounted for 85 percent of the nation's fed cattle inventory and sales. Cattle feeding has become increasingly concentrated over the last few decades. Feedlots have decreased in number, but increased in capacity. The decline in the number of operations is mostly among feedlots with less than 1,000 head.

The majority of cattle and calves are sold through private arrangements and spot market agreements. Production contracting is not common in the beef sector. Most beef sector contracts are marketing based where operations agree to sell packers a certain amount of cattle on a predetermined schedule. Production contracts are uncommon, but may be used to specialize in a single stage of livestock production. For example, custom feeding operations provide finish feeding under contract. Backgrounding or stocker operations raise cattle under contract from the time the calves are weaned until they are on a finishing ration in a feedlot. As shown by 1997 USDA data of animal ownership, production contracts account for a relatively small share (4 percent) of beef production. These same data show that production contracts are used to grow replacement breeding stock.

Despite the limited use of contracts for the finishing and raising phase of production, EPA expects that no businesses, other than the CAFO where the animals are raised, will be subject to the proposed co-permitting requirements. Reasons for this assumption are based on data from USDA on the use of production contracts and on animal ownership at operations in this sector. Additional information is provided in Section 2 of the Economic Analysis. EPA is seeking comment on this assumption as part of today's notice.

2. Farm Production and Waste Management Practices

Beef cattle may be kept on unpaved, partly paved, or totally paved lots. The majority of beef feedlots use unpaved open feedlots. In open feedlots, protection from the weather is often limited to a windbreak near the fence in the winter and/or sunshade in the summer; however, treatment facilities for the cattle and the hospital area are usually covered. Confinement feeding barns with concrete floors are also sometimes used at feedlots in cold or high rainfall areas, but account for only 1 to 2 percent of all operations. Smaller beef feedlots with less than 1,000 head, especially in areas with severe winter weather and high rainfall, may use open-front barns, slotted floor housing, or housing with sloped gutters.

Wastes produced from beef operations include manure, bedding, and contaminated runoff. Paved lots generally produce more runoff than unpaved lots. Unroofed confinement areas typically have a system for collecting and confining contaminated runoff. Excessively wet lots result in decreased animal mobility and performance. For this reason, manure is often stacked into mounds for improved drainage and drying, as well as providing dry areas for the animals. If the barn has slotted floors, the manure is collected beneath slotted floors, and is scraped or flushed to the end of the barn where it flows or is pumped to a storage area for later application via irrigation or transported in a tank wagon. Waste may also be collected using flushing systems.

Waste from a beef feedlot may be handled as a solid or liquid. Solid manure storage can range from simply constructed mounds within the pens to large stockpiles. In some areas, beef feedlot operations may use a settling basin to remove bulk solids from the pen runoff, reducing the volume of solids prior to entering a storage pond, therefore increasing storage capacity. A storage pond is typically designed to hold the volume of manure and wastewater accumulated during the storage period, including additional storage volume for normal precipitation, minus evaporation, and storage volume to contain a 25-year, 24-hour storm event. An additional safety volume termed ''freeboard'' is also typically built into the storage pond design.

Veal are raised almost exclusively in confinement housing, generally using individual stalls or pens. Veal calves are raised on a liquid diet and their manure is highly liquid. Manure is typically removed from housing facilities by scraping or flushing from collection channels and then flushing or pumping into liquid waste storage structures, ponds, or lagoons.

Waste collected from the feedlot may be transported within the site to storage, treatment, and use or disposal areas. Solids and semisolids are typically transported using mechanical conveyance equipment, pushing the waste down alleys, and transporting the waste in solid manure spreaders. Flail-type spreaders, dump trucks, or earth movers may also be used to transport these wastes. Liquids and slurries are transferred through open channels, pipes, or in a portable liquid tank. The most common form of utilization is land application. However, the amount of cropland and pastureland that is available for manure application varies at each operation. Cattle waste may also be used as a bedding for livestock, marketed as compost, or used as an energy source.

Additional information on the types of farm production and waste management practices is provided in the Development Document.

C. Dairy Subcategory

1. General Industry Characteristics

Operations that produce milk are identified under NAICS 11212, dairy cattle and milk production (SIC 0241, dairy farms).

A dairy operation may have several types of animal groups present, including:

- *Calves* (0–5 months);
- *Heifers* (6–24 months);
- *Lactating dairy cows* (*i.e.,* currently producing milk); and;
- *Cows close to calving and dry cows* (*i.e.,* not currently producing milk); and
- *Bulls.*

Animal feeding operations in this sector that may be affected by today's proposed regulations include facilities that confine animals. Information on the types of facilities in this sector that may be covered by the proposed regulations is provided in Section VII.

In 1997, there were 116,900 dairy operations with a year-end inventory of

9.1 million milk cows that produced 156.1 billion pounds of milk (Table 6.1). Only a portion of these operations would be subject to the proposed regulations. As shown in Table 6.2, under the two-tier structure, EPA estimates that there are 3,760 dairy operations that confine more than 350 milk cows (*i.e.,* 500 AU equivalent). Under the three-tier structure, EPA estimates that 6,480 dairy operations with more than 200 head (*i.e.,* 300 AU equivalent) would meet the ''risk-based'' conditions described in Section VII and thus require a permit.

Table 6–1 shows that dairies with fewer than 200 head account for the majority (95 percent) of milking operations and account for 55 percent of the nation's milk cow herd. EPA expects that under the two-tier structure designation of dairies with fewer than 350 milk cows would be limited to about 22 operations annually, or 220 dairies projected over a 10-year time period. Under the three-tier structure, EPA expects annual designation of dairies with fewer than 200 milk cows would be limited to about 5 operations, or 50 operations over a 10-year period. EPA expects that designated facilities will be located in more traditional farming regions.

More than one-half of all milk produced nationally is concentrated among the top five producing states: California, Wisconsin, New York, Pennsylvania, and Minnesota. Other major producing states include Texas, Michigan, Washington, Idaho, and Ohio. Combined, these ten states accounted for nearly 70 percent of milk production in 1997. Milk production has been shifting from traditional to nontraditional milk producing states. Operations in the more traditional milk producing regions of the Midwest and Mid-Atlantic tend to be smaller and less industrialized. Milk production at larger operations using newer technologies and production methods is emerging in California, Texas, Arizona, New Mexico, and Idaho. Milk production in these states is among the fastest-growing in the nation, relying on economies of scale and a specialization in milk production to lower per-unit production costs. (Additional data on these trends are provided in Section IV.C).

Over the past few decades, the number of dairy operations and milk cow inventories has dropped, while overall milk production has been increasing. USDA reports that while the number of dairy operations dropped by more than one-half from 277,800 in 1982 to 116,900 in 1997, the amount of milk produced annually at these operations rose from 135.5 billion pounds to 156.1 billion pounds. These figures signal trends toward increased consolidation, large gains in per-cow output, and increases in average herd size per facility. From 1982 to 1997, the average number of dairy cows per facility doubled from 40 cows to 80 cows per facility.

Although milk and dairy food production has become increasingly specialized, it has not experienced vertical integration in the same way as other livestock industries. The use of production contracts is uncommon in milk production. In part, this is attributable to the large role of farmer-owned, farmer-controlled dairy cooperatives, which handle about 80 percent of the milk delivered to plants and dealers. Milk is generally produced under marketing-type contracts through verbal agreement with their buyer or cooperative. Data from USDA indicate that little more than 1 percent of milk was produced under a production contract in 1997. Use of production contracts in the dairy sector is mostly limited to contracts between two animal feeding operations to raise replacement heifers.

Despite the limited use of contracts between operations to raise replacement herd, EPA expects that no businesses other than the CAFO where the animals are raised will be subject to the proposed co-permitting requirements. Reasons for this assumption are based on data from USDA on the use of production contracts and on animal ownership at operations in this sector. Additional information is provided in Section 2 of the Economic Analysis. EPA is seeking comment on this assumption as part of today's notice of the proposed rulemaking.

2. Farm Production and Waste Management Practices

Animals at dairy operations may be confined in free-stalls, drylots, tie-stalls, or loose housing. Some may be allowed access to exercise yards or open pasture. The holding area confines cows that are ready for milking. Usually, this area is enclosed and is part of the milking center, which in turn may be connected to the barn or located in the immediate vicinity of the cow housing. Milking parlors are separate facilities where the cows are milked and are typically cleaned several times each day to remove manure and dirt. Large dairies tend to have automatic flush systems, while smaller dairies simply hose down the area. Larger dairies in the northern states, however, may be more likely to use continuous mechanical scraping of alleys in barns. Cows that are kept in tie-stalls may be milked directly from their stalls.

Waste associated with dairy production includes manure, contaminated runoff, milking house waste, bedding, spilled feed and cooling water. Dairies may either scrape or flush manure, depending on the solids content in manure and wastewater. Scraping systems utilize manual, mechanical, or tractor-mounted equipment to collect and transport manure from the production area. Flushing systems use fresh or recycled lagoon water to move manure. Dairy manure as excreted has a solids content of about 12 percent and tends to act as a slurry; however, it can be handled as a semisolid or a solid if bedding is added. Semisolid manure has a solids content ranging from 10 to 16 percent. Dilution water may be added to the manure to create a slurry with a solids content of 4 to 10 percent. If enough dilution water is added to the manure to reduce the solids content below 4 percent, the waste is considered to be a liquid.

Manure in a solid or semisolid state minimizes the volume of manure that is handled. In a dry system, the manure is collected on a regular basis and covered to prevent exposure to rain and runoff; sources of liquid waste, such as milking center waste, are typically handled separately. In a liquid or slurry system, the manure is typically mixed with flushing system water from lagoons; the milking center effluent is usually mixed in with the animal manure in the lagoon or in the manure transfer system to ease pumping. Liquid systems are usually favored by large dairies because they have lower labor cost and because the dairies tend to use automatic flushing systems.

Methods used at dairy operations to collect waste include mechanical/tractor scraper, flushing systems, gutter cleaner/gravity gutters, and slotted floors. Manure is typically stored as a slurry or liquid in a waste storage pond or in structural tanks. Milking house waste and contaminated runoff must be stored as liquid in a waste storage pond or structure. One common practice for the treatment of waste at dairies includes solids separation. Another common practice for the treatment of liquid waste at dairies includes anaerobic lagoons. The transfer of dairy waste depends on its consistency: liquid and slurry wastes can be transferred through open channels, pumps, pipes, or in a portable tank; solid and semi-solid waste can be transferred by mechanical conveyance, solid manure spreaders, or by being pushed down curbed concrete alleys. The majority of

dairy operations dispose of their waste through land application. The amount of crop and pastureland available for land application of manure varies by operation.

Additional information on the types of farm production and waste management practices is provided in the Development Document.

D. Hog Subcategory

1. General Industry Characteristics

Hog operations that raise or feed hogs and pigs either independently or on a contract basis are identified under NAICS 11221, hog and pig farming (SIC 0213, hogs).

Hog operations may be categorized by six facility types based on the life stage of the animal in which they specialize:

- *Farrow-to-wean* operations that breed pigs and ship 10- to 15-pound pigs to nursery operations.
- *Farrowing-nursery* operations that breed pigs and ship 40- to 60-pound ''feeder'' pigs to growing-finishing operations.
- *Nursery* operations that manage weaned pigs (more than 10 to 15 pounds) and ship 40- to 60-pound ''feeder'' pigs to growing-finishing operations.
- *Growing-finishing or feeder-to-finish* operations that handle 40- to 60-pound pigs and ''finish'' these to market weights of about 255 pounds.
- *Farrow-to-finish* operations that handle all stages of production from breeding through finishing.
- *Wean-to-finish* operations that handle all stages of production, except breeding, from weaning (10- to 15-pound pigs) through finishing.

Animal feeding operations in this sector that may be affected by today's proposed regulations include facilities that confine animals. Information on the types of facilities in this sector that may be covered by the proposed regulations is provided in Section VII.

In 1997, USDA reports that there were 117,880 hog operations with 56.7 million market and breeding hogs (Table 6–1). Not all of these operations would be subject to the proposed regulations. As shown in Table 6–2, under the two-tier structure, EPA estimates that there are 5,860 farrow-finish feedlots (including breeder and nursery operations) and 2,690 grower-finish feedlots with more than 1,250 head (*i.e.,* 500 AU equivalent). Under the three-tier structure, EPA estimates that 5,700 farrow-finish feedlots (including breeder and nursery operations) and 2,650 grower-finish feedlots with more than 750 head (*i.e.,* 300 AU equivalent) would meet the ''risk-based'' conditions described in Section VII and thus require a permit.

Table 6–1 shows that the majority of hog operations (93 percent) have fewer than 1,250 head, accounting for about one-third of overall inventories. Nearly half the inventories are concentrated among the 3 percent of operations with more than 2,500 head. Under the two-tier structure EPA expects that designation of hog operations with fewer than 1,250 head will be limited to about 20 confinement operations annually, or 200 operations over a 10-year time period. Under the three-tier structure, EPA expects that about 5 hog operations with fewer than 750 head would be designated annually, or 50 operations over a 10-year time period. EPA expects that designated facilities will be located in more traditional farming regions.

Hog production is concentrated among the top five producing states, including Iowa, North Carolina, Minnesota, Illinois, and Missouri. Together these states supply 60 percent of annual pork supplies. The majority of operations are located in the Midwest; however, the Southeast has seen rapid growth in hog production in the past decade. Recent growth in this region is due to increased vertical integration, proximity to growing consumer markets, and the mild climate, which offers lower energy costs and improved feed efficiency. (Additional data on these trends are provided in Section IV.C).

The hog sector is undergoing rapid consolidation and becoming increasingly specialized. USDA reports that while the number of hog operations dropped by nearly two-thirds between 1982 and 1997 (from 329,800 to 109,800 operations), the number of feeder pigs sold has risen from 20.0 million to 35.0 million marketed head over the same period. As in other livestock sectors, increasing production from fewer operations is attributable to expansion at remaining operations. Data from USDA indicate that the average number of hogs per facility increased from 170 pigs in 1982 to 560 pigs in 1997. Increasing production is also attributable to substantial gains in production efficiency and more rapid turnover, which has allowed hog farmers to produce as much output with fewer animals.

The hog sector is rapidly evolving from an industry of small, independent firms linked by spot markets to an industry of larger firms that are specialized and vertically coordinated through production contracting. This is particularly true of large-scale hog production in rapidly growing hog production states such as North Carolina. Production contracting is less common in the Midwest where coordination efforts are more diversified.

Information from USDA on animal ownership at U.S. farms provides an indication of the potential degree of processor control in this sector. Data from USDA indicate the use of production contracts accounted for 66 percent of hog production in the Southern and Mid-Atlantic states in 1997, especially among the larger producers. This indicates that a large share of hog production may be under the ownership or control of processing firms that are affiliated with hog operations in this region. This compares to the Midwest, where production contracting accounted for 18 percent of hog production. Production contracting in the hog sector differs from that in the beef and dairy sectors since it is becoming increasingly focused on the finishing stage of production, with the farmer (''grower'') entering into an agreement with a meat packing or processing firm (''integrator''). Production contracts are also used between two independent animal feeding operations to raise immature hogs.

Businesses that contract out the growing or finishing phase of production to an AFO may also be affected by the proposed co-permitting requirements. Affected businesses may include other animal feeding operations as well as processing sector firms. By NAICS code, meat packing plants are classified as NAICS 311611, animal slaughtering (SIC 2011, meat packing plants). The Department of Commerce reports that there were a total of 1,393 red meat slaughtering facilities that slaughter hogs as well as other animals, including cattle and calves, sheep, and lamb. Of these, Department of Commerce's 1997 product class specialization identifies 83 establishments that process fresh and frozen pork and 11 establishments that process or cure pork. These data generally account for larger processing facilities that have more than 20 employees. EPA believes that processing firms that may be affected by the proposed co-permitting requirements will mostly be larger facilities that have the administrative and production capacity to take advantage of various contract mechanisms. This assumption is supported by information from USDA that indicates that production contracts in the hog sector are generally associated with the largest producers and processors. Section 2 of the Economic Analysis provides additional information on the basis for EPA's

estimate of potential co-permittees. EPA is seeking comment on this assumption as part of today's notice of the proposed rulemaking.

Using these Department of Commerce data, EPA estimates that 94 companies engaged in pork processing may be subject to the proposed co-permitting requirements. This estimate does not include other processors under NAICS 311611, including sausage makers and facilities that ''further process'' hog hides and other by-products because these operations are considered to be further up the marketing chain and likely do not contract out to CAFOs.

2. Farm Production and Waste Management Practices

Many operations continue to have the traditional full range of pork production phases at one facility, known as farrow-to-finish operations. More frequently at new facilities, operations are specialized and linked into a chain of production and marketing. The evolution in farm structures has resulted in three distinct production systems to create pork products: (1) farrow-to-finish; (2) farrowing, nursery, and grow-finish operations; and (3) farrow-to-wean and wean-finish operations. Most nursery and farrowing operations, as well as practically all large operations of any type, raise pigs in pens or stalls in environmentally controlled confinement housing. These houses commonly use slatted floors to separate manure and wastes from the animal. Open buildings with or without outside access are relatively uncommon at large operations, but can be used in all phases of pork production. Smaller operations, particularly in the Midwest, may utilize open lots or pasture to raise pigs.

Hog waste includes manure and contaminated runoff. Most confinement hog operations use one of three waste handling systems: flush under slats, pit recharge, or deep underhouse pits. Flush housing uses fresh water or recycled lagoon water to remove manure from sloped floor gutters or shallow pits. The flushed manure is stored in lagoons or tanks along with any precipitation or runoff that may come into contact with the manure. Flushing occurs several times a day. Pit recharge systems are shallow pits under slatted floors with 6 to 8 inches of pre-charge water. The liquid manure is pumped or gravity fed to a lagoon approximately once a week. Deep pit systems start with several inches of water, and the manure is stored under the house until it is pumped out for field application on the order of twice a year. Most large operations have 90 to 365 days storage. The deep pit system uses less water, creating a slurry that has higher nutrient concentrations than the liquid manure systems. Slurry systems are more common in the Midwest and the cooler climates.

Dry manure handling systems include those used at open buildings and lots, scraped lots, hoop houses, deep bedded systems, and high rise hog houses. These systems produce a more solid manure material that is readily handled with a tractor or front end loader. The solids are stored in stacks or covered until used as fertilizer. In some cases, solids are composted.

Storage lagoons are used to provide anaerobic bacterial decomposition of organic materials. When only the top liquid is removed for irrigation or some other use, a limited amount of phosphorus-rich sludge accumulates in the lagoon, which requires periodic removal. Vigorous lagoon mixing with an agitator or a chopper prior to irrigation is sometimes done to minimize the sludge accumulation. In certain climates, a settling and evaporation pond is used to remove solids, which are dried in a separate storage area. Some lagoons and tanks are covered with a synthetic material that reduces ammonia volatilization. Covers also prevent rainfall from entering the system and, therefore, reduce disposal costs.

Land application is the most common form of utilization. To mitigate odor problems and volatization of ammonia, liquid waste can be injected below the soil surface. Waste may also be distributed through an irrigation process. Waste management systems for hogs often incorporate odor control measures, where possible.

Additional information on the types of farm production and waste management practices is provided in the Development Document.

E. Poultry Subcategory

1. General Industry Characteristics

Poultry operations can be classified into three individual sectors based on the type of commodity in which they specialize. These sectors include operations that breed and/or raise:

- *Broilers* or young meat chickens that are raised to a live weight of 4 to 4.5 pounds and other meat-type chickens, including roasters that are raised to 8 to 9 pounds. Classification: NAICS 11232, broilers and other meat-type chickens (SIC 0251, broiler, fryer and roaster chickens).
- *Turkeys and turkey hens,* including whole turkey hens that range from 8 to 15 pounds at slaughter, depending on market, and also turkey ''canners and cut-ups'' that range from 22 to 40 pounds. Classification: NAICS 11233, turkey production (SIC 0253, turkey and turkey eggs).
- *Hens that lay shell eggs,* including eggs that are sold for human consumption and eggs that are produced for hatching purposes. Classification: NAICS 11231, Chicken egg production (SIC 0252, chicken eggs) and NAICS 11234, poultry hatcheries (SIC 0254, poultry hatcheries).

Animal feeding operations in this sector that may be affected by today's proposed regulations include facilities that confine animals. Information on the types of facilities in this sector that may be covered by the proposed regulations is provided in Section VII.

In 1997, the USDA reports that there were 34,860 broiler operations that raised a total of 1.9 billion broilers during the year. There were also 13,720 turkey operations raising a total 112.8 million turkeys. Operations with egg layers and pullets totaled 75,170 with an average annual inventory of 393 million egg layers on-site. (See Table 6–1). Not all of these operations would be subject to the proposed regulations.

Under the two-tier structure, EPA estimates that there are 9,780 broiler operations, 1,280 turkey operations and 1,640 egg laying and pullet operations that have more than 500 AU (i.e., operations with more than 50,000 chickens and more than 27,500 turkeys). Under the three-tier structure, EPA estimates that 13,740 broiler operations, 2,060 turkey operations and 2,010 egg laying operations with more than 300 AU (i.e., operations with more than 30,000 chickens and more than 16,500 turkeys) would meet the ''risk-based'' conditions described in Section VII and thus require a permit.

EPA expects few, if any, poultry AFOs with fewer than 500 AU will be subject to the revised requirements. As shown in Table 6–1, most poultry operations have fewer than 500 AU. Under the two-tier structure, EPA expects that designation of broiler operations with fewer than 50,000 chickens will be limited to two broiler and two egg operations being designated annually, or a total of 40 poultry operations over a 10-year period. EPA expects that no turkey operations would be designated as CAFOs and subject to the proposed regulations. EPA expects that no confinement poultry operations will be designated as CAFOs under the proposed requirements under the three-tier structure.

Overall, most poultry production is concentrated in the Southeast and in key Midwestern states. As in the pork sector, the Southeast offers advantages

such as lower labor, land, and energy costs; proximity to end markets; and milder weather, which contributes to greater feed efficiency. Nearly 60 percent of all broiler production is concentrated among the top five producing states, including Georgia, Arkansas, Alabama, Mississippi, and North Carolina. The top five turkey producing states also account for about 60 percent of all turkeys sold commercially. These include North Carolina, Minnesota, Virginia, Arkansas, and California. Missouri and Texas are also major broiler and turkey producing states. The top five states for egg production account for more than 40 percent of all egg production, including Ohio, California, Pennsylvania, Indiana, and Iowa. Other major egg producing states include Georgia, Texas, Arkansas, and North Carolina.

The number of operations in each of the poultry sectors has been declining while production has continued to rise. USDA reports that while the number of both turkey and broiler operations decreased by about 10,000 operations between 1982 and 1997, the number of animals sold for slaughter rose nearly twofold: the number of broilers sold rose from 3.5 billion to 6.7 billion and the number of turkeys sold rose from 167.5 million to 299.5 million. During the same period, the number of egg operations dropped nearly two-thirds (from 215,800 operations in 1982), while the number of eggs produced annually has increased from 5.8 billion dozen to 6.2 billion dozen. Increased production from fewer operations is due to expanded production from the remaining operations. This is attributable to increases in the average number of animals raised at these operations as well as substantial gains in production efficiency and more rapid turnover, which has allowed operators to produce more with fewer animals. Data from USDA indicate that average inventory size on poultry operations increased twofold on broiler operations and rose threefold at layer and turkey operations between 1982 and 1997. (Additional data on these trends are provided in Section IV.C). As in other sectors, larger operations control most animal inventories and sales.

The poultry industry is characterized by increasing integration and coordination between the animal production facility and the processing sector. Vertical integration has progressed to the point where large multifunction producer-packer-processor-distributor firms are the dominant force in poultry meat and egg production and marketing. Coordination through production contracting now dominates the poultry industry. Today's integrators are subsidiaries of feed companies, independent processors, cooperatives, meat packers, or retailers, or affiliates of conglomerate corporations. These firms may own and/or direct the entire process from the production of hatching eggs to the merchandising of ready-to-eat-sized poultry portions to restaurants.

Production contracting in the poultry sector differs from that in the other livestock sectors since it is dominated by near vertical integration between a farmer (''grower'') and a processing firm (''integrator''). Information from USDA on animal ownership at U.S. farms provides an indication of the potential degree of processor control in this sector. Data from USDA indicate production contracting accounted for virtually all (98 percent) of U.S. broiler production in 1997. This indicates that nearly all broiler production may be under the ownership or control of processing firms that are affiliated with broiler operations. Production contracting accounts for a relatively smaller share of turkey and egg production, accounting for 70 percent and 37 percent, respectively.

Businesses that contract out the growing or finishing phase of production to an AFO may also be affected by the proposed co-permitting requirements. Affected businesses may include other animal feeding operations as well as processing sector firms. Poultry processing facilities are classified under NAICS 311615, poultry processing, and NAICS 311999, all other miscellaneous (SIC 2015, poultry slaughtering facilities). The Department of Commerce reports that there were a total of 558 poultry and egg slaughtering and processing facilities in 1997. Of these, Department of Commerce's 1997 product class specialization for poultry identifies 212 establishments that process young chickens, 15 that process hens or fowl, and 39 that process turkeys (rounded to the nearest ten). These data generally account for larger processing facilities that have more than 20 employees. EPA believes that processing firms that may be affected by the proposed co-permitting requirements will mostly be larger facilities that have the administrative and production capacity to take advantage of various contract mechanisms. Section 2 of the Economic Analysis provides additional information on the basis for EPA's estimate of potential co-permittees. EPA is seeking comment on this assumption as part of today's notice of the proposed rulemaking.

Using these Department of Commerce data, EPA estimates that about 270 companies engaged in poultry slaughtering may be subject to the proposed co-permitting requirements. This estimate does not include egg processors under NAICS 311999 because these operations are considered to be further up the marketing chain and likely do not contract out to CAFOs.

2. Farm Production and Waste Management Practices

There are two types of basic poultry confinement facilities—those that are used to raise turkeys and broilers for meat and those that are used to house layers. Broilers and young turkeys are grown on floors on beds of litter shavings, sawdust, or peanut hulls; layers are confined to cages. Broilers are reared in houses where an absorbent bedding material such as wood shavings or peanut hulls are placed on the floor at a depth of several inches. Breeder houses contain additional rows of slats for birds to roost. Broilers may also be provided supplementary heat during the early phases of growth. Turkeys as well as some pullets and layers are produced in a similar fashion. Pullets or chickens that are not yet of egg laying age are raised in houses on litter, or in cages. Most commercial layer facilities employ cages to house the birds, although smaller laying facilities and facilities dedicated to specialty eggs such as brown eggs or free range eggs may use pastures or houses with bedded floors. Layer cages are suspended over a bottom story in a high-rise house, or over a belt or scrape gutter. The gutter may be a shallow sloped pit, in which case water is used to flush the wastes to a lagoon. Flush systems are more likely to be found at smaller facilities in the South.

Poultry waste includes manure, poultry mortalities, litter, spilt water, waste feed, egg wash water, and also flush water at operations with liquid manure systems. Manure from broiler, breeder, some pullet operations, and turkey operations is allowed to accumulate on the floor where it is mixed with the litter. In the chicken houses, litter close to drinking water access forms a cake that is removed between flocks. The rest of the litter pack generally has low moisture content and is removed every 6 months to 2 years, or between flocks to prevent disease. This whole house clean-out may also require storage, depending on the time of year it occurs. The litter is stored in temporary field stacks, in covered piles, or in stacks within a roofed facility to help keep it dry. Commonly, treatment of broiler and

turkey litter includes composting which stabilizes the litter into a relatively odorless material and which increases the market value of the litter. Proper composting raises the temperature within the litter such that pathogens are reduced, allowing reuse of the litter in the poultry house.

The majority of egg laying operations also use dry manure handling. Laying hens are kept in cages and the manure drops below the cages in both dry and liquid manure handling systems. Most of the dry manure laying operations are constructed as high rise houses where the birds are kept on the second floor and the manure drops to the first floor sometimes referred to as the pit. Ventilation flows through the house from the roof down over the birds and into the pit over the manure before it is forced out through the sides of the house. The ventilation drys the manure as it piles up into cones. Manure can be stored in high rise houses for up to a year before requiring removal. In dry layer houses with belts, the manure that drops below the cage collects on belts and is transported to a separate covered storage area. Layer houses with liquid systems use either a shallow pit or alleyway located beneath the cages for flushing. Flushed wastes are pumped to a lagoon.

Because of the large number of routine mortalities associated with large poultry operations, the disposal of dead birds is occasionally a resource concern. Poultry facilities must have adequate means for disposal of dead birds in a sanitary manner. To prevent the spread of disease, dead birds are usually collected daily. Disposal alternatives include incineration, rendering, composting, and in-ground burial or burial in disposal tanks. Much of the waste from poultry facilities is land applied.

Additional information on the types of farm production and waste management practices is provided in the Development Document.

VII. What Changes to the NPDES CAFO Regulations Are Being Proposed?

A. Summary of Proposed NPDES Regulations

EPA is co-proposing, for public comment, two alternative ways to structure the NPDES regulation for defining which AFOs are CAFOs. Both structures represent significant improvements to the existing regulation and offer increased environmental protection. The first alternative proposal is a ''two-tier structure,'' and the second is a ''three-tier structure.'' Owners or operators of all facilities that are defined as CAFOs in today's proposal, under either alternative, would be required to apply for an NPDES permit.

In the first co-proposed alternative, EPA is proposing to replace the current three-tier structure in 40 CFR 122.23 with a two-tier structure. See proposed § 122.23(a)(3) for the two-tier structure, included at the end of this preamble. All AFOs with 500 or more animal units would be defined as CAFOs, and those with fewer than 500 animal units would be CAFOs only if they are designated as such by EPA or the State NPDES permit authority.

In the second co-proposed alternative, EPA is proposing to retain the current three-tier structure. All AFOs with 1,000 or more animal units would be defined as CAFOs, and those with less than 300 animals units would be CAFOs only if they are designated by EPA or the State NPDES permit authority. Those with 300 to 1,000 animal units would be CAFOs if they meet one or more of several specific conditions, and today's proposal would revise the existing conditions. These facilities could also be designated as CAFOs if they are found to be significant contributors of pollutants to waters of the United States. Further, all AFOs between 300 and 1,000 animal units would be required to certify to the permit authority that they do not meet any of the conditions. Those facilities unable to certify would be required to apply for a permit.

These regulatory alternatives are two of six different approaches that the Agency considered. Two of the approaches are also being seriously considered, but are not being proposed in today's action because they have not been fully analyzed. However, EPA is soliciting public comment on these two alternatives. One of the alternatives is a two-tier structure, similar to what is being proposed today, but would establish a threshold at the equivalent of 750 AU. The other alternative under consideration is a three-tier structure, with different certification and permitting requirements for facilities in the 300 AU to 1,000 AU tier. These alternatives are described in more detail in Section VII.B.5. After reviewing public comment, EPA may decide to pursue either of these alternatives.

In addition, EPA considered two other alternative approaches that are not being proposed. One would retain the existing three-tier structure for determining which AFOs are CAFOs, and would retain the existing conditions for determining which of the middle tier facilities are CAFOs while incorporating all other proposed changes to the CAFO regulations (e.g., the definition of CAFO, the duty to apply, etc.). The sixth approach that was not proposed which is similar to today's second alternative proposal, would retain the three-tiered structure and would revise the conditions for determining which of the middle tier facilities are CAFOs in the same manner as today's proposal. In contrast with today's proposal, it would not require all AFOs in the middle tier to certify they are not CAFOs.

EPA is soliciting comment on all six scenarios for structuring how to determine which facilities are CAFOs.

TABLE 7–1.—PROPOSED REVISION TO THE STRUCTURE OF THE CAFO REGULATION

Proposed revision	Section
Historical Record	B.1
Two-Tier Structure	B.2
Three-Tier Structure	B.3
Comparative Analysis	B.4
Alternative Scenarios Considered but not Proposed	B.5

Besides changing the structure of the regulation, under both of today's proposals, EPA is also proposing changes to clarify, simplify, and strengthen the NPDES regulation, including to: clarify the definition of an AFO; discontinue the use of the term ''animal unit'' and eliminate the mixed animal type multiplier when calculating numbers of animals; eliminate the 25-year, 24-hour storm permit exemption; and impose a clearer and more broad duty to apply for a permit on all operations defined or designated as a CAFO.

EPA is also proposing several changes that determine whether a facility is an AFO or whether it is a CAFO and

therefore must apply for an NPDES permit on that basis. Specifically, EPA is proposing to formally define a CAFO to: include both the animal production area and the land application area; broaden coverage in the poultry sector to include all chicken operations, both wet and dry; add coverage for stand-alone immature swine and heifer operations; lower the NPDES threshold that defines which facilities are CAFOs for other animal sectors, including horses, sheep, lambs and ducks; and require facilities that are no longer active CAFOs to remain permitted until their manure and storage facilities are properly closed and they have no potential to discharge CAFO manure or wastewater. This section also discusses the concept of ''direct hydrologic connection'' between ground water and surface water and its application to CAFOs. Considerations for providing regulatory relief to small businesses are also discussed.

EPA is also proposing changes that clarify the scope of NPDES regulation of CAFO manure and process wastewater. Today's proposal modifies the criteria for designation of AFOs as CAFOs on a case-by-case basis and explicitly describes EPA's authority to designate facilities as CAFOs in States with approved NPDES programs. EPA is also proposing that the permit authority must require entities that have ''substantial operational control'' over a CAFO to be co-permitted, and is requesting comment on an option for States to waive this requirement if they provide another means of ensuring that excess manure transported from CAFOs to off-site recipients is properly land applied. EPA also is clarifying Clean Water Act requirements concerning point source discharges at non-CAFOs.

These changes are summarized in Table 7–2 and described in the noted sections.

TABLE 7–2.—PROPOSED REVISIONS FOR DEFINING CAFOS OTHER POINT SOURCES

Proposed revision	Section
Clarify the vegetation language in the definition of an AFO	C.1
Discontinue use of the term animal unit	C.2.a
Eliminate the mixed animal type multiplier	C.2.b
Remove the 25-year, 24-hour storm event exemption from the definition of a CAFO	C.2.c
Clarify the duty to apply, that all CAFOs must apply for an NPDES permit	C.2.d
Definition of a CAFO includes both production area and land application area	C.2.e
Include dry poultry operations	C.2.f
Include stand-alone immature swine and heifer operations	C.2.g
Coverage of other sectors besides beef, dairy, swine and poultry	C.2.h
Require facilities that are no longer CAFOs to remain permitted until proper closure	C.2.i
Applicability of direct hydrological connection to surface water	C.2.j
Regulatory relief for small businesses	C.2.k
Designation criteria	C.3
Designation of CAFOs by EPA in States with NPDES authorized programs	C.4
Co-permitting of entities that exert substantial operational control over a CAFO	C.5
Point source discharges at AFOs that are not CAFOs	C.6

We also extensively discuss matters associated with the land application of CAFO-generated manure and wastewater, including how the agricultural storm water exemption applies to the application of CAFO-generated manure both on land under the control of the CAFO operator and off-site. EPA is proposing to require CAFO owners or operators to land apply manure in accordance with proper agricultural practices, as defined in today's regulation. EPA is also co-proposing two different means of addressing the off-site transfer of CAFO-generated manure. In one proposal, CAFO owners or operators would be allowed to transfer manure off-site only to recipients who certify to land apply according to proper agricultural practices; to maintain records of all off-site transfers; and to provide adequate information to off-site manure recipients to facilitate proper application. Alternately, the certification would not be required, and CAFOs owners or operators would simply be required to maintain records and provide the required information to recipients. See Table 7–3 for references.

TABLE 7–3.—LAND APPLICATION OF CAFO-GENERATED MANURE AND WASTEWATER

Proposed revision	Section
Why is EPA Regulating Land Application of CAFO Waste?	D.1
How is EPA Interpreting the Agricultural Storm Water Exemption with Respect to Land Application of CAFO-generated Manure?	D.2
How is EPA Proposing to Regulate Discharges from Land Application of CAFO-generated Manure by CAFOs?	D.3
How is EPA Proposing to Regulate Land Application of Manure and Wastewater by non-CAFOs?	D.3

EPA is proposing several revisions to requirements contained in CAFO permits. The requirement that CAFO owners or operators develop and implement a ''Permit Nutrient Plan,'' or ''PNP,'' is discussed extensively, including clarifying that a PNP is the EPA-enforceable subset of a Comprehensive Nutrient Management Plan, or ''CNMP.''

EPA is also proposing to apply revised Effluent Limitation Guidelines and standards (and hereafter referred to as effluent guidelines or ELG) to beef, dairy, swine, poultry and veal operations that are CAFOs by definition in either of the two proposed structures, or that have 300 AU to 1,000 AU in the three-tier structure and are designated. NPDES permits issued to small operations that are CAFOs by designation (those with fewer than 500 AU in the two tier structure, and those with fewer than 300 AU in the three tier structure) would continue to be based on Best Professional Judgment (BPJ) of

the permit authority. Similarly, CAFOs in other sectors (i.e., horse, sheep, lambs, and ducks) that have greater than 1,000 AU will continue to be subject to the existing effluent guidelines and standards (as they are in the existing regulation), while those with 1,000 AU or fewer would be issued permits based on BPJ, as today's proposed effluent guidelines does not include revisions to sectors other than beef, dairy, swine, poultry and veal.

Today's NPDES proposal includes monitoring, reporting and record keeping requirements that are consistent with those required by today's proposed effluent guidelines (discussed in section VIII). In addition, EPA is proposing to require all individual permit applicants, as well as new facilities applying for coverage under general NPDES permits, to submit a copy of the cover sheed and Executive Summary of their draft Permit Nutrient Plan (PNP) to the permit authority along with the permit application or Notice of Intent (NOI). EPA is proposing to require all CAFOs to submit a notification to the permit authority, within three months of obtaining permit coverage, that their Permit Nutrient Plans (PNPs) have been developed, along with a fact sheet summarizing the PNP. Further, EPA is proposing to require permittees to submit a notification to the permit authority whenever the PNP has been modified.

EPA is also proposing to require that the permit authority include certain conditions in its general and individual permits that specify: (1) Requirements for land application of manure and wastewater, including methods for developing the allowable manure application rate; (2) restrictions on timing of land application if determined to be necessary, including restrictions with regard to frozen, saturated or snow covered ground; (3) requirements for the facility to be permitted until manure storage facilities are properly closed and therefore the facility has no potential to discharge; (4) conditions for facilities in certain types of topographical regions to prevent discharges to ground water with a direct hydrological connection to surface water; and (5) under one co-proposed option, requirements that the CAFO owner or operator obtain a signed certification from off-site recipients of more than twelve tons annually, that manure will be land applied according to proper agricultural practices (co-proposed with omitting such a requirement). Comments are also requested on whether EPA should include erosion controls in the NPDES permit, and whether EPA should establish an additional design standard that would address chronic rainfall. Table 7–4 summarizes the proposed revisions that address minimum permit conditions, as well as issues for which comment are being sought.

TABLE 7–4.—PROPOSED REVISIONS FOR PERMIT REQUIREMENTS

Proposed revision	Section
Permit Nutrient Plan	E.1
Effluent Limitations	E.2
Monitoring and reporting	E.3
Record keeping	E.4
Special Conditions and Standard Conditions	E.5
Determining allowable manure application rate	E.5.a
Timing of land application of manure	E.5.b
Maintaining permit until proper closure	E.5.c
Discharge to ground water with a direct hydrological connection to surface water	E.5.d
Obtain certification from off-site recipients of manure of appropriate land application	E.5.e
Erosion control	E.5.f
Solicitation of comment on defining chronic rainfall	E.5.g

Finally, EPA is proposing to amend certain aspects of the general and individual permit process to improve public access and public involvement in permitting CAFOs. While the NPDES regulations already provide a process for public involvement in issuing individual NPDES permits, today EPA is proposing to require the permit authority to issue quarterly public notices of all Notices of Intent (NOIs) received for coverage under general NPDES permits for CAFOs, as well as of notices from CAFOs that their Permit Nutrient Plans have been developed or amended. Today's proposal discusses public availability of NOIs, Permit Nutrient Plans and PNP notifications. EPA is proposing several new criteria for which CAFOs may be ineligible for general permits, and would require the permit authority to conduct a public process for determining, in light of those criteria, when individual permits would be required.

Owners or operators of all facilities that are defined as CAFOs in today's proposed regulation would be required to apply for an NPDES permit. However, EPA also is proposing that they may, instead, seek to obtain from the permit authority a determination of ''no potential to discharge'' in lieu of submitting a permit application. (EPA notes that, because of the stringency of demonstrating that a facility has no potential to discharge, EPA expects that few facilities will receive such determinations.) Finally, EPA is proposing to amend the CAFO individual permit application requirements and corresponding Form 2B. See Table 7–5.

TABLE 7–5.—PROPOSED REVISIONS TO PERMIT PROCESS

Proposed revision	Section
General Permit and NOI provisions	F.1
Individual permits	F.2
Requests not to have a permit issued by demonstrating ''no potential to discharge''	F.3
Amendments to NPDES Permit Application For CAFOs Form 2B	F.4

B. What Size AFOs Would be Considered CAFOs?

EPA is proposing two alternative structures for establishing which AFOs would be regulated as CAFOs. Each proposal reflects the Agency's efforts to balance the goals of ease of implementation and effectively addressing the sources of water quality impairments. The two-tier structure is designed to give both regulators and animal feeding facility operators a clear, straightforward means of determining whether or not an NPDES permit is required for a facility. On the other hand, the three-tier structure, while less straightforward in determining which facilities are required to have NPDES permits, may allow the permit authority to focus its permitting resources on facilities which are more likely to be significant sources of water quality impairments. The Agency believes both the two-tier and three-tier approaches are reasonable and is requesting comment on how best to strike a balance between simplicity and flexibility while achieving the goals of the Clean Water Act. EPA may decide to choose either or both alternatives in the final rule, and requests comments on both. EPA is also requesting comment on a variation of the two-tier structure and a variation of the three-tier structure and, after considering public comment, may decide to pursue either or both of these variations for the final rule.

EPA is not proposing to define animal types on the basis of age, size or species in order to avoid complicating the implementation of this proposal. Throughout today's preamble, each of the subcategories, under today's proposed effluent guidelines, is described as follows:

- ''Cattle, excluding mature dairy or veal'' (referred in today's preamble as the beef sector) includes any age animal confined at a beef operation, including heifers when confined apart from the dairy. This subcategory also includes stand-alone heifer operations, also referred to as heifer operations.
- ''Mature dairy cattle'' (referred in today's preamble as the dairy sector) indicates that only the mature cows, whether milking or dry, are counted to identify whether the dairy is a CAFO.
- ''Veal'' is distinguished by the type of operation. Veal cattle are confined and manure is managed differently than beef cattle. EPA is not proposing to define veal by size or age. Note that the current regulation includes veal under the beef subcategory, but in today's proposal a new veal subcategory would be established.
- ''Swine weighing over 25 kilograms or 55 pounds'' also indicates that only mature swine are counted to determine whether the facility is a CAFO. Once defined as a CAFO, all animals in confinement at the facility would be subject to the proposed requirements.
- ''Immature Swine weighing less than 25 kilograms or 25 pounds'' indicates that immature swine are counted only when confined at a stand-alone nursery. Today's preamble uses the terms ''swine sector'' to indicate both mature and immature swine, but permit provisions are separately applied to them.
- ''Chicken'' and ''Turkeys'' are listed as separate subcategories and are counted separately in order to determine whether the facility is a CAFO. However, they are subject to the same effluent limitations, and are collectively referred to as the ''poultry sector.''
- ''Ducks,'' ''Horses,'' and ''Sheep or Lambs'' are separate subcategories under the existing NPDES and effluent limitation regulations. Part 412 effluent limitations are not being revised in today's proposal; however, some of the proposed revisions to the NPDES program will affect these subcategories.

1. Historical Record

In 1973, when EPA proposed regulations for CAFOs, the Agency determined the thresholds above which AFOs would be subject to NPDES permitting requirements ''on the basis of information and statistics received, pollution potential, and administrative manageability.'' 38 FR 10961, 10961 (May 3, 1973). In 1975, the Agency, after litigation, again proposed regulations for CAFOs which established a threshold number of animals above which an AFO would be determined to be a CAFO. 40 FR 54182 (Nov. 20, 1975). The Agency noted that it might be possible to establish a precise regulatory formula to determine which AFOs are CAFO point sources based on factors such as the proximity of the operation to surface waters, the numbers and types of animals confined, the slope of the land, and other factors relative to the likelihood or frequency of discharge of pollutants into navigable waters. 40 FR at 54183.

The Agency decided, however, that even if such a formula could be constructed, it would be so complex that both permitting authorities and feedlot operators would find it difficult to apply. Then, as now, EPA concluded that the clearest and most efficient means of regulating concentrated animal feeding operations was to establish a definitive threshold number of confined animals above which a facility is defined as a CAFO, below which a permitting authority could designate a facility as a CAFO, after consideration of the various relevant factors. The threshold numbers initially established by the Agency were based generally on a statement by Senator Muskie when the Clean Water Act was enacted. Senator Muskie, floor manager of the legislation, stated that: ''Guidance with respect to the identification of 'point sources' and 'nonpoint sources,' especially with respect to agriculture, will be provided in regulations and guidelines of the Administrator.'' 2 Legislative History of the Water Pollution Control Act Amendments of 1972 at 1299, 93d Cong, 1st Sess. (January 1973). Senator Muskie then identified the existing policy with respect to identification of agricultural point sources was generally that ''runoff from confined livestock and poultry operations are not considered a 'point source' unless the following concentrations of animals are exceeded: 1000 beef cattle; 700 dairy cows; 290,000 broiler chickens; 180,000 laying hens; 55,000 turkeys; 4,500 slaughter hogs; 35,000 feeder pigs; 12,000 sheep or lambs; 145,000 ducks.'' *Id.* In the final rule, the Agency and commenters agreed that while Senator Muskie's statement provided useful general guidance, particularly in support of the idea of defining CAFOs based on specified numbers of animals present, it was not a definitive statement of the criteria for defining a CAFO. 41 FR 11458 (Mar. 18, 1976). The Agency, thus, looked to data with respect to both the amount of manure generated by facilities above the threshold and the number of facilities captured by the regulation.

EPA has again looked to those factors and, with 25 years of regulatory experience, focused particularly on the amount of manure captured by the threshold, ease of implementation for both regulators and the regulated community, as well as on matters of administrative convenience and manageability of the permitting program. Based on these considerations, EPA is proposing two alternative structures. EPA notes that the NPDES threshold is generally synchronized with the effluent guidelines applicability threshold, and information on the cost per pound of pollutants removed, and affordability of the various options is available in Section X.

2. Two-Tier Structure

The first alternative that EPA is proposing is a two-tier structure that establishes which operations are

defined as CAFOs based on size alone. See proposed § 122.23(a)(3). In this alternative, EPA is proposing that the threshold for defining operations as CAFOs be equivalent to 500 animal units (AU). All operations with 500 or more animal units would be defined as CAFOs (§ 122.23(a)(3)(i)). Operations with fewer than 500 animal units would be CAFOs only if designated by EPA or the State permit authority (§ 122.23(a)(3)(ii)). Table 7–6 describes the number of animals that are equivalent to the proposed 500 AU threshold, as well as three other two-tier thresholds that are discussed in this section.

The proposed two-tier structure would eliminate the 300 AU to 1,000 AU tier of the existing regulation, under which facilities were either defined as a CAFO if they met certain conditions or were subject to designation on a case-by-case basis by the permit authority according to the criteria in the regulations. EPA is proposing to eliminate this middle category primarily because it has resulted in general confusion about which facilities should be covered by an NPDES permit, which, in turn, has led to few facilities being permitted under the existing regulation. The two-tier structure offers simplicity and clarity for the regulated community and enforcement authorities for knowing when a facility is a CAFO and when it is not, thereby improving both compliance and enforcement.

TABLE 7–6.—NUMBER OF ANIMALS COVERED BY ALTERNATIVE TWO-TIER APPROACHES

Animal type	Number of animals equivalent to:			
	300 AU	500 AU	750 AU	1,000 AU
Cattle and Heifers	300	500	750	1,000
Veal	300	500	750	1,000
Mature Dairy Cattle	200	350	525	700
Swine weighing over 25 kilograms—or 55 pounds	750	1,250	1,875	2,500
Immature Swine weighing less than 25 kilograms, or 55 pounds	3,000	5,000	7,500	10,000
Chickens	30,000	50,000	75,000	100,000
Turkeys	16,500	27,500	41,250	55,000
Ducks	1,500	2,500	3,750	5,000
Horses	150	250	375	500
Sheep or Lambs	3,000	5,000	7,500	10,000

Operations with fewer animals than the number listed for the selected threshold in Table 7–6 would only become CAFOs through case-by-case designation.

In order to determine the appropriate threshold for this two-tier approach, EPA analyzed information on numbers of operations, including percent of manure generated, potential to reduce nutrient loadings, and administrative burden. EPA considered current industry trends and production practices, including the trend toward fewer numbers of AFOs, and toward larger facilities that tend to be more specialized and industrialized in practice, as compared to more traditional agricultural operations. EPA also considered other thresholds, including 300 AU, 750 AU, or retaining the existing 1,000 AU threshold. After considering each of these alternatives, EPA is proposing 500 AU as the appropriate threshold for a two-tier structure, but is also requesting comment on a threshold of 750 AU.

EPA is proposing 500 AU as the appropriate threshold for a two-tier structure because it regulates larger operations and exempts more traditional—and oftentimes more sustainable—farm production systems where farm operators grow both livestock and crops and land apply manure nutrients. Consistent with the objectives under the USDA–EPA Unified National Strategy for Animal Feeding Operations (March 9, 1999), the proposed regulations cover more of the largest operations since these pose the greatest potential risk to water quality and public health, given the sheer volume of manure generated at these operations. Larger operations that handle larger herds or flocks often do not have an adequate land base for manure disposal through land application. As a result, large facilities need to store large volumes of manure and wastewater, which have the potential, if not properly handled, to cause significant water quality impacts. By comparison, smaller farms manage fewer animals and tend to concentrate less manure nutrients at a single farming location. Smaller farms tend to be less specialized and are more diversified, engaging in both animal and crop production. These farms often have sufficient cropland and fertilizer needs to appropriately land apply manure nutrients generated at a farm's livestock or poultry business. More information on the characteristics of larger-scale animal production practices is provided in sections IV and VI of this document, as well as noted in the analysis of impacts to small businesses (section X.I).

EPA is proposing the 500 AU threshold because operations of this size account for the majority of all manure and manure nutrients produced annually. The proposed two-tier structure would cover an estimated 25,540 animal production operations, or approximately seven percent of all operations, which account for 64 percent of all AFO manure generated annually. The USDA–EPA Unified National Strategy had a goal of regulating roughly five percent of all operations.

EPA is specifically seeking comment on an alternative threshold of 750 AU, which would encompass five percent of AFOs. There are an estimated 19,100 operations with 750 AU or more (13,000 of which have more than 1,000 AU), and account for 58 percent of all manure and manure nutrients produced annually by AFOs. Regulating five percent of AFOs may be viewed by some as being consistent with the USDA–EPA Unified National Strategy.

A 750 AU threshold has the benefits cited for the 500 AU threshold. The two-tier structure is simple and clear, and it would focus regulation on even larger operations, thereby relieving smaller operations from the burden of being automatically regulated, and moderating the administrative burden to permit authorities. Permit authorities could use state programs to focus on operations below 750 AU, and could use the designation process as needed.

In some sectors, a 750 AU threshold may not be sufficiently protective of the environment. For example, in the Pacific Northwest, dairies tend to be smaller, but also tend to be a significant concern. In the mid-Atlantic, where

poultry operations have been shown to be a source of environmental degradation, a 750 AU threshold would exempt many broiler operations from regulatory requirements. EPA is concerned that a 750 AU threshold would disable permit authorities from effectively addressing regional concerns.

EPA also considered adopting the 1,000 AU threshold, which would have regulated three percent of all operations and 49 percent of all manure generated annually. A threshold of 300 AU was also considered, which would have addressed an additional 8 percent of all manure generated annually, but would have brought into regulation 50 percent more operations than the 500 AU threshold (thus regulating a total of 10 percent of all AFOs which account for 72 percent of AFO manure).

Raising the NPDES threshold to 500 AU, 750 AU or 1,000 AU raises a policy question for facilities below the selected threshold but with more than 300 AU. Facilities with 300 to 1,000 AU are currently subject to NPDES regulation under some conditions, though in practice few operations in this size range have actually been permitted to date. To rely entirely on designation for these operations could be viewed by some as deregulatory, because the designation process is a time consuming and resource intensive process that makes it difficult to redress violations. It also results in the inability for permit authorities to take enforcement actions against initial discharges, (unless they are from an independent point source at the facility); instead such discharges could only result in requiring a permit. Unless the designation process can be streamlined in some way to enable permit authorities to more efficiently address those who are significant contributors of pollutants, raising the threshold too high may also not be sufficiently protective of the environment. Please see Section VII.C.3 and VII.C.4 for a discussion of the designation process.

More information on how data for these alternatives were estimated is provided in section VI of this preamble.

EPA is soliciting comment on the two-tier structure, and what the appropriate threshold should be. In addition, EPA is soliciting comment on other measures this rule, when final, might include to ensure that facilities below the regulatory threshold meet environmental requirements, such as by streamlining the designation process or some other means.

3. Three-Tier Structure

The second alternative that EPA is proposing is a three-tier structure that retains the existing tiers but amends the conditions under which AFOs with 300 AU to 1,000 AU, or ''middle tier'' facilities, would be defined as CAFOs. Further, EPA would require all middle tier AFOs to either apply for an NPDES permit or to certify to the permit authority that they do not meet any of the conditions which would require them to obtain a permit.

EPA is proposing this alternative because it presents a ''risk based'' approach to determining which operations pose the greatest concern and have the greatest potential to discharge. The particular conditions being proposed would have the effect of ensuring that manure at *all* facilities with 300 AU or more is properly managed, and thus may be more environmentally protective than the two-tier structure. Further, even though this alternative would impose some degree of burden on all AFOs with 300 AU or more, it would provide a way for facilities to avoid being permitted, and could reduce the administrative burden associated with permitting.

The three-tier alternative would affect all 26,665 facilities between 300 AU and 1,000 AU in addition to the 12,660 facilities with greater than 1,000 AU, and thus would affect 10 percent of all AFOs while addressing 72 percent of all AFO manure. However, because owners or operators of middle tier facilities would be able to certify that their operations are not CAFOs, EPA estimates that between 4,000 to 19,000 mid-size facilities would need to apply for and obtain a permit.

Of the approximately 26,000 AFOs with 300 AU to 1,000 AU, EPA estimates that owners or operations of approximately 7,000 facilities would have to, at a minimum, implement a Permit Nutrient Plan (as discussed further below) and would be able to certify to the permit authority that they are not a CAFO based on existing practices. Operators of some 19,000 facilities of these middle tier facilities would be required to adopt certain practices in addition to implementing a PNP, in order to be able to certify they are not a CAFO to avoid being permitted.

See the EPA NPDES CAFO Rulemaking Support Document, included in the Record, for detailed descriptions of the number of facilities affected by this and the other alternative scenarios considered.

EPA is also proposing the three-tier structure because it provides flexibility for State programs. A State with an effective non-NPDES program could succeed in helping many of their middle tier operations avoid permits by ensuring they do not meet any of the conditions that would define them as CAFOs. This important factor would enable States to tailor their programs while minimizing the changes State programs might need to make to accommodate today's proposed rulemaking.

The three-tier structure would affect the facilities shown in Table 7–7.

TABLE 7–7.—NUMBER OF ANIMALS IN THE THREE-TIER APPROACH

[By sector]

Animal Type	>1000 AU equivalent (Number of animals)	300–1000AU equivalent (Number of animals)	<300 AU equivalent (Number of animals)
Cattle, Excluding Mature Dairy and Veal	1,000	300–1,000	<300
Veal	1,000	300–1,000	<300
Mature Dairy Cattle	700	200–700	<200
Swine, weighing over 25 kilograms or 55 pounds	2,500	750–2,500	<750
*Immature Swine, weighing less than 25 kilograms or 55 pounds	10,000	3,000–10,000	<3,000
*Chickens	100,000	30,000–100,000	<30,000
Turkeys	55,000	16,500–55,000	<16,500
Ducks	5,000	1,500–5,000	<1,500
Horses	500	150–500	<150

TABLE 7–7.—NUMBER OF ANIMALS IN THE THREE-TIER APPROACH—Continued

[By sector]

Animal Type	>1000 AU equivalent (Number of animals)	300–1000AU equivalent (Number of animals)	<300 AU equivalent (Number of animals)
Sheep or Lambs	10,000	3,000–10,000	<3,000

*Immature swine, heifers and dry chicken operations are not included in the existing regulation but are included in today's proposed rulemaking.

Revised Conditions. EPA examined the conditions under the existing regulation and determined that the conditions needed to be modified in order to improve its efficacy. Under the existing regulation, an AFO with 300 AU to 1,000 AU is not defined as a CAFO unless it meets one of the two criteria governing the method of discharge: (1) Pollutants are discharged through a man-made ditch, flushing system, or other similar man-made device; or (2) pollutants are discharged directly into waters of the United States that originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the confined animals. Under the two-tier structure, these conditions would be eliminated because a facility would simply be defined as a CAFO if it had more than 500 AU. Under the three-tier structure, EPA is proposing to eliminate the existing conditions and add several others designed to identify facilities which pose the greatest risk to water quality.

The three-tier proposal would, for the middle tier, eliminate both criteria in the existing regulation because these conditions have proven to be difficult to interpret and implement for AFOs in the 300 AU to 1,000 AU size category, and thus have not facilitated compliance or enforcement, and the scenario does not meet the goal of today's proposal to simplify the NPDES regulation for CAFOs. The two criteria governing method of discharge, e.g., ''man-made device'' and ''stream running through the CAFO,'' are subject to interpretation, and thus difficult for AFO operators in this size range to determine whether or not the permit authority would consider them to be a CAFO. EPA does not believe it is necessary to retain these criteria because all discharges of pollutants from facilities of this size should be considered point source discharges. By replacing these terms with a list of conditions, EPA intends to clarify that all discharges from CAFOs must be covered by an NPDES permit, whether or not they are from a manmade conveyance. EPA notes that under this proposal, the Agency would not eliminate the two conditions as criteria for designation of AFOs with less than 300 AU as CAFOs. See the discussion of designation in Section VII.C.3.

The revised conditions for the middle tier would require the owner or operator to apply for an NPDES permit if the operation meets any of the following conditions and is therefore a CAFO: (1) There is direct contact of animals with waters of the U.S. at the facility; (2) there is insufficient storage and containment at the production area to prevent discharges from reaching waters of the U.S.; (3) there is evidence of a discharge from the production area in the last five years; (4) the production area is located within 100 feet of waters of the U.S.; (5) the operator does not have, or is not implementing, a Permit Nutrient Plan that meets EPA's minimum requirements; or (6) more than twelve tons of manure is transported off-site to a single recipient annually, unless the recipient has complied with the requirements for off-site shipment of manure.

The EPA NPDES CAFO Rulemaking Support Document, dated September 26, 2000 (available in the rulemaking Record), describes the assumptions used to estimate the number of facilities that would be affected by each condition, which EPA developed in consultation with state regulatory agency personnel, representatives of livestock trade associations, and extension specialists.

Each of these proposed conditions is described further below.

Direct contact of animals with waters of the U.S. The condition for ''direct contact of animals with waters of the U.S.'' covers situations such as dairy or beef cattle walking or standing in a stream or other such water that runs through the production area. This condition ensures that facilities which allow such direct contact have NPDES permits to minimize the water quality problems that such contact can cause.

Insufficient Storage. The condition for ''insufficient storage and containment at the production area to prevent discharge to waters of the U.S.'' is intended to address discharges through any means, including sheet runoff from the production area, whereby rain or other waters might come into contact with manure and other raw materials or wastes and then run off to waters of the U.S. or leach to ground water that has a direct hydrologic connection to waters of the U.S. This is to ensure that all mid-sized facilities prevent discharges from inadequate storage and containment of manure, process wastewater, storm water, and other water coming in contact with manure.

Sufficient storage would be defined as facilities that have been designed and constructed to standards equivalent to today's proposed effluent guidelines. Thus, beef and dairy operations would be designed and constructed to prevent discharge in a 25-year, 24-hour storm event, while swine and poultry would be required to meet a zero discharge standard. See Section VIIIC.6.

Past or Current Discharge. Operations that meet the condition for ''evidence of discharge from the production areas within the past five years'' would be considered CAFOs under this proposal. A discharge would include *all* discharges from the production area including, for example, a discharge from a facility designed to contain a 25-year, 24-hour storm. Evidence of discharge would include: citation by the permit authority; discharge verified by the permit authority whether cited or not; or other verifiable evidence that the permit authority determines to be adequate to indicate a discharge has occurred.

Under this approach, there would be no allowance in the certification process for facilities in the beef and dairy sectors designed to contain runoff from a 25-year, 24-hour storm that had a discharge anyway during an extreme storm event. Thus, in this respect, the requirements for certification would be more stringent than those that would apply to a permitted facility. EPA is thus proposing that a facility that chooses not to be covered by an NPDES permit would not get the benefits of NPDES coverage such as the 25-year, 24-hour storm standard for beef and dairy operations, and upset and bypass defense. Alternatively, EPA is soliciting

comment on the definition of a ''past or current discharge,'' including whether to define it as a discharge from a facility that has not been designed and constructed in accordance with today's proposed effluent guidelines. This would make the certification requirements consistent with those for permitted facilities.

Proximity to Waters of the U.S. Operations with production areas that are located within 100 feet of waters of the U.S. are of particular concern to EPA, since their proximity increases the chance of discharge to waters and is a compelling factor that would indicate the potential to discharge. Research has shown that the amount of pollutants in runoff over land can be mitigated by buffers and setbacks. (See Environmental Impact Assessment; Development of Pollutant Loading Reductions from the Implementation of Nutrient Management and Best Management Practices; both available in the rulemaking Record.) Any operation located at a distance less than the minimum setback poses a particular risk that contaminants will discharge to receiving waters. EPA estimates that approximately 4,000 operations between 300 AU and 1,000 AU in size have production areas that are within 100 feet of waters of the U.S.

Permit Nutrient Plan for Land Application of Manure and Wastewater. For facilities that land apply manure, another condition indicative of risk to water impairment is whether or not the facility has developed and is implementing a Permit Nutrient Plan for manure and/or wastewater that is applied to land that is owned or controlled by the AFO operator. Contamination of water from excessive application of manure and wastewater to fields and cropland presents a substantial risk to the environment and public health because nutrients from agriculture are one of the leading sources of water contamination in the United States. While CAFOs are not the only source of contamination, they are a significant source, and CAFO operators should apply manure properly to minimize environmental impacts. Thus, EPA would require any facility with 300 AU to 1,000 AU that does not have a PNP that conforms to today's proposed effluent guidelines for land application to apply for an NPDES permit. (As described in Section VII.E.1, the PNP is the effluent guideline subset of elements in a CNMP. Section VIII.C.6 of today's proposal describes the effluent guideline requirements in a PNP.)

Certification for Off-site Transfer of CAFO-generated Manure. The final condition for avoiding a permit concerns the transfer of CAFO-generated manure and wastewater to off-site recipients. EPA is co-proposing two ways to address manure transferred off-site, which are discussed in detail in Section VII.D.2, as well as in VII.e.5.e. In this condition, a facility would be considered a CAFO if more than 12 tons of manure is transported off-site to a single recipient annually, unless the AFO owner or operator is complying with the requirements for off-site transfer of manure, or is complying with the requirements of a State program that are equivalent to the requirements of 40 CFR part 412.

Under one co-proposed option, the AFO owner or operator would be required to obtain certifications from recipients that the manure will be properly managed; to maintain records of the recipients and the quantities transferred; and to provide information to the recipient on proper manure management and test results on nutrient content of the manure. Under the alternative option, CAFOs would not be required to obtain certifications, but would still maintain the records of transfers and provide the information to the recipients.

Under the first option, the CAFO owner or operator would obtain a certification from recipients (other than waste haulers that do not land apply the waste) that the manure: (1) Will be land applied in accordance with proper agricultural practices as defined in today's proposal; (2) will be applied in accordance with an NPDES permit; or (3) will be used for alternative uses, such as for pelletizing or distribution to other markets. If transferring manure and wastewater to a waste hauler, the CAFO owner or operator would be required to obtain the name and location of the recipients of the waste, if known, and provide the hauler with an analysis of the content of the manure and a brochure describing responsibilities for appropriate manure management, which would be provided, in turn, to the recipient. These provisions are discussed in more detail in Sections VII.D.4 and VII.E.4.

Excess Manure Alternative Considered. As an alternative to the two conditions addressing land application of CAFO-generated manure, EPA also considered a condition that would simply require the CAFO operator to determine whether it generates more manure than the land under his or her control could accommodate at allowable manure application rates, and if so, it would be a CAFO, required to land apply according to a PNP. Further, this condition would create a voluntary option for off-site transfer of CAFO-generated manure whereby, if the manure was transferred to someone certifying they had a certified CNMP and were implementing it, the facility would not be a CAFO on the basis of having excess manure.

EPA considered this criterion to identify which CAFOs were likely to pose a risk of discharge and impacts to human health and the environment based on generation of excess manure (*e.g.,* more manure than can be properly applied to land under his or her operational control). Requiring such CAFOs to apply for an NPDES permit would allow EPA to require these operations to maintain records documenting the fate of the manure (*e.g.,* whether it was land applied on-site or transferred to a third party). EPA is interested in monitoring the fate of the large quantities of manure generated by CAFOs, and in educating recipients regarding proper agricultural practices. CAFO operators able to certify there is sufficient cropland under their operational control to accommodate the proper application of manure generated at their facility would not be defined as CAFOs and thus would not need to apply for an NPDES permit on that basis.

To identify facilities that generate excess manure, EPA considered a screening tool originally developed by USDA, known as Manure Master. The tool allows AFO operators to compare the nutrient content in the animal manure produced by an AFO with the quantity of nutrients used and removed from the field on which that manure is applied. This tool would help assess the relative potential for the nutrients contained in the animal manure to meet or exceed the crop uptake and utilization requirements for those crops that receive applications of manure. The screening tool calculates a balance between the nitrogen, phosphorus, and potassium content in the manure and the quantity of these nutrients used by particular crops. This balance can be calculated based upon recommended fertilizer application rates, when known, or upon estimated plant nutrient content, when recommended fertilizer application rates are not known. For nitrogen, the balance is calculated taking into account expected losses from leaching, denitrification, and volatilization.

The manure screening tool would be available as either an Internet-based program or as a computer software program that allows for direct input of data and generation of reports. AFO operators would enter the average number of confined animals by animal

type, the number of acres for each crop, and the expected yield for each crop for which the operator expects to apply manure. The operator would also specify whether the manure is incorporated into the soil or surface applied. The software also allows, but does not require, entry of soil test or other crop nutrient recommendations. The screening tool produces a report that includes the balance (i.e., pounds needed or pounds excess, per acre) for nitrogen, phosphorus, and potassium for an AFO operator's fields. The balance will advise the operator whether the quantity of nutrients in his or her animal manure exceeds the quantity removed in harvested plants or the quantity of nutrients recommended.

There are many assumptions in this screening tool that make it too general to use for detailed nutrient management planning, although it would be useful as a rough means of determining whether a facility is generating manure in excess of crop needs. The factors used to calculate manure nutrient content are developed from estimates that account for nutrient losses due to collection, storage, treatment, and handling. When manure is not incorporated, an additional nitrogen loss is included for volatilization. When the nutrients exceed nutrient utilization, there is increased potential for nutrients to leach or runoff from fields and become pollutants of ground or surface water. This software is intended to be used as a decision support screening tool to allow AFO operators to make a quick evaluation as to whether the quantity of nutrients applied to the land on which manure is spread exceeds the quantity of nutrients used by crops. EPA believes it could be a valuable tool to determine, at a screening level, whether available nutrients exceed crop needs and, thus, whether a facility has a greater likelihood for generating the runoff of nutrients that could impact water quality. EPA is not proposing this option as there are concerns that simply having enough land may not provide assurance that the manure would be applied in ways that avoided impairing water quality. However, EPA is requesting comment below on an alternative three-tier approach that would include such a screening tool as one of the criteria for certifying that an AFO in the 300 to 1,000 AU size category is not a CAFO.

Certifying That a Middle Tier AFO is not a CAFO. Under the three-tier structure, EPA is proposing to allow AFOs with between 300 AU and 1,000 AU to certify to the permit authority that they do not meet any of the risk-based conditions and thus are not CAFOs. The certification would be a check-off form that would also request some basic information about the facility, including name and address of the owner and operators; facility name and address and contact person; physical location and longitude and latitude information for the production area; type and number of animals at the AFO; and signature of owner, operator or authorized representative. The draft sample certification form is included here for public comment.

Form for Certifying Out of the Concentrated Animal Feeding Operation Provisions of the National Pollutant Discharge Elimination System

This checklist is to assist you in determining whether your animal feeding operation (AFO) is, or is not, a concentrated animal feeding operation (CAFO) subject to certain regulatory provisions. For clarification, please see the attached fact sheet.

Section 1. First Determine Whether or not Your Facility Is an AFO

A facility that houses animals is an animal feeding operation if:

- Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period.
- Animals are not considered to be stabled or confined when they are in areas such as pastures or rangeland that sustain crops or forage growth during the entire time that animals are present.

Yes, my facility is an AFO. PROCEED TO SECTION 2.

No, my facility is *not* an AFO. STOP. YOU DO NOT NEED TO SUBMIT THIS FORM

Section 2. Determine the Size Range of Your AFO

If your facility is an AFO, and the number of animals is in the size range for any animal type listed below, then you may potentially be a concentrated animal feeding operation.

200–700 mature dairy cattle (whether milked or dry)
300–1000 head of cattle other than mature dairy cattle
750–2,500 swine each weighing over 25 kilograms (55 pounds)
3,000–10,000 swine each weighing under 25 kilograms (55 pounds)
30,000–100,000 chickens
16,500–55,000 turkeys
150–500 horses
3,000–10,000 sheep or lambs
1,500–5,000 ducks

My AFO is within this size range. PROCEED TO SECTION 3.

My AFO has fewer than the lower threshold number for any animal type so I am not a CAFO under this description. STOP.

My AFO has more than the upper threshold number of animals for any animal type. STOP. PLEASE CONTACT YOUR PERMIT AUTHORITY FOR INFORMATION ON HOW TO APPLY FOR AN NPDES PERMIT.

Section 3. Minimum Requirements

Check all boxes that apply to your operation. If *all* of the following boxes are checked, PROCEED TO SECTION 4.

My production area is not located within 100 feet of waters of the U.S.

There is no direct contact of animals with waters of the U.S. in the production area.

I am currently maintaining properly engineered manure and wastewater storage and containment structures designed to prevent discharge in either a 25-year, 24-hour storm (for beef and dairy facilities) or all circumstances (for all other facilities), in accordance with the effluent guidelines (40 CFR Part 412).

There are no discharges from the production area and there have been no discharges in the past 5 years.

I have not been notified by my State permit authority or EPA that my facility needs an NPDES permit

If any box in this section is *not* checked, you may not use this certification and you must apply for an NPDES permit. STOP. PLEASE CONTACT YOUR PERMIT AUTHORITY FOR MORE INFORMATION.

Section 4. Land Application

A. If all of the boxes in Section 3 are checked, you may be able to certify that you are not a CAFO on the basis of ensuring proper agricultural practices for land application of CAFO manure:

I either do not land apply manure or, if land applying manure, I have, and am implementing, a certified Permit Nutrient Plan (PNP). I maintain a copy of my PNP at my facility, including records of implementation and monitoring; and

B. Check One:

My State has a program for excess manure in which I participate. OR

[Alternative 1: I do not transfer more than 12 tons of manure to any off-site recipients unless they have signed a certification form assuring me that they are either 1) applying manure according to proper agricultural practices; 2) obtaining an NPDES permit for discharges; or 3) transferring manure to other non-land application uses; and] [For Alternative 2, this box is not needed]

I maintain records of recipients, receiving greater than 12 tons of manure annually, and the quantity and dates transferred, and I provide recipients an analysis of the content of the manure as well as information describing the recipients responsibilities for appropriate manure management. If I transfer manure or wastewater to a manure hauler, I also obtain the name and location of the recipients of the manure, if known;

If a box is checked in both subsection A and subsection B above, you may certify that you are not a CAFO. PROCEED TO SECTION 5.

If a box is not checked in both subsection A and subsection B above, you may not use this certification form. STOP. YOU MUST APPLY FOR AN NPDES PERMIT.

Section 5. Certification

I certify that I own or operate the animal feeding operation described herein, and have legal authority to make management decisions about said operation. I certify that

the information provided is true and correct to the best of my knowledge.

I understand that in the event of a discharge to waters of the U.S. from my AFO, I must report the discharge to the Permit Authority and apply for a permit. I will report the discharge by phone within 24 hours, submit a written report within 7 calendar days, and make arrangements to correct the conditions that caused the discharge.

In the event any of these conditions can no longer be met, I understand that my facility is a CAFO and I must immediately apply for a permit. I also understand that I am liable for any unpermitted discharges. This certification must be renewed every 5 years.

I certify under penalty of law that this document either was prepared by me or was prepared under my direction or supervision. Based on my inquiry of the person or persons who gathered the information, the information provided is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Facility Name ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐
Name of Certifier ☐☐☐☐☐☐☐☐☐☐☐☐☐☐
Signature ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐
Date☐☐☐☐☐☐☐☐☐☐☐

Check one: ☐ owner ☐ operator

Name & Address of other entity that exercises substantial operational control of this CAFO:
☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

Address of animal feeding operation:
County:
State:
Latitude/Longitude:
Phone:
Email:
Name of Closest Waters of the U.S.:
Distance to Waters:
Description of closest waters: (e.g. intermittent stream, perennial stream; ground water aquifer): ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐
☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

Where an operation in the 300–1000 AU size range has certified that it meets all of the required conditions to be excluded from the CAFO definition, if at any future point the operation fails to meet one or more of these conditions, it would immediately become defined as a CAFO. Any discharges from the operation at that point would be illegal until the operation obtains a permit. For example, if an operation has certified that it meets all of the conditions for being excluded from the CAFO definition, but then has an actual discharge to the waters (which would be inconsistent with the certification that there is no ''current discharge''), that discharge would be considered to be an unpermitted discharge from a CAFO. Similarly, if an operation at any point no longer has sufficient storage and containment to prevent discharges, it would immediately become a CAFO and be required to apply for a permit (regardless of whether it had any actual discharges).

Constructing the regulations in this way would do two things. First, it would make clear that there is no shield from liability for any operation that falsely certified that it met the conditions to be excluded from regulation. Second, it would make clear that even in cases where an operation has certified to all the required conditions in good faith, there is no protection from the regulatory and permitting requirements if at any point the operation no longer meets those conditions. Operations would be on notice that if they had any doubts about their continued ability to meet the conditions for exclusion, they should decline to ''certify out'' and should apply for a permit.

Alternative Three-tier Structure: Simplified Certification. EPA is requesting comment on a variation of the three-tier structure being co-proposed today. Under this alternative, operations with > 1,000 AU would be subject to the same requirements as under both of today's co-proposed options, and operations between 300 and 1,000 animal units would be defined as CAFOs, required to obtain an NPDES permit, unless they can certify that they do not meet the conditions for definition as a CAFO. However, the conditions for making this certification would be different than those under the proposed three-tier approach, and the substantive permit requirements for operations between 300 and 1,000 AU that do not certify would also be different.

Under this approach, operations between 300 and 1,000 AU, that are not likely to be significant contributors of pollutants, could avoid definition as a CAFO by certifying to a more limited range of factors. The check list would indicate, for example, adequate facility design to contain manure and runoff in up to a 25-year, 24-hour storm, use of appropriate BMPs, and application of manure at agronomic rates. Under this variation, the check list would be designed to minimize both the required information and the substantive operational requirements for these middle tier facilities on the grounds that, because they are smaller size operations, they are less likely to be the type of concentrated, industrial operations that Congress intended to include as CAFOs. So, for example, the check list could allow several alternatives for appropriate manure storage, including cost-effective BMPs such as stacking manure in certain locations or in certain ways to avoid discharge, in lieu of expanded structural storage capacity. Similarly, the indication that manure is applied at agronomic rates could be based on a simple ratio of animals to crop land, or on the use of a more sophisticated screening tool, such as the USDA developed tool described above, but would not necessarily require preparation of a full CNMP by a certified planner. The check list might also include an assurance by the operator that recipients of off-site manure are provided nutrient test results and information on appropriate manure management.

AFOs in this size category that are not able to certify, according to the check list criteria, that they are not likely to be significant contributors of pollutants to waters of the US would be defined as CAFOs and thus required to obtain an NPDES permit. However, the conditions in the permit would not necessarily be the same as those in permits for operations with > 1,000 AU. In particular, the effluent guidelines described in today's proposal would not be applicable to these facilities. Rather, CAFOs in this size category would be required to operate in accordance with BAT, as determined by the best professional judgement (BPJ) of the permit writer. This is the same as the existing requirement for CAFOs in this size category. Or, EPA might promulgate an alternate set of national effluent guidelines for CAFOs in this subcategory. Such effluent guidelines might include zero discharge from the production area in up to a 25-year, 24-hour storm, implementation of a PNP, appropriate BMPs, and appropriate management of manure shipped off-site.

Under this approach, all 26,665 operations between 300 and 1,000 AU would be affected by the rule, just as under the three-tier approach being proposed today. However, EPA expects that a larger number of facilities would be able to avoid definition as a CAFO and the requirement to obtain a permit than under today's proposed approach. EPA has not estimated the number of operations that would be defined as CAFOs under this alternative three-tier approach, but expects that it would be more than 16,420 but fewer than 31,930 (of which some 13,000 would have over 1,000 AU). For those facilities that did receive a permit, compliance would generally be less expensive. This approach was presented to small entity representatives (SERs) during the SBREFA outreach conducted for this rule, and discussed in detail by the Small Business Advocacy Review Panel that conducted the outreach. While some concerns were expressed, the approach was generally received

favorably by both the SERs and the Panel. See the Panel Report (2000) for a complete discussion of the Panel's consideration of this option.

EPA requests comment on this alternative three tier approach. In particular, EPA requests comment on which items should be included in the certification check list, and whether substantive permit requirements for CAFOs in this size category should be left completely up to the BPJ of the permit authority, or based on an alternate set of effluent guidelines, as discussed above. After evaluating public comments, EPA may decide to further explore this option. At that time, EPA would develop and make available for public comment as appropriate a more detailed description of the specific requirements of such an approach, as well as a full analysis of its costs, benefits, and economic impacts. In particular, EPA would add an analysis to the public record of why it would be appropriate to promulgate different effluent guideline requirements, or no effluent guideline requirements, for CAFOs that have between 300 and 1,000 AU as compared to the effluent guidelines for operations with greater than 1,000 AU. This would include an evaluation of whether the available technologies and economic impacts are different for the smaller versus the larger CAFOs.

4. Comparative Analysis

EPA is proposing both the two- and three-tier structures for public comment as they both offer desirable qualities. On the one hand, the two-tier structure is simple and clear, focuses on the larger operations, and provides regulatory relief to smaller businesses. However, it requires permits of all facilities meeting the size threshold. On the other hand, the three-tier structure offers flexibility to States for addressing environmental impacts of AFOs through non-NPDES programs or non-regulatory programs, while focusing the regulation on facilities demonstrating certain risk characteristics. It imposes, however, some degree of burden to all facilities more than 300 AU.

The costs of each of the six alternatives considered by EPA are discussed in Section X of today's proposal, and benefits are discussed in Section XI. Key findings from EPA's analysis are summarized in Table 7–8 for quick reference. See Sections X and XI for full discussions and explanations.

EPA solicits comment on both of today's alternative proposed structures, as well as on the two alternatives discussed above.

EPA is also soliciting comment on whether or not to adopt both the two-tier and the three-tier structures, and to provide a mechanism to allow States to select which of the two alternative proposed structures to adopt in their State NPDES program. Under this option, a State could adopt the structure that best fits with the administrative structure of their program, and that best serves the character of the industries located in their State and the associated environmental problems. This option is viable only if the Agency is able to determine that the two structures provide substantially similar environmental benefits by regulating equivalent numbers of facilities and amounts of manure. Otherwise, States would be in a position to choose a less stringent regulation, contrary to the requirements of the Clean Water Act.

EPA's preliminary assessment is that there appear to be significant differences in the scope of the structures, such that the two-tier structure could be considered less stringent than the three-tier structure, depending upon which structures, criteria and thresholds are selected in the final proposal. As table 7–8 indicates, for example, the co-proposed two-tier structure with a 500 AU threshold would regulated 25,540 operations, whereas the co-proposed three-tier structure would regulate up to 39,320 operations. A two-tier structure with 750 AU would regulate 19,100 operations, whereas the alternative, less stringent, three-tier structure would regulate as few as 16,000 and as many as 32,000. The range of manure covered under these various alternatives ranges from as little as 49% to as much as 72% of all AFO manure. Further, how each animal sector is affected varies with each alternative, with some alternatives being significantly less protective in certain sectors than other alternatives. Section VI of today's preamble provides more information on the affects on each animal sector of various alternatives.

EPA is not able to conclude that the stringency of the two options is equivalent, due to the lack of data and EPA's uncertainty over exactly how many facilities may be subject to regulation under each alternative. Therefore, EPA is not proposing this option. However, EPA seeks comment on the option to allow States to select which of two structures to implement, and requests information on establishing whether two options provide equivalent environmental protection.

TABLE 7–8.—COMPARISON OF REGULATORY ALTERNATIVES FOR SELECT CRITERIA [a]

Criteria	Baseline	2-Tier alternatives			3-Tier alternatives	
	>1000 AU	>750 AU	>500 AU	>300 AU	Proposed	Alternative
Number Operations that will be Required to Obtain a Permit	12,660	19,100	25,540	39,320	[1] 31,930	[2] >16,420
Percentage of Affected Operations Required to Obtain a Permit	3	5	7	11	9	10
Estimated Compliance Costs to CAFOs ($million/year, pre-tax)	605	721	831	980	930	>680
Percentage Manure Covered by Proposed Regulations	49	58	64	72	72	[3] ND

[1] Three-tier Proposed: Number of affected facilities up to 39,320. Number of permitted facilities between 16,000 and 32,000, rounded.
[2] Three-tier Alternative: Number of affected facilities and industry costs are expected to be greater than that estimated for NPDES Scenario 1 (''Status Quo'').
[3] ND = Not Determined.

5. Additional Scenarios Considered But Not Proposed

EPA also considered two other scenarios, which would retain the existing three-tier approach.

a. *Scenario 1: Retain Existing Structure.* One of the alternative regulatory scenarios would incorporate all of today's proposed revisions except those related to the tiered structure for defining which AFOs are CAFOs. In other words, the existing three-tier structure (greater than 1,000 AU; 300 AU to 1,000 AU; fewer than 300 AU) would remain in place, and the conditions for defining the middle tier operations would not change. Thus, as under the existing regulation, mid-sized AFOs (300 AU to 1,000 AU) would be defined as CAFOs only if, in addition to the number of animals confined, they

also meet one of the two specific criteria governing the method of discharge: (1) Pollutants are discharged through a man-made ditch, flushing system, or other similar man-made device; or (2) pollutants are discharged directly into waters of the United States that originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the confined animals.

EPA is not proposing this scenario because these conditions have proven to be difficult to interpret and implement for AFOs in the 300 to 1,000 AU size category, and thus have not facilitated compliance or enforcement, and the scenario does not meet the goal of today's proposal to simplify the NPDES regulation for CAFOs. The two criteria governing method of discharge, e.g., ''man-made device'' and ''stream running through the CAFO,'' are subject to interpretation, and thus difficult for AFO operators in this size range to determine whether or not the permit authority would consider them to be a CAFO. EPA does not believe it is necessary to retain these criteria because all discharges of pollutants from facilities of this size should be considered point source discharges. While the other proposed changes go a long way to improve the effectiveness of the NPDES program for CAFOs, EPA believes the definition criteria for facilities in this size range also need to be amended to make the regulation effective, simple, and enforceable.

b. *Scenario 2: Revised Conditions Without Certification.* The second scenario EPA considered would also retain the existing three-tier structure, and would modify the conditions for defining the middle tier AFOs as CAFOs in the same way that today's proposed three-tier structure does. That is, any AFO that meets the size condition (300 AU to 1,000 AU) would be defined as a CAFO if it met one or more of the following risk-based conditions: (1) Direct contact of animals with waters of the U.S.; (2) insufficient storage and containment at the production area to prevent discharge from reaching waters of the U.S.; (3) evidence of discharge in the last five years; (4) the production area is located within 100 feet of waters of the U.S.; (5) the operator does not have, or is not implementing, a Permit Nutrient Plan; and (6) any manure transported off-site is transferred to recipients of more than twelve tons annually without following proper off-site manure management, described above in the discussion of the three-tier structure (co-proposed with omitting this requirement).

In this scenario, owners or operators of AFOs in the middle tier would not be required to certify to the permit authority that the facility is not a CAFO. However, all facilities that do meet one or more of the conditions would have a duty to apply for an NPDES permit. This scenario is not being proposed because of concerns that there would be no way for the permit authority to know which operations were taking the exemption and which should, in fact, be applying for a permit. The certification scenario provides a measure of assurance to the public, the permit authority, and the facilities' owners or operators, that CAFOs and AFOs are implementing necessary practices to protect water quality.

C. Changes to the NPDES Regulations

In addition to changing the threshold for determining which facilities are CAFOs, EPA is proposing a number of other changes that address how the permitting authority determines whether a facility is an AFO or a CAFO that, therefore, must apply for an NPDES permit. These proposed revisions are discussed in this section and in section D.

1. Change the AFO Definition to Clearly Distinguish Pasture Land

EPA is proposing to clarify the regulatory language that defines the term ''animal feeding operations,'' or AFO, in order to remove ambiguity. See proposed § 122.23(a)(2). The proposed rule language would clarify that animals are not considered to be ''stabled or confined'' when they are in areas such as pastures or rangeland that sustain crops or forage during the entire time animals are present. Other proposed changes to the definition of AFO are discussed below in section 3.e.

To be considered a CAFO, a facility must first meet the AFO definition. AFOs are enterprises where animals are kept and raised in confined situations. AFOs concentrate animals, feed, manure and urine, dead animals, and production operations on a small land area. Feed is brought to the animals rather than the animals grazing or otherwise seeking feed in pastures, fields, or on rangeland. The current regulation [40 CFR 122.23(b)(1)] defines an AFO as a ''lot or facility where animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12 month period; *and where crops, vegetation[,] forage growth, or post-harvest residues are not sustained over any portion of the lot or facility in the normal growing season*'' [emphasis added].

The definition states that animals must be kept on the lot or facility for a minimum of 45 days, in a 12-month period. If an animal is at a facility for any portion of a day, it is considered to be at the facility for a full day. However, this does not mean that the same animals must remain on the lot for 45 consecutive days or more; only that some animals are fed or maintained on the lot or at the facility 45 days out of any 12-month period. The 45 days do not have to be consecutive, and the 12-month period does not have to correspond to the calendar year. For example, June 1 to the following May 31 would constitute a 12-month period.

The definition has proven to be difficult to implement and has led to some confusion. Some CAFO operators have asserted that they are not AFOs under this definition where incidental growth occurs on small portions of the confinement area. In the case of certain wintering operations, animals confined during winter months quickly denude the feedlot of growth that grew during the summer months. The definition was not intended to exclude, from the definition of an AFO, those confinement areas that have growth over only a small portion of the facility or that have growth only a portion of the time that the animals are present. The definition is intended to exclude pastures and rangeland that are largely covered with vegetation that can absorb nutrients in the manure. It is intended to include as AFOs areas where animals are confined in such a density that significant vegetation cannot be sustained over most of the confinement area.

As indicated in the original CAFO rulemaking in the 1970s, the reference to vegetation in the definition is intended to distinguish feedlots (whether outdoor confinement areas or indoor covered areas with constructed floors) from pasture or grazing land. If a facility maintains animals in an area without vegetation, including dirt lots or constructed floors, the facility meets this part of the definition. Dirt lots with nominal vegetative growth while animals are present are also considered by EPA to meet the second part of the AFO definition, even if substantial growth of vegetation occurs during months when animals are kept elsewhere. Thus, in the case of a wintering operation, EPA considers the facility an AFO potentially subject to NPDES regulations as a CAFO. It is not EPA's intention, however, to include within the AFO definition pasture or rangeland that has a small, bare patch of land, in an otherwise vegetated area, that is caused by animals frequently

congregating if the animals are not confined to the area.

The following examples are presented to further clarify EPA's intent. (1) When animals are restricted to vegetated areas as in the case of rotational grazing, they would not be considered to be confined in an AFO if they are rotated out of the area while the ground is still covered with vegetation. (2) If a small portion of a pasture is barren because, e.g., animals congregate near the feed trough in that portion of the pasture, that area is not considered an AFO because animals are not confined to the barren area. (3) If an area has vegetation when animals are initially confined there, but the animals remove the vegetation during their confinement, that area would be considered an AFO. This may occur, for instance, at some wintering operations.

Thus, to address the ambiguities noted above, EPA is proposing to clarify the regulatory language that defines the term ''animal feeding operation'' as follows: ''An animal feeding operation or AFO is a facility where animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period. Animals are not considered to be stabled or confined when they are in areas such as pastures or rangeland that sustain crops or forage growth during the entire time that animals are present. Animal feeding operations include both the production area and land application area as defined below.'' EPA is interested in receiving comments regarding whether the proposed revision to the AFO definition clearly distinguishes confinement areas from pasture land.

2. Proposed Changes to the NPDES Permitting Regulation for Determining Which AFOs are CAFOs

To improve the effectiveness and clarity of the NPDES regulation for CAFOs, EPA is proposing to revise the regulation as discussed in the following sections.

a. *Eliminate the Term ''Animal Unit''.* To remove confusion for the regulated community concerning the definition of the term ''animal unit'' or ''AU,'' EPA is proposing to eliminate the use of the term in the revised regulation. Instead of referring to facilities as having greater or fewer than 500 animal units, for example, EPA will use the term ''CAFO'' to refer to those facilities that are either defined or designated, and all others as ''AFOs.'' However, in the text of today's preamble, the term AU will be used in order to help the reader understand the differences between the existing regulation and today's proposal. If this revision is adopted, the term AU will not be used in the final regulation. Section VII.B, above, lists the numbers of animals in each sector that would be used to define a facility as a CAFO.

EPA received comment on the concept of animal units during the AFO Strategy listening sessions, the small business outreach process, and on comments submitted for the draft CAFO NPDES Permit Guidance and Example Permit. EPA's decision to move away from the concept of ''animal units'' is supported by the inconsistent use of this concept across a number of federal programs, which has resulted in confusion in the regulated community. A common thread across all of the federal programs is the need to normalize numbers of animals across animal types. Animal units have been established based upon a number of different values that include live weight, forage requirements, or nutrient excretion.

USDA and EPA have different ''animal unit'' values for the livestock sectors. Animal unit values used by USDA are live-weight based, and account for all sizes and breeds of animals at a given operation. This is particularly confusing as USDA's animal unit descriptions result in different values in each sector and at each operation.

The United States Department of Interior (Bureau of Land Management and National Park Service) also references the concept of ''animal unit'' in a number of programs. These programs are responsible for the collection of grazing fees for federal lands. The animal unit values used in these programs are based upon forage requirements. For Federal lands an animal unit represents one mature cow, bull, steer, heifer, horse, mule, or five sheep, or five goats, all over six months of age. An animal unit month is based on the amount of forage needed to sustain one animal unit for one month. Grazing fees for Federal lands are charged by animal unit months.

In summary, using the total number of head that defines an operation as a CAFO will minimize confusion with animal unit definitions established by other programs. See tables 7–6 and 7–7 above.

b. *How Will Operations With Mixed Animal Types be Counted?* EPA is proposing to eliminate the existing mixed animal provision, which currently requires an operator to add the number of animal units from all animal sectors at the facility when determining whether it is a CAFO. (Poultry is currently excluded from this mixed animal type calculation). While the mixed calculation would be eliminated, once the number of animals from one sector (e.g. beef, dairy, poultry, swine, veal) of one type cause an operation to be defined as a CAFO, manure from all confined animal types at the facility would be covered by the permit conditions. In the event that waste streams from multiple livestock species are commingled, and the regulatory requirements for each species are not equivalent, the permit must apply the more stringent requirements.

In the existing regulation, a facility with 1,000 animal units or the cumulative number of mixed animal types which exceeds 1,000, is defined as a CAFO. Animal unit means a unit of measurement for any animal feeding operation calculated by adding the following numbers: the number of slaughter and feeder cattle multiplied by 1.0, plus the number of mature dairy cattle multiplied by 1.4, plus the number of swine weighing over 25 kilograms (approximately 55 pounds) multiplied by 0.4, plus the number of sheep multiplied by 0.1, plus the number of horses multiplied by 2.0. As mentioned, poultry operations are excluded from this mixed unit calculation as the current regulation simply stipulates the number of birds that define the operation as a CAFO, and assigns no multiplier.

Because simplicity is one objective of these proposed regulatory revisions, the Agency believes that either all animal types, including poultry, covered by the effluent guidelines and NPDES regulation should be included in the formula for mixed facilities, or EPA should eliminate the facility multipliers from the revised rule. Today's rulemaking proposes changes that would have to be factored in to a revised mixed animal calculation which would make the regulation more complicated to implement. For example, EPA is proposing to cover additional animal types (dry chicken operations, immature swine and heifer operations). Thus, EPA is proposing to eliminate the mixed operation calculation rather than revise it and create a more complicated regulation to implement that would potentially bring smaller farms into regulation.

EPA believes that the effect of this proposed change would be sufficiently protective of the environment while maintaining a consistently enforceable regulation. EPA estimates 25 percent of AFOs with less than 1,000 AU have multiple animal types present simultaneously at one location, and only a small fraction of these AFOs would be CAFOs exceeding either 300 AU or 500 AU when all animal types are

counted. EPA also believes that few large AFOs possess mixed animals due to the increasingly specialized nature of livestock and poultry production. Therefore, EPA believes that a rule which required mixed animal types to be part of the threshold calculation to determine if a facility is a CAFO would result in few additional operations meeting the definition of a CAFO. In addition, most facilities with mixed animal types tend to be much smaller, and tend to have more traditional, oftentimes more sustainable, production systems. These farms tend to be less specialized, engaging in both animal and crop production. They often have sufficient cropland and fertilizer needs to land apply manure nutrients generated at the farm's livestock or poultry business. Nevertheless, should such an AFO be found to be a significant contributor of pollution to waters of the U.S., it could be designated a CAFO by the permit authority.

EPA is, therefore, proposing to eliminate the mixed animal calculation in determining which AFOs are CAFOs. Once an operation is a CAFO for any reason, manure from all confined animal types at the facility is subject to the permit requirements. EPA is requesting comment on the number of operations that could potentially have the equivalent of 500 AU using the mixed calculation that would be excluded from regulation under this proposal.

c. *Is an AFO Considered a CAFO if it Only Discharges During a 25-Year, 24-Hour Storm?* EPA is proposing to eliminate the 25-year, 24-hour storm event exemption from the CAFO definition (40 CFR 122.23, Appendix B), thereby requiring any operation that meets the definition of a CAFO either to apply for a permit or to establish that it has no potential to discharge. Under the proposed three-tier structure an operation with 300 AU to 1,000 AU may certify that it is not a CAFO if it is designed, constructed, and maintained in accordance with today's effluent guidelines and it does not meet any of the risk-based conditions. See Section VII.B.2.

The existing NPDES definition of a CAFO provides that ''no animal feeding operation is a concentrated animal feeding operation * * * as defined above * * * if such animal feeding operation discharges only as the result of a 25-year, 24-hour storm event'' (40 CFR § 122.23, Appendix B). This provision applies to AFOs with 300 AU or more that are defined as CAFOs under the existing regulation. (Facilities of any size that are CAFOs by virtue of designation are not eligible for this exemption because, by the terms of designation, it does not apply to them. Moreover, they have been determined by the permit authority to be a significant contributor of pollution to waters of the U.S.)

The 25-year, 24-hour standard is an engineering standard used for construction of storm water detention structures. The term ''25-year, 24-hour storm event'' means the maximum 24-hour precipitation event with a probable recurrence of once in 25 years, as defined by the National Weather Service (NWS) in Technical Paper Number 40 (TP40), ''Rainfall Frequency Atlas of the United States,'' May 1961, and subsequent amendments, or by equivalent regional or State rainfall probability information developed therefrom. [40 CFR Part 412.11(e)]. (Note that the NWS is updating some of the Precipitation Frequency Publications, including part of the TP40. In 1973, the National Atmospheric and Oceanic Administration (NOAA) issued the NOAA Atlas 2, Precipitation Frequency Atlas of the Western United States. The Atlas is published in a separate volume for each of the eleven western states. An update for four of the State volumes is currently being conducted. In addition, the NWS is updating TP40 for the Ohio River Basin which covers a significant portion of the eastern U.S. The updates will reflect more than 30 years of additional data and will benefit from NWS enhanced computer capabilities since the original documents were generated almost 40 years ago.) As discussed further in section VIII, the 25-year, 24-hour storm event also is used as a standard in the effluent limitation guideline.

The circularity of the 25-year, 24-hour storm event exemption in the existing CAFO definition has created confusion that has led to difficulties in implementing the NPDES regulation. The effluent guidelines regulation, which is applicable to permitted CAFOs, requires that CAFOs be designed and constructed to contain such an event. However, the NPDES regulations allows facilities that discharge only as a result of such an event to avoid obtaining a permit. This exemption has resulted in very few operations actually obtaining NPDES permits, which has hampered implementation of the NPDES program. While there are an estimated 12,000 AFOs likely to meet the current definition of a CAFO, only about 2,500 such facilities have obtained an NPDES permit. Many of these unpermitted facilities may incorrectly believe they qualify for the 25-year, 24-hour storm permitting exemption. These unpermitted facilities operate outside the current NPDES program, and State and EPA NPDES permit authorities lack the basic information needed to determine whether or not the exemption has been applied correctly and whether or not the CAFO operation is in compliance with NPDES program requirements.

EPA does not believe that the definition as a CAFO should hinge on whether an AFO only discharges pollutants due to a 25-year, 24-hour storm event. Congress clearly intended for concentrated animal feeding operations to be subject to NPDES permits by explicitly naming CAFOs as point sources in the Clean Water Act Section 502(14). Further, Section 101(a) of the Act specifically states that elimination of discharges down to zero is to be achieved where possible, and EPA does not believe that facilities should avoid the regulatory program altogether by merely claiming that they meet the 25-year, 24-hour criterion. This issue is discussed further below in section VII.C.2(c).

The public has expressed widespread concern regarding whether some of these currently unpermitted facilities are, in fact, entitled to this exemption. Based on comments EPA has received in a variety of forums, including during the AFO Strategy listening sessions and on the draft CAFO permit guidance, EPA believes there is a strong likelihood that many of these facilities are discharging pollutants to waters of the U.S. EPA is concerned that, in applying the 25-year, 24-hour storm exemption, operations are not now taking into consideration runoff from their production areas, or are improperly interpreting which discharges are the result of 25-year 24-hour storms and chronic rainfall which may result in breaches and overflows of storage systems, all of which cause pollution to enter waters of the U.S. Additionally, facilities may not be considering discharges from improper land application of manure and wastewater.

EPA is today proposing to eliminate the 25-year, 24-hour storm exemption from the CAFO definition (40 CFR 122.23, Appendix B) in order to: (a) Ensure that all CAFOs with a potential to discharge are appropriately permitted; (b) ensure through permitting that facilities are, in fact, properly designed, constructed, and maintained to contain a 25-year, 24-hour storm event, or to meet a zero discharge requirement, as the case may be; (c) improve the ability of EPA and State permit authorities to monitor compliance; (d) ensure that facilities do

not discharge pollutants from their production areas or from excessive land application of manure and wastewater; (e) make the NPDES permitting provision consistent with today's proposal to eliminate the 25-year, 24-hour storm design standard from the effluent guidelines for swine, veal and poultry; and (f) achieve EPA's goals of simplifying the regulation, providing clarity to the regulated community, and improving the consistency of implementation.

Under the proposed two-tier structure, any facility that is defined as a CAFO would be a CAFO even if it only discharges in the event of a 25-year, 24-hour storm. Further, the CAFO operator would be required to apply for an NPDES permit, as discussed below regarding the duty to apply for a NPDES permit. (If the operator believes the facility never discharges, the operator could request a determination of no potential to discharge, as discussed below.) Under the three-tier structure a facility with 300 AU to 1,000 AU would be required to either certify it is not a CAFO, to apply for a permit, or demonstrate it has no potential to discharge. Today's effluent guidelines proposal would retain the design specification for beef or dairy facilities, which would allow a permitted facility to discharge due to a 25-year, 24-hour event, as long as the facility's containment system is designed, constructed and operated to handle manure and wastewater plus precipitation from a 25-year, 24-hour storm event (unless a permit writer imposed a more stringent, water quality-based effluent limitation). However, a facility that meets the definition of CAFO and discharges during a 25-year, 24-hour storm event, but has failed to apply for an NPDES permit (or to certify in the three-tier structure), would be subject to enforcement for violating the CWA. Swine, veal and poultry CAFOs would be required to achieve a zero discharge standard at all times.

EPA considered limiting this change to the very largest CAFOs (e.g., operations with 1,000 or more animal units), and retaining the exemption for smaller facilities. However, EPA is concerned that this could allow significant discharges resulting from excessive land application of manure and wastewater to remain beyond the scope of the NPDES permitting program, thereby resulting in ongoing discharge of CAFO-generated pollutants into waters of the U.S. Moreover, EPA believes that retaining the exemption for certain operations adds unnecessary complexity to the CAFO definition.

The Small Business Advocacy Review Panel also considered the idea of removing the 25-year, 24-hour exemption. While the Panel agreed that this was generally appropriate for operations above the 1,000 AU threshold, it was divided on whether it would also be appropriate to remove the exemption for facilities below this threshold. The Panel noted that for some such facilities, removing the exemption would not expand the scope of the current regulation, but rather ensure coverage for facilities that should already have obtained a permit. However, the Panel also recognized that eliminating the exemption would require facilities that *do* properly quality for it—e.g., because they do have sufficient manure management and containment in place, or for some other reason, do not discharge except in a 25-year, 24-hour storm—to obtain a permit or certify that none is needed. The Panel recommended that EPA carefully weigh the costs and benefits of removing the exemption for small entities and that it fully analyze the incremental costs associated with permit applications for those facilities not presently permitted that can demonstrate that they do not discharge in less than a 25-year, 24-hour storm event, as well as any costs associated with additional conditions related to land application, nutrient management, or adoption of BMPs that the permit might contain. The Panel further recommended that EPA consider reduced application requirements for small operators affected by the removal of the exemption. The Agency requests comment on whether to retain this exemption for small entities and at what animal unit threshold would be appropriate for doing so.

d. *Who Must Apply for and Obtain an NPDES Permit?* EPA is proposing today to adopt regulations that would expressly require all CAFO owners or operators to apply for an NPDES permit. See proposed § 122.23(c). That is, owners or operators of all facilities defined or designated as CAFOs would be required to apply for an NPDES permit. The existing regulations contain a general duty to apply for a permit, which EPA believes applies to virtually all CAFOs. The majority of CAFO owner or operators, however, have not applied for an NPDES permit. Today's proposed revisions would clarify that all CAFOs owners or operators must apply for an NPDES permit; however, if he or she believes the CAFO does not have a potential to discharge pollutants to waters of the U.S. from either its production area or its land application area(s), he or she could make a no potential discharge demonstration to the permit authority in lieu of submitting a full permit application. If the permit authority agrees that the CAFO does not have a potential to discharge, the permit authority would not need to issue a permit. However, if the unpermitted CAFO does indeed discharge, it would be violating the CWA prohibition against discharging without a permit and would be subject to civil and criminal penalties. Thus, an unpermitted CAFO does not get the benefit of the 25-year, 24-hour storm standard established by the effluent guidelines for beef and dairy, nor does it have the benefit of the upset and bypass affirmative defenses.

The duty to apply for a permit under existing regulations. EPA believes that virtually all facilities defined as CAFOs already have a duty to apply for a permit under the current NPDES regulations, because of their past or current discharges or potential for future discharge. Under NPDES regulations at 40 CFR Part 122.21(a), any person who discharges or proposes to discharge pollutants to the waters of the United States from a point source is required to apply for an NPDES permit. CAFOs are point sources by definition, under § 502 of the CWA and 40 CFR 122.2. Thus, any CAFO that ''discharges or proposes to discharge'' pollutants must apply for a permit.

Large CAFOs with greater than 1,000 AU pose a risk of discharge in a number of different ways. For example, a discharge of pollutants to surface waters can occur through a spill from the waste handling facilities, from a breach or overflow of those facilities, or through runoff from the feedlot area. A discharge can also occur through runoff of pollutants from application of manure and associated wastewaters to the land or through seepage from the production area to ground water where there is a direct hydrologic connection between ground water and surface water. Given the large volume of manure these facilities generate and the variety of ways they may discharge, and based on EPA's and the States' own experience in the field, EPA believes that all or virtually all large CAFOs have had a discharge in the past, have a current discharge, or have the potential to discharge in the future. A CAFO that meets any one of these three criteria would be a facility that ''discharges or proposes to discharge'' pollutants and would therefore need to apply for a permit under the current regulations.

Where CAFO has not discharged in the past, does not now discharge pollutants, and does not expect to discharge pollutants in the future, EPA

believes that the owner or operator of that facility should demonstrate during the NPDES permit application process that it is, in fact, a ''no discharge'' facility. See proposed § 122.23(e). EPA anticipates that very few large CAFOs will be able to successfully demonstrate that they do not discharge pollutants and do not have a reasonable potential to discharge in the future, and furthermore, that very few large CAFOs will wish to forego the protections of an NPDES permit. For instance, only those beef and dairy CAFOs with an NPDES permit will be authorized to discharge in a 25-year, 24-hour storm.

EPA also believes that a CAFO owner or operator's current obligation to apply for an NPDES permit is based not only on discharges from the feedlot area but also on discharges from the land application areas under the control of the CAFO operator. More specifically, discharges of CAFO-generated manure and/or wastewater from such land application areas should be viewed as discharges from the CAFO itself for the purpose of determining whether it has a potential to discharge. EPA recognizes, however, that it has not previously defined CAFOs to include the land application area. EPA is proposing to explicitly include the land application area in the definition of a CAFO in today's action.

The need for a clarified, broadly applicable duty to apply. EPA believes that virtually all large CAFOs have had a past or current discharge or have the potential to discharge in the future, and that meeting any one of these criteria would trigger a duty to apply for a permit. Today, EPA is proposing to revise the regulations by finding that, as a rebuttable presumption, all CAFOs do have a potential to discharge and, therefore, are required to apply for and to obtain an NPDES permit unless they can demonstrate that they will not discharge. See proposed § 122.23(c). (See section VII(F)3 for a fuller discussion on demonstrating ''no potential to discharge.'')

EPA has not previously sought to categorically adopt a duty to apply for an NPDES permit for all facilities within a particular industrial sector. The Agency is proposing today to do so for CAFOs for reasons that involve the unique characteristics of CAFOs and the zero discharge regulatory approach that applies to them.

First, as noted, since the inception of the NPDES permitting program in the 1970s, a relatively small number of larger CAFOs has actually sought permits. Information from State permit authorities and EPA's own regional offices indicates that, currently, approximately 2,500 CAFOs have NPDES permits out of approximately 12,000 CAFOs with greater than 1,000 AU.

EPA believes there are a number of reasons why so few CAFOs have sought NPDES permits over the years. The primary reason appears to be that the definition of a CAFO in the current regulations (as echoed in the regulations of some State programs) excludes animal feeding operations that do not discharge at all or discharge only in the event of a 25-year, 24-hour storm. [40 CFR 122.23, Appendix B]. Based on the existing regulation, many animal feeding operations that claim to be ''zero dischargers'' believe that they are not subject to NPDES permitting because they are excluded from the CAFO definition and thus are not CAFO point sources.

EPA believes that many of the facilities that have relied on this exclusion from the CAFO definition may have misinterpreted this provision. It excludes facilities from the CAFO definition only when they neither discharge pollutants nor have the potential to discharge pollutants in a 25-year, 24-hour storm. In fact, as explained above, a facility that has at least a potential to discharge pollutants (and otherwise meets the CAFO definition) not only is defined as a CAFO but also has a duty to apply for an NPDES permit, regardless of whether it actually discharges. (40 CFR 122.21(a)). Thus, many facilities that have at least a potential to discharge manure and wastewaters may have avoided permitting based on an incorrect reliance on this definitional exclusion.

To compound the confusion under the current regulations, EPA believes, there has been misinterpretation surrounding the issue of discharges from a CAFO's land application areas. As EPA has explained in section VII.D of today's notice, runoff from land application of CAFO manure is viewed as a discharge from the CAFO point source itself. Certain operations may have claimed to be ''zero dischargers'' when in fact they were not, and are not, zero dischargers when runoff from their land application areas is taken into account.

Another category of operations that may have improperly avoided permitting are those that have had a past discharge of pollutants, and are not designed and operated to achieve zero discharge except in a 25-year, 24-hour storm event. Many of these facilities may have decided not to seek a permit because they believe they will not have any future discharges. However, as explained above, an operation that has had a past discharge of pollutants is covered by the NPDES permitting regulations in the same way as operations that have a ''potential'' to discharge—*i.e.,* it is not only defined as a CAFO (where it meets the other elements of the definition) but is required to apply for a permit [Carr v. Alta Verde Industries, Inc., 931 F.2d 1055 (5th Cir. 1991)]. Facilities that have had a past discharge meet the criteria of § 122.21(a), in EPA's view, both as ''dischargers'' and as operations that have the potential for further discharge. Accordingly, they are required to apply for an NPDES permit. Misinterpretation regarding the need to apply for a permit may also have occurred in cases where the past discharges were from land application runoff, as explained above.

Finally, the nature of these operations is that any discharges from manure storage structures to waters of the U.S. are usually only intermittent, either due to accidental releases from equipment failures or storm events or, in some cases, deliberate releases such as pumping out lagoons or pits. The intermittent nature of these discharges, combined with the large numbers of animal feeding operations nationwide, makes it very difficult for EPA and State regulatory agencies to know where discharges have occurred (or in many cases, where animal feeding operations are even located), given the limited resources for conducting inspections. In this sense, CAFOs are distinct from typical industrial point sources subject to the NPDES program, such as manufacturing plants, where a facility's existence and location and the fact that it is discharging wastewaters at all is usually not in question. Accordingly, it is much easier for CAFOs to avoid the permitting system by not reporting their discharges, and there is evidence that such avoidances have taken place.

In sum, EPA believes it is very important in these regulatory revisions to ensure that all CAFOs have a duty to apply for an NPDES permit, including those facilities that currently have a duty to apply because they meet the definition of CAFO under the existing regulations and those facilities which would meet the proposed revised definition of CAFO. Two of the revisions that EPA is proposing today to other parts of the CAFO regulations would themselves significantly address this matter. First, EPA is proposing to eliminate the 25-year, 24-hour storm exemption from the definition of a CAFO. Operations would no longer be able to avoid being defined as CAFO point sources subject to permitting on

the basis that they do not discharge or discharge only in the event of a 25-year, 24-hour storm. Second, EPA is proposing to clarify that land application areas are part of the CAFO and any associated discharge from these areas is subject to permitting.

While these two proposed changes would help address the ''duty to apply'' issue, EPA does not believe they would go far enough. Even with eliminating the 25-year, 24-hour storm exemption from the CAFO definition, EPA is concerned that operations would still seek to avoid permitting by claiming they are ''zero dischargers.'' Specifically, EPA has encountered a further zero discharge conundrum: A facility claims that by controlling its discharge down to zero—the very level that a permit would require—it has effectively removed itself from CWA jurisdiction, because the CWA simply prohibits discharging without a permit, so a facility that does not discharge does not need a permit. EPA believes this would be an incorrect reading of the CWA and would not be a basis for claiming an exemption from permitting (as explained directly below). Therefore, it is important to clarify in the regulations that even CAFOs that claim to be zero dischargers must apply for a permit.

To round out the basis for this proposed revision, EPA is proposing a regulatory presumption in the regulations that all CAFOs have a potential to discharge to the waters such that they should be required to apply for a permit. EPA believes this would be a reasonable presumption on two grounds. First, the Agency believes this is reasonable from a factual standpoint, as is fully discussed in section V of today's preamble.

This factual finding would become even more compelling under today's proposals to eliminate the 25-year, 24-hour storm exemption from the CAFO definition and to clarify that discharges from on-site land application areas, are considered CAFO point source discharges. If these two proposals were put in place, EPA believes, many fewer operations would be claiming that they do not discharge.

Second, a presumption that all CAFOs have a potential to discharge would be reasonable because of the need for clarity on the issues described above and the historical inability under the current regulations to effectuate CAFO permitting. Under today's proposal, the duty would be for each CAFO to apply for a permit, not necessarily to obtain one. A CAFO that believes it does not have a potential to discharge could seek to demonstrate as much to the permitting authority in lieu of submitting a full permit application. (To avoid submitting a completed permit application, a facility would need to receive a ''no potential to discharge'' determination from the permit authority prior to the deadline for applying for a permit. See section VII.F.3 below.) If the demonstration were successful, the permitting authority would not issue a permit. Therefore, the duty to apply would be based on a rebuttable presumption that each facility has a potential to discharge. Without this rebuttable presumption, EPA believes it could not effectuate proper permitting of CAFOs because of operations that would claim to be excluded from the CWA because they do not discharge.

CWA authority for a duty to apply. In pre-proposal discussions, some stakeholders have questioned EPA's authority under the Clean Water Act to impose a duty for all CAFOs to apply for a permit. EPA believes that the CWA does provide such authority, for the following reasons.

Section 301(a) of the CWA says that no person may discharge without an NPDES permit. The Act is silent, however, on the requirement for permit applications. It does not explicitly require anyone to apply for a permit, as some stakeholders have pointed out. But neither does the Act expressly prohibit EPA from requiring certain facilities to submit an NPDES permit application or from issuing an NPDES permit without one. Section 402(a) of the Act says simply that the Agency may issue an NPDES permit after an opportunity for public hearing.

Indeed, finding that EPA could not require permitting of CAFOs would upset the legislative scheme and render certain provisions of the Act meaningless. Section 301(b)(2)(A), which sets BAT requirements for existing sources and thus is at the heart of the statutory scheme, states that EPA shall establish BAT standards that ''require the elimination of discharges of all pollutants if the Administrator finds * * * that such elimination is technologically and economically achievable.* * *'' In other words, Congress contemplated that EPA could set effluent standards going down to zero discharge where appropriate. Section 306, concerning new sources, contains similar language indicating that zero discharge may be an appropriate standard for some new sources. Section 402 puts these standards into effect by requiring EPA to issue NPDES permits that apply these standards and ensure compliance with them. Thus, the Act contemplates the issuance of NPDES permits that require zero discharge. These provisions are underscored by Section 101(a) of the Act, which sets a national goal of not just reducing but eliminating the discharge of pollutants to the waters.

This statutory scheme would be negated if facilities were allowed to avoid permitting by claiming that they already meet a zero discharge standard that is established in the CAFO regulations and that a permit would require. Issuing a zero discharge standard would be an act of futility because it could not be implemented through a permit. Under a contrary interpretation, a CAFO could repeatedly discharge and yet avoid permitting by claiming that it does not intend to discharge further. EPA does not believe that Congress intended to tie the Agency's hands in this manner. To be sure, in no other area of the NPDES program are industrial operations allowed to avoid permitting by claiming that they already meet the limits that a permit would require. That would be a plainly wrong view of the Act; Section 301(a) states unequivocally that no person may discharge at all without a permit. The Act does not contemplate a different system for facilities that are subject to a zero discharge standard, and it is the unique nature of the zero discharge standard that makes it appropriate for EPA to require CAFOs to apply for permits.

EPA also finds authority to require NPDES permit applications from CAFOs in Section 308 of the Act. Under Section 308, the Administrator may require point sources to provide information ''whenever required to carry out the objective of this chapter,'' for purposes, among other things, of determining whether any person is in violation of effluent limitations, or to carry out Section 402 and other provisions. Because EPA proposes a presumption that all CAFOs have a potential to discharge pollutants, it is important, and within EPA's authority, to collect information from CAFOs in order to determine if they are in violation of the Act or otherwise need a permit.

EPA solicits comment on the proposed duty to apply.

e. *The Definitions of AFO and CAFO Would Include the Land Areas Under the Control of the Operator on Which Manure is Applied.* In today's proposal, EPA defines an AFO to include both the animal production areas of the operation and the land areas, if any, under the control of the owner or operator, on which manure and associated waste waters are applied. See proposed § 122.23(a)(1). The definition of a CAFO is based on the AFO definition and thus would include the

land application areas as well. Accordingly, a CAFO's permit would include requirements to control not only discharges from the production areas but also those discharges from the land application areas. Under the existing regulations, discharges from a CAFO's land application areas that result from improper agricultural practices are already considered to be discharges from the CAFO and therefore, are subject to the NPDES permitting program. However, EPA believes it would be helpful to clarify the regulations on this point.

By the term ''production area,'' EPA means the animal confinement areas, the manure storage areas (e.g. lagoon, shed, pile), the feed storage areas (e.g., silo, silage bunker), and the waste containment areas (e.g., berms, diversions). The land application areas include any land to which a CAFO's manure and wastewater is applied (e.g., crop fields, fields, pasture) that is under the control of the CAFO owner or operator, whether through ownership or a lease or contract. The land application areas do not include areas that are not under the CAFO owner's or operator's control. For example, where a nearby farm is owned and operated by someone other than the CAFO owner or operator and the nearby farm acquires the CAFO's manure or wastewater, by contract or otherwise, and applies those wastes to its own crop fields, those crop fields are not part of the CAFO.

The definition of an AFO under the existing regulations refers to a ''lot or facility'' that meets certain conditions, including that ''[c]rops, vegetation[,] forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.'' 40 CFR 122.23(b)(1). In addition, the regulations define ''discharge of a pollutant'' as the addition of any pollutant to waters of the United States from any point source. 40 CFR 122.2. EPA interprets the current regulations to include discharges of CAFO-generated manure and wastewaters from improper land application to areas under the control of the CAFO as discharges from the CAFO itself. Otherwise, a CAFO could simply move its wastes outside the area of confinement, and over apply or otherwise improperly apply those wastes, which would render the CWA prohibition on unpermitted discharges of pollutants from CAFOs meaningless. Moreover, the pipes and other manure-spreading equipment that convey CAFO manure and wastewaters to land application areas under the control of the CAFO are an integral part of the CAFO. Under the existing regulations, this equipment should be considered part of the CAFO, and discharges from this equipment that reach the waters of the United States as a result of improper land application should be considered discharges from the CAFO for this reason as well. In recent litigation brought by citizens against a dairy farm, a federal court reached a similar conclusion. *See* CARE v. Sid Koopman Dairy, et al., 54 F. Supp. 2d 976 (E.D. Wash., 1999).

One of the goals of revising the existing CAFO regulations is to make the regulations clearer and more understandable to the regulated community and easier for permitting authorities to implement. EPA believes that amending the definition of an AFO (and, by extension, CAFO) to expressly include land application areas will help achieve this clarity and will enable permitting authorities to both more effectively implement the proposed effluent guidelines and to more effectively enforce the CWA's prohibition on discharging without a permit. It would be clear under this revision that the term ''CAFO'' means the entire facility, including land application fields and other areas under the CAFO's control to which it applies its manure and wastewater. By proposing to include land application areas in the definition of an AFO, and therefore, a CAFO, discharges from those areas would, by definition, be discharges from a point source—i.e., the CAFO. There would not need to be a separate showing of a discernible, confined, and discrete conveyance such as a ditch.

While the CWA includes CAFOs within the definition of a point source, it does not elaborate on what the term CAFO means. EPA has broad discretion to define the term CAFO. Land application areas are integral parts of many or most CAFO operations. Land application is typically the end point in the cycle of manure management at CAFOs. Significant discharges to the waters in the past have been attributed to the land application of CAFO-generated manure and wastewater. EPA does not believe that Congress could have intended to exclude the discharges from a CAFO's land application areas from coverage as discharges from the CAFO point source. Moreover, defining CAFOs in this way is consistent with EPA's effluent limitations guidelines for other industries, which consider on-site waste treatment systems to be part of the production facilities in that the regulations restrict discharges from the total operation. Thus, it is reasonable for EPA to revise the regulations by including land application areas in the definition of an AFO and CAFO.

While the proposal would include the land application areas as part of the AFO and CAFO, it would continue to count only those animals that are confined in the production area when determining whether a facility is a CAFO.

EPA is also considering today whether it is reasonable to interpret the agricultural storm water exemption as not applicable to any discharges from CAFOs. See section VII.D.2. If EPA were to adopt that interpretation, all discharges from a CAFO's land application areas would be subject to NPDES requirements, regardless of the rate or manner in which the manure has been applied to the land.

Please refer to section VII.D for a full discussion of land application, including EPA's proposal with regard to land application of CAFO manure by non-CAFOs.

EPA is requesting comment on this approach.

f. *What Types of Poultry Operations are CAFOs?* EPA is proposing to revise the CAFO regulations to include all poultry operations with the potential to discharge, and to establish the threshold for AFOs to be defined as CAFOs at 50,000 chickens and 27,500 turkeys. See proposed § 122.23(a)(3)(i)(H) and (I). The proposed revision would remove the limitation on the type of manure handling or watering system employed at laying hen and broiler operations and would, therefore, address all poultry operations equally. This approach would be consistent with EPA's objective of better addressing the issue of water quality impacts associated with both storage of manure at the production area and land application of manure while simultaneously simplifying the regulation. The following discussion focuses on the revisions to the threshold for chickens under each of the co-proposed regulatory alternatives.

The existing NPDES CAFO definition is written such that the regulations only apply to laying hen or broiler operations that have continuous overflow watering or liquid manure handling systems (i.e.,''wet'' systems). (40 CFR Part 122, Appendix B.) EPA has interpreted this language to include poultry operations in which dry litter is removed from pens and stacked in areas exposed to rainfall, or piles adjacent to a watercourse. These operations may be considered to have established a crude liquid manure system (see 1995 NPDES Permitting Guidance for CAFOs). The existing CAFO regulations also specify different thresholds for determining which AFOs

are CAFOs depending on which of these two types of systems the facility uses (e.g., 100,000 laying hens or broilers if the facility has continuous overflow watering; 30,000 laying hens or boilers if the facility has a liquid manure system). When the NPDES CAFO regulations were promulgated, EPA selected these thresholds because the Agency believed that most commercial operations used wet systems (38 FR 18001, 1973).

In the 25 years since the CAFO regulations were promulgated, the poultry industry has changed many of its production practices. Many changes to the layer production process have been instituted to keep manure as dry as possible. Consequently, the existing effluent guidelines do not apply to many broiler and laying hen operations, despite the fact that chicken production poses risks to surface water and ground water quality from improper storage of dry manure, and improper land application. It is EPA's understanding that continuous overflow watering has been largely discontinued in lieu of more efficient watering methods (i.e., on demand watering), and that liquid manure handling systems represent perhaps 15 percent of layer operations overall, although in the South approximately 40 percent of operations still have wet manure systems.

Despite the CAFO regulations, nutrients from large poultry operations continue to contaminate surface water and ground water due to rainfall coming in contact with dry manure that is stacked in exposed areas, accidental spills, etc. In addition, land application remains the primary management method for significant quantities of poultry litter (including manure generated from facilities using ''dry'' systems). Many poultry operations are located on smaller parcels of land in comparison to other livestock sectors, oftentimes owning no significant cropland or pasture, placing increased importance on the proper management of the potentially large amounts of manure that they generate. EPA also believes that all types of livestock operations should be treated equitably under the revised regulation.

As documented in the Environmental Impact Assessment, available in the rulemaking Record, poultry production in concentrated areas such as in the Southeast, the Delmarva Peninsula in the mid-Atlantic, and in key Midwestern States has been shown to cause serious water quality impairments. For example, the Chesapeake Bay watershed's most serious water quality problem is caused by the overabundance of nutrients (e.g. nitrogen and phosphorus). EPA's Chesapeake Bay Program Office estimates that poultry manure is the largest source of excess nitrogen and phosphorous reaching the Chesapeake Bay from the lower Eastern Shore of Maryland and Virginia, sending more than four times as much nitrogen into the Bay as leaky septic tanks and runoff from developed areas, and more than three times as much phosphorus as sewage treatment plants. These discharges of nutrients result from an over-abundance of manure relative to land available for application, as well as the management practices required to deal with the excess manure. The State of Maryland has identified instances where piles of chicken litter have been stored near ditches and creeks that feed tributaries of the Bay. Soil data also suggest that in some Maryland counties with poultry production the soils already contain 90 percent or more of the phosphorus needed by crops. The State of Maryland has surveyed the Pocomoke, Transquaking, and Manokin river systems and has concluded that 70–87 percent of all nutrients reaching those waters came from farms (though not all from AFOs). Based on EPA data, phosphorus concentrations in the Pocomoke Sound have increased more than 25 percent since 1985, suffocating sea grasses that serve as vital habitat for fish and crabs. In 1997, poultry operations were found to be a contributing cause of Pfiesteria outbreaks in the Pokomoke River and Kings Creek (both in Maryland) and in the Chesapeake Bay, in which tens of thousands of fish were killed. Other examples of impacts from poultry manure are discussed in section V of today's proposal.

Dry manure handling is the predominant practice in the broiler and other meat type chicken industries. Birds are housed on dirt or concrete floors that have been covered with a bedding material such as wood shavings. Manure becomes mixed with this bedding to form a litter, which is removed from the house in two ways. After each flock of birds is removed from the house a portion of litter, referred to as cake, is removed. Cake is litter that has become clumped, usually below the watering system, although it can also be formed by a concentration of manure. In addition, the operator also removes all of the litter from the house periodically. The frequency of the ''whole house'' clean-out varies but commonly occurs once each year, unless a breach of biosecurity is suspected.

Broiler operations generally house between five and six flocks of birds each year, which means there are between five or six ''cake-outs'' each year. Roasters have fewer flocks, and small fryers have more flocks, but the volume of ''cake-out'' removed in a year is comparable. ''Cake-outs'' will sometimes occur during periods when it is not possible to land apply the litter (e.g. in the middle of the growing season or during the winter when field conditions may not be conducive to land application). Consequently, it is usually necessary to store the dry litter after removal until it can be land applied.

Depending on the time of year it occurs, ''whole house'' clean-out may also require the operator to store the dry manure until it can be land applied. If the manure is stored in open stockpiles over long periods of time, usually greater than a few weeks, runoff from the stockpile may contribute pollutants to surface water and/or ground water that is hydrologically connected to surface water.

The majority of egg laying operations use dry manure handling, although there are operations with liquid manure handling systems. Laying hens are kept in cages and manure drops below the cages in both dry and liquid manure handling systems. Most of the dry manure operations are constructed as high rise houses where the birds are kept on the second floor and the manure drops to the first floor, which is sometimes referred to as the pit. Ventilation flows through the house from the roof down over the birds and into the pit over the manure before it is forced out through the sides of the house. The ventilation dries the manure as it piles up into cones. Manure can usually be stored in high rise houses for up to a year before requiring removal.

Problems can occur with dry manure storage in a high rise house when drinking water systems are not properly designed or maintained. For example, improper design or maintenance of the water system can result in excess water spilling into the pit below, which raises the moisture content of the manure, resulting in the potential for spills and releases of manure from the building.

Concerns with inadequate storage or improper design and maintenance contribute to concerns over dry manure systems for laying hens. As with broiler operations, open stockpiles of litter stored over long periods of time (e.g., greater than a few weeks) may contribute to pollutant discharge from contaminated runoff and leachate leaving the stockpile. Laying hens operations may also use a liquid manure handling system. The system is similar to the dry manure system except that

the manure drops below the cages into a channel or shallow pit and water is used to flush this manure to a lagoon.

The existing regulation already applies to laying hen and broiler operations with 100,000 birds when a continuous flow watering system is used, and to 30,000 birds when a liquid manure handling system is used. In revising the threshold for poultry operations, EPA evaluated several methods for equating poultry to the existing definition of an animal unit. EPA considered laying hens, pullets, broilers, and roasters separately to reflect the differences in size, age, production, feeding practices, housing, waste management, manure generation, and nutrient content of the manure. Manure generation and pollutant parameters considered include: nitrogen, phosphorus, BOD5, volatile solids, and COD. Analysis of these parameters consistently results in a threshold of 70,000 to 140,000 birds as being equivalent to 1,000 animal units. EPA also considered a liveweight basis for defining poultry. The liveweight definition of animal unit as used by USDA defines 455,000 broilers and pullets and 250,000 layers as being representative of 1,000 animal units. EPA data indicates that using a liveweight basis at 1,000 AU would exclude virtually all broiler operations from the regulation.

Consultations with industry indicated EPA should evaluate the different sizes (ages) and purposes (eggs versus meat) of chickens separately. However, when evaluating broilers, roasters, and other meat-type chickens, EPA concluded that a given number of birds capacity represented the same net annual production of litter and nutrients. For example, a farm producing primarily broilers would raise birds for 6–8 weeks with a final weight of 3 to 5 pounds, a farm producing roasters would raise birds for 9–11 weeks with a final weight of 6 to 8 pounds, whereas a farm producing game hens may only keep birds for 4–6 weeks and at a final weight of less than 2 pounds. The housing, production practices, waste management, and manure nutrients and process wastes generated in each case is essentially the same. Layers are typically fed less than broilers of equivalent size, and are generally maintained as a smaller chicken. However, a laying hen is likely to be kept for a year of egg production. The layer is then sold or molted for several weeks, followed by a second period of egg production. Pullets are housed until laying age of approximately 18 to 22 weeks. In all cases manure nutrients and litter generated results in a threshold of 80,000 to 130,000 birds as being the equivalent of 1,000 animal units.

Today's proposed NPDES and effluent guidelines requirements for poultry eliminate the distinction between how manure is handled and the type of watering system that is used. EPA is proposing this change because it believes there is a need to control poultry operations regardless of the manure handling or watering system. EPA believes that improper storage as well as land application rates which exceed agricultural use have contributed to water quality problems, especially in areas with large concentrations of poultry production. Inclusion of poultry operations in the proposed NPDES regulation is intended to be consistent with the proposed effluent guidelines regulation, discussed in section VIII of today's preamble. EPA is proposing that 100,000 laying hens or broilers be considered the equivalent of 1,000 animal units.

Consequently EPA proposes to establish the threshold under the two-tier alternative structure that defines which operations are CAFOs at 500 animal units as equivalent to 50,000 birds. Facilities that are subject to designation are those with fewer than 50,000 birds. This threshold would address approximately 10 percent of all chicken AFOs nationally and more than 70 percent of all manure generated by chickens. On a sector specific basis, this threshold would address approximately 28 percent of all broiler operations (including all meat-type chickens) while addressing more than 70 percent of manure generated by broiler operations. For layers (including pullets) the threshold would address less than 5 percent of layer operations while addressing nearly 80 percent of manure generated by layer operations. EPA believes this threshold is consistent with the threshold established for the other livestock sectors.

Under this two-tier structure, today's proposed changes exclude poultry operations with liquid manure handling systems if they have between 30,000 and 49,999 birds. EPA estimates this to be few if any operations nationally and believes these are relatively small operations. EPA does not believe these few operations pose a significant threat to water quality even in aggregation. EPA also notes that the trend in laying hen operations (where liquid systems may occur) has been to build new operations to house large numbers of animals (e.g., usually in excess of 100,000 birds per house), which frequently employ dry manure handling systems. Given the limited number of existing operations with liquid manure handling systems and the continuing trend toward larger operations, EPA believes the proposed uniform threshold of 50,000 birds is appropriate.

Under the proposed alternative three-tier structure, any operation with more than 100,000 chickens is automatically defined as a CAFO. This upper tier reflects 4 percent of all chicken operations. Additionally those poultry operations with 30,000 to 100,000 chickens are defined as CAFOs if they meet the unacceptable conditions presented in section VII.C. This middle tier would address an additional 10 percent of poultry facilities. By sector this middle tier would potentially cover an additional 45 percent of broiler manure and 22 percent layer manure. In aggregate this scenario would address 14 percent of chicken operations and 86 percent of manure. See VI.A.2 for the additional information regarding scope of the two proposed regulatory alternatives.

EPA acknowledges that this threshold pulls in a substantial number of chicken operations under the definition of a CAFO. Geographic regions with high density of poultry production have experienced water quality problems related to an overabundance of nutrients, to which the poultry industry has contributed. For example northwestern Arkansas and the Delmarva peninsula in the Mid-Atlantic tend to have smaller poultry farms as compared to other regions. The chicken and turkey sectors also have higher percentages of operations with insufficient or no land under the control of the AFO on which to apply manure. Thus EPA believes this threshold is appropriate to adequately control the potential for discharges from poultry CAFOs.

g. *How Would Immature Animals in the Swine and Dairy Sectors be Counted?* EPA is proposing to include immature swine and heifer operations under the CAFO definition. See proposed § 122.23(a)(3)(i)(C) and (E). In the proposed two-tier structure, EPA would establish the 500 AU threshold equivalent for defining which operations are CAFOs as operations with 5000 or more swine weighing 55 pounds or less, and those with fewer than 5000 swine under 55 pounds are AFOs which may be designated as CAFOs. Immature dairy cows, or heifers, would be counted equivalent to beef cattle; that is, the 500 AU threshold equivalent for defining CAFOs would be operations with 500 or more heifers, and those with fewer than 500 could be designated as CAFOs.

In the proposed three-tier structure, the 300 AU and 1,000 AU equivalents,

respectively for each animal type would be: 3,000 head and 10,000 head for immature swine; and 300 head and 1,000 head for heifers.

Only swine over 55 pounds and mature dairy cows are specifically included in the current definition (although manure and wastewater generated by immature animals confined at the same operation with mature animals are subject to the existing requirements). Immature animals were not a concern in the past because they were generally part of operations that included mature animals and, therefore, their manure was included in the permit requirements of the CAFO. However, in recent years, these livestock industries have become increasingly specialized with the emergence of increasing numbers of large stand-alone nurseries. Further, manure from immature animals tends to have higher concentrations of pathogens and hormones and thus poses greater risks to the environment and human health.

Since the 1970s, the animal feeding industry has become more specialized, especially at larger operations. When the CAFO regulations were issued, it was typical to house swine from birth to slaughter together at the same operation known as a farrow to finish operation. Although more than half of swine production continues to occur at farrow-to-finish operations, today it is common for swine to be raised in phased production systems. As described in section VI, specialized operations that only house sows and piglets until weaned represent the first phase, called farrowing. The weaned piglets are transferred to a nursery, either at a separate building or at a location remote from the farrowing operation for biosecurity concerns. The nursery houses the piglets until they reach about 55 to 60 pounds, at which time they are transferred to another site, the grow-finish facility.

The proposed thresholds for swine are established on the basis of the average phosphorus excreted from immature swine in comparison to the average phosphorus excreted from swine over 55 pounds. A similar threshold would be obtained when evaluating live-weight manure generation, nitrogen, COD and volatile solids (VS). See the Technical Development Document for more details.

Dairies often remove immature heifers to a separate location until they reach maturity. These off-site operations may confine the heifers in a manner that is very similar to a beef feedlot or the heifers may be placed on pasture. The existing CAFO definition does not address operations that only confine immature heifers. EPA acknowledges that dairies may keep heifers and calves and a few bulls on site. EPA data indicates some of these animals are in confinement, some are pastured, and some moved back and forth between confinement, open lots, and pasture. The current CAFO definition considers only the mature milking cows. This has raised some concerns that many dairies with significant numbers of immature animals could be excluded from the regulatory definition even though they may generate as much manure as a dairy with a milking herd large enough to be a CAFO. The proportion of immature animals maintained at dairies can vary significantly with a high being a one to one ratio. Industry-wide there are 0.6 immature animals for every milking cow.

EPA considered options for dairies that would take into account all animals maintained in confinement, including calves, bulls and heifers when determining whether a dairy is a CAFO or not. EPA examined two approaches for this option, one that would count all animals equally and another based on the proportion of heifers, calves, and bulls likely to be present at the dairy. EPA is not proposing to adopt either of these options.

The milking herd is usually a constant at a dairy, but the proportion of immature animals can vary substantially among dairies and even at a given dairy over time. Some operations maintain their immature animals on-site, but keep them on pasture most of the time. Some operations keep immature animals on-site, and maintain them in confinement all or most of the time. Some operations may also have one or two bulls on-site, which can also be kept either in confinement or on pasture, while many keep none on-site. Some operations do not keep their immature animals on-site at all, instead they place them offsite, usually in a stand-alone heifer operation. Because of the variety of practices at dairies, it becomes very difficult to estimate how many operations have immature animals on-site in confinement. EPA believes that basing the applicability on the numbers of immature animals and bulls would make implementing the regulation more difficult for the permit authority and the CAFO operator. However, EPA requests comment on this as a possible approach.

EPA also requests comments on using only mature milking cows as the means for determining applicability of the size thresholds. Under the two-tier structure, EPA's proposed requirements for dairies would apply to 3 percent of the dairies nationally and will control 37 percent of the CAFO manure generated by all dairies nationally. This is proportionally lower than other livestock sectors, largely due to the dominance of very small farms in the dairy industry. There are similar trends in the dairy industry as in the other livestock sectors, indicating that the number of large operations is increasing while the number of small farms continues to decline. Under the three-tier structure, EPA's proposed requirements would apply to 6 percent of the dairies nationally, and will control 43 percent of all manure generated at dairy CAFOs annually. See Section VI.A.1.

Inclusion in the proposed NPDES definition of immature swine and heifers is intended to be consistent with the proposed effluent guidelines regulation, described in section VIII of today's preamble.

P. *What Other Animal Sectors Does Today's Proposal Affect?* EPA is proposing to lower the threshold for defining which AFOs are CAFOs to the equivalent of 500 AU in the horse, sheep, lamb and duck sectors under the two-tier structure. See proposed § 122.23(a)(3)(i). This action is being taken to be consistent with the NPDES proposed revisions for beef, dairy, swine and poultry. Under the three-tier structure, the existing thresholds would remain as they are under the existing regulation.

The animal types covered by the NPDES program are defined in the current regulation (Part 122 Appendix B). The beef, dairy, swine, poultry and veal sectors are being addressed by both today's effluent guidelines proposal and today's NPDES proposal. However, today's proposal would not revise the effluent guidelines for any animal sector other than beef, dairy, swine, poultry and veal. Therefore, under today's proposal, any facility in the horse, sheep, lamb and duck sectors with 500 to 1,000 AU that is defined as a CAFO, and any facility in any sector below 500 AU that is designated as a CAFO, will not be subject to the effluent guidelines, but will have NPDES permits developed on a best professional judgment (BPJ) basis.

Table 7–6 identifies those meeting the proposed 500 AU threshold in the two-tier structure. Table 7–7 identifies the numbers of animals meeting the 300 AU, 300 AU to 1,000 AU, and the 1,000 AU thresholds in the three-tier structure.

A facility confining any other animal type that is not explicitly mentioned in the NPDES and effluent guidelines regulations is still subject to NPDES permitting requirements if it meets the definition of an AFO and if the permit

authority designates it as a CAFO on the basis that it is a significant contributor of pollution to waters of the U.S. Refer to VII.C.4 in today's proposal for a discussion of designation for AFOs.

The economic analysis for the NPDES rule does not cover animal types other than beef, dairy, swine and poultry. EPA chose to analyze those animal types that produce the greatest amount of manure and wastewater in the aggregate while in confinement. EPA believes that most horses, sheep, and lambs operations are not confined and therefore will not be subject to permitting, thus, the Agency expects the impacts in these sectors to be minimal. However, most duck operations probably are confined. EPA requests comments on the effect of this proposal on the horse, sheep, lamb and duck sectors.

i. *How Does EPA Propose to Control Manure at Operations that Cease to be CAFOs?* EPA is proposing to require operators of permitted CAFOs that cease operations to retain NPDES permits until the facilities are properly closed, i.e., no longer have the potential to discharge. See § 122.23(i)(3). Similarly, today's proposal would clarify that, if a facility ceases to be an active CAFO (e.g., it decreases the number of animals below the threshold that defined it as a CAFO, or ceases to operate), the CAFO must remain permitted until all wastes at the facility that were generated while the facility was a CAFO no longer have the potential to reach waters of the United States.

These requirements mean that if a permit is about to expire and the manure storage facility has not yet been properly closed, the facility would be required to apply for a permit renewal because the facility has the potential to discharge to waters of the U.S. until it is properly closed. Proper facility closure includes removal of water from lagoons and stockpiles, and proper disposal of wastes, which may include land application of manure and wastewater in accordance with NPDES permit requirements, to prevent or minimize discharge of pollutants to receiving waters.

The existing regulations do not explicitly address whether a permit should be allowed to expire when an owner or operator ceases operations. However, the public has expressed concerns about facilities that go out of business leaving behind lagoons, stockpiles and other contaminants unattended and unmanaged. Moreover, there are a number of documented instances of spills and breaches at CAFOs that have ceased operations, leaving behind environmental problems that became a public burden to resolve (see, for example, report of the North Carolina DENR, 1999).

EPA considered five options for NPDES permit requirements to ensure that CAFO operators provide assurances for proper closure of their facilities (especially manure management systems such as lagoons) in the event of financial failure or other business curtailment. EPA examined the costs to the industry and the complexity of administering such a program for all options. The analyses of these options are detailed in the EPA NPDES CAFO Rulemaking Support Document, September 26, 2000.

Closure Option 1 would require a closure plan. The CAFO operator would be required to have a written closure plan detailing how the facility plans to dispose of animal waste from manure management facilities. The plan would be submitted with the permit application and be approved with the permit application. The plan would identify the steps necessary to perform final closure of the facility, including at least:

- A description of how each major component of the manure management facility (e.g., lagoons, settlement basins, storage sheds) will be closed;
- An estimate of the maximum inventory of animal waste ever on-site, accompanied with a description of how the waste will be removed, transported, land applied or otherwise disposed; and
- A closure schedule for each component of the facility along with a description of other activities necessary during closure (e.g., control run-off/run-on, ground water monitoring if necessary).

EPA also investigated several options that would provide financial assurances in the event the CAFO went out of business, such as contribution to a sinking fund, commercial insurance, surety bond, and other common commercial mechanisms. Under Closure Option 2, permittees would have to contribute to a sinking fund to cover closure costs of facilities which abandon their manure management systems. The contribution could be on a per-head basis, and could be levied on the permitting cycle (every five years), or annually. The sinking fund would be available to cleanup any abandoned facility (including those which are not permitted). Data on lagoon closures in North Carolina (Harrison, 1999) indicate that the average cost of lagoon closure for which data are available is approximately $42,000. Assuming a levy of $0.10 per animal, the sinking fund would cover the cost of approximately 50 abandonments nationally per year, not accounting for any administrative costs associated with operating the funding program.

Closure Option 3 would require permittees to provide financial assurance by one of several generally accepted mechanisms. Financial assurance options could include the following common mechanisms: a) Commercial insurance; (b) Financial test; (c) Guarantee; (d) Certificate of Deposit or designated savings account; (e) Letter of credit; or (f) Surety bond. The actual cost to the permittee would depend upon which financial assurance option was available and implemented. The financial test would likely be the least expensive for some operations, entailing documentation that the net worth of the CAFO operator is sufficient such that it is unlikely that the facility will be abandoned for financial reasons. The guarantee would also be inexpensive, consisting of a legal guarantee from a parent corporation or other party (integrator) that has sufficient levels of net worth. The surety bond would likely be the most expensive, typically requiring an annual premium of 0.5 to 3.0 percent of the value of the bond; this mechanism would likely be a last resort for facilities that could not meet the requirement of the other mechanisms.

Option 4 is a combination of Options 2 and 3. Permittees would have to provide financial assurance by one of several generally accepted mechanisms, or by participating in a sinking fund. CAFO operators could meet closure requirements through the most economical means available for their operation.

Option 5, the preferred option in today's proposal, simply requires CAFOs to maintain NPDES permit coverage until proper closure. Under this option, facilities would be required to maintain their NPDES permits, even upon curtailment of the animal feeding operation, for as long as the facility has the potential to discharge. The costs for this option would be those costs associated with maintaining a permit.

Today, EPA is proposing to require NPDES permits to include a condition that imposes a duty to reapply for a permit unless an owner or operator has closed the facility such that there is no potential for discharges. The NPDES program offers legal and financial sanctions that are sufficient, in EPA's view, to ensure that operators comply with this requirement. EPA believes that this option would accomplish its objectives and would be generally easy and effective to implement. However, there are concerns that it would not be effective for abandoned facilities because, unlike some of the other

options, no financial assurance mechanism would be in place. EPA is requesting comment on the practical means of addressing the problem of unmanaged waste from closed or abandoned CAFOs, and what authorities EPA could use under the CWA or other statutes to address this problem.

See Section VII.E.5.c of today's proposal, which further discusses the requirement for permit authorities to include facility closure in NPDES permit special conditions.

While EPA is today proposing to only require ongoing permit coverage of the former CAFO, permit authorities are encouraged to consider including other conditions such as those discussed above.

j. *Applicability of the Regulations to Operations That Have a Direct Hydrologic Connection to Ground Water.* Because of its relevance to today's proposal, EPA is restating that the Agency interprets the Clean Water Act to apply to discharges of pollutants from a point source via ground water that has a direct hydrologic connection to surface water. See proposed § 122.23(e). Specifically, the Agency is proposing that all CAFOs, including those that discharge or have the potential to discharge CAFO wastes to navigable waters via ground water with a direct hydrologic connection must apply for an NPDES permit. In addition, the proposed effluent guidelines will require some CAFOs to achieve zero discharge from their production areas including via ground water which has a direct hydrologic connection to surface water. Further, for CAFOs not subject to such an effluent guideline, permit writers would in some circumstances be required to establish special conditions to address such discharges. In all cases, a permittee would have the opportunity to provide a hydrologist's report to rebut the presumption that there is likely to be a discharge from the production area to surface waters via ground water with a direct hydrologic connection.

For CAFOs that would be subject to an effluent guideline that includes requirements for zero discharge from the production area to surface water via ground water (all existing and new beef and dairy operations, and new swine and poultry operations, see proposed § 412.33(a), 412.35(a), and 412.45(a)), the proposed regulations would presume that there is a direct hydrologic connection to surface water. The permittee would be required to either achieve zero discharge from the production area via ground water and perform the required ground water monitoring or provide a hydrologist's statement that there is no direct connection of ground water to surface water at the facility. See 40 CFR 412.33(a)(3), 412.35(a)(3), and 412.45(a)(3).

For CAFOs that would be subject to the proposed effluent guideline at 412.43 (existing swine, poultry and veal facilities) which does not include ground water requirements, if the permit writer determines that the facility is in an area with topographical characteristics that indicate the presence of ground water that is likely to have a direct hydrologic connection to surface water and if the permit writer determines that pollutants may be discharged at a level which may cause or contribute to an excursion above any State water quality standard, the permit writer would be required to include special conditions to address potential discharges via ground water. EPA is proposing that the permittee must either comply with those conditions or provide a hydrologist's statement that the facility does not have a direct hydrologic connection to surface water. 40 CFR 122.23(j)(6) and (k)(5).

If a CAFO is not subject to the Part 412 Subparts C or D effluent guideline (e.g., because it has been designated as a CAFO and is below the threshold for applicability of those subparts; or is a CAFO in a sector other than beef, dairy, swine, poultry or veal and thus is subject to subparts A or B), then the permit writer would be required to decide on a case-by-case basis whether effluent limitations (technology-based and water quality-based, as necessary) should be established to address potential discharges to surface water via hydrologically connected ground water. Again, the permittee could avoid or satisfy such requirements by providing a hydrologist's statement that there is no direct hydrologic connection 40 CFR 122.23(k)(5).

Legal Basis. The Clean Water Act does not directly answer the question of whether a discharge to surface waters via hydrologically connected ground water is unlawful. However, given the broad construction of the terms of the CWA by the federal courts and the goals and purposes of the Act, the Agency believes that while Congress has not spoken directly to the issue, the Act is best interpreted to cover such discharges. The statutory terms certainly do not prohibit the Agency's determination that a discharge to surface waters via hydrologically-connected ground waters can be governed by the Act, while the terms do clearly indicate Congress' broad concern for the integrity of the Nation's waters. Section 301(a) of the CWA provides that ''the discharge of any pollutant [from a point source] by any person shall be unlawful'' without an NPDES permit. The term ''discharge of a pollutant'' is defined as ''any addition of a pollutant to navigable waters from any point source.'' 33 U.S.C. § 1362(12). In turn, ''navigable waters'' are defined as ''the waters of the United States, including the territorial seas.'' 33 U.S.C. § 1362(7). None of these terms specifically includes or excludes regulation of a discharge to surface waters via hydrologically connected ground waters. Thus, EPA interprets the relevant terms and definitions in the Clean Water Act to subject the addition of manure to nearby surface waters from a CAFO via hydrologically connected ground waters to regulation.

Some sections of the CWA do directly apply to ground water. Section 102 of the CWA, for example, requires the Administrator to ''develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary conditions of surface and underground waters.'' 33 U.S.C. § 1252. Such references, however, are not significant to the analysis of whether Congress has spoken directly on the issue of regulating discharges via ground water which directly affect surface waters. Specific references to ground water in other sections of the Act may shed light on the question of whether Congress intended the NPDES program to regulate ground water quality. That question, however, is not the same question as whether Congress intended to protect surface water from discharges which occur via ground water. Thus, the language of the CWA is ambiguous with respect to the specific question, but does not bar such regulation. Moreover, the Supreme Court has recognized Congress' intent to protect aquatic ecosystems through the broad federal authority to control pollution embodied in the Federal Water Pollution Control Act Amendments of 1972. Section 101 of the Act clearly states the purpose of the Act ''to restore and maintain the chemical, physical, and biological integrity of the Nations' waters.'' 33 U.S.C. § 1251(a)(1). The Supreme Court found that ''[t]his objective incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, ''the word ''integrity'' * * * refers to a condition in which the natural structure and function of aquatic ecosystems [are] maintained.'' *United States* v. *Riverside Bayview Homes,* 474 U.S. 121, 132 (1985). An interpretation of the CWA which excludes regulation

of point source discharges to the waters of the U.S. which occur via ground water would, therefore, be inconsistent with the overall Congressional goals expressed in the statute.

Federal courts have construed the terms of the CWA broadly (*Sierra Club* v. *Colorado Refining Co.,* 838 F. Supp. 1428, 1431 (D.Colo. 1993) (*citing Quivera Mining Co.* v. *EPA,* 765 F.2d 126, 129 (10th Cir. 1985)), but have found the language ambiguous with regard to ground water and generally examine the legislative history of the Act. *See e.g., Exxon* v. *Train,* 554 F.2d 1310, 1326–1329 (reviewing legislative history). However, a review of the legislative history also is inconclusive. Thus, courts addressing the issue have reached conflicting conclusions.

Since the language of the CWA itself does not directly address the issue of discharges to ground water which affect surface water, it is proper to examine the statute's legislative history. Faced with the problem of defining the bounds of its regulatory authority, ''an agency may appropriately look to the legislative history and underlying policies of its statutory grants of authority.'' *Riverside Bayview Homes,* 474 U.S. at 132. However, the legislative history also does not address this specific issue. *See Colorado Refining Co.,* 838 F. Supp. at 1434 n.4 (noting legislative history inconclusive).

In the House, Representative Les Aspin proposed an amendment with explicit ground water protections by adding to the definition of ''discharge of a pollutant'' the phrase ''any pollutant to ground waters from any point source.'' *Legislative History of the Water Pollution Control Act Amendments of 1972,* 93d Cong., 1st. Sess. at 589 (1972) (hereinafter ''Legislative History''). While the Aspin amendment was defeated, that rejection does not necessarily signal an explicit decision by Congress to exclude even ground water per se from the scope of the permit program. Commentators have suggested that provisions in the amendment which would have deleted exemptions for oil and gas well injections were the more likely cause of the amendment's defeat. Mary Christina Wood, *Regulating Discharges into Groundwater: The Crucial Link in Pollution Control Under the Clean Water Act,* 12 Harv. Envtl. L. Rev. 569, 614 (1988); *see also* Legislative History at 590–597 (during debate on the amendment, members in support and members in opposition focused on the repeal of the exemption for oil and gas injection wells).

At the least, there is no evidence that in rejecting the explicit extension of the NPDES program to all ground water Congress intended to create a ground water loophole through which the discharges of pollutants could flow, unregulated, to surface water. Instead, Congress expressed an understanding of the hydrologic cycle and an intent to place liability on those responsible for discharges which entered the ''navigable waters.'' The Senate Report stated that ''[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'' Legislative History at 1495. The Agency has determined that discharges via hydrologically connected ground water impact surface waters and, therefore, should be controlled at the source.

Most of the courts which have addressed the question of whether the CWA subjects discharges to surface waters via hydrologically connected ground waters to regulation have found the statute ambiguous on this specific question. They have then looked to the legislative history for guidance. *McClellan Ecological Seepage Situation* v. *Weinberger,* 707 F. Supp. 1182, 1194 (E.D. Cal. 1988), *vacated (on other grounds),* 47 F.3d 325 (9th Cir. 1995), *cert. denied,* 116 S.Ct. 51 (1995); *Kelley* v. *United States,* 618 F.Supp. 1103, 1105–06 (D.C.Mich. 1985). Even those courts which have not found jurisdiction have acknowledged that it is a close question. *Village of Oconomowoc Lake* v. *Dayton Hudson Corp.,* 24 F.3d 962, 966 (7th Cir. 1994), *cert. denied,* 513 U.S. 930 (1994). As one court noted, ''the inclusion of groundwater with a hydrological connection to surface waters has troubled courts and generated a torrent of conflicting commentary.'' *Potter* v. *ASARCO,* Civ. No. S:56CV555, slip op. at 19 (D.Neb. Mar. 3, 1998). The fact that courts have reached differing conclusions when examining whether the CWA regulates such discharges is itself evidence that the statute is ambiguous.

EPA does not argue that the CWA directly regulates ground water quality. In the Agency's view, however, the CWA does regulate discharges to surface water which occur via ground water because of a direct hydrologic connection between the contaminated ground water and nearby surface water. EPA repeatedly has taken the position that the CWA can regulate discharges to surface water via ground water that is hydrologically connected to surface waters.

For example, in issuing the general NPDES permit for concentrated animal feeding operations (''CAFOs'') in Idaho, EPA stated:

''EPA agrees that groundwater contamination is a concern around CAFO facilities. However, the Clean Water Act does not give EPA the authority to regulate groundwater quality through NPDES permits.

''The only situation in which groundwater may be affected by the NPDES program is when a discharge of pollutants to surface waters can be proven to be via groundwater.'' 62 FR 20177, 20178 (April 25, 1997). In response to a comment that the CAFO general permit should not cover ground water, the Agency stated:

''EPA agrees that the Clean Water Act does not give EPA the authority to regulate groundwater quality through NPDES permits. However, the permit requirements * * * are not intended to regulate groundwater. Rather, they are intended to protect surface waters which are contaminated via a groundwater (subsurface) connection.'' *Id.*

EPA has made consistent statements on at least five other occasions. In the Preamble to the final NPDES Permit Application Regulations for Storm Water Discharges, the Agency stated: ''this rulemaking only addresses discharges to waters of the United States, consequently discharges to ground waters are not covered by this rulemaking (*unless there is a hydrological connection between the ground water and a nearby surface water body.*'') 55 FR 47990, 47997 (Nov. 16, 1990)(emphasis added)). *See also* 60 FR 44489, 44493 (August 28, 1995) (in promulgating proposed draft CAFO permit, EPA stated: ''[D]ischarges that enter surface waters indirectly through groundwater are prohibited''); EPA, ''Guide Manual On NPDES Regulations For Concentrated Animal Feeding Operations'' at 3 (December 1995) (''Many discharges of pollutants from a point source to surface water through groundwater (that constitutes a direct hydrologic connection) also may be a point source discharge to waters of the United States.'').

In promulgating regulations authorizing the development of water quality standards under the CWA by Indian Tribes for their Reservations, EPA stated:

Notwithstanding the strong language in the legislative history of the Clean Water Act to the effect that the Act does not grant EPA authority to regulate pollution of ground waters, EPA and most courts addressing the issue have recognized that * * * the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwater and surface waters. In

these situations, the affected ground waters are not considered ''waters of the United States'' but *discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters.* Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, Final Rule, 56 FR 64876, 64892 (Dec. 12, 1991)(emphasis added).

While some courts have not been persuaded that the Agency's pronouncements on the regulation of discharges to surface water via ground water represent a consistent Agency position, others have found EPA's position to be clear. The *Hecla Mining* court noted that ''The court in Oconomowoc Lake dismissed the EPA statements as a collateral reference to a problem. It appears to this court, however, that the preamble explains EPA's policy to require NPDES permits for discharges which may enter surface water via groundwater, as well as those that enter directly.'' *Washington Wilderness Coalition* v. *Hecla Mining Co.,* 870 F. Supp. 983, 990–91 (E.D. Wash. 1994), *dismissed on other grounds,* (lack of standing) per unpublished decision (E.D. Wash. May 7, 1997) (citing Preamble, NPDES Permit Regulations for Storm Water Discharges, 55 FR 47990, 47997 (Nov. 16, 1990)).

As a legal and factual matter, EPA has made a determination that, in general, collected or channeled pollutants conveyed to surface waters via ground water can constitute a discharge subject to the Clean Water Act. The determination of whether a particular discharge to surface waters via ground water which has a direct hydrologic connection is a discharge which is prohibited without an NPDES permit is a factual inquiry, like all point source determinations. The time and distance by which a point source discharge is connected to surface waters via hydrologically connected surface waters will be affected by many site specific factors, such as geology, flow, and slope. Therefore, EPA is not proposing to establish any specific criteria beyond confining the scope of the regulation to discharges to surface water via a ''direct'' hydrologic connection. Thus, EPA is proposing to make clear that *a* general hydrologic connection between *all* waters is not sufficient to subject the owner or operator of a point source to liability under the Clean Water Act. Instead, consistent with the case law, there must be information indicating that there is a ''direct'' hydrologic connection to the surface water at issue. *Hecla Mining,* 870 F.Supp. at 990 (''Plaintiffs must still demonstrate that pollutants from a point source affect surface waters of the United States. It is not sufficient to allege groundwater pollution, and then to assert a general hydrological connection between all waters. Rather, pollutants must be traced from their source to surface waters, in order to come within the purview of the CWA.'')

The reasonableness of the Agency's interpretation is supported by the fact that the majority of courts have determined that CWA jurisdiction may extend to surface water discharges via hydrologic connections.[1] As the court in *Potter* v. *ASARCO, Inc.* declared, ''in light of judicial precedent, Congress'' remedial purpose, the absence of any specific legislative intent pertaining to hydrologically connected ground water and the informal pronouncements of EPA, any pollutants that enter navigable waters, whether directly or indirectly through a specific hydrological connection, are subject to regulation by the CWA.'' Slip op. at 26.

The decisions which did not find authority to regulate such discharges under the CWA may, for the most part, be distinguished. In *Village of Oconomowoc Lake* v. *Dayton Hudson Corp.,* the Seventh Circuit held that the CWA does not regulate ground water per se. 24 F.3d 962 (7th Cir. 1994), cert. denied, 513 U.S. 930 (1994). In *Oconomowoc,* however, the plaintiff only alluded to a ''possibility'' of a hydrologic connection. 24 F.3d at 965. In *Kelley* v. *United States,* the district court held that enforcement authority under the CWA did not include ground water contamination. 618 F. Supp. 1103 (W.D. Mich. 1985). The decision is not well-reasoned, as the *Kelley* court merely states—without further elaboration—that the opinion in *Exxon* v. *Train,* which specifically ''expressed no opinion'' on whether the CWA regulated hydrologically connected ground waters, and the legislative history ''demonstrate that Congress did not intend the Clean Water Act to extend federal regulatory enforcement authority over *groundwater contamination.*'' *Kelley,* 618 F. Supp. at 1107 (emphasis added). In *Umatilla,* the court concluded that the NPDES program did not apply to even hydrologically connected ground water. 962 F.Supp. at 1318. The court reviewed the legislative history and existing precedent on the issue, but failed to distinguish between the regulation of ground water per se and the regulation of discharges into waters of the United States which happen to occur via ground water. Moreover, the court failed to give deference to the Agency's interpretation of the CWA. Id. at 1319 (finding that the Agency interpretations cited by the plaintiffs failed to articulate clear regulatory boundaries and were not sufficiently ''comprehensive, definitive or formal'' to deserve deference, but acknowledging that ''neither the statute nor the legislative history absolutely prohibits an interpretation that the NPDES requirement applies to discharges of

[1] *See e.g., Williams PipeLine Co. v. Bayer Corp.,* 964 F.Supp. 1300, 1319–20 (S.D.Iowa 1997) (''Because the CWA's goal is to protect the quality of surface waters, the NPDES permit system regulates any pollutants that enter such waters either directly or through groundwater.''); *Washington Wilderness Coalition* v. *Hecla Mining Co.,* 870 F. Supp. 983, 989–90 (E.D. Wash. 1994), *dismissed on other grounds,* (lack of standing) per unpublished decision (E.D. Wash. May 7, 1997) (finding CWA jurisdiction where pollution discharged from manmade ponds via seeps into soil and ground water and, thereafter, surface waters; and holding that, although CWA does not regulate isolated ground water, CWA does regulate pollutants entering navigable waters via tributary ground waters); *Friends of the Coast Fork* v. *Co. of Lane, OR,* Civ. No. 95–6105–TC (D. OR. January 31, 1997) (reaching same conclusion as court in *Washington Wilderness Coalition v. Hecla Mining Co.,* and finding hydrologically-connected ground waters are covered by the CWA); *McClellan Ecological Seepage Situation,* 763 F. Supp. 431, 438 (E.D. Cal. 1989), *cacated (on other grounds),* 47 F.3d 325 (9th Cir. 1995), *cert. denied,* 116 S.Ct. 51 (1995) (allowing plaintiff to attempt to prove at trial that pollutants discharged to ground water are subsequently discharged to surface water); and *McClellan Ecological Seepage Situation* v. *Weinberger,* 707 F. Supp. 1182, 1195–96 (E.D. Cal. 1988), *vacated (on other grounds),* 47 F.3d 325 (9th Cir. 1995), *cert. denied,* 116 S.Ct.51 (1995) (although NPDES permit not required for discharges to isolated ground water, Congress' intent to protect surface water may require NPDES permits for discharges to ground water with direct hydrological connection to surface waters); *Friends of Sante Fe Co.* v. *LAC Minerals, Inc.,* 892 F. Supp. 1333, 1357–58 (D.N.M. 1995) (although CWA does not cover discharges to isolated, nontributary groundwater, *Quivira* and decisions within Tenth Circuit demonstrating expansive construction of CWA's jurisdictional reach foreclose arguments that CWA does not regulate discharges to hydrologically-connected groundwater); *Sierra club* v. *Colorado Refining Co.,* 838 F. Supp. at 1434 (''navigable waters'' encompasses tributary groundwater and, therefore, allegations that defendant violated CWA by discharging pollutants into soils and groundwater, and that pollutants infiltrated creek via groundwater and seeps in creek bank, stated cause of action); and *Quivira Mining Co.* v. *United States EPA,* 765 F.2d 126, 130 (10th Cir. 1985), *cert. denied,* 474 U.S. 1055 (1986) (affirming EPA's determination that CWA permit required for discharges of pollutants into surface arroyos that, during storms, channeled rainwater both directly to streams and into underground aquifers that connected with such streams); *Martin* v. *Kansas Board of Regents,* 1991 U.S.Dist. LEXIS 2779 (D.Kan. 1991) (''Groundwater . . . that is naturally connected to surface waters constitute 'navigable waters' under the Act.''); *see also Inland Steel Co.* v. *EPA,* 901 F.2d 1419, 1422–23 (7th Cir. 1990) (''the legal concept of navigable waters might include ground waters connected to surface waters—though whether it does or not is an unresolved question. * * * [A] well that ended in such connected ground waters might be within the scope of the [CWA]'').

pollutants to hydrologically-connected groundwater''). Today's proposal should provide the type of formal Agency interpretation that court sought. Two other decisions have simply adopted the reasoning of the Umatilla court. *United States* v. *ConAgra, Inc.,* Case No. CV 96–0134–S–LMB (D. Idaho 1997); *Allegheny Environmental Action Coalition v. Westinghouse,* 1998 U.S. Dist. LEXIS 1838 (W.D.Pa. 1998).

The Agency has utilized its expertise in environmental science and policy to determine the proper scope of the CWA. The determination of whether the CWA regulates discharges to ground waters connected to surface waters, like the determination of wetlands jurisdiction, ''ultimately involves an ecological judgment about the relationship between surface waters and ground waters, it should be left in the first instance to the discretion of the EPA and the Corps.'' *Town of Norfolk* v. *U.S. Army Corps of Engineers,* 968 F.2d 1438, 1451 (1st Cir. 1992) (citing *United States* v. *Riverside Bayview Homes, Inc.,* 474 U.S. at 134). The Supreme Court, too, has acknowledged the difficulty of determining precisely where Clean Water Act jurisdiction lies and has held that an agency's scientific judgment can support a legal jurisdictional judgment. *United States* v. *Riverside Bayview Homes,* Inc., 474 U.S. 121, 134 (1985) (''In view of the breadth of federal regulatory authority contemplated by the [Clean Water] Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.'').

The Agency has made clear the rationale for its construction: ''the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwater and surface waters. In these situations, the affected ground waters are not considered 'waters of the United States' but *discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters.*'' Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, Final Rule, 56 FR 64,876, 64892 (Dec. 12, 1991) (emphasis added). The Agency has taken this position because ground water and surface water are highly interdependent components of the hydrologic cycle. The hydrologic cycle refers to ''the circulation of water among soil, ground water, surface water, and the atmosphere.'' U.S. Environmental Protection Agency, ''A Review of Methods for Assessing Nonpoint Source Contaminated Ground-Water Discharge to Surface Water'' at 3 (April 1991). Thus, a hydrologic connection has been defined as ''the interflow and exchange between surface impoundments and surface water through an underground corridor or groundwater.'' NPDES General Permit and Reporting Requirements for Discharges from Concentrated Animal Feeding Operations, EPA Region 6 Public Notice of Final Permitting Decision, 58 FR 7610, 7635–36 (Feb. 8, 1993). The determination of whether a discharge to ground water in a specific case constitutes an illegal discharge to waters of the U.S. if unpermitted is a fact specific one. The general jurisdictional determination by EPA that such discharges can be subject to regulation under the CWA is a determination that involves an ecological judgment about the relationship between surface waters and ground waters.

Finally, the Supreme Court has explicitly acknowledged that resolution of ambiguities in agency-administered statutes involves policymaking: ''As Chevron itself illustrates the resolution of ambiguity in a statutory text is often more a question of policy than of law. * * * When Congress, through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policymaking to an administrative agency, the extent of judicial review of the agency's policy determinations is limited.'' *Pauly* v. *Bethenergy Mines, Inc.,* 116 S.Ct. 2524, 2534 (1991). Congress established a goal for the CWA ''to restore and maintain the chemical, physical and biological integrity of the nation's waters and to eliminate the discharge of pollutants into the navigable waters.'' 33 U.S.C. § 1251(a)(1). Congress also established some parameters for reaching that goal, but left gaps in the statutory structure. One of those gaps is the issue of discharges of pollutants from point sources which harm navigable waters but which happen to occur via ground water. The Agency has chosen to fill that gap by construing the statute to regulate such discharges as point source discharges. Given the Agency's knowledge of the hydrologic cycle and aquatic ecosystems, the Agency has determined that when it is reasonably likely that such discharges will reach surface waters, the goals of the CWA can only be fulfilled if those discharges are regulated.

Determining Direct Hydrologic Connection. In recent rulemakings, EPA has used various lithologic settings to describe areas of vulnerability to contamination of ground water. This information can serve as a guide for permit writers to make the initial determination whether or not it is necessary to establish special conditions in a CAFO permit to prevent the discharge of CAFO waste to surface water via ground water with a direct hydrologic connection to surface water.

During the rulemaking processes for the development of the Ground Water Rule and the Underground Injection Control Class V under the Safe Drinking Water Act, significant stakeholder and Federal Advisory Committee Act (FACA), input was used to define lithologic settings that are likely to indicate ground water areas sensitive to contamination. Areas likely to have such a connection are those that have ground water sensitive to contamination and that have a likely connection to surface water. The Ground Water Proposed Rule includes language that describes certain types of lithologic settings (karst, fractured bedrock, and gravel) as sensitive to contamination and, therefore, subject to requirements under the rule to mitigate threats to human health from microbial pathogens. [See National Primary Drinking Water Regulations: Ground Water Rule, 65 FR 30193 (2000) (to be codified at 40 CFR Parts 141 and 142) (proposed May 10, 2000). See also Underground Injection Control Regulations for Class V Injection Wells, Revision; Final Rule, 64 FR 68546 (Dec. 7, 1999) (to be codified at 40 CFR Parts 9, 144, 145, and 146). See also Executive Summary, NDWAC UIC/Source Water Program Integration Working Group Meeting (March 25–26, 1999). All are available in the rulemaking Record.]

Under the Class V rule, a facility must comply with the mandates of the regulation if the facility has a motor vehicle waste disposal well (a type of Class V well) that is in an area that has been determined to be sensitive. (See Technical Assistance Document (TAD) for Delineating ''Other Sensitive Ground Water Areas'', EPA #816–R–00–016—to be published.) States that are responsible for implementing the Class V Rule, or in the case of Direct Implementation Programs, the EPA Regional Office, are given flexibility to make determinations of ground water sensitivity within certain guidelines.

40 CFR 145.23(f)(12) provides items that States are expected to consider in developing their other sensitive ground water area plan, including:

- Geologic and hydrogeologic settings,
- Ground water flow and occurrence,

- Topographic and geographic features,
- Depth to ground water,
- *Significance as a drinking water source,
- *Prevailing land use practices, and
- *Any other existing information relating to the susceptibility of ground water to contamination from Class V injection wells.

*The last three factors are not relevant to this rulemaking but are specific to mandates under the Safe Drinking Water Act to protect current and future sources of drinking water.

Geologic and hydrogeologic settings considered sensitive under the Class V Rule include areas such as karst, fractured bedrock or other shallow/unconsolidated aquifers. The Class V Rule lists karst, fractured volcanics and unconsolidated sedimentary aquifers, such as glacial outwash deposits and eolian sands, as examples of aquifer types. Under the Class V Rule, EPA urges States to consider all aquifer types that, based on their inherent characteristics, are likely to be moderately to highly sensitive. Such aquifer types are those that potentially have high permeability, such as: all fractured aquifers; all porous media aquifers with a grain size of sand or larger, including not only unconsolidated aquifers, but sandstone as well; and karst aquifers.

For more information at the regional level, information can be found in the document ''Regional Assessment of Aquifer Vulnerability and Sensitivity in the Coterminous United States'' [EPA/600/2–91/043] for state maps showing aquifers and portions of aquifers whose transmissivity makes them sensitive/vulnerable. This document may be helpful in identifying areas where existing contaminants are most likely to spread laterally. State and federal geological surveys have numerous geological maps and technical reports that can be helpful in the identification of areas of sensitive aquifers. University geology and earth science departments and consulting company reports may also have helpful information.

Data sources to assist permit writers in making sensitivity determinations can be acquired through many sources as listed above and include federal, state, and local data. For example, USGS maps and databases such as the principal aquifers map, state maps, other programs where such assessments may have been completed, such as State Source Water Assessment Programs (SWAP), state Class V, or Ground Water Rule sensitivity determinations.

Another potential approach to defining areas of ground water sensitivity would be to define a set of characteristics which a facility could determine whether it met by using a set of national, regional and/or local maps. For instance, overburden, that is, soil depth and type, along with depth to water table, hydrogeologic characteristics of the surficial aquifer, and proximity to surface water could be factors used to define sensitive areas for likely ground water/surface water connections. For example, while there is no consistent definition or agreement as to what could be considered ''shallow,'' a depth to the water table less than, say, six feet with sandy soils or other permeable soil type might indicate ground water vulnerability. Data of this nature could be obtained from USDA's Natural Resource Conservation Service (NRCS) national soils maps, available from the NRCS web site (*www.nhq.nrcs.usda.gov/land/index/soils.html*) or from the EPA web site (*www.epa.gov/ostwater/BASINS/metadata/statsgo.htm*).

Once it is determined that the CAFO is in a ground water sensitive area, proximity to a surface water would indicate a potential for the CAFO to discharge to surface water via a direct hydrological connection with ground water. Proximity to surface water would be considered when there is a short distance from the boundary of the CAFO to the closest downstream surface water body. Again, information of this type could be obtained from USGS topographic maps or state maps.

USGS Hydrologic Landscape Regions. Another approach for determining whether CAFOs in a region are generally located in areas where surface water is likely to have hydrological connections with ground water is by using a set of maps under development by the U.S. Geological Survey (USGS). USGS is developing a national map of Hydrologic Landscape Regions that describe watersheds based on their physical characteristics, such as topography and lithology. These maps will, among other things, help to identify physical features in the landscape that are important to water quality such as areas across the country where the geohydrology is favorable for ground water interactions with surface water.

The regions in this map will be delineated based on hydrologic unit codes (HUCs) nationwide and do not provide information at local scales; however, the maps can provide supplemental information that describes physical features within watersheds where interactions between ground water and surface water are found. These areas are the most likely places where ground water underlying CAFO's could be discharged to nearby surface water bodies. While EPA has not fully assessed how this tool might be used to determine a CAFO's potential to discharge an excerpt of the pre-print report is provided here for purposes of discussion. The report describing this tool is anticipated to be published in Spring 2001 (Wolock, Winter, and McMahon, in review).

The concept of hydrologic landscapes is based on the idea that a single, simple physical feature is the basic building block of all landscapes. This feature is termed a fundamental landscape unit and is defined as an upland adjacent to a lowland separated by an intervening steeper slope. Some examples of hydrologic landscapes are as follows:

- A landscape consisting of narrow lowlands and uplands separated by high and steep valley sides, characteristic of mountainous terrain;
- A landscape consisting of very wide lowlands separated from much narrower uplands by steep valley sides, characteristic of basin and range physiography and basins of interior drainage; or
- A landscape consisting of narrow lowlands separated from very broad uplands by valley sides of various slopes and heights, characteristic of plateaus and high plains.

The hydrologic system of a fundamental landscape unit consists of the movement of surface water, ground water, and atmospheric-water exchange. Surface water movement is controlled by land-surface slope and surficial permeability; ground-water flow is a function of gravitational gradients and the hydraulic characteristics of the geologic framework; and atmospheric-water exchange primarily is determined by climate (Winter, in review). The same physical and climate characteristics control the movement of water over the surface and through the subsurface regardless of the geographic location of the landscapes. For example, if a landscape has gentle slopes and low-permeability soils, then surface runoff will be slow and recharge to ground water will be limited. In contrast, if the soils are permeable in a region of gentle slopes, then surface runoff may be limited but ground-water recharge will be high.

The critical features used to describe hydrologic landscapes are land-surface form, geologic texture, and climate. Land-surface form can be used to quantify land-surface slopes and relief. Geologic texture provides estimates of surficial and deep subsurface permeability which control infiltration, the production of overland flow, and

ground-water flow rates. Climate characteristics can be used to approximate available water to surface and ground-water systems. The variables used to identify hydrologic settings were averaged within each of the 2,244 hydrologic cataloging units defined by the USGS. This degree of spatial averaging was coarse enough to smooth the underlying data but fine enough to separate regions from each other.

For example, two Hydrological Landscape Regions (HLR) that are likely to have characteristics of ground water and surface water interactions with direct relevance to this proposed rulemaking would be ''HLR1'' and ''HLR9''. HLR1 areas are characterized by variably wet plains having highly permeable surface and highly permeable subsurface. This landscape is 92 percent flat land, with 56 percent of the flat land in the lowlands and 37 percent in the uplands. Land surface and bedrock are highly permeable. Because of the flat sandy land surface, this geologic framework should result in little surface runoff, and recharge to both local and regional ground-water flow systems should be high. Therefore, ground water is likely to be the dominant component of the hydrologic system in this landscape. The water table is likely to be shallow in the lowlands, resulting in extensive wetlands in this part of the landscape.

Major water issues in this hydrologic setting probably would be related to contamination of ground water. In the uplands, the contamination could affect regional ground-water flow systems. In the lowlands, the thin unsaturated zone and the close interaction of ground water and surface water could result in contamination of surface water. Flooding probably would not be a problem in the uplands, but it could be a serious problem in the lowlands because of the flat landscape and shallow water table.

HLR9 areas are characterized by wet plateaus having poorly permeable surface and highly permeable subsurface. This landscape is 42 percent flat land, with 24 percent in lowlands and 17 percent in uplands. Land surface is poorly permeable and bedrock is highly permeable. Because of the flat poorly permeable land surface, this geologic framework should result in considerable surface runoff and limited recharge to ground water. However, the bedrock is largely karstic carbonate rock, which probably would result in a considerable amount of surface runoff entering the deep aquifer through sinkholes. This water could readily move through regional ground-water flow systems. Surface runoff and recharge through sinkholes are likely to be the dominant component of the hydrologic system in this landscape. The water table is likely to be shallow in the lowlands, resulting in extensive wetlands in this part of the landscape. Major water issues in this hydrologic setting probably would be related to contamination of surface water from direct surface runoff, and extensive contamination of ground water (and ultimately surface water) because of the ease of movement through the bedrock. The capacity of these carbonate rocks to mediate contaminants is limited. Flooding could be a problem in the lowlands.

EPA is requesting comment on how a permit writer might identify CAFOs at risk of discharging to surface water via ground water. EPA is also requesting comment on its cost estimates for the permittee to have a hydrologist make such a determination. EPA estimates that for a typical CAFO, the full cost of determining whether ground water beneath the facility has a direct hydrologic connection to surface water would be approximately $3,000. See Section X for more information on cost estimates.

Permit requirements for facilities with groundwater that has a direct hydrologic connection with surface water are discussed in Section VII.E.5.d below.

k. *What Regulatory Relief is Provided by Today's Proposed Rulemaking? Two-tier vs. Three-tier Structure.* Each of EPA's proposals effect small livestock and poultry businesses in different ways, posing important trade-offs when selecting ways to mitigate economic impacts. First, by proposing to establish a two-tier structure with a 500 AU threshold, EPA is proposing not to automatically impose the effluent guidelines requirements on operations with 300 to 500 AU. By eliminating this size category, EPA estimates that about 10,000 smaller AFOs are relieved from being defined as CAFOs, and instead would only be subject to permitting if designated by the permit authority due to being a significant contributor of pollutants.

A three-tier structure, by contrast, only automatically defines all operations over 1,000 AU as CAFOs, instead of 500 AU. However, while all of the 26,000 AFOs between 300 and 1,000 AU wouldn't be required to apply for an NPDES permit, all those operations would be required to either apply for a permit or to certify to the permit authority that they do not meet any of the conditions for being a CAFO. EPA estimates that approximately 19,000 of these operations would have to change some aspect of their operation in order to avoid being permitted, and all 26,000 would be required to develop and implement a PNP. Thus, while in theory fewer operations could be permitted, in fact more small enterprises would incur costs under a three-tier scenario. Section X.J.4 provides a summary of the difference in costs associated with these two options; more detailed information is provided in Section 9 of the Economic Analysis.

The three-tier structure allows States more flexibility to develop more effective non-NPDES programs to assist middle tier operations. The two-tier structure with a 500 AU threshold might limit access to federal funds, such as Section 319 nonpoint source program funds, for operations in the 500 to 1,000 AU range. The detailed conditions in the three-tier structure, however, do not meet the goal of today's proposal to simplify the NPDES regulation for CAFOs because it leaves in place the need for the regulated community and enforcement authorities to interpret a complicated set of conditions.

Chicken Threshold. During deliberations to select a threshold for dry chicken operations, EPA considered various options for relieving small business impacts. Under the two-tier structure, EPA examined a 100,000 bird threshold as well as a 50,000 bird threshold. Although the 50,000 bird threshold effects many more small chicken operations, analysis showed that setting the threshold at 100,000 birds would not be sufficiently environmentally protective in parts of the country that have experienced water quality degradation from the chicken industry. Section VII.C.2.f describes the relative benefits of each of these options. Nonetheless, because wet layer operations are currently regulated at 30,000 birds, raising the threshold to 50,000 birds will relieve some small businesses in this sector.

Elimination of the mixed animal calculation. EPA's is further proposing to mitigate the effects of today's proposal on small businesses by eliminating the mixed animal calculation for determining which AFOs are CAFOs. Thus, operations with mixed animal types that do not meet the size threshold for any single livestock category would not be defined as a CAFO. EPA expects that there are few AFOs with more than a single animal type that would be defined as CAFOs, since most mixed operations tend to be smaller in size. The Agency determined that the inclusion of mixed operations would disproportionately burden small businesses while resulting in little additional environmental benefit. Since

most mixed operations tend to be smaller in size, this exclusion represents important accommodations for small business. EPA's decision not to include smaller mixed operations is consistent with its objective to focus on the largest operations since these pose the greatest potential risk to water quality and public health given the sheer volume of manure generated at these operations.

Operations that handle larger herds or flocks take on the characteristics of being more industrial in nature, rather than having the characteristics typically associated with farming. These facilities typically specialize in a particular animal sector rather than having mixed animal types, and often do not have an adequate land base for agricultural use of manure. As a result, large facilities need to dispose of significant volumes of manure and wastewater which have the potential, if not properly handled, to cause significant water quality impacts. By comparison, smaller farms manage fewer animals and tend to concentrate less manure nutrients at a single farming location. Smaller farms tend to be less specialized and are more diversified, engaging in both animal and crop production. These farms often have sufficient cropland and fertilizer needs to land apply manure nutrients generated at a farm's livestock or poultry business for agricultural purposes.

For operations not defined as a CAFO, the Permit Authority would designate any facility determined to be a significant contributor of pollution to waters of the U.S. as a CAFO, and would consequently develop a permit based on best professional judgement (BPJ).

The estimated cost savings from eliminating the mixed animal calculation is indeterminate due to limited information about operations of this size and also varying cost requirements. EPA's decision is also expected to simplify compliance and be more administratively efficient, since the mixed operation multiplier was confusing to the regulated community and to enforcement personnel, and did not cover all animal types (because poultry did not have an AU equivalent).

Site-specific PNPs Rather than Mandated BMPs. In addition, while facilities that are defined or designated as CAFOs would be subject to specific performance standards contained with the permit conditions, EPA's proposed revisions also provide flexibility to small businesses. In particular, the revised effluent guidelines and NPDES standards and conditions are not specific requirements for design, equipment, or work practices, but rather allow the CAFO operator to write site-specific Permit Nutrient Plans that implement the permit requirements in a manner appropriate and manageable for that business. This will reduce impacts to all facilities, regardless of size, by allowing operators to choose the least costly mix of process changes and new control equipment that would meet the limitations.

Demonstration of No Potential to Discharge. Finally, in both proposals, operations that must apply for a permit would have the additional opportunity to demonstrate to the permit authority that pollutants have not been discharged and have no potential to discharge into waters of the U.S. These operations would not be issued a permit if they can successfully demonstrate no potential to discharge. See section VII.D.3 for a discussion of demonstrating ''no potential to discharge.''

Measures Not Being Proposed. During the development of the CAFO rulemaking, EPA considered regulatory relief measures under the NPDES permit program that are not being proposed, including: (1) A ''Good Faith Incentive,'' and (2) an ''Early Exit'' provision. These options are summarized below. More detail is provided in the SBREFA Panel Report (2000).

Under the ''Good Faith Incentive,'' EPA considered incorporating an incentive for small CAFO businesses (i.e., AFOs with a number of animals below the regulatory threshold) to take early voluntary actions in good faith to manage manure and wastewater in accordance with the requirements of a nutrient management plan. In the event that such smaller AFOs have a discharge that would otherwise cause them to be designated as CAFOs, the CAFO regulations would provide an opportunity for these smaller AFOs to address the cause of the one-time discharge and avoid being designated as CAFOs.

Under the ''Early Exit'' provision, EPA considered a regulatory provision that would explicitly allow CAFOs with fewer animals than the regulatory threshold for large CAFOs to exit the regulatory program after five years of good performance. The regulations could allow such a smaller CAFO to exit the regulatory program if it demonstrates that it had successfully addressed the conditions that caused it to either be defined or designated as a CAFO.

EPA decided not to include either of these provisions in the proposed regulations following the SBAR Panel consultation process. Neither small businesses, SBA, OMB, nor EPA enforcement personnel expressed support for either of these provisions. Also, the Early Exit provision was not deemed to provide additional regulatory relief over the current program, since an operation that has been defined or designated as a CAFO can already make changes at the operation whereby, after complying with the permit for the permit's five year term, the operation would no longer meet the definition of a CAFO and therefore would no longer be required to be permitted.

Both the regulatory relief measures selected and those considered but not selected are discussed in detail in Chapter 9 of the Economic Analysis, included in the Record for today's proposed rulemaking. EPA requests comment on the regulatory relief measures considered but not included in today's proposal.

3. How Does the Proposed Rule Change the Existing Designation Criteria and Procedure?

In the existing regulation, an operation in the middle tier, those with 300 AU to 1,000 AU, may either be defined as a CAFO or designated by the permit authority; those in the smallest category, with fewer than 300 AU, may only be designated a CAFO if the facility discharges: (1) into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or (2) directly into waters of the United States that originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the confined animals. The permit authority must conduct an on-site inspection to determine whether the AFO is a significant contributor of pollutants. The two discharge criteria have proved difficult to interpret and enforce, making it difficult to take enforcement action against dischargers. Very few facilities have been designated in the past 25 years despite environmental concerns.

EPA's proposals on how, and whether, to amend these criteria vary with the alternative structure. Under a two-tier structure, EPA is proposing to eliminate these two criteria; under a three-tier structure, EPA is proposing to retain these two criteria.

Under the proposed two-tier structure with a 500 AU threshold, or under any other alternative two-tier structure such as with a 750 AU threshold, EPA is proposing to eliminate the two discharge criteria. Raising the NPDES threshold to 500 AU, 750 AU or 1,000 AU raises a policy question for facilities below the selected threshold but with more than 300 AU. Facilities with 300 to 1,000 AU are currently subject to

NPDES regulation (if certain criteria are met). To rely entirely on designation for these operations could be viewed by some as deregulatory, because the designation process is a time consuming and resource intensive process that makes it difficult to redress violations. It could also result in the inability of permit authorities to take enforcement actions against initial discharges unless they are from an independent point source at the facility. Otherwise, the initial discharge can only result in initiation of the designation process itself; enforcement could only take place upon a subsequent discharge. Unless the designation process can be streamlined in some way to enable permit authorities to more efficiently address those who are significant contributors of pollutants, raising the threshold too high may also not be sufficiently protective of the environment. While EPA could have proposed to retain the two criteria for those with fewer than 300 AU, and eliminate it only for those with greater than 300 AU but below the regulatory threshold, EPA believes that this would introduce unnecessary complexity into this regulation.

While eliminating the two discharge criteria, this proposal would retain the provision in the existing regulation that any AFO may be designated as a CAFO on a case-by-case basis if the NPDES permit authority determines that the facility is a significant contributor of pollutants to waters of the U.S. Today's proposal would not change the factors that the regulation lists as relevant to whether a facility is a significant contributor—see proposed § 122.23(b)(1) (listing factors such as: the size of the operation; the amount of wastewater discharged; the location of any potential receiving waters; means of conveyance of animal manure and process wastewater into waters of the U.S.; slope, vegetation, rainfall and other factors affecting the likelihood or frequency of discharge to receiving waters).

This proposal also retains the existing requirement that the permit authority conduct an on-site inspection before making a designation. No inspection would be required, however, to designate a facility that was previously defined or designated as a CAFO, although the permit authority may chose to do one.

Under a three-tier structure, EPA is proposing to retain the two discharge criteria used to designate an AFO with fewer than 300 AU as a CAFO. In this approach, facilities in the 300 AU to 1,000 AU size range must meet certain conditions for being considered a CAFO, and EPA considers this to be sufficiently protective of the environment.

EPA is requesting comment on these two proposals, and also requests comment on three other alternatives. EPA could: (1) retain the two criteria even under a two-tier structure for all operations below the regulatory threshold; (2) retain the two criteria under a two-tier structure for only for those with fewer than 300 AU and eliminate the two criteria for those below the regulatory threshold but with greater than 300 AU; or (3) eliminate the criteria in the three-tier structure for those with fewer than 300 AU.

Significant concern was raised over the issue of designation during the SBREFA Panel process. At the time of the Panel, EPA was not considering eliminating these two criteria, and SERs and Panel members strongly endorsed this position. At that time, EPA's was focusing on a three-tier structure with revised conditions as the preferred option, and retaining the criteria was consistent with the revisions being considered. Since then, however, EPA's analysis has resulted in a strong option for a two-tier approach that would be simpler to implement and would focus on the largest operations. Once this scenario became a strong candidate, reconsideration of the two designation criteria was introduced. EPA realizes that this proposal has raised some concern in the small business community. However, EPA does not believe that eliminating these criteria will result in significantly more small operations being designated. Rather, it will enable the permit authority to ensure that the most egregious discharges of significant quantities of pollutants are addressed.

It is likely that few AFOs with less than 300 AU are significant contributors of pollutants, and permit authorities may be appropriately focusing scarce resources on larger facilities. Further, some also believe that it may be appropriate under a two-tier structure to retain the two criteria as well as the on-site inspection criterion to AFOs under the regulatory threshold, e.g. with fewer than 500 AU or 750 AU. SERs during the SBREFA process indicated that family farmers operating AFOs with fewer than 1,000 AU tend to have a direct interest in environmental stewardship, since their livelihood (e.g., soil quality and drinking water) often depends on it. They also argued that EPA should not divert resources away from AFOs with the greatest potential to discharge—those with 1,000 AU or more. EPA is soliciting comment on whether to retain the designation criteria for all AFOs below the regulatory threshold in a two-tier structure, and whether this option will be protective of the environment.

While permit authorities have indicated that the requirement for an on-site inspection makes the designation process resource intensive, recommendations resulting from the SBREFA small business consultation process encouraged EPA not to remove the on-site inspection requirement. Some were concerned that EPA might do widespread blanket designations of large numbers of operations, especially in watersheds that have been listed under the CWA 303(d), Total Maximum Daily Load (TMDL) process. Thus, EPA is soliciting comment on whether to eliminate the requirement that the inspection be ''on-site,'' perhaps by allowing, in lieu of on-site inspections, other forms of site-specific information gathering, such as use of monitoring data, fly-overs, satellite imagery, etc. Other parts of the NPDES program allow such information gathering and do not require inspections to be ''on-site.''

If the on-site requirement were eliminated, the permit authority would still need to make a determination that the facility is a significant contributor of pollution, which might necessitate an on-site inspection in many cases. On the other hand, in watersheds that are not meeting water quality standards for nutrients, the permit authority could designate all AFOs as CAFOs without conducting individual on-site inspections. Even in 303(d) listed watersheds, however, an operator of an individual facility might be able to demonstrate in the NPDES permit application that it has no potential to discharge, and request that it be exempted from NPDES requirements.

Due to the significant concerns of the small business community, EPA is not proposing at this time to eliminate the on-site inspection requirements, but, rather, EPA is soliciting comment on whether or not to eliminate this provision or to revise it to allow other forms of site-specific data gathering.

Finally, EPA is proposing a technical correction to the designation regulatory language. The existing CAFO NPDES regulations provide for designation of an AFO as a CAFO upon determining that it is a significant contributor of ''pollution'' to the waters of the U.S. 40 CFR 122.23(c). EPA is today proposing to change the term to ''pollutants.'' Elsewhere in the NPDES regulations, EPA uses the phrase ''significant contributor of pollutants'' for designation purposes. 40 CFR 122.26(a)(1)(v). EPA is not aware of any reason the Agency would have used different terms for similar designation

standards, and is seeking consistency in this proposal. The Agency believes the term ''pollutant'' is the correct term. The Clean Water Act provides definitions for both ''pollutant and ''pollution'' in Section 502, but the NPDES program of Section 402 focuses specifically on permits ''for the discharge of any pollutant, or combination of pollutants.'' Therefore, EPA believes it is appropriate to establish a designation standard for purposes of permitting CAFOs based on whether a facility is a significant contributor of ''pollutants.''

4. Designation of CAFOs by EPA in Approved States

Today's proposal would explicitly allow the EPA Regional Administrator to designate an AFO as a CAFO if it meets the designation criteria in the regulations, even in States with approved NPDES programs. See proposed § 122.23(b). As described in the preceding section, VII.C.4, AFOs that have not been defined as CAFOs may be designated as CAFOs on a case-by-case basis upon determination that such sources are significant contributors of pollution to waters of the United States. EPA's authority to designate AFOs as CAFOs would be subject to the same criteria and limitations to which State designation authority is subject.

The existing regulatory language is not explicit as to whether EPA has the authority to designate AFOs as CAFOs in States with approved NPDES programs. The current regulations state that ''the Director'' may designate AFOs as CAFOs. 40 CFR 122.23(c)(1). The existing definition of ''Director'' states: ''When there is an approved State program, 'Director' normally means the State Director. In some circumstances, however, EPA retains the authority to take certain actions even where there is an approved State program.'' 40 CFR 122.2. Today's proposal would give EPA the explicit authority to designate an AFO as a CAFO in States with approved programs.

EPA does not propose to assume authority or jurisdiction to issue permits to the CAFOs that the Agency designates in approved NPDES States. That authority would remain with the approved State.

EPA believes that CWA Section 501(a) provides the Agency with the authority to designate point sources subject to regulation under the NPDES program, even in States approved to administer the NPDES permit program. This interpretive authority to define point sources and nonpoint sources was recognized by the D.C. Circuit in *NRDC* v. *Costle,* 568 F.2d 1369, 1377 (D.C. Cir. 1977). The interpretive authority arises from CWA Section 501(a) when EPA interprets the term ''point source'' at CWA Section 502(14). EPA's proposal would ensure that EPA has the same authority to designate AFOs as CAFOs that need a permit as the Agency has to designate other storm water point sources as needing a permit. See 40 CFR 122.26(a)(2)(v).

EPA recognizes that many State agencies have limited resources to implement their NPDES programs. States may be hesitant to designate CAFOs because of concerns that regulating the CAFOs will require additional resources that could be used for competing priorities. In light of the increased reliance and success in control of point sources under general permits, however, the Agency believes that there will be only an incremental increase in regulatory burden due to the designated sources.

On August 23, 1999, the Agency proposed to provide explicit authority for EPA to designate CAFOs in approved States, but would have limited such authority to the designation of AFOs where pollutants are discharged into waters for which EPA establishes a total maximum daily load or ''TMDL'' and designation is necessary to ensure that the TMDL is achieved. 64 FR 46058, 46088 (August 23, 1999). EPA received comments both supporting and opposing the proposal. In promulgating the final TMDL rule, however, the Agency did not take final action on the proposed changes applicable to CAFOs, 65 FR 43586, 43648 (July 13, 2000), deciding instead to take action in this proposed rulemaking.

Today's proposal is intended to help ensure nationally consistent application of the provisions for designating CAFOs and is not focusing specifically at AFOs in impaired watersheds. Implementation of the current rule in States with NPDES authorized programs has varied greatly from State to State, with several States choosing to implement non-NPDES State programs rather than a federally enforceable NPDES program. Public concerns have also been raised about lack of access to State non-NPDES CAFO programs. While several of today's proposed revisions would help to correct these disparities, EPA is concerned that there may be instances of significant discharges from AFOs that may not be addressed by State programs, and that are not being required to comply with the same standards and requirements expected of all AFOs. As part of their approved programs, States should designate AFOs that are significant sources of pollutants. EPA would have the authority to designate AFOs as CAFOs, should that be necessary.

The Agency invites comment on this proposal.

5. Co-permitting Entities That Exert Substantial Operational Control Over a CAFO

EPA is proposing that permit authorities co-permit entities that exercise substantial operational control over CAFOs along with the owner/operator of the facility. See proposed § 122.23(a)(5) and (i)(4). While the permit authority currently may deem such entities to be ''operators'' under the Clean Water Act and require them to be permitted under existing legal requirements, today's proposal includes changes to the regulations to identify the circumstances under which co-permitting is required and how permit authorities are expected to implement the requirements. Because the existing definition of ''operator'' in 122.2 generally already encompasses operators who exercise substantial operational control, the Agency is seeking comment on whether this additional definition [or provision] is necessary.

For other categories of discharges, EPA's regulations states that contributors to a discharge ''may'' be co-permittees. See 40 CFR § 122.44(m). § 122.44(m) addresses the situation in which the co-permittees operate distinct sources and a privately owned treatment works is the owner of the ultimate point source discharge. In that context, EPA deemed it appropriate to give the permit writer the discretion to permit only the privately owned treatment works or the distinct sources, or both, depending on the level of control each exercises over the pollutants. In the context of CAFOs, however, the co-permittees both control some aspects of operations at the point source. Therefore, EPA is proposing that they must either be co-permittees or each must hold a separate permit.

Processor/Producer Relationship. As discussed below, proposed § 122.23(a)(5) is intended, at a minimum, to require permit authorities to hold certain entities that exercise substantial operational control over other entities jointly responsible for the proper disposition of manure generated at the CAFO. While under today's proposal a permit authority could require an entity that has substantial operational control over a CAFO to be jointly responsible for all of the CAFO's NPDES permit requirements, the proposal would allow the permit authority to allocate individual responsibility for various activities to any of the co-permittees. The proposed

rule would specify, however, that the proper disposition of manure must remain the joint responsibility of all the entities covered by the permit.

As discussed in more detail in section IV.C. of this preamble, among the major trends in livestock and poultry production are closer linkages between animal feeding operations and processing firms. Increasingly, businesses such as slaughtering facilities and meat packing plants and some integrated food manufacturing facilities are contracting out the raising or finishing production phase to a CAFO. Oftentimes, production contracts are used in which a contractor (such as a processing firm, feed mill, or other animal feeding operation) retains ownership of the animals and/or exercises substantial operational control over the type of production practices used at the CAFO. More information on the trends in animal agriculture and the evolving contractual relationships between producer and processors is presented in section IV.C of this preamble.

Use of production contracts varies by sector. Production contracting dominates U.S. broiler and turkey production, accounting for 98 percent of annual broiler production and 70 percent of turkey production. About 40 percent of all eggs produced annually are under a production contract arrangement. Production contracting in the hog sector still accounts for a relatively small share of production (about 30 percent of hog production in 1997), but use is rising, especially in some regions. Production contracts are uncommon at beef and dairy operations, although they are used by some operations to raise replacement herd or to finish animals prior to slaughter. Additional detail on the use of production contracts in these sectors is provided in section VI.

Although farmers and ranchers have long used contracts to market agricultural commodities, increased use of production contracts is changing the organizational structure of agriculture and is raising policy concerns regarding who is responsible for ensuring that manure and wastewater is contained on-site and who should pay for environmental improvements at a production facility. As a practical matter, however, regulatory authorities have limited ability to influence who pays for environmental compliance, since the division of costs and operational responsibilities is determined by private contracts, not regulation.

In addition, there is also evidence that the role of the producer-processor relationship may influence where animal production facilities become concentrated, since animal feeding operations tend to locate in close proximity to feed and meat packing plants. This trend may be increasing the potential that excess manure nutrients beyond the need for crop fertilizer are becoming concentrated in particular geographic areas, thus raising the potential for increased environmental pressure in those areas. To further examine this possibility, EPA conducted an analysis of the correlation between areas of the country where there is a concentration of excess manure generated by animal production operations and a concentration of meat packing and poultry slaughtering facilities. This analysis concludes that in some areas of the country there is a strong correlation between areas of excess manure concentrations and areas where there is a large number of processing plants. More information on this analysis is provided in section IV.C.4 of this preamble.

Substantial Operational Control as Basis for Co-Permitting. Today's proposal would clarify that all entities that exercise substantial operational control over a CAFO are subject to NPDES permitting requirements as an ''operator'' of the facility. EPA's regulations define an owner or operator as ''the owner or operator of any 'facility or activity' subject to regulation under the NPDES program.'' 40 CFR § 122.2. This definition does not provide further detail to interpret the term, and the Agency looks for guidance in the definitions of the term in other sections of the statute: ''The term 'owner or operator' means any person who owns, leases, operates, *controls, or supervises* a source.'' CWA § 306(a)(4) (emphasis added).

Case law defining the term ''operator'' is sparse, but courts generally have concluded that through the inclusion of the terms owner and operator: ''Liability under the CWA is predicated on either (1) performance of the work, or (2) responsibility for or control over the work.'' *U.S.* v. *Sargent County Water Resources Dist.,* 876 F.Supp 1081, 1088 (N.D. 1992). See also, *U.S.* v. *Lambert,* 915 F.Supp. 797, 802 (S.D.WVa. 1996) (''The Clean Water Act imposes liability both on the party who actually performed the work and on the party with responsibility for or control over performance of the work.''); *U.S.* v. *Board of Trustees of Fla. Keys Community College,* 531 F.Supp. 267, 274 (S.D.Fla. 1981). Thus, under the existing regulation and existing case law, integrators which are responsible for or control the performance of the work at individual CAFOs may be subject to the CWA as an operator of the CAFO. With today's proposal, EPA is identifying some factors which the Agency believes indicate that the integrator has sufficient operational control over the CAFO to be considered an ''operator'' for purposes of the CWA.

Whether an entity exercises substantial operational control over the facility would depend on the circumstances in each case. The proposed regulation lists factors relevant to ''substantial operational control,'' which would include (but not be limited to) whether the entity: (1) Directs the activity of persons working at the CAFO either through a contract or direct supervision of, or on-site participation in, activities at the facility; (2) owns the animals; or (3) specifies how the animals are grown, fed, or medicated. EPA is aware that many integrator contracts may not provide for direct integrator responsibility for manure management and disposal. EPA believes, however, that the proposed factors will identify integrators who exercise such pervasive control over a facility that they are, for CWA purposes, co-operators of the CAFO.

This is a representative list of factors that should be considered in determining whether a co-permit is appropriate, but States should develop additional factors as needed to address their specific needs and circumstances. The greater the degree to which one or more of these or other factors is present, the more likely that the entity is exercising substantial operational control and, thus, the more important it becomes to co-permit the entity. For example, the fact that a processor required its contract grower to purchase and feed its animals feed from a specific source could be relevant for evaluating operational control. EPA will be available to assist NPDES permit authorities in making case-specific determinations of whether an entity is exerting control such that it should be co-permitted. EPA is also taking comment on whether there are additional factors which should be included in the regulation. EPA also requests comment on whether degree of participation in decisions affecting manure management and disposal is one of the factors which should be considered.

EPA is soliciting comment on whether, alternatively, the fact that an entity owns the animals that are being raised in a CAFO should be sufficient to require the entity to be a joint permittee as a owner. EPA believes that ownership of the animals establishes an ownership interest in the pollutant generating

activity at the CAFO that is sufficient to hold the owner of the animals responsible for the discharge of pollutants from the CAFO.

In non-CAFO parts of the NPDES regulations, the operator rather than the owner is generally the NPDES permit holder. One reason an owner is not required to get a permit is illustrated by an owner who has leased a factory. When an owner leases a factory to the lessee-operator, the owner gives up its control over the pollution-producing activities. The owner of animals at a feedlot, on the other hand, maintains all current interests in the animal and is merely paying the contract grower to raise the animals for the owner. It is the owner's animals that generate most of the manure and wastewater that is created at a CAFO. Therefore, EPA believes that ownership of the animals may be sufficient to create responsibility for ensuring that their wastes are properly disposed of. This may be particularly true where manure must be sent off-site from the CAFO in order to be properly disposed of.

EPA has previously identified situations where the owner should be the NPDES permittee rather than, or in addition to, the contract operator. In the context of municipal wastewater treatment plants, EPA has recognized that the municipal owner rather than the contract operator may be the proper NPDES permittee where the owner maintains some control over the plant.

If EPA selects this option, it might also clarify that ownership could be determined by factors other than outright title to the animals. This would prevent integrators from modifying their contracts so that they do not own the animals outright. EPA could develop factors for determining ownership such as the existence of an agreement to purchase the animals at a fixed price together with the integrator accepting the risk of loss of the animals prior to sale. EPA solicits comments on whether such criteria are necessary and, if so, what appropriate criteria would be.

Implementation of Co-Permitting. All permittees would be held jointly responsible for ensuring that manure production in excess of what can be properly managed on-site is handled in an environmentally appropriate manner. The effluent guidelines proposes to require a number of land application practices that will limit the amount of CAFO manure that can be applied to a CAFO's land application areas. If the CAFO has generated manure in excess of the amount which can be applied consistent with its NPDES permit, the proposed NPDES regulations impose a number of requirements on co-permittees, described in VII.D.4. See proposed § 122.23(j)(4). The co-permittees could also transfer their excess manure to a facility to package it is as commercial fertilizer, to an incinerator or other centralized treatment, to be transformed into a value-added product, or to any other operation that would not land apply the manure. EPA is proposing that manure that must leave the CAFO in order to be properly managed not be considered within the unique control of any of the entities with substantial operational control over the CAFO. In fact, an integrator that owns the animals at a number of CAFOs in an area which are producing manure in such volumes that it cannot be properly land applied may be in a unique position to be able to develop innovative means of compliance with the permit limits. Today's proposal would specify that the disposition of excess manure would remain the joint responsibility of all permit holders. See proposed § 122.23(i)(9). Integrators would thereby be encouraged to ensure compliance with NPDES permits in a number of ways, including: (a) establishing a corporate environmental program that ensures that contracts have sound environmental requirements for the CAFOs; (b) ensuring that contractors have the necessary infrastructure in place to properly manage manure; and (c) developing and implementing a program that ensures proper management and/or disposal of excess manure. The proposed requirement will give integrators a strong incentive to ensure that their contract producers comply with permit requirements and subject them to potential liability if they do not. Integrators could also establish facilities to which CAFOs in the area could transfer their excess manure. EPA is further proposing to require co-permitted entities to assume responsibility for manure generated at their contract operations when the manure is transferred off-site.

EPA believes that integrators will want to make good faith efforts to take appropriate steps to address the adverse environmental impacts associated with their business. EPA is soliciting comments on how to structure the co-permitting provisions of this rulemaking to achieve the intended environmental outcome without causing negative impacts on growers.

EPA also believes the proposal contains sufficient flexibility for permit authorities to develop creative, and streamlined, approaches to co-permitting. For example, a State might want to develop an NPDES general permit in collaboration with a single integrator or, alternatively, with all integrators in a geographic region (*e.g.,* statewide, watershed, *etc.*). Such a general permit might require integrators to assume responsibility for ensuring that their contractors engage in proper management practices for excess manure. As a condition of the NPDES general permit, the integrator could be obligated to fulfill its commitment or to assume responsibility for violations by its growers.

The proposed regulations would provide that a person is an ''operator'' when ''the Director determines'' that the person exercises substantial operational control over the CAFO. EPA also considered whether to delete the reference to a determination by the Director, so that any person who exercised such control over a CAFO would be an operator without the need for a determination by the Director. If EPA were to eliminate the need for a determination before such a person may be an ''operator,'' persons who may meet this definition would be less certain in some cases as to whether they do in fact meet it. On the other hand, if EPA retains the need for a determination by the Director, then because of resource shortages or for other reasons, EPA or the State might not be able to make these determinations in a timely way, or might not make them at all in some cases. These persons would therefore inappropriately be able to avoid liability even though they are exercising substantial operational control of a CAFO. Accordingly, EPA requests comments on whether the final rule should retain the need for a determination by the Director of substantial operational control. Finally, EPA solicits comment on whether to provide that, in authorized States, either the Director or EPA may make the determination of substantial operational control.

Additional Issues Associated With Co-Permitting. The option of co-permitting integrators was discussed extensively by small entity representatives (SERs) and by the Small Business Advocacy Review Panel during the SBREFA outreach process. The SERs included both independent and contract producers. A majority of SERs expressed opposition to such an approach. They were concerned that co-permitting could decrease the operator's leverage in contract negotiations with the corporate entity, increase corporate pressure on operators to indemnify corporate entities against potential liability for non-compliance on the part of the operator, encourage corporate entities to interfere in the operational management

of the feedlot in order to protect against such liability, provide an additional pretext for corporate entities to terminate a contract when it was to their financial advantage to do so, restrict the freedom of operators to change integrators, and generally decrease the profits of the operator. These SERs were not convinced that co-permitting would result in any benefit to the environment, given that the operator generally controls those aspects of a feedlot's operations related to discharge, nor were they convinced that such an approach would result in additional corporate resources being directed toward environmental compliance, given the integrator's ability to pass on any additional costs it might incur as a result of co-permitting to the operator. A few SERs, who were not themselves involved in a contractual relationship with a larger corporate entity, favored co-permitting as a way of either leveling the playing field between contact and independent operators, or extracting additional compliance resources from corporate entities. Despite general concern over co-permitting due to the economic implications for the contractor, several SERs voiced their support for placing shared responsibility for the manure on the integrators, especially in the swine sector.

The Panel did not reach consensus on the issue of co-permitting. On the one hand, the Panel shared the SER's concern that co-permitting not serve as a vehicle through which the bargaining power and profits of small contract growers are further constrained with little environmental benefit. On the other, the Panel believed that there is a potential for environmental benefits from co-permitting. For example, the Panel noted (as discussed above), that co-permitted integrators may be able to coordinate manure management for growers in a given geographic area by providing centralized treatment, storage, and distribution facilities, though the Panel also pointed out that this could happen anyway through market mechanisms without co-permitting if it resulted in overall cost savings. In fact, the Agency is aware of situations where integrators do currently provide such services through their production contracts. The Panel also noted that co-permitting could motivate corporate entities to oversee environmental compliance of their contract growers, in order to protect themselves from potential liability, thus providing an additional layer of environmental oversight.

The Panel also expressed concern that any co-permitting requirements may entail additional costs, and that co-permitting can not prevent these costs from being passed on to small operators, to the extent that corporate entities enjoy a bargaining advantage during contract negotiations. The Panel thus recommended that EPA carefully consider whether the potential benefits from co-permitting warrant the costs, particularly in light of the potential shifting of these costs from corporate entities to contract growers. The Panel further recommended that if EPA does propose any form of co-permitting, it address in the preamble both the environmental benefits and any economic impacts on small entities that may result and request comment on its approach.

As discussed in Section VI, EPA estimates that 94 meat packing plants that slaughter hogs and 270 poultry processing facilities may be subject to the proposed co-permitting requirements. EPA expects that no meat packing or processing facilities in the cattle and dairy sectors will be subject to the proposed co-permitting requirements. Reasons for this assumption are summarized in Section VI of this preamble. Additional information is provided in Section 2 of the Economic Analysis. EPA is seeking comment on this assumption as part of today's notice.

EPA did not precisely estimate the costs and impacts that would accrue to individual co-permittees. Information on contractual relationships between contract growers and processing firms is proprietary and EPA does not have the necessary market information and data to conduct such an analysis. Market information is not available on the number and location of firms that contract out the raising of animals to CAFOs and the number and location of contract growers, and the share of production, that raise animals under a production contract. EPA also does not have data on the exact terms of the contractual agreements between processors and CAFOs to assess when a processor would be subject to the proposed co-permitting requirements, nor does EPA have financial data for processing firms or contract growers that utilize production contracts.

EPA, however, believes that the framework used to estimate costs to CAFO does provide a means to evaluate the possible upper bound of costs that could accrue to processing facilities in those industries where production contracts are more widely utilized and where EPA believes the proposed co-permitting requirements may affect processors. The details of this analysis are provided in Section X..F.2. Based on the results of this analysis, EPA estimates that the range of potential annual costs to hog processors is $135 million to $306 million ($1999, pre-tax). EPA estimates that the range of potential annual costs to broiler processors as $34 million to $117 million. EPA is soliciting comment on this approach.

This approach does not assume any addition to the total costs of the rule as a result of co-permitting, yet it does not assume that there will be a cost savings to contract growers as result of a contractual arrangement with a processing firm. This approach merely attempts to quantify the potential magnitude of costs that could accrue to processors that may be affected by the co-permitting requirements. Due to lack of information and data, EPA has not analyzed the effect of relative market power between the contract grower and the integrator on the distribution of costs, nor the potential for additional costs to be imposed by the integrator's need to take steps to protect itself against liability and perhaps to indemnify itself against such liability through its production contracts. EPA has also not specifically analyzed the environmental effects of co-permitting.

EPA recognizes that some industry representatives do not support assumptions of cost passthrough from contract producers to integrators, as also noted by many small entity representatives during the SBREFA outreach process as well as by members of the SBAR Panel. These commenters have noted that integrators have a bargaining advantage in negotiating contracts, which may ultimately allow them to force producers to incur all compliance costs as well as allow them to pass any additional costs down to growers that may be incurred by the processing firm. EPA has conducted an extensive review of the agricultural literature on market power in each of the livestock and poultry sectors and concluded that there is little evidence to suggest that increased production costs would be prevented from being passed on through the market levels. This information is provided in the docket.

EPA requests comments on its cost passthrough assumptions in general and as they relate to the analysis of processor level impacts under the proposed co-permitting requirements. EPA will give full consideration to all comments as it decides whether to include the proposed requirement for co-permitting of integrators in the final rule, or alternately whether to continue to allow this decision to be made on a case-by-case basis by local permit writers. Several other alternatives to co-permitting are discussed below. EPA

also requests comment on how to structure the co-permitting provisions of the rule making to achieve the intended environmental outcome without causing negative impacts on growers, should it decide to finalize them.

Alternatives to Co-Permitting. EPA also considered alternative approaches under which EPA would waive the co-permitting requirement for States and processors that implement effective programs for managing excess manure and nutrients. One such approach would require the disposition of manure that is transported off-site to remain the joint responsibility of the processor and other permit holders, unless an enforceable state program controls the off-site land application of manure. For example, if the State program addressed the off-site land application of manure with PNP development and implementation requirements that are equivalent to the requirements in 40 CFR 412.13(b)(b) and 122.23(j)(2), it would not be necessary to permit the processor in order to ensure the implementation of those requirements.

Another approach would be based on whether the processor has developed an approved Environmental Management System (EMS) that is implemented by all of its contract producers and regularly audited by an independent third party. EPA anticipates that the alternative program would be designed to achieve superior environmental and public health outcomes by addressing factors beyond those required in this proposed regulation, such as odor, pests, etc. The following section describes the principles of such a system.

Environmental Management System as Alternative to Co-Permitting. An increasing number of organizations, in both the private and public sector, are using environmental management systems (EMS) as a tool to help them not only comply with environmental legal requirements, but also address a full range of significant environmental impacts, many of which are not regulated. Environmental management systems include a series of formal procedures, practices, and policies that allow an organization to continually assess its impacts on the environment and take steps to reduce these impacts over time, providing an opportunity and mechanism for continuous improvement. EMSs do not replace the need for regulatory requirements, but can complement them and help organizations improve their overall environmental performance. EPA supports the adoption of EMSs that can help organizations improve their compliance and overall performance and is working with a number of industries to help them adopt industry-wide EMS programs.

Under this alternative, EPA would not require a processor to be co-permitted with their producers if the processor has developed, in conjunction with its contract producers, an EMS program that is approved by the permit authority and EPA, including opportunities for review and comment by EPA and the public. The EMS would identify the environmental planning and oversight systems, and critical management practices expected to be implemented by all of the processors' contract growers. Independent third-party auditors annually would verify effective implementation of the EMS to the permit authority and integrator. If a processor agreed to implement such a program, and then one or more of its contract producers failed to meet these requirements, the processor would remove animals from the contract producers farm, in a time and manner as defined in the approved EMS, and not supply additional animals until the contract producer is certified as being in compliance with the EMS by the third party auditor. Once the animals have been removed, processors would not continue contractual relationships with producers not capable or willing to meet the minimum requirements of the EMS. Processors who fail the independent audit would be required to apply for an NPDES permit or be included as a co-permittee on contract producers' permits.

Each permitted facility's EMS would also require that programs be in place to ensure that it remained in compliance with its NPDES permit (if a permitted facility). For all contractors, the EMS would address all activities that could have a significant impact on the environment, including activities not subject to this proposed regulations. These best management practices could be adapted to meet the particular needs of individual States, as appropriate.

To ensure consistency, contract growers and the processor would be required to be annually audited by an independent third party. The permit authority would be expected to develop criteria for the audit, including what constitutes acceptable implementation of the EMS by both contract producers and the processor. Such an EMS would require contract producers to comply with their NPDES permit (if a permitted facility) and to implement the terms of the EMS that address manure management as well as other unregulated impacts like odor, pests, etc. Contract producers would need to employ specific Best Management Practices (BMPs) when addressing unregulated impacts and maintain specific records on their use. BMPs could be adapted to meet the needs of a particular state or region.

The EMS would be required to be consistent with guidance developed by the processor and approved by the permit authority and EPA. Processors would assume responsibility for developing, in conjunction with contract producers, the proposed EMS as well as the proposed third party auditing guidance, which would be subject to approval by the permit authority and EPA. Further, the processors would facilitate implementation by their producers through training and technical assistance.

Each facility's EMS would be required to successfully complete an audit conducted by an independent third party organization approved by the permit authority. Facilities would also be subject to annual follow up audits designed to determine if the EMS was in place and being adequately implemented. Contractors would not continue contractual relationships with producers that did not remain in compliance and did not continue to adequately implement their EMSs, as determined by annual third party follow-up audits.

Each processor would be required to seek input from local stakeholders as it developed and implemented its EMS. Further, information about EMS implementation, including audit results, would be publicly available.

Because geographic areas tend to be dominated by few processors, contract growers tend to have limited choice in selecting with whom to have a production contract. Thus, EPA expects that processors would provide economic and technical assistance to help contract producers implement the EMS.

EPA sees potential benefits to this type of approach. Besides giving processors an incentive to develop regional approaches to managing excess manure nutrients from CAFO generated manure, it would involve the processors in ensuring that permittees meet their permit requirements, thus relieving burden on the resources of permit authorities and EPA. Further, an EMS goes beyond what NPDES requires, in that it addresses issues beyond the scope of this rulemaking, such as odor, pests, etc., and, most important, it will address manure generated by all CAFOs as well as all AFOs under contract with the processors. Finally, this approach will provide local stakeholders with important information about the operations of producers and give these

stakeholders meaningful opportunities to provide input to the facility on its operations throughout the permitting and EMS development process.

On the other hand, an EMS approach could be more difficult to administer and enforce. Some also question whether it would be appropriate to impose the requirements of an EMS on independent growers or AFO operators who trade with the processors, but who are not subject to this regulation. Further, it could be a concern that a producer might, seemingly arbitrarily, refuse resources to assist with implementing the EMS, and then subsequently withholding animals from the grower and effectively terminating the contract.

EPA solicits comment on whether EPA should provide an option for States to develop an alternative program for addressing excess manure in lieu of requiring co-permitting. EPA also requests comment on the EMS concept described in detail in this proposal.

6. How Does EPA Propose To Regulate Point Source Discharges at AFOs That Are Not CAFOs?

EPA is proposing to clarify in today's proposed rulemaking that all point source discharges from AFOs are covered by the NPDES regulations even if the facility is not a CAFO (except for certain discharges composed entirely of storm water, as discussed below). See proposed § 122.23(g).

The definition of point source in the CWA and regulations lists both discrete conveyances (such as pipes and ditches) and CAFOs. CWA § 502(14); 40 CFR 122.2. EPA wants to confirm as explicitly as possible that the NPDES regulatory program applies to both types of discharges. Thus, where an AFO is not a CAFO (either because it has not met the definition criteria or has not been designated) discharges from the AFO are still regulated as point source discharges under the NPDES program if the discharge is through a discrete conveyance that would qualify itself as a point source. An AFO is not excluded from the NPDES regulatory program altogether simply because it is not a CAFO. That is, if an AFO has a point source discharge through a pipe, ditch, or any other type of discernible, confined and discrete conveyance, it is subject to NPDES requirements just the same as any other facility that has a similar point source discharge and that is not an AFO.

Today's proposal would clarify that, even though an AFO is not a CAFO, an AFO may nevertheless require an NPDES permit due to discharges from a point source at the facility. See proposed § 122.23(g). More specifically, under existing regulation and today's proposal, an AFO may be subject to regulation under the Clean Water Act in any of the following ways:

(1) *Non-storm water discharges.* A non-storm water discharge of pollutants from a point source, such as a ditch, at the production area or land application area of an AFO, into waters of the U.S. is a violation of the CWA unless the owner or operator of the facility has an NPDES permit for the discharge from that point source (as discussed further below); or

(2) *Storm water discharges.* A discharge from a point source, such as a ditch, at the land application area of an AFO that does not qualify for the agricultural storm water discharge exemption may be designated as a regulated storm water point source under § 122.26(a)(1)(v), and, therefore, require an NPDES permit. The agricultural storm water exemption is discussed further in the following section D; or

(3) *Discharge as a CAFO.* An AFO may be designated as a CAFO and, therefore, require an NPDES permit on that basis (as discussed in the section on designation).

In addition to listing ''physical'' conveyances (such as pipes and ditches), the definition of point source in the CWA and EPA's regulations identifies CAFOs as a point source. CWA § 502(14); 40 CFR 122.2. Because all CAFOs are point sources, even surface run off from a CAFO that is not channelized in a discrete conveyance is considered a point source discharge that is subject to NPDES permit requirements. AFOs, on the other hand, are not defined as point sources. Because of that, under today's proposal, AFOs will be subject to NPDES permitting requirements if they have a point source discharge including under the circumstances described above.

First, today's proposal states clearly that an AFO which has a discharge of pollutants through a point source, such as a pipe or ditch, at either the production area or the land application area, to the waters of the United States which is not the direct result of precipitation is in violation of the Clean Water Act. See proposed § 122.23(g). The existing regulations are silent and some AFO operators have argued that none of their discharges can be considered point source discharges unless their AFO is defined or designated as a CAFO under 40 CFR 122.23. Today's proposal would make it clear that certain discharges at AFOs are subject to NPDES requirements and no designation by the permitting authority is required. For example, if the operator of an AFO with less than 500 animal units (in the two-tier structure) or less than 300 animal units (in the three-tier structure) empties its lagoon via a pipe directly into a stream without an NPDES permit, that would be a violation of the Clean Water Act.

Second, today's proposal clarifies that a storm water discharge composed entirely of storm water from a point source at the land application area of an AFO into waters of the U.S. requires an NPDES permit if: (1) the discharge does not quality for the agricultural storm water discharge exemption, discussed below; and (2) it is designated as a regulated storm water point source. Generally, all point source discharges are prohibited unless authorized by an NPDES permit. Section 402(p) of the Clean Water Act exempts certain storm water discharges from that general prohibition. Section 402(p)(2)(E) and the EPA regulations that implement Section 402(p)(6) provide for regulation of unregulated point sources on a case by case basis upon designation by EPA or the State permitting authority (40 CFR 122.26(a)(1)(v)).

EPA considered proposing that only 40 CFR 122.23 may be used to designate an AFO based on discharges from its land application area. Designation as a CAFO, however, could unnecessarily subject the AFO's production area to NPDES permit requirements. Also, because the land application area of third party applicators of manure may be designated using 122.26(a)(1)(v), EPA is proposing that AFO controlled land application areas could also be designated under that section, even if the AFO has not been designated as a CAFO. AFOs may be required to get a permit based on storm water discharges from their production areas only if they have been designated as a CAFO under § 122.23.

An AFO operator is not required to obtain a permit for a point source discharge at the land application area which consists entirely of storm water, and which does not qualify for the agricultural storm water discharge exemption, unless the point source has been designated under 40 CFR 122.26(a)(1)(v). A discharge consists entirely of storm water if it is due entirely to precipitation. It may include incidental pollutants that the storm water picks up while crossing the facility. The discharge would not consist entirely of storm water if, for example, a non-storm water (*e.g.,* process waste water) discharge occurs during the storm and is mixed with the storm water. Once a permit authority has determined that a point source

discharge from the land application area of an AFO is not composed entirely of storm water and does not qualify for the agricultural storm water discharge exemption, the permit authority may designate that point source as a regulated storm water point source if the permit authority further determines under 40 CFR 122.26(a)(1)(v) that the discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the U.S.

Designation under § 122.26 is separate from the designation of an operation as a CAFO. The criteria for designation as a CAFO based on discharges from either the land application or the production area are discussed above in C.4.

D. Land Application of CAFO-generated Manure

1. Why Is EPA Regulating Land Application of CAFO-generated Manure?

As discussed in Section IV.B of this preamble, agricultural operations, including animal production facilities, are considered a significant source of water pollution in the United States. The recently released National Water Quality Inventory indicates that agriculture is the leading contributor of identified water quality impairments in the nation's rivers and streams, as well as in lakes, ponds, and reservoirs. Agriculture is also identified as a major contributor to identified water quality impairments in the nation's estuaries.

Pollutant discharges from CAFOs arise from two principal routes. The first route of discharges from CAFOs is from manure storage or treatment structures, especially catastrophic failures, which cause significant volumes of often untreated manure and wastewater to enter waters of the U.S. resulting in fish kills. The second route of pollutant discharges is from the application of manure to land, usually for its fertilizer value or as a means of disposal. Additional information on how pollutants from CAFOs reach surface waters is provided in Section V.B of this document and in the rulemaking record.

The proposed regulation seeks to improve control of discharges that occur from land applied manure and wastewater. Analysis conducted by USDA indicates that, in some regions, the amount of nutrients present in land applied manure has the potential to exceed the nutrient needs of the crops grown in those regions. Actual soil sample information compiled by researchers at various land grant universities provides an indication of areas where there is widespread phosphorus saturation. Other research by USDA documents the runoff potential of land applied manure under normal and peak precipitation. Furthermore, research from a variety of sources indicates that there is a high correlation between areas with impaired lakes, streams and rivers due to nutrient enrichment and areas where there is dense livestock and poultry production. This information is documented in the Technical Development Document. Additional information is available in the Environmental Assessment of the Proposed Effluent Limitations Guidelines for Concentrated Animal Feeding Operations and other documents that support today's rulemaking.

2. How Is EPA Interpreting the Agricultural Storm Water Exemption With Respect to Land Application of CAFO-generated Manure?

Today, EPA is proposing to define the term ''agricultural stormwater discharge'' with respect to land application of manure and wastewater from animal feeding operations. Section 502(14) of the Clean Water Act excludes ''agricultural stormwater discharges'' from the definition of the term point source. The Clean Water Act does not further define the term, and the Agency has not formally interpreted it. Under today's proposal, an ''agricultural stormwater discharge'' would be defined as ''a discharge composed entirely of storm water, as defined in 40 CFR 122.26(a)(13), from a land area upon which manure and/or wastewater from an animal feeding operation or concentrated animal feeding operation has been applied in accordance with proper agricultural practices, including land application of manure or wastewater in accordance with either a nitrogen-based or, as required, a phosphorus-based manure application rate.'' § 122.23(a)(1).

The CWA defines a point source as: ''any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. The term does not include agricultural stormwater discharges and return flows from irrigated agriculture.'' 33 U.S.C. § 1362(14).

Congress added the exemption from the definition of point source for ''agricultural stormwater discharges'' in the Water Quality Act of 1987. There is limited legislative history for this provision; Congress simply stated that the ''provision expands the existing exemption for return flows from irrigated agriculture to include agricultural stormwater discharges.'' *Legislative History of the Water Quality Act of 1987*, 100th Cong., 2d. Sess. at 538 (1988).

The courts have found that the EPA Administrator has the discretion to define point and nonpoint sources. *NRDC* v. *Costle*, 568 F.2d 1369, 1382 (D.C. Cir. 1977). EPA is proposing to exercise that discretion by defining the exemption for ''agricultural stormwater discharges'' to include only those discharges that (1) are composed entirely of storm water; and, (2) occur only after the implementation of proper agricultural practices.

EPA believes the first component is clear on the face of the statute. Only discharges that result from precipitation can qualify for an agricultural storm water discharge exemption. Therefore, the addition of pollutants as a result of a discharge from a point source to waters of the United States that is not due to precipitation is a violation of the Clean Water Act (except in compliance with an NPDES permit). For example, the application of CAFO manure onto a field in quantities that are so great that gravity conveys the manure through a ditch even in dry weather into a nearby river would not be eligible for the exemption for agricultural storm water discharges. Furthermore, it is possible for a discharge to occur during a precipitation event yet not be considered to be ''composed entirely of stormwater.'' As the Second Circuit found, a discharge during a storm could be ''primarily caused by the over-saturation of the fields rather than the rain and * * * sufficient quantities of manure were present so that the run-off could not be classified as ''stormwater'.'' *CARE* v. *Southview Farms*, 34 f. 3d 114,121 (Sept. 2, 1994).

Second, EPA is proposing that to be eligible for the exemption for agricultural storm water, any addition of manure and/or wastewater to navigable waters must occur despite the use of proper agricultural practices. EPA interprets the statute to reflect Congress' intent not to regulate additions of manure or wastewater that are truly agricultural because they occur despite the use of proper agricultural practices. Application of manure or wastewater that is not consistent with proper rates and practices such that there are adverse impacts on water quality would be considered waste disposal rather than agricultural usage. In today's action, EPA is proposing to interpret the term ''proper agricultural practices'' to incorporate the concept of protecting

water quality. This is consistent with USDA's Technical Guidance for Developing Comprehensive Nutrient Management Plans, which states that: ''[t]he objective of a CNMP is to provide AFO owners/operators with a plan to manage generated nutrients and by-products by combining conservation practices and management activities into a system that, when implemented, will protect or improve water quality.'' EPA believes that proper agricultural practices do encompass the need to protect water quality. While EPA recognizes that there may be legitimate agricultural needs that conflict with protecting water quality in some instances, EPA believes that its proposed definition of proper agricultural practices strikes the proper balance between these objectives. Since one focus of agricultural management practices, whether through guidance or regulation, at the state or federal level, is the minimization of water quality impacts, and since this is of particular concern to EPA, the Agency is proposing a definition of ''agriculture'' for Clean Water Act purposes which would be flexible enough so that an assessment of the actual impacts of a discharge of animal waste on a specific waterbody could be factored in. Today's proposal identifies the proper agricultural practices which land appliers seeking to qualify for the agricultural storm water discharge exemption would need to implement. In addition, if a permit authority determined that despite the implementation of the practices identified in today's proposal, discharges from the land application area of a CAFO were having an impact on water quality, the permit writer would need to impose additional agricultural practice requirements to mitigate such impacts. Only discharges that occur despite the implementation of all these proper agricultural practices would be considered ''agricultural stormwater discharges'' and be eligible for the exemption. EPA requests comment on this interpretation of the agricultural storm water exemption and on the proposal to define proper agricultural practice.

For CAFOs which land apply their manure, the Agency is proposing to require that owners or operators implement specific agricultural practices, including land application of manure and wastewater at a specified rate, development and implementation of a Permit Nutrient Plan, a prohibition on the application of CAFO manure or wastewater within 100 feet of surface water, and, as determined to be necessary by the permit authority, restrictions on application of manure to frozen, snow covered or saturated ground. See proposed §§ 412.31(b) and 412.37; § 122.21(j). The Agency is proposing to require these specific agricultural practices under its CWA authority both to define the scope of the agricultural storm water discharge exemption and to establish the best available technology for specific industrial sectors. Given the history of improper disposal of CAFO waste and Congress' identification of CAFO's as point sources, the Agency believes it should clearly define the agricultural practices which must be implemented at CAFOs.

EPA considered limiting the scope of the proper agricultural practices necessary to qualify for the agricultural storm water discharge exemption to those specified in the effluent guideline and NPDES regulations with no flexibility for the permit authority to consider additional measures necessary to mitigate water quality impacts. EPA chose not to propose this option because EPA was concerned that permit authorities would then be unable to include any additional permit conditions necessary to implement Total Maximum Daily Loads in impaired watersheds. EPA seeks comment on this option and other ways to address this concern.

The Agency is proposing to allow AFO owners or operators who land apply manure (either from their own operations or obtained from CAFOs) and more traditional, row crop farmers who land apply manure obtained from CAFOs to qualify for the agricultural storm water exemption as long as they are applying manure and wastewater at proper rates. As discussed in VII.B, under one of today's co-proposed options, CAFOs that transfer manure to such recipients would be required to obtain a letter of certification from the recipient land applier that the recipient intends to determine the nutrient needs of its crops based on realistic crop yields for its area, sample its soil at least once every three years to determine existing nutrient content, and not apply the manure in quantities that exceed the land application rates calculated using either the Phosphorus Index, Phosphorus Threshold, or Soil Test Phosphorus method as specified in 40 CFR 412.13(b)(1)(iv). For purposes of the CAFO's permit, recipient land appliers need not implement all of the proper agricultural practices identified above which CAFOs would be required to implement at their own land application areas. EPA believes that this proposal enables the Agency to implement Congress' intent to both exclude truly agricultural discharges due to storm water and regulate the disposition of the vast quantities of manure and wastewater generated by CAFOs.

EPA considered defining the agricultural storm water discharge exemption for non-CAFO land appliers to apply only to those discharges which occurred despite the implementation of all the practices required by today's proposal at CAFO land application areas. EPA could require a more comprehensive set of practices for land appliers of CAFO manure and wastewater to qualify for the agricultural storm water discharge exemption. Under any definition of proper agricultural practices, a recipient who failed to implement the required practices and had a discharge through a point source into waters of the U.S. could be designated as a regulated storm water point source. However, that recipient would not be vulnerable to enforcement under the Clean Water Act for discharges prior to designation, and could only be designated as a point source if the permitting authority (or EPA in authorized States) found that the conditions of 40 CFR 122.26(a)(1)(v) were met. See discussion below. EPA is requesting comment on this option.

Whether a discharger (who would otherwise be ineligible for the agricultural storm water discharge exemption) is subject to the Clean Water Act permitting requirements varies, because of the complex interaction among the agricultural storm water discharge exemption, the definition of ''point source,'' and other storm water discharge provisions. The next sections clarify EPA's intentions with regard to such regulation.

3. How is EPA Proposing To Regulate Discharges From Land Application of CAFO-generated Manure by CAFOs?

In today's action, EPA is proposing that the entire CAFO operation (*e.g.* the feedlot/production area and the land application areas under the operational control of a CAFO owner or operator) is subject to the revised effluent limitations guideline and the revised NPDES permitting regulation. See proposed § 122.23(a)(2). Also, as discussed above, EPA is proposing to interpret the CWA to allow CAFO land application areas to be eligible for the agricultural storm water discharge exemption. However, unless the CAFO could demonstrate that it has absolutely no potential to discharge from the production area and the land application area, the facility would be required to apply for an NPDES permit.

See proposed § 122.23(e). While EPA is proposing to interpret the terms of the statute such that CAFOs may qualify for the agricultural storm water exemption, EPA is also proposing that such CAFOs must apply for a permit even if the CAFO's only discharges may potentially qualify for the agricultural storm water discharge exemption. EPA is proposing such a requirement because it has the authority to regulate point source discharges and any discharge from the land application area of a CAFO which is not agricultural storm water is subject to the Clean Water Act. EPA believes that the only way to ensure that all nonagricultural, and therefore point source, discharges from CAFOs are permitted is to require that CAFOs apply for NPDES permits which will establish effluent limitations based on proper agricultural practices.

As noted above, the CWA explicitly defines the term ''point source'' to include CAFOs, and explicitly excludes agricultural storm water discharges. In today's action, EPA is attempting to interpret both provisions in a way that establishes meaningful controls over a significant source of pollution in our Nation's waters. EPA is proposing to interpret the definition of ''point source'' such that the exclusion of ''agricultural stormwater discharges'' may be an exclusion from any and all of the conveyances listed in the definition of ''point source,'' including ''concentrated animal feeding operations.'' The production area of the CAFO would continue to be ineligible for the agricultural storm water discharge exemption because it involves the type of industrial activity that originally led Congress to single out concentrated animal feeding operations as point sources. However, the land application areas under the operational control of the CAFO, where CAFO manure or wastewater is appropriately used as a fertilizer for crop production, appear to have the kind of agricultural activity that Congress intended to exempt. Consequently, EPA proposes to interpret the CWA so that its authority to regulate discharges of CAFO manure due to precipitation from land application areas is used in a way that ensures that any discharge is the result of agricultural practices. Any such discharges would be from the CAFO and, therefore, no separate, confined and discrete conveyance need be present.

Under today's proposal, permit writers would establish effluent limits for land application areas in the form of rates and practices that constitute proper agricultural practices to the extent necessary to fulfill the requirements of the effluent guidelines or based on BPJ, as well as to the extent necessary to ensure that a CAFO's practices are agricultural in that they minimize the operation's impact on water quality.

As noted above, EPA believes the statute does not directly address the interaction between the specific listing of ''concentrated animal feeding operations'' and the specific exemption of ''agricultural stormwater discharges'' in the definition of ''point source.'' While EPA is proposing to interpret the Act to allow the land application areas of CAFOs to be eligible for the agricultural storm water discharge exemption, EPA is considering an interpretation of the Act under which all additions of pollutants associated with CAFOs could be regulated as ''point source'' discharges, and, thus, the agricultural storm water exemption would never apply to discharges from a CAFO. By singling out ''concentrated animal feeding operations,'' a far more specific conveyance reference compared to the other, more general, terms in the definition of ''point source'' (such as ''ditch,'' ''channel,'' and ''conduit''), Congress may have intended the addition of pollutants to waters of the United States from these facilities to be considered ''industrial'' and not ''agricultural'' discharges. As such, the tremendous amount of manure and wastewater generated by CAFOs could be considered industrial waste. Thus, any discharge, even if caused by storm water after land application of the manure could be considered a discharge ''associated with industrial activity'' under the statute's storm water discharge provisions.

EPA is soliciting comments on four additional approaches under which the agricultural storm water exemption would not apply to CAFOs. Each of these approaches would require that all CAFO permits restrict discharges from land application sites to the extent necessary to prevent them from causing or contributing to a water quality impairment.

First, EPA is soliciting comment on an alternate approach that would regulate CAFO waste as ''process waste'' that is not eligible for the agricultural storm water exemption, when it is applied on land that is owned or controlled by the CAFO owner or operator, because it is industrial process waste and therefore not agricultural. Any storm water associated discharges would be regulated under the existing storm water statutory provisions and EPA's implementing regulations. Under that approach, in addition to the requirements in the proposed effluent limitation guideline, the NPDES permit issued to the CAFO operator would include any additional limitations necessary to protect water quality.

Second, EPA solicits comment on classifying discharges from land application sites as discharges regulated under ''Phase I'' of the NPDES storm water program (CWA Section 402(p)(2)(B)). EPA's existing storm water regulations already identify discharges from land application sites that receive industrial wastes as a ''storm water discharge associated with industrial activity.'' 40 CFR 122.26(b)(14)(v). Under the storm water regulation, EPA does not currently interpret that category (*i.e.*, storm water discharge associated with industrial activity) to include land application of CAFO manure because the Agency did not assess the cost of such regulation when it promulgated the rule. With today's proposal, however, EPA has calculated the cost of proper land application of CAFO-generated manure and wastewater and could clarify that precipitation-induced discharges from land application areas are subject to the storm water discharge regulations. If EPA finalizes a definition of CAFO which includes the land application area, then EPA could also regulate any storm water discharges from CAFOs under its existing regulations as a storm water discharge associated with industrial activity because facilities subject to storm water effluent guidelines are considered to be engaging in ''industrial activity.'' 40 CFR 122.26 (b)(14)(i). EPA would have to conclude that no discharges from CAFO land application areas qualify for the agricultural storm water discharge exemption, even discharges which occur despite implementation of proper agricultural practices.

Third, EPA could consider discharges from the CAFO's land application area to be discharges of ''process wastewater,'' and, therefore, not ''composed entirely of stormwater,'' rendering the statutory storm water provisions entirely inapplicable. Under this alternate interpretation of the statutory terms, NPDES permit provisions for the CAFO, including both the production area and the land application area, could include both technology-based limits and any necessary water quality-based effluent limits.

Fourth, EPA could clarify that once a facility is required to be permitted because it is a CAFO, the agricultural storm water discharge exemption no longer applies to the land application area subject to the permit. Thus, all permit conditions, including a water

quality-based effluent limitation, could be required on both the production area and the land application area.

EPA is also requesting comment on whether the land application practices established under the effluent guidelines will be sufficient to ensure that there will be little or no discharge due to precipitation from CAFO land application areas. If there were no such discharges, then EPA wouldn't need to adopt any of the four alternative approaches described above, because the effluent guidelines requirements would protect water quality. If there would be significant run-off even when manure is applied in accordance with agricultural practices, EPA is requesting comment on the extent and the potential adverse water quality impacts from that increment.

4. How is EPA Proposing to Regulate Land Application of Manure and Wastewater by non-CAFOs?

In some instances, CAFO owners or operators transport their manure and/or wastewater off-site. If off-site recipients land apply the CAFO-generated manure, they may be subject to regulation under the Clean Water Act. In addition, AFOs may land apply their own manure and wastewater, and they too may be subject to regulation under the Clean Water Act. A land applier could be subject to regulation if: (1) its field has a point source, as defined under the Act, through which (2) a discharge occurs that is not eligible for the agricultural storm water exemption, and (3) the land applier is designated on a case-by-case basis as a regulated point source of storm water. 40 CFR § 122.26(a)(1)(v). EPA notes that under the three-tier structure, an AFO with between 300 AU and 1,000 AU which has submitted a certification that it does not meet any of the conditions for being CAFO, and therefore does not receive an NPDES permit, would be immediately subject to enforcement and regulation under the Clean Water Act if it has a discharge which is not subject to the agricultural storm water discharge exemption; EPA and the State do not need to designate such a facility as either a CAFO or as a regulated storm water point source.

With this proposal, EPA intends to give effect to both the agricultural storm water discharge exemption and the other storm water provisions of the Clean Water Act by subjecting to regulation a non-CAFO land applier of AFO and/or CAFO-generated manure and wastewater only if: (1) the discharge is not eligible for the agricultural storm water discharge exemption (which, as discussed above, for AFOs and other non-CAFO land appliers primarily consists of applying the manure in accordance with proper agricultural practice, including soil test, P threshold, or Phosphorus Index methods); and (2) a conveyance at the land applier's operation has been designated as a regulated storm water point source. EPA emphasizes again that this regulatory approach is relevant only to discharges which are composed entirely of storm water. If it is not due to precipitation, a discharge of manure or wastewater through a point source, such as a ditch, into the waters of the U.S. need not be designated to be subject to enforcement and regulation under the Clean Water Act, as discussed in Section VII.C.6 of today's proposal.

In addition, the Director (or Regional Administrator) could exercise his or her authority to designate such dischargers within a geographic area as significant contributors of pollution to waters of the United States. 40 CFR 122.26(a)(9)(i)(D). The geographic area of concern could be a watershed which is impaired for the pollutants of concern in CAFO waste. To do so, the Director (or Regional Administrator) would need to identify the point source at each land application area or provide a record for presuming that the land application areas in that watershed have point sources, and the designation would only apply to those that do.

As noted above, case-by-case designation of point sources at land application areas which are not under the control of a CAFO owner or operator can already occur under existing regulations. Under section 122.26(a)(1)(v), either the permitting authority or EPA may designate a discharge which he or she determines contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the U.S. EPA is soliciting comment on whether to clarify the term ''significant contributor of pollutants'' for the purposes of designating a discharge of manure and/or wastewater. If a land applier is applying manure and/or wastewater such that he or she is not eligible for the agricultural storm water discharge exemption and if the receiving waterbody (into which there are storm water discharges associated with manure and/or wastewater) is not meeting water quality standards for a pollutant in the waste (such as phosphorus, nitrogen, dissolved oxygen or fecal coliform), then EPA could propose that, by regulation, such a discharge constitutes a ''significant contributor of pollutants.'' For example, if a land applier is applying manure and/or wastewater at a rate above the rate which qualifies the recipient for the agricultural storm water discharge exemption, and if, due to precipitation, waste runs off the land application area through a ditch into a navigable water that is impaired due to nutrients, then the permit authority may designate that point source as a regulated storm water point source. The designee would then need to apply for an NPDES permit or risk being subject to enforcement for unpermitted discharges.

EPA solicits comment on the proposed means of ensuring that manure and wastewater from AFOs and CAFOs is used in an environmentally appropriate manner, whether on-site at the CAFO or AFO or off-site outside of the control of the CAFO operator.

E. What are the Terms of an NPDES Permit?

EPA is proposing to include several new requirements in the NPDES permit for CAFOs. See proposed § 122.23(i). As discussed in section VIII on the proposed effluent guidelines, EPA is proposing to require all CAFO operators to develop and implement a Permit Nutrient Plan, which is a site-specific plan for complying with the effluent limitations requirements contained in the NPDES permit. EPA is proposing to require permit authorities to develop special conditions for each individual or general NPDES permit that address: (1) development of the allowable manure application rate; and (2) timing and method for land applying manure. Permits would also include a special condition that clarifies the duty to maintain permit coverage until the facility is properly closed.

NPDES permits are comprised of seven sections: cover page; effluent limitations; monitoring and reporting requirements; record keeping requirements; special conditions; and standard conditions, discussed below.

1. What is a Permit Nutrient Plan (PNP) and What is the difference between USDA's CNMP and EPA's PNP?

EPA is proposing to require all CAFO operators to develop and implement a Permit Nutrient Plan, or PNP. See proposed § 412.31(b)(1)(i)(iv) and § 122.23(k)(4). The PNP is a site-specific plan that describes how the operator intends to meet the effluent discharge limitations and other requirements of the NPDES permit. Because it is the primary planning document for determining appropriate practices at the CAFO, EPA is also proposing to require that it be developed, or reviewed and modified, by a certified planner. The PNP must be developed within three months of submitting either a notice of intent for coverage under an NPDES

general permit, or an application for an NPDES individual permit.

EPA is proposing to include a permit requirement for the CAFO to develop and implement a PNP and modify it when necessary. EPA believes this approach will maintain flexibility for modifications as the agricultural practices of the CAFO change. PNPs are intended to be living documents that are updated as circumstances change. Formal permit modification procedures would not have to be followed every time the PNP was modified.

As described in section VIII of today's proposed revisions to the effluent guidelines, CAFO operators would be required to prepare a PNP that establishes the allowable manure application rate for land applying manure and wastewater, and that documents how the rate was derived. The plan would also address other site-specific conditions that could affect manure and wastewater application. It would also describe sampling techniques to be used in sampling manure and soils, as well as the calibration of manure application equipment, and would describe operational procedures for equipment at the production area.

EPA is proposing to use the term ''Permit Nutrient Plan'' in today's proposed regulation in order to have a separate and distinct term that applies solely to the subset of activities in a CNMP that are directly connected with the effluent guideline and NPDES permit requirements, which are related to the best available technology currently available. EPA expects that many CAFOs will satisfy the requirement to develop a PNP by developing a Comprehensive Nutrient Management Plan (CNMP). EPA recognizes that creating a new term has the potential to create some initial confusion, and cause concern about overlapping or duplicative requirements. However, EPA believes the term PNP more clearly articulates to the regulated community the important distinctions between the broad requirements of a CNMP and the more specific effluent guideline requirements for a PNP.

EPA invites comment on today's proposal to define PNPs as the subset of elements in the CNMP that are written to meet the effluent guideline requirements. EPA is especially interested in knowing whether PNP is the best term to use to refer to the regulatory components of the CNMP, and whether EPA's explanation of both the differences and relationship between these two terms (PNP and CNMP) is clear and unambiguous.

In the Unified National Strategy for Animal Feeding Operations, EPA and USDA agreed that the development and implementation of CNMPs was the best way to minimize water quality impairment from confinement facilities and land application of manure and wastewater. The Strategy also articulated the expectation that all AFOs would develop and implement CNMPs, although certain facilities (CAFOs) would be required to do so while others (AFOs) would do so on a voluntary basis.

In December 2000, USDA published its Comprehensive Nutrient Management Planning Technical Guidance (referred to here as the ''CNMP Guidance''). **Federal Register:** December 8, 2000 (Volume 65, Number 237) Page 76984–76985. The CNMP Guidance is intended for use by NRCS, consultants, landowners/operators, and others that will either be developing or assisting in the development of CNMPs. USDA published the CNMP Guidance to serve only as a technical guidance document, and it does not establish regulatory requirements for local, tribal, State, or Federal programs. Rather, it is intended as a tool to support the conservation planning process, as contained in the NRCS National Planning Procedures Handbook. The objective of the CNMP technical guidance is to identify management activities and conservation practices that will minimize the adverse impacts of animal feeding operations on water quality. The CNMP Guidance provides a list of elements that USDA believes should be considered when developing a CNMP. The strength of the CNMP Guidance is the breadth of conservation practices and management activities that it recommends AFO operators should consider.

Initially, it was EPA's expectation to simply adopt USDA's voluntary program into its NPDES permitting program. However, by intentionally avoiding establishing regulatory requirements and limiting its role to that of technical guidance only, USDA's CNMP Guidance lacks many of the details EPA believes are necessary to ensure discharges of manure and other process wastewater are adequately controlled and nutrients applied to agricultural land in an acceptable manner. In addition, the CNMP Guidance addresses certain elements that address aspects of CAFO operations that EPA will not include as a part of the effluent guidelines and standards.

Nonetheless, it is important to ensure that the regulatory program that would be established by the effluent guidelines and standards and NPDES permit regulations proposed today is complementary to and leverages the technical expertise of USDA with its CNMP Guidance, rather than present CAFO operators with programs that they might perceive as contradictory. EPA believes this goal will be accomplished by the requirements being proposed today. EPA is proposing that CAFOs, covered by the effluent guideline, develop and implement a PNP that is narrower in scope than USDA's CNMP Guidance, but that establishes specific actions and regulatory requirements.

One of the key differences between the effluent guideline PNP and USDA's CNMP is the scope of elements included in each plan. USDA's CNMP includes certain aspects that EPA does not require CAFO operators to address within the regulatory program. For example, element 4.2.2.1 of USDA's CNMP Guidance (''Animal Outputs—Manure and Wastewater Collection, Handling, Storage, Treatment, and Transfer'') tells operators that the CNMP should include insect control activities, disposal of animal medical wastes, and visual improvement considerations. Additionally, Element 4.2.2.1 of the CNMP Guidance (''Evaluation and Treatment of Sites Proposed for Land Application'') states the CNMP should identify conservation practices and management activities needed for erosion control and water management. The regulations (and PNP) being proposed today include no such requirement. EPA is not including conservation practices which control erosion as part of a PNP because erosion control is not needed on all CAFO operations and because the costs associated with controlling erosion would add $150 million dollars to the cost of this proposal. These elements of a CNMP are, however, key components to protect water quality from excessive nutrients and sediments. EPA solicits comment and data on the costs and benefits of controlling erosion and whether erosion control should be a required component of PNPs.

There are a number of elements that are addressed by both the CNMP and PNP. Examples of common elements include soil and manure analyses to determine nutrient content; calibration of application equipment; developing nutrient budgets; and records of Plan implementation. However, USDA's CNMP Guidance is indeed presented only as technical *guidance.* The CNMP Guidance identifies a number of elements that AFOs should consider, but there is no avenue for ensuring that AFOs implement any management practices or achieve a particular performance standard. In contrast,

EPA's proposed PNP would establish requirements for CAFOs that are consistent with the technical guidance published by USDA experts, but that go beyond that guidance by identifying specific management practices that must be implemented.

For example, EPA is proposing the effluent guidelines to require CAFOs to analyze soil samples at least once every three years, and manure and lagoon samples at least annually. 40 CFR 412.37(a)(4)(ii). The CNMP Guidance addresses such analyses, but imposes no mandatory duty to perform such analyses, nor to conform to a particular monitoring frequency. Given the degree to which overflows and catastrophic failures of lagoons have been due to poor operation or maintenance of manure storage structures, EPA is proposing to establish specific requirements under Sections 308 and 402 that would: (1) More precisely monitor lagoon levels to prevent overflows that could be reasonably avoided; (2) require operators to periodically inspect the structural integrity of manure handling and storage structures, and expeditiously take corrective action when warranted; and (3) maintain records to ensure the proper operation and maintenance of manure handling and storage structures. USDA's CNMP Guidance establishes no such requirements.

The regulations proposed today would also require permit authorities to establish more specific requirements for application of manure and wastewater to land, where appropriate, including: how the CAFO operator is to calculate the allowable manure application rate; when it is appropriate to apply manure to frozen, snow covered or saturated land; and facility closure.

a. *How are PNPs Developed and What is the Role of Certified Specialists?* Under today's proposed rule, CAFO owners and operators would be required to seek qualified technical assistance for developing PNPs to meet their effluent guidelines and NPDES permit requirements. EPA is proposing that PNPs be developed, or reviewed and modified, by certified planners. See proposed § 412.31(b)(1)(ii).

Since PNPs are a defined subset of activities covered in CNMPs, as described above, owners and operators are expected to take advantage of the same technical assistance that is available for CNMP development, including appropriate Federal agencies, such as the NRCS, State and Tribal agricultural and conservation agency staff, Cooperative Extension Service agents and specialists, Soil and Water Conservation Districts, and Land Grant Universities. In addition, there are a growing number of non-governmental sources of qualified technical assistance, including integrators, industry associations, and private consultants who are certified to develop CNMPs, as well as the defined subset of activities covered in PNPs. In addition to the help of these experts, a growing number of computer-based tools are either available or under development to facilitate development and implementation of CNMPs, and should be equally useful for PNPs.

Although CAFO owners and operators are ultimately responsible for developing and implementing effective PNPs, EPA is today proposing that PNPs be developed and/or reviewed and approved by a certified specialist. A certified PNP specialist is a person who has a demonstrated capability to develop CNMPs in accordance with applicable USDA and State standards, as well as PNPs that meet the EPA effluent guideline, and is certified by USDA or a USDA-sanctioned organization. Certified specialists include qualified persons who have received certifications through a State or local agency, personnel from NRCS, certification programs recognized as third party vendors of technical assistance, or other programs recognized by States. In addition, USDA is now developing agreements with third-party vendors similar to the 1998 agreement with the Certified Crop Advisors (CCAs) and consistent with NRCS standards and specifications (or State standards if more restrictive). CCAs are expected to be available to provide technical assistance to producers in nutrient management, pest management, and residue management.

The purpose of using certified specialists is to ensure that effective PNPs are developed and/or reviewed and modified by persons who have the requisite knowledge and expertise to ensure that plans fully and effectively address the need for PNPs that meet the minimum effluent guideline requirements in the NPDES permit, and that plans are appropriately tailored to the site-specific needs and conditions at each CAFO.

EPA recognizes that some States already have certification programs in place for nutrient management planning, and expects that the USDA and EPA guidance for AFOs and CAFOs will provide additional impetus for new and improved State certification programs. These programs provide an excellent foundation for producing qualified certified specialists for CNMPs, and can be modified relatively easily to include a special module on how to develop an effective PNP as a defined subset of activities in the CNMP. EPA expects that, as a result of experience gained in the initial round of CAFO permitting under the existing regulations (2000—2005), certification programs will be well equipped to deal with both CNMPs and PNPs by the time today's regulations go into effect and States begin issuing the next round of CAFO permits that reflect these regulations. Thus, PNPs won't be expected to be developed before 2005.

The issue of CNMP preparer requirements was also discussed by the SERs and SBAR Panel during the SBREFA outreach process. (Note that at that time, EPA was still using the term CNMP to apply to regulatory as well as voluntary nutrient management plans.) Several SERs were concerned that requiring the use of a certified planner could significantly increase the cost of plan development, as well as limit the operator's influence over the final product. These SERs felt that, with adequate financial and technical assistance, they could write their own plans and suggested that EPA work to facilitate such an option through expanded training and certification of farmers and provision of a user-friendly computer program to aid in plan development.

The Panel recognized the need for plan preparers to have adequate training to write environmentally sound plans, particularly for large operations. However, the Panel also recognized the potential burden on small entities of having to use certified planners, especially considering the large number of AFOs and the limited number of certified planners currently available. The Panel recommended that EPA work with USDA to explore ways for small entities to minimize costs when developing CNMPs, and indicated that EPA should continue to coordinate with other Federal, State and local agencies in the provision of low-cost CNMP development services and should facilitate operator preparation of plans by providing training, guidance and tools (e.g., computer programs). EPA indicated in the Panel Report that it expected that many operations could become certified through USDA or land grant universities to prepare their own CNMPs.

EPA is requesting comment on the proposal to require that PNPs be developed, or reviewed and modified, by certified planners, and on ways to structure this requirement in order to minimize costs to small operators.

b. *Submittal of Permit Nutrient Plan to the Permit Authority.*—EPA is proposing to require that applicants for

individual permits and operators of new facilities submitting notices of intent for coverage under a general permit submit a copy of the cover sheed and executive summary of their draft PNP to the permit authority at the time of application or NOI submittal. § 122.21(i)(1)(iv) and 122.28(b)(2)(ii). Operators of existing facilities seeking coverage under a general permit must submit a notice of final PNP development within 90 days of seeking coverage, but are not required to provide a copy of the PNP to the Permit Authority unless requested. The reporting requirements, including the notice of PNP development and notice of PNP amendment, are discussed in more detail in section VII.E.3 below.

Initial installation of manure control technologies are significantly less costly compared to retrofitting existing facilities, and early development of a PNP will help to ensure that, when a new facility is being designed, the operator is considering optimal control technologies. In addition, in situations where individual permits are warranted, the public interest demands early review of the PNP, rather than waiting for its availability after the permit has been in effect for some time.

EPA is requesting comment on the proposal to require new facilities seeking coverage under a general permit, as well as applicants for individual permits, to submit a copy of the cover sheet and executive summary of their PNP to the permit authority along with the NOI or permit application. EPA is further requesting comment on whether the entire draft PNP should be submitted along with the NOI or permit application.

EPA is further requesting comment on whether, for individual permits, the PNP, in part or in its entirety, should be part of the public notice and comment process along with the permit.

c. *Availability of the Permit Nutrient Plan Information to the Public.*—EPA is proposing to require the operator of a permitted CAFO to make a copy of the PNP cover sheet and executive summary available to the public for review. The CAFO operator could choose to make this information directly available to the public in any of several ways, such as: (1) maintaining a copy of these documents at the facility and making them available to the permit authority as publicly viewable documents upon request; (2) maintaining a copy of these documents at the facility and making them available directly to the requestor; (3) placing a copy of them at a publicly accessible site, such as at a public library; or (4) submitting a copy of them to the permit authority. EPA is proposing that, if the operator has not made the information available by other means, the permit authority would be required, upon request from the public, to obtain a copy of the PNP cover sheet and executive summary and make them available. It is important to ensure that the public has access to this information, which is needed to determine whether a CAFO is complying with its permit, including the land application provisions.

EPA is also considering adding a provision in the final rule that would state that all information in the PNP, not just the cover sheet and executive summary, must be publicly available and cannot be claimed as confidential business information. Some stakeholders have claimed that all or a portion of the PNPs should be entitled to protection as confidential business information (CBI). EPA does not believe that the PNP cover sheet or executive summary would ever contain confidential business information. The information in these two sections of the plan is simply too general ever to be considered as CBI. However, EPA is sensitive to the concerns of CAFOs that there may be information in the remaining, more detailed portions of the PNP that is legitimately proprietary to the CAFOs' businesses and that the permit authorities should therefore protect. We therefore request comments on whether the final rule should require the entire PNP to be publicly available, or alternatively, whether the CAFO should be able to make a confidentiality claim as to the remaining information in the PNP. Any such claim of confidentiality would be governed by EPA's regulations at 40 CFR, Part 2 and relevant statutes.

There would be two bases on which EPA could base a determination that no portion of the Permit Nutrient Plans would be entitled to CBI status. First, CWA Section 402(j) states that ''[a] copy of each permit application and each permit issued under this section shall be available to the public.'' It may be that the PNPs that would be required by today's proposal are properly viewed as a part of the CAFO's NPDES permit. The permits would require each CAFO to develop and carry out a PNP, as specified in the proposed Part 122 regulations. In addition, today's proposed effluent limitations guidelines would specify detailed requirements that PNPs must meet. Failure to develop and properly carry out a PNP would be enforceable under each permit as a permit violation. Therefore, for purposes of Section 402(j), EPA may conclude that PNPs are properly viewed as a part of the permit or permit application and, accordingly, must be available to the public.

EPA issued a ''Class Determination'' in 1978 that addresses this issue. See ''Class Determination 1–78'' (March 22, 1978) (a copy of which is in the public record for today's proposal). This Class Determination addressed how to reconcile Section 402(j) of the Clean Water Act with Section 308 of the Act. Section 308, which authorizes EPA to collect information, states that information obtained under that section shall be available to the public, except upon a showing satisfactory to the Administrator that the information, if made public, would divulge methods or processes entitled to protection as trade secrets. Upon such a showing, the Administrator shall protect that information as confidential. Section 308 makes an exception for ''effluent data,'' which is not entitled to such protection.

This Class Determination concludes that information contained in NPDES permits and permit applications is not entitled to confidential treatment because Section 402(j) mandates disclosure of this information to the public, notwithstanding the fact that it might be trade secrets or commercial or financial information. Referring to the legislative history of the CWA, the Class Determination notes that Congress sought to treat the information in permits and permit applications differently from information obtained under Section 308. It concludes that Congress intended Section 402(j) to be a disclosure mandate in contrast to the basic approach of Section 308, which provides protection for trade secret information. (Class Determination at pp. 2–4.) Therefore, consistent with the Class Determination, if EPA were to conclude that the PNPs are a part of the permit, the entire PNP would be a public document that would not be entitled to confidentiality protection.

A second basis for finding that PNPs must be available to the public would be that, even apart from Section 402(j), the information in PNPs may be ''effluent data'' and if so, also would not be entitled to protection under Section 308. EPA's regulations define the term ''effluent data,'' among other things, as ''[i]nformation necessary to determine the identity, amount, frequency, concentration, temperature, or other characteristics (to the extent related to water quality) of any pollutant which has been discharged by the source (or of any pollutant resulting from any discharge from the source), or any combination of the foregoing.'' 40 CFR 2.302(a)(2)(i). There is a limited exception for information that is related to research and development activities.

EPA believes that the information in PNPs may fit this definition of ''effluent data.'' The information in PNPs has direct bearing on the amount of pollutants that may be discharged by a CAFO and on characteristics of the pollutants that may be discharged (such as the identity and presence of nutrients) that would be related to water quality.

On the other hand, the Agency could conclude that the information in the PNP is not part of the CAFO's permit. Each permit would indeed require the CAFO to develop and carry out a PNP that is approved by a certified specialist. Nevertheless, the CAFO will be developing the terms of the final PNP, as well as periodic modifications to the PNP, outside of the permitting process. It may be appropriate not to consider the PNP to be part of the permit for purposes of section 402(j). If 402(j)—which states that all information *in the permit* must be publicly available—is therefore not a relevant provision, then whether PNPs could be protected as confidential would be determined under section 308.

Section 308, as noted above, allows information to be protected as CBI where the submitter can demonstrate the trade secret nature of the information to the satisfaction of the Administrator, except that ''effluent data'' is never confidential. EPA could find that the information in PNPs is *not* ''effluent data.'' That is, EPA could conclude that the information in PNPs primarily concerns operational practices at the facility and does not have enough of a bearing on the characteristics of pollutants in the effluent to be considered ''effluent data.'' Because it would not be ''effluent data,'' the PNP information would not be categorically excluded from being treated as confidential. EPA's regulations at 40 CFR Part 2 specify the procedures for parties to make case-specific claims that information they submit to EPA is confidential and for EPA to evaluate those claims. Consistent with these regulations, each CAFO could claim that the information in its PNP is confidential (except for the cover sheet and executive summary). EPA would evaluate these claims and determine in each case whether the CAFO's CBI claim should be approved or denied. In sum, EPA could adopt final regulations that would require a CAFO's CBI claims for the more detailed information in the remaining parts of the PNP to be decided in each case.

The Agency notes that EPA itself would, of course, always be able to request and review the CAFO's full PNP. The issues raised in this discussion concern only the availability of these plans to outside parties.

EPA requests comments on all aspects of this proposal, including whether it would be proper to determine that the full PNP must be publicly available under CWA Section 402(j) and under CWA Section 308 as ''effluent data.'' EPA also requests comments on whether the cover sheet and executive summary should always be made available to the public, as proposed, or whether there are elements of the cover sheet or executive summary that might appropriately be claimed as CBI, and not considered to be either part of the permit or ''effluent data.''

The PNP would be narrower than the CNMP and would contain only requirements that are necessary for purposes of the effluent guideline. A CNMP may contain other elements that go beyond the effluent guideline. EPA is not proposing any separate requirements for CNMPs themselves to be made publicly available and is not proposing any findings as to whether information in a CNMP may be confidential.

2. What are the Effluent Limitations in the Permit?

The effluent limitations section in the permit serves as the primary mechanism for controlling discharges of pollutants to receiving waters. This section describes the specific narrative or numeric limitations that apply to the facility and to land application. It can contain either technology-based effluent limits or water quality-based effluent limits, or both, and can contain additional best management practices, as needed.

a. What Technology Based Effluent Limitations Would be in the Permit? Under the two-tier structure, for CAFOs with 500 AU or more, the effluent guidelines and standards regulations [40 CFR 412] would establish the technology-based effluent limitations to be applied in NPDES permits. Under the three-tier structure, any operation defined as a CAFO would be subject to the revised effluent guidelines. The proposal to revise the effluent guidelines and standards regulation is described in section VIII of today's proposed rule.

Operations with fewer than 500 AU under the two-tier structure, or fewer than 300 AU under the three-tier structure, which have been designated as CAFOs by the permit authority would not be subject to the effluent guidelines and standards. For these CAFOs, the permit writer would use ''Best Professional Judgement,'' or BPJ, to establish, on a case-by-case basis, the appropriate technology-based requirements. Often, permit writers adopt requirements similar to, or the same as the effluent guidelines requirements.

b. What Water Quality-based Effluent Limitations Would be in the Permit? Section 301(b)(1)(C) of the Clean Water Act requires there to be achieved ''any more stringent limitation, including those necessary to meet water quality standards.'' Therefore, where technology-based effluent limitations are not sufficient to meet water quality standards, the permit writer must develop more stringent water quality-based effluent limits. Under today's proposal, the permit writer must include any more stringent effluent limitations for the waste stream from the production area as necessary to meet water quality standards. If necessary to meet water quality standards, permit writers may consider requiring more stringent BMPs (e.g., liners for lagoons to address a direct hydrologic connection to surface waters; covers for lagoons to prevent rainwater from causing overflows; allowing discharges only from catastrophic storms and not from chronic storms; pollutant limits in the overflow; particular treatments, such as grassed waterways for the overflows discharged; etc.).

If EPA chose to promulgate one of the options discussed in section VII.D.2 above under which the agricultural storm water discharge exemption did not apply to land application areas under the operational control of a permitted CAFO, then the permit writer would be required to establish water quality-based effluent limits where necessary to meet water quality standards. If EPA chose to promulgate the option described in section VII.D.2 above, under which the appropriate rates and practices identified in the effluent guidelines and the NPDES regulations established the scope of the term ''agriculture'' without additional consideration of water quality impacts or water quality standards, only the limitations and practices required by the effluent guidelines and the NPDES regulations could be required by the permit authority for land application discharges.

c. What Additional Best Management Practices Would be in the Permit? Under § 122.44(k)(4) of the existing NPDES regulations, permit writers may include in permits best management practices ''that are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA.'' Under today's proposal, the permit writer may include BMPs for land application areas in

addition to those required by the effluent guidelines, as necessary to prevent adverse impacts on water quality. As discussed in section VII.D.2 above, EPA is today defining proper agricultural practices required to qualify for the agricultural storm water discharge exemption to include practices necessary to minimize adverse water quality impacts. Therefore, if a permit writer determines that despite the implementation of the BMPs required by the effluent guidelines discharges from a CAFO will have adverse water quality impacts, the permit writer should impose additional BMPS designed to minimize such impacts.

3. What Monitoring and Reporting Requirements are Included in the Permit?

The section of the NPDES permit on monitoring and reporting requirements identifies the specific conditions related to the types of monitoring to be performed, the frequencies for collecting samples or data, and how to record, maintain, and transmit the data and information to the permit authority. This information allows the NPDES permit authority to determine compliance with the permit requirements.

As described in section VIII, today's proposed revisions to the effluent guidelines would require the operator to conduct periodic visual inspection and to maintain all manure storage and handling equipment and structures as well as all runoff management devices. See proposed § 412.33(c). The NPDES permit would also require the permittee to: (1) test and calibrate all manure application equipment annually to ensure that manure is land applied in accordance with the proper application rates established in the NPDES permit; (2) sample manure for nutrient content at least once annually, and up to twice annually if manure is applied more than once or removed to be sent off-site more than once per year; and (3) sample soils for phosphorus once every three years. Today's proposed effluent guidelines would also require the operator to review the PNP annually and amend it if practices change either at the production area or at the land application area, and submit notification to the permit authority. Examples of changes in practice necessitating a PNP amendment include: a substantial increase in animal numbers (e.g., more than 20 percent) which would significantly increase the volume of manure and nutrients produced on the CAFO; a change in the cropping program which would significantly alter land application of animal manure and wastewater; elimination or addition of fields receiving animal waste application; or changes in animal waste collection, storage facilities, treatment, or land application method.

As discussed in section VII.E.1.c above, CAFO operators would be required to submit their PNPs, as well as any information necessary to determine compliance with their PNPs and other permit requirements, to the permit authority upon request. The CAFO operator could make a copy of the cover sheet and executive summary of the PNP available to the public in any of several ways. Operators of new facilities seeking coverage under a general permit and applicants for individual permits would be required to submit a copy of their draft PNP to the permit authority at the time of NOI submittal or application.

EPA is also proposing to require operators to submit a written notification to the permit authority, signed by the certified planner, that the PNP has been developed or amended, and is being implemented, accompanied by a fact sheet summarizing certain elements of the PNP. See § 412.31(b)(1)(ii). This written notice of PNP availability would serve an important role in verifying that the permittee is complying with one of the requirements of the NPDES permit. EPA is proposing that the PNP notification and fact sheet contain the following information:

- The number and type of animals covered by the plan
- The number of acres to which manure and wastewaters will be applied
- The phosphorus conditions for those fields receiving the manure
- Nutrient content of the manure
- Application schedule and rate
- The quantity to be transferred off-site
- Date PNP completed or amended
- Key implementation milestones

4. What are the Record Keeping Requirements?

The record keeping requirements section of the permit specifies the types of records to be kept on-site at the permitted facility.

Operation and Maintenance of the CAFO. As described in section VIII of today's proposal, EPA is proposing to require operators to maintain records at the facility that document: (1) the visual inspections, findings, and preventive maintenance; (2) the date, rate, location and methods used to apply manure and wastewater to land under the control of the CAFO operators; (3) the transfer of the CAFO-generated manure off-site; (4) the results of annual manure and wastewater sampling and analyses to determine the nutrient content; and (5) the results of representative soil sampling and analyses conducted at least every three years to determine nutrient content.

Transfer to Off-site Recipients of CAFO Manure. As described in Chapter IV.B and V.B, inappropriate land application of CAFO-generated manure poses a significant risk to water quality. Further, EPA estimates that the majority of CAFO-generated manure is in excess of CAFO's crop needs, and will very likely be transferred off-site. The ultimate success of the CAFO program depends on whether recipients handle manure appropriately, and in a manner that prevents discharge to waters. As discussed fully in section VII.D.4, EPA is not proposing to regulate off-site recipients through CAFO permit requirements, however, EPA believes that the certification and record-keeping requirements described here will help to ensure responsible handling of manure. Thus, EPA is co-proposing additional record keeping requirements under the NPDES program.

Under one co-proposed option, EPA would require that owners or operators of CAFOs obtain from off-site land appliers a certification that, if land applying CAFO-generated manure, they are doing so at proper agricultural rates. In addition, the CAFO owner or operator would be required to maintain records of transfer, including the name of the recipient and quantity transferred, and would be required to provide the recipient with an analysis of the contents of the manure and a brochure describing the recipient's responsibilities for proper management of the manure.. Under another co-proposed option, EPA would not require the certification, but would require the CAFO owner or operator to keep records and provide information.

Certification Option. Under one option, EPA is proposing that CAFOs obtain a certification and that recipients of CAFO-generated manure so certify, pursuant to § 308 of the CWA. Under § 308, EPA has the authority to require the owner or operator of a point source to establish and maintain records and provide any information the Agency reasonably requires. The Agency has documented historic problems associated with over application of CAFO manure and wastewater by both CAFO operators and recipients of CAFO manure and wastewater. Today's proposal would establish effluent limitations designed to prevent discharges due to over application. In order to determine whether or not CAFOs are meeting the effluent

limitations which would be established under today's proposals, EPA believes it is necessary for the Agency to have access to information concerning where a CAFO's excess manure is sent. Furthermore, in order to determine whether or not the recipients of CAFO manure should be permitted (which may be required if they do not land apply the CAFO manure in accordance with proper agricultural practices and they discharge from a point source, see section VII.D.2), EPA has determined that it will be necessary for such recipients to provide information about their land application methods. Recipients who certify that they are applying manure in accordance with proper agricultural practices as detailed in section VII.D.2 are responding to a request under Section 308 of the CWA. Therefore, a recipient who falsely certifies is subject to all applicable civil and criminal penalties under Section 309 of the CWA.

In some cases, CAFOs give or sell manure to many different recipients, including those taking small quantities, and this requirement could result in an unreasonable burden. EPA is primarily concerned with recipients who receive and dispose of large quantities, presuming that recipients of small quantities pose less risk of inappropriate disposal or over-application. To relieve the paperwork burden, EPA is proposing that CAFOs not be required to obtain certifications from recipients that receive less than twelve tons of manure per year from the CAFO. The CAFO would, however, be required to keep records of transfers to such recipients, as described below.

The Agency believes that it would be reasonable to exempt from the PNP certification requirements recipients who receive small amounts of manure from CAFOs. EPA considered exempting amounts such as a single a truckload per day or a single truckload per year. EPA decided that an appropriate exemption would be based on an amount that would be typically used for personal, rather than commercial, use. The exemption in today's proposal regulation is based on the amount of manure that would be appropriately applied to five acres of land, since five acres is at the low end of the amount of land that can be profitably farmed. See, e.g., ''The New Organic Grower,'' Eliott Coleman (1995).

To determine the maximum amount of manure that could be appropriately applied to five acres of land, an average nutrient requirement per acre of cropland and pasture land was computed. Based on typical crops and national average yields, 160 pounds of nitrogen and 14.8 pounds of phosphorous are required annually per acre. See ''Manure Nutrient Relative to the Capacity of Cropland and Pastureland to Assimilate Nutrients,'' Kellogg et al (USDA, July, 25, 2000). The nutrient content of manure was based on USDA's online software, *Manure Master,* available on the world wide web at *http://www2.ftw.nrcs.usda.gov/ManureMaster/MM21.html.*

The nitrogen content of manure at the time of land application ranges from 1.82 pounds per ton for heifers and dairy calves to 18.46 pounds per ton for hens and pullets. Using the low end rate of 1.82 pounds of nitrogen per ton, 87.4 tons of manure would be needed for a typical acre or 439 tons of manure for five acres in order to achieve the 160 pounds per acre rate. Using the high end rate of 18.46 pounds of nitrogen per ton, 8.66 tons of manure would be needed for a typical acre or 43.3 tons of manure for five acres in order to achieve the 160 pounds per acre rate. Thus, the quantity of manure needed to meet the nitrogen requirements of a five acre plot would range from 43.3 tons to 439 tons, depending on the animal type.

The phosphate content of manure at the time of land application ranges from 1.10 pounds per ton for heifers and dairy calves to 11.23 pounds per ton for turkeys for breeding. Using the high end 11.23 pound per ton rate for phosphorous, only about 1.3 tons would be needed for an average acre, or 6.5 tons for five acres in order to meet the 14.8 pounds of phosphorous required annually for a typical acre of crops. Using the low end 1.1 pound per ton rate for phosphorous, about 13.2 tons would be needed for an average acre, or 66 tons for five acres. Using the phosphate content for broilers of 6.61 pounds per ton is more typical of the phosphate content of manure and would result in 2.23 tons per acre being needed for an average acre, or 11.2 tons for five acres.

Clearly, exempting the high end amount of manure based on nitrogen content could lead to excess application of phosphorous. Regulating based on the most restrictive phosphate requirement could lead to manure not being available for personal use.

The exemption is only an exemption from the requirement that the CAFO obtain a certification. The recipient would remain subject to any requirements of State or federal law to prevent discharge of pollution to waters of the U.S.

EPA is proposing to set the threshold at 12 tons per recipient per year. This is rounding the amount based on typical phosphate content. It also allows one one-ton pick up load per month, which is consistent with one of the alternative approaches EPA considered. Recipients that receive more than 12 tons would have to certify that it will be properly managed. EPA is interested in comments on alternative thresholds for exempting small quantity transfers by the CAFO from the requirement that CAFOs receive certifications from the recipients.

For CAFO owners or operators who transfer CAFO-generated manure and wastewater to manure haulers who do not land apply the waste, EPA is proposing that the CAFO owner or operator must: (1) obtain the name and address of the recipients, if known; (2) provide the manure hauler with an analysis of the nutrient content of the manure, to be provided to the recipients; and (3) provide the manure hauler with a brochure to be given to the recipients describing the recipient's responsibility to properly manage the land application of the manure to prevent discharge of pollutants to waters of the U.S. The certification form would include the statement,

> ''I understand that the information is being collected on behalf of the U.S. Environmental Protection Agency or State and that there are penalties for falsely certifying. The permittee is not liable if the recipient violates its certification.''

Concern has been expressed that many potential recipients of CAFO manure will choose to forego CAFO manure, and buy commercial fertilizers instead, in order to avoid signing such a certification and being brought under EPA regulation. The result could be that CAFO owners and operators might be unable to find a market for proper disposal, thereby turning the manure into a waste rather than a valuable commodity. EPA requests comment on this concern.

This alternative is potentially protective of the environment because non-CAFO land appliers would be liable for being designated as a point source in the event that there is a discharge from improper land application. EPA's proposed requirements for what constitutes proper agricultural practices, described in VII.D.2 above, would ensure that CAFO-generated manure is properly managed.

No Certification Option. In the second alternative proposal for ensuring proper management of manure that is transferred off-site, EPA is not proposing to require CAFO owners or operators to obtain the certification described above. Rather, CAFO owners or operators would be required to maintain records of transfer, described in the following section.

Concern has been expressed that many potential recipients of CAFO manure will choose to forego CAFO manure, and buy commercial fertilizers instead, in order to avoid signing such a certification and being brought under EPA regulation. The result could be that CAFO owners and operators might be unable to find a market for proper disposal, thereby turning the manure into a waste rather than a valuable commodity.

This alternative is potentially protective of the environment because non-CAFO land appliers would be liable for being designated as a point source in the event that there is a discharge from improper land application. EPA's proposed requirements for what constitutes proper agricultural practices, described in VII.D.2 above, would ensure that CAFO-generated manure is properly managed.

Records of Transfer of Manure Off-site. In both alternative proposals for whether or not to require CAFO owners or operators to obtain certifications from off-site recipients, EPA is proposing to require CAFO operators to maintain records of the off-site transfer of the CAFO-generated manure and wastewater, *e.g.,* when manure is sold or given away for land application on land not under their operational control, to ensure the environmentally acceptable use of the CAFO-generated manure. See § 122.23(i)(5). When CAFO-generated manure is sold or given away to be used for land application, the specific manner of land application does not need to be addressed in the CAFO's PNP. However, to help ensure the environmentally acceptable use of the CAFO-generated manure, the CAFO operator would be required to do the following: See § 122.23(j)(4) and (5).

- Maintain records showing the amount of manure and/or wastewater that leaves the operation;
- Record the name and address of the recipient(s), including the intended recipient(s) of manure and/or wastewater transferred to contract haulers, if known;
- Provide the recipient(s) with representative information on the nutrient content of the manure to be used in determining the appropriate land application rates; and
- Provide the recipient with information provided by the permit authority of his/her responsibility to properly manage the land application of the manure to prevent discharge of pollutants to waters of the U.S.
- [Under one co-proposed option, obtain and retain on-site a certification from each recipient of the CAFO-generated manure and wastewater that they will do one of the following: (a) land apply in accordance proper agricultural practices as defined in today's proposal; (b) obtain an NPDES permit for discharges resulting from non-agricultural spreading; (c) or utilize it for other than land application purposes.]

EPA proposes to require these records to be retained on-site at the CAFO, and to be submitted to the permit authority upon request.

5. What are the Special Conditions and Standard Conditions in an NPDES Permit?

Standard conditions in an NPDES permit list pre-established conditions that apply to all NPDES permits, as specified in 40 CFR 122.41.

The special conditions in an NPDES permit are used primarily to supplement effluent limitations and ensure compliance with the CWA. EPA is proposing at 40 CFR 122.23(i) to (k) to require permit authorities to develop special conditions that: (a) specify how the permittee is to calculate the allowable manure application rate; (b) specify timing restrictions, if necessary, on land application of manure and wastewater to frozen, snow covered or saturated ground; (c) establish requirements for facility closure; (d) specifying conditions for groundwater with a direct hydrological connection to surface water; (e) require certification for off-site transfer of manure and wastewater (co-proposed with omitting this requirement). Finally, EPA is soliciting comment on whether a special condition should be included regarding erosion control.

a. *Determining Allowable Manure Application Rate.* EPA is proposing that the permit authority be required to include a term in the NPDES permit that establishes the method to be used for determining the allowable manure application rate for applying manure to land under the control of the CAFO operator. See proposed § 122.23(j)(1).

As described in detail in section VIII, three methods are available which may be used to determine the allowable manure application rate for a CAFO. These three methods are: (1) the Phosphorus Index; (2) the Soil Phosphorus Threshold Level; and (3) the Soil Test Phosphorus Level.

EPA is proposing to adopt these three methods from USDA Natural Resource Conservation Service's (NRCS) nutrient management standard (Standard 590). State Departments of Agriculture are developing State nutrient standards which incorporate one of these three methods. EPA is proposing to require that each authorized permit authority adopt one or more of these three methods as part of the State NPDES program, in consultation with the State Conservationist. The permit would require the permittee to develop the appropriate land application rates in the site-specific PNP based upon the State's adopted method. EPA solicits comment on whether the special conditions in an NPDES permit should require permit authorities to adopt the USDA Natural Resource Conservation Service's (NRCS) Nutrient Management Standard (Standard 590) in its entirety rather than just the portion that applies to determining the allowable manure application rate.

b. *Would Timing Restrictions on Land Application of CAFO-generated Manure be Required?* EPA is proposing to require that the permit writer include in the CAFO's NPDES permit regionally appropriate prohibitions or restrictions on the timing and methods of land application of manure where necessary. See proposed § 122.23(i)(3). The permit writer would develop the restrictions based on a consideration of local crop needs, climate, soil types, slope and other factors.

The permit would prohibit practices that would not serve an agricultural purpose and would have the potential to result in pollutant discharges to waters of the United States. A practice would be considered not to be agricultural if significant quantities of the nutrients in the manure would be unavailable to crops because they would leach, run off or be lost due to erosion before they can be taken up by plants.

EPA considered establishing a national prohibition on applying CAFO-generated manure to frozen, snow covered or saturated ground in today's proposed effluent guidelines. Disposal of manure or wastewater to frozen, snow covered or saturated ground is generally not a beneficial use for agricultural purposes. While such conditions can occur anywhere in the United States, pollutant runoff associated with such practice is a site specific consideration and is dependent on a number of variables, including climate and topographic variability, distance to surface water, and slope of the land. Such variability makes it difficult to develop a national technology-based standard that is consistently reasonable, and does not impose unnecessary cost on CAFO operators.

While EPA believes that many permit writers will find a prohibition on applying CAFO-generated manure to frozen, snow covered or saturated ground to be reasonably necessary to achieve the effluent limitations and to carry out the purposes and intent of the

CWA, EPA is aware that there are areas where these practices might be allowed provided they are restricted. Application on frozen ground, for example, may be appropriate in some areas provided there are restrictions on the slope of the ground and proximity to surface water. Many States have already developed such restrictions.

While the proposed regulations would not establish a national technology-based limitation or BMP, EPA is proposing at § 122.23(j)(2) that permit writers consider the need for these limits. Permit authorities would be expected to develop restrictions on timing and method of application that reflect regional considerations, which restrict applications that are not an appropriate agricultural practice and have the potential to result in pollutant discharges to waters of the United States. It is likely that the operators would need to consider means of ensuring adequate storage to hold manure and wastewater for the period which manure may not be applied. EPA estimates that storage periods might range from 45 to 270 days, depending on the region and the proximity to surface water, and to ground water with a direct hydrological connection to surface water. Permit authorities are expected to work with State agricultural departments, USDA's Natural Resource Conservation Service, the EPA Regional office, and other local interests to determine the appropriate standard, and include the standard consistently in all NPDES permits for CAFOs.

EPA's estimate that storage periods would range from 45 days to 270 days is derived using published freeze/frost data from the National Oceanic and Atmospheric Administration, National Center for Disease Control. For the purpose of estimating storage requirements to prevent application to frozen ground, EPA assumed CAFOs could only apply manure between the last spring frost and the first fall frost, called the ''freeze free period''. With a 90 percent probability, EPA could also use a 28 degree temperature threshold to determine the storage time required, rounded to the nearest 45 day increment. This calculation results in 45 days of storage in the South; 225 days in parts of the Midwest and the Mid-Atlantic; and as high as 270 days storage in the Central region.

EPA is soliciting comment on alternate approaches of prohibiting land application at certain times or using certain methods. For example, EPA might develop a nationally applicable prohibition against applying manure on frozen land that is greater than a certain slope such as 15 percent. EPA is also interested in whether to prohibit application to saturated soils.

c. *Closure.* EPA is proposing to require permit authorities to require the CAFO operator to maintain permit coverage (*e.g.,* after the facility ceases operation as a CAFO or drops below the size for being defined as a CAFO) until all CAFO-generated manure and wastewater is properly disposed and, therefore, the facility no longer has the potential to discharge. See proposed § 122.23(i)(3). Specifically, the permit writer would need to impose a permit condition requiring the owner or operator to reapply for a permit unless and until the owner or operator can demonstrate that the facility has no potential to discharge wastes generated by the CAFO. This requirement would be included as a special condition in the NPDES permits.

EPA considered several options for ensuring that manure and wastewater from CAFOs is properly disposed after the operation terminates or ceases being a CAFO. Section VII.C.2.g above discusses the options in detail. In this proposal, EPA is also proposing to ensure that permits explicitly address closure requirements. While EPA is today proposing to only require ongoing permit coverage of the former CAFO, permit authorities are encouraged to consider including other conditions such as those discussed in Section VII.C.2.g above.

EPA is soliciting comment on these proposed provisions.

d. *Discharge to Surface Water via a Direct Hydrological Connection with Ground Water.* EPA is proposing requirements to address the serious environmental harms caused by discharges from CAFOs to surface waters via direct hydrologic connection with ground water. As described in section V.B.2.a, studies in Iowa, the Carolinas, and the Delmarva Peninsula have shown that CAFO lagoons do leak, and that leaks from lagoons contaminate ground water and the surface water to which that ground water is hydrologically connected, often severely. EPA believes that it is reasonable to include a requirement to ensure that discharges to surface water via a direct hydrologic connection with ground water do not occur from CAFOs, either by requiring the permit applicant to implement appropriate controls or to provide evidence that no such connection exists at the facility.

Section VII.C.2.J of today's preamble discusses the legal and technical basis for the proposed ground water controls, and provides information on tools and resources available to permit writers to make determinations as to whether the production area of a CAFO may potentially discharge to surface waters via direct hydrologic connection with ground water.

EPA requests comment on the following proposals.

CAFOs Subject to Effluent Guideline Requirements for Ground water. EPA is proposing that, for all CAFOs that are subject to an effluent guideline that includes requirements for zero discharge from the production area to surface water via direct hydrologic connection to ground water (all beef and dairy operations, as well as new swine, poultry and veal operations), the permit would require the appropriate controls and monitoring. See proposed 40 CFR 412.33(a)(3), 412.35(a)(3) and 412.45(a)(3). The permittee would be able to avoid the requirements by submitting a hydrologist's report demonstrating, to the satisfaction of the permit authority, that the ground water beneath the production area is not connected to surface water through a direct hydrologic connection.

EPA is also requesting comment on other options for determining which CAFOs must implement appropriate monitoring and controls to prevent discharges from the production area to hydrologically connected groundwater. One option would be for EPA to narrow the rebuttable presumption to areas with topographical characteristics that indicate the presence of ground water that is likely to have a direct hydrologic connection to surface water. For example, the final rule could specify that only CAFOs located in certain areas, such as an area with certain types of lithologic settings (e.g., karst, fractured bedrock, or gravel); or an area defined by the USGS as a HLR1 or HLR9; or an area with a shallow water table; would need to either comply with the groundwater monitoring requirements and appropriate controls in the effluent guideline or provide a hydrologist's statement demonstrating that there is no direct hydrologic connection to surface waters. Another option would be to require States, through a public process, to identify the areas of the State in which there is the potential for such discharges. In those areas, CAFOs subject to an effluent guideline that includes requirements to prevent discharges to surface water via hydrologically connected ground water would again need to either comply with the monitoring requirements and appropriate controls in the guideline or provide a hydrologist's statement demonstrating that there is no hydrologic connection to surface waters.

Requirements for CAFOs Not Subject to Effluent Guidelines Ground Water

Provisions. Certain facilities are not subject to today's revised effluent guideline (412 Subpart C and D) that includes requirements to prevent discharges to surface water via hydrologically connected ground water. Such CAFOs include: (1) Facilities below the effluent guideline applicability threshold that are designated as CAFOs; (2) existing swine, poultry and veal operations; and (3) CAFOs in sectors other than beef, dairy, poultry, swine and veal. For such CAFOs not subject to an effluent guideline that includes ground water requirements, EPA is proposing that the permit writer must assess whether the facility is in an area with topographical characteristics that indicate the presence of ground water that is likely to have a direct hydrologic connection to surface water. For instance, if the facility is in an area with topographical characteristics that indicate the presence of ground water that is likely to have a hydrologic connection to surface water, as discussed above, the permit writer is likely to determine that there is the potential for a discharge to surface water via ground water with a direct hydrologic connection.

For existing swine, poultry, and veal operations, if the permit writer determines that pollutants may be discharged at a level which may cause or contribute to an excursion above any State water quality standard, the permit writer would be required to decide on a case-by-case basis whether effluent limitations (technology-based and water quality-based, as necessary) should be established to address potential discharges to surface water via hydrologically connected ground water. EPA is proposing that a permittee for whom the permit authority has made the above determinations would be required to comply with those conditions, or could avoid having those conditions imposed by providing a hydrologist's statement that the facility does not have a direct hydrologic connection to surface water. 40 CFR 122.23(j)(6) and (k)(5).

For CAFOs not subject to today's revised effluent guidelines, if the permit writer determines that there is likely to be a discharge from the CAFO to surface waters via a direct hydrologic connection, the permit writer must impose technology-based or water quality-based, or both, effluent limitations, as necessary. Again, EPA is proposing that a permittee for whom the permit authority has made the above determinations would be required to comply with those conditions, or could avoid having those conditions imposed by providing a hydrologist's statement that the facility does not have a direct hydrologic connection to surface water. 40 CFR 122.23(j)(6) and (k)(5).

EPA is soliciting comments on the alternative provisions discussed here. EPA is also requesting comment on the proposal to place the burden on the permittee to establish to the satisfaction of the permitting authority that the ground water beneath the production area is not connected to surface waters through a direct hydrologic connection.

e. *Certification for Off-site Recipients of CAFO Manure.* EPA is co-proposing either to include the following requirement or to omit it. In the inclusionary proposal, EPA would require permit writers to include a special condition in each permit that requires CAFO owners or operators to transfer manure off-site only to recipients who can certify that they will either: (1) Land apply manure according to proper agricultural practices, as defined for off-site land appliers in today's proposed rule; (2) obtain an NPDES permit for potential discharges; or (3) use the manure for purposes other than land application. EPA proposes to define the term ''proper agriculture practice'' to mean that the recipient shall determine the nutrient needs of its crops based on realistic crop yields for its area, sample its soil at least once every three years to determine existing nutrient content, and not apply the manure in quantities that exceed the land application rates calculated using either the Phosphorus Index, Phosphorus Threshold, or Soil Test Phosphorus method as specified in 40 CFR 412.13(b)(1)(iv).

EPA is also proposing to allow States to waive this requirement if the recipient is complying with the requirements of a State program that are equivalent to proposed 40 CFR 412.13(b).

f. *Erosion Control.* EPA is not proposing to specify erosion controls as a necessary element of the PNP, but permit writers should consider whether to add special conditions on a case-by-case basis as appropriate.

As described in previous sections, EPA recognizes that sediment eroding from cropland can have a significant negative impact on surface waters. While EPA realizes that it is not possible to completely prevent all erosion, erosion can be reduced to tolerable rates. In general terms, tolerable soil loss is the maximum rate of soil erosion that will permit indefinite maintenance of soil productivity, *i.e.,* erosion less than or equal to the rate of soil development. The USDA–NRCS uses five levels of erosion tolerance (''T'') based on factors such as soil depth and texture, parent material, productivity, and previous erosion rates. These T levels are equivalent to annual losses of about 1–5 tons/acre/year (2–11 mt/ha/year), with minimum rates for shallow soils with unfavorable subsoils and maximum rates for deep, well-drained productive soils (from Ag Management Measures).

Options for controlling erosion are: (1) Implementation of one of the three NRCS Conservation Practices Standards for Residue Management: No-Till and Strip Till (329A), Mulch Till (329B), or Ridge Till (329C) in the state Field Office Technical Guide; (2) requiring a minimum 30 percent residue cover; (3) achieving soil loss tolerance or ''T''; or (4) following the Erosion and Sediment Control Management Measure as found in EPA's draft National Management Measures to Control Nonpoint Source Pollution from Agriculture which is substantially the same as EPA's 1993 Guidance Specifying Management Measure for Sources of Nonpoint Pollution in Coastal Waters.

EPA is requesting public comment on the suitability of requiring erosion control as a special condition of an NPDES permit to protect water quality from sediment eroding from fields where CAFO manure is applied to crops. If erosion control is desirable, EPA is soliciting comment as to which method would be the most cost-efficient.

g. *Design Standards for Chronic Rainfall.* In this section, EPA is soliciting comments on whether additional regulatory language is needed to clarify when a discharge is considered to be caused by ''chronic rainfall.'' EPA also solicits comment on whether design standards to prevent discharges due to chronic rainfall should be specified in the effluent limitations or as a special condition in the NPDES permit.

CAFOs in the beef and dairy sub-category [412-subpart C] are prohibited from discharging except during a ''25-year, 24-hour rainfall event or chronic rainfall'' and then only if they meet the criteria in § 412.13(a)(2). Section 412.13(a)(2)(i) allows a discharge caused by such rainfall events only if ''(i) The production area is designed and constructed to contain all process wastewaters including the runoff from a 25-year, 24-hour rainfall event; and (ii) the production area is operated in accordance with the requirements of § 412.37(a).''

The term ''25-year, 24-hour rainfall event'' is clearly defined in 40 CFR 412.01(b). In addition, proposed § 412.37(c)(1)(iv) would require all surface impoundments to have a depth

marker which indicates the design volume and clearly indicates the minimum freeboard necessary to allow for the 25-year, 24-hour rainfall event. A discharge may be caused by a 25-year, 24-hour storm when it occurs despite the fact that the CAFO operator maintained adequate freeboard.

The term ''chronic rainfall'' has not been specifically defined. Generally, a chronic rainfall event is one that lasts longer than 24 hours and causes a discharge from a system that has been designed, constructed, maintained and operated to contain all process wastewaters plus the runoff from a 25-year, 24-hour rainfall event. Persistent rainfall over a period longer than 24 hours may overwhelm a system designed for the 25-year, 24-hour rainfall event even though such persistent rainfalls may be expected to occur more frequently than every 25 years.

In order for a discharge to be ''caused'' by chronic rainfall, it would need to be contemporaneous with the rainfall. The discharge could not continue after the event any longer than is necessary. For example, once a flooded lagoon has been drawn down to the level necessary to protect the integrity of the lagoon (which in no case should be below the level of the freeboard necessary for a 25/24-hour storm), the discharge should cease. If the lagoon could not then accept additional waste from the CAFO, no animals that would contribute waste to the lagoon should be brought to the facility until additional capacity can be generated by properly land applying the waste or shipping the waste off-site.

A discharge also would not be considered to be ''caused'' by the chronic storm if the operator should have foreseen the event in time to properly land apply the waste and thereby have avoided an overflow or the need to apply wastes to saturated grounds. Similarly, a discharge is not considered to be caused by the chronic storm if the operator should have foreseen the event and maintained adequate facilities for managing the waste. Although (in the absence of more specific regulatory requirements) operators would be responsible for foreseeing and planning for chronic rainfall events, they would be liable for discharges during chronic events only where they were not reasonable in their decision regarding what would be adequate capacity.

An approach that would provide more certainty to the operator but place a greater burden on permitting authorities would be for EPA to require permit authorities to specify regionally-specific minimum free board requirements necessary to contain runoff from foreseeable chronic events. For example, it may be known that, in a given area, the free board necessary to contain the runoff from a 25-year, 24-hour storm will not be sufficient to contain the run off that typically accumulates during the region's rainy season, especially when it would not be appropriate to draw down the lagoon by land applying wastes during that time. In that case, it may be necessary for the permit writer to specify a greater freeboard requirement that would apply to the CAFO at the beginning of that season. For example, Nebraska requires CAFOs to be able to capture the average rainfall for the three summer months. EPA notes that such additional permit conditions are already required where they are necessary to eliminate potential discharges that would cause or contribute to violations of state water quality standards.

Another approach would be to require the operator to notify the permitting authority as soon as it knows that a discharge will occur or is occurring and to come to an agreement on how long the discharge will occur. This approach has several disadvantages. Because many facilities located in the same area may be experiencing the same problem, permitting authorities may not have the resources to address several simultaneous requests. It is not clear how a disagreement between the operator and permit authority would be resolved. Perhaps most importantly, this approach also does not address the need to foresee and prepare for such events in advance of the event.

EPA solicits comment on all of these approaches for clarifying when a discharge is considered to be caused by ''chronic rainfall,'' and whether technology guidelines are necessary in either section 412 or 122 to address discharges due to chronic rainfall.

F. What Type of NPDES Permit is Appropriate for CAFOs?

NPDES permit authorities can exercise one of two NPDES permitting options for CAFOs: general permits or individual permits. A general NPDES permit is written to cover a category of point sources with similar characteristics for a defined geographic area.

1. What Changes Are Being Made to the General Permit and NOI Provisions?

The majority of CAFOs may appropriately be covered under an NPDES general permit because CAFOs generally involve similar types of operations, require the same kinds of effluent limitations and permit conditions, and discharge the same types of pollutants. In the past, about 70 percent of permitted CAFOs have been permitted under an NPDES general permit, and EPA expects this trend to continue. General permits offer a cost-effective approach for NPDES permit authorities because they can cover a large number of facilities under a single permit. The geographic scope of a general permit is flexible and can correspond to political or other boundaries, such as watersheds. At the same time, the general permit can also provide the flexibility for the permittee to develop and implement pollution control measures that are tailored to the site-specific circumstances of the permittee. The public has an opportunity for input during key steps in the permit development and implementation process.

EPA is proposing to clarify that CAFOs may obtain permit coverage under a general permit. See proposed § 122.28(a)(2)(iii). Although section 122.28 currently authorizes CAFOs to be regulated using a general permit, some stakeholders have questioned whether CAFOs fall within the current language of that section. Today's proposal would clarify that permit writers may use a general permit to regulate a category of CAFOs that are appropriately regulated under the terms of the general permit.

A complete and timely NOI indicates the operator's intent to abide by all the conditions of the permit, and the NOI fulfills the requirements for an NPDES permit application. The contents of the NOI are specified in the general permit.

The current regulation requires NOIs to include legal name and address of the owner and operator; facility name and address; type of facility or discharges; and the receiving stream(s). EPA is proposing to amend § 122.28(b)(2)(ii) to require, in addition:

- Type and number of animals at the CAFO
- Physical location, including latitude and longitude of the production area
- Acreage available for agricultural use of manure and wastewater;
- Estimated amount of manure and wastewater to be transferred off-site
- Name and address of any other entity with substantial operational control of facility
- If a new facility, provide a copy of the draft PNP
- If an existing facility, the status of the development of the PNP
- If an area is determined to have vulnerable ground water (karst, sandy soil, shallow water table, or in a hydrological landscape region 1 (HLR1), submit a hydrologist's statement that the

ground water under the production area of the facility is not hydrologically connected to surface water, if the applicant asserts as such

• Provide a topographic map as described in 40 CFR 122.21(f)(7), showing any ground water aquifers and depth to ground water that may be hydrologically connected to surface water

§ 122.21(f) requires the applicant to submit a topographic map extending one mile beyond the facility's boundary that shows potential discharge points and surface water bodies in the area. EPA is proposing to include a requirement that the operator also identify on the topographic map any ground water aquifers that may be hydrologically connected to surface water, as well as the depth to ground water.

EPA is proposing to require permit authorities to make the NOI and the notification of PNP development or amendment available to the public and other interested parties in a timely manner, updated on a quarterly basis. See proposed § 122.23(j)(2). EPA encourages States to develop and use Internet-based sites as a supplemental means to provide ready public access to CAFO NPDES general permits, facility NOIs, and other information.

EPA will explore ways to adapt the Permit Compliance System, EPA's national wastewater database, so that permit authorities may use it to track CAFO compliance information. This information might include: NPDES permit number; facility name; facility location; latitude and longitude of the production of area; animal type(s); number of animals; the name and address of the contract holder (for contract operations); PNP date of adoption or, where a PNP has not yet been developed, the schedule for developing and implementing the PNP, including interim milestones.

EPA is proposing to clarify that CAFOs may obtain permit coverage under a general permit. See proposed § 122.28(a)(2)(iii), which would expressly add ''concentrated animal feeding operations'' to the list of sources that are eligible for general permits. In fact, CAFOs are already eligible for general permits under the existing regulations at § 122.28(a)(2), both because they are storm water point sources (see subsection (a)(2)(i)) and because they are a category of point sources that involve the same or substantially similar types of operations, may be more appropriately controlled under a general permit than under individual permits, and otherwise meet the criteria of subsection (a)(2)(ii). Some stakeholders, however, have questioned whether CAFOs meet these existing criteria for general permit eligibility. Therefore, to remove any such questions among stakeholders, EPA is proposing to expressly add CAFOs to the list of sources that are eligible for general permits. In sum, this proposed change would be for purposes of clarity only; it would effect no substantive change to the regulations.

2. Which CAFOs May Be Subject to Individual Permits?

Although EPA is not proposing to require NPDES individual permits in particular circumstances, the Agency is proposing additional criteria for when general permits may be inappropriate for CAFOs. See proposed § 122.28(b)(3)(i)(G). Under the existing regulation, the public may petition the permit authority when it believes that, based on the criteria in section 122.28(b)(3)(i), that coverage under a general permit is inappropriate. Finally, EPA is proposing to require the permit authority to conduct a public process for determining which criteria, if any, would require a CAFO owner or operator to apply for an individual permit. See proposed § 122.28(b)(3)(i)(G). Permit authorities would be required to conduct this public process and set forth its policy prior to issuing any general permit for CAFOs. Permit authorities would have flexibility as to how to conduct this public process.

Besides requiring a public process to develop criteria for requiring individual permits, the proposed regulation would also add the following CAFO-specific criteria for when the Director may require an individual permit: (1) CAFOs located in an environmentally or ecologically sensitive area; (2) CAFOs with a history of operational or compliance problems; (3) CAFOs that are exceptionally large operations as determined by the permit authority; and (4) significantly expanding CAFOs. See proposed § 122.28(b)(3)(i)(G)(i)–(iv). Any interested member of the public may petition the Director to require an individual permit for a facility covered by a general permit. Section 122.28(b)(3).

EPA believes these criteria on the availability of general permits for CAFOs are desirable because of keen public interest in participating in the process of issuing permits to CAFOs. The public may participate in notice and comment during the development of general permits, but once issued, public participation regarding facilities submitting notices of intent is limited. On the other hand, the public does have access to notice and comment participation with regard to individual permits.

EPA considered requiring all CAFOs, or all new CAFOs, to obtain an individual permit, but considered this potentially burdensome to permit authorities. Using general permits to cover classes of facilities by type of operation, by jurisdiction, or by geographic boundary such as a watershed, offers positive environmental as well as administrative benefits.

EPA also considered identifying a threshold to establish when exceptionally large facilities would be required to apply for an individual permit, such as 5,000 AU or 10,000 AU, or by defining such a threshold as the largest ten percent or 25 percent of CAFOs within each sector. EPA did not propose this approach because, as shown in table 7–9, it was difficult to establish a consistent basis across sectors for making this determination. While EPA's cost models assume that 30% of operations might obtain individual permits, and thus such thresholds are taken into account in the cost analyses for this proposed regulation, EPA did not believe particular thresholds would be appropriate across all sectors or all states. EPA is interested in comments on whether it should establish a size threshold above which individual permits would be required, recommendations of what the threshold should be, and data to support such recommendations.

TABLE 7–9. POTENTIAL DEFINITION OF ''EXCEPTIONALLY LARGE'' FACILITIES

Animal sector	5,000 AU	10,000 AU	Top 10% (Est.)		Top 25% (Est.)	
	Head equivalent	Head equivalent	Head	AU	Head	AU
Beef/Heifer	5,000	10,000	11,000	11,000	3,500	3,500

TABLE 7–9. POTENTIAL DEFINITION OF ''EXCEPTIONALLY LARGE'' FACILITIES—Continued

Animal sector	5,000 AU	10,000 AU	Top 10% (Est.)		Top 25% (Est.)	
	Head equivalent	Head equivalent	Head	AU	Head	AU
Dairy	3,500	7,000	3,800	5,440	2,170	3,100
Veal	5,000	10,000	1,500	1,500	950	950
Swine	12,500	25,000	9,000	3,600	5,000	2,000
Broiler	500,000	1,000,000	150,000	1,500	110,000	1,100
Layer	500,000	1,000,000	500,000	5,000	180,000	1,800
Turkey	275,000	550,000	100,000	1,820	55,000	1,000

Note: Except for beef, these values are interpolations based on best professional judgement.

EPA also considered whether operations that significantly expand should be required to reapply for a permit. Public concern has been expressed as to whether operations that significantly expand should be required to undergo a public process to determine whether new limits are necessitated by the expansion. EPA believes, however, that if the general permit covers operations similar to the newly expanded operation, there would be no basis for requiring an individual permit. In section VIII above, EPA also has explained why it would not be appropriate to classify facilities that expand their production capacities as new sources. If a member of the public believes that the requirements of a proposed general permit are not adequate for CAFOs above a certain size, it should raise that issue when the permit authority proposes the general permit and request that it be limited to certain size operations. As is discussed above, the public could also petition the permit authority if it believes that a specific facility should be covered by an individual permit.

Under existing regulations the permit authority may modify a permit if there are material and substantial alterations to the permitted facility or activity that occur after the permit is issued and justify different permit conditions. 40 CFR 122.62(a)(1). The public would be able to participate in the permit modification process to incorporate the new standards. 40 CFR 123.5(c).

EPA is interested in comment on whether the above procedures are adequate to ensure public participation or whether individual permits should be required for any of the categories of facilities discussed above. Specifically, EPA is interested in comments on whether individual permits should be required for (a) facilities over a certain size threshold, (b) new facilities; (c) facilities that are significantly expanding; (d) facilities that have historical compliance problems; or (e) operations that are located in areas with significant environmental concerns.

3. Demonstrating No Potential to Discharge

As described in section VII.C.2.d above, today's proposal would require all CAFO owners or operators to apply for an NPDES permit, based on a presumption that all CAFOs have a potential to discharge pollutants to waters of the U.S. There would, however, be one exception to this requirement: A CAFO owner or operator would not need to apply for a permit if it received a determination by the permit authority that the CAFO does *not* have a potential to discharge. It would be the CAFO owner's or operator's burden to ask for a ''no potential to discharge'' determination and to support the request with appropriate data and information. See proposed § 122.23(c) and (e).

The term ''no potential to discharge'' means that there is no potential for any CAFO manure or wastewaters to be added to waters of the United States from the operation's production or land application areas, without qualification. For example, if a CAFO land applies its manure according to a permit nutrient plan, it may not claim ''no potential to discharge'' status on the basis that it *would* have runoff, but any runoff would be exempt as agricultural storm water. CAFOs owners or operators should not be able to avoid permitting by claiming that they already meet the land application requirements that would be in a permit—in this case, the requirement of zero discharge from land application areas except for runoff from properly applied manure and wastewater (see today's proposed effluent limitation guidelines). Moreover, today's proposed effluent limitation guidelines would include not only restrictions on the rate of land application but also a set of best management practices to further protect against inadvertent discharges from land applied manure and wastewater (for example, the requirement for 100 foot setbacks, consideration of timing of application, etc.). EPA's intention would be to require a permit that imposes both types of requirements unless an operation has clearly established the absence of a potential to discharge. A CAFO's claim that it already meets the restrictions on the rate of land application would not ensure, as a permit would, that the CAFO has employed and is continuing to employ these additional management practices.

Instead, EPA proposes to allow ''no potential to discharge'' status in order to provide relief where there truly is no potential for a CAFO's wastes to reach the waters. This would include, for example, CAFOs that are far from any water body, or those that have closed cycle systems for managing their wastes and that do not land apply their wastes. In particular, EPA believes that the act of land applying its manure and wastewater would, in many cases, be enough by itself to indicate that a CAFO does have a potential to discharge. It would be very difficult, in general, for CAFOs that land apply their wastes to demonstrate that they have no potential to discharge (although conceivably such a showing could be made if the physical features of the site, including lack of proximity to the waters, slope, etc. warrant it).

It is only where there is no potential for a CAFO's wastes to reach the waters that EPA believes it is appropriate not to require a permit. Indeed, where a CAFO has demonstrated that it has no potential to discharge, it no longer qualifies as a point source under the Act (see Section 502(14), which defines ''point source'' to include conveyances such as CAFOs from which pollutants ''are or may be'' discharged).

Under today's proposal, the burden of proof to show that there is no potential to discharge would be with the CAFO owner or operator, not the permitting authority. There would be a presumption that the CAFO does have the potential to discharge unless the CAFO owner or operator has rebutted this presumption by showing, to the satisfaction of the permit authority, that it does not.

It is not EPA's intention to allow a broad interpretation of this provision but, rather, to establish that ''no potential to discharge'' is to be narrowly interpreted and applied by permit authorities. This provision is intended to be a high bar that provides an exemption only to those facilities that can demonstrate to a degree of certainty that they have no potential to discharge to the waters of the U.S.

Today's proposal would specify that an operation that has had a discharge within the past five years cannot receive a determination that it has no potential to discharge. The Agency is not proposing to specify further the exact conditions that would indicate that a facility has no potential to discharge. However, any such demonstration would need to account for all manure generated at the facility, specifying how the design of the animal confinement areas, storage areas, manure and wastewater containment areas, and land application areas eliminates any possibility of discharge to surface waters or to groundwater with a direct hydrological connection to surface water. Further, the CAFO operator must be able to provide assurance that all CAFO-generated manure and wastewater that is transported off-site are transferred to a recipient that provides for environmentally appropriate handling, such as by: (1) land applying according to proper agricultural practices as defined in this regulation; (2) obtaining an NPDES permit for discharges resulting from land application; or (3) having other non-land application uses.

If an owner or operator is able to demonstrate no potential to discharge at the production area, but cannot demonstrate an assurance that manure transported off-site is being appropriately disposed of, the facility would be required to apply for a zero discharge permit that includes the record keeping requirements described in section VII.E. of today's proposal.

EPA requests comment on whether it should include additional specific criteria for determining whether a CAFO has ''no potential to discharge,'' and what those criteria should be. The Agency is concerned that without more specific criteria, this provision could be subject to abuse. Therefore, EPA is seeking comment on whether safeguards are necessary to ensure that only those CAFOs which truly pose no risk to the environment are able to avoid permitting requirements.

The fact that a CAFO owner or operator submits a request for a determination that the facility has no potential to discharge would not change the deadline to apply for a permit. The CAFO owner or operator would need to apply for a permit according to the date specified in § 122.23(f) unless it receives a no potential to discharge determination before that date. It would be inappropriate, in EPA's view, to allow otherwise—*i.e.*, to postpone the deadline to apply for a permit if the CAFO has not yet received a determination on its ''no potential to discharge'' request. Under that approach, even CAFOs owners or operators who could not make a serious claim of ''no potential to discharge'' could apply for such a determination simply as a way of delaying the permitting process, and the process could in fact be delayed if permitting authorities are faced with large numbers of such requests. We recognize that under the approach we are proposing, some CAFOs who really do have no potential to discharge will be forced to file a complete permit application if their permitting authority has not ruled on their request prior to the deadline for the permit application. However, EPA expects there to be few such cases, since we expect relatively few CAFOs to be able to demonstrate no potential to discharge; and in light of the problems of the alternative approach, EPA's proposed approach seems preferable.

It is important to recognize that if a CAFO receives a ''no potential to discharge'' determination but subsequently does have a discharge, that operation would be in violation of the Clean Water Act for discharging without a permit. The ''no potential to discharge'' determination would not identify an operation as forever a non-point source. To the contrary, there would be no basis for excluding an operation from the requirements for point sources if it meets the criteria for being a CAFO and has an actual discharge of pollutants to the waters. The operation, upon discharging, would immediately revert to status as a point source.

EPA is requesting comment on whether the Director's ''no potential to discharge'' determination should be subject to the same types of administrative procedures that are required for the Director's decision to issue or deny a permit. That is, EPA is considering a requirement that, before EPA or the State could issue a final determination that there is no potential to discharge, the public would have the formal right to comment on, and EPA would have the opportunity to object to (in authorized States), the Director's draft determination. These procedures may be appropriate, for example, in light of anticipated public interest in the Director's determination. Alternatively, EPA requests comment on *not* requiring the Director to follow these procedures for public and EPA input into the Director's decision. EPA could conclude that the types of procedures that apply to permitting decisions are not appropriate here (since the ''no potential to discharge'' determination is neither the issuance nor denial of a permit), but that the environment is sufficiently protected by the fact that any actual discharge from either the production or land application areas would be a violation of the Clean Water Act. Under this latter interpretation, EPA would not itself follow the types of procedures that apply to permit decisions (such as providing the public with the formal opportunity to submit public comments on the Director's draft decision) and would not require States to follow those procedures; however, States could make those procedures available if they chose, since they would be more stringent than the procedures required by EPA. EPA requests comment on which of these two alternative approaches to adopt in the final rule.

It should be noted that under the three-tier proposal, in some cases owners of operations in the middle tier (300 AU to 1,000 AU) would not need to demonstrate ''no potential to discharge'' to avoid a permit because they would not be defined as CAFOs in the first instance. That is, if they do not meet any of the conditions under that regulatory option for being defined as a CAFO (insufficient storage and containment to prevent discharge, production area located within 100 feet of waters, evidence of discharge in the last five years, land applying without a PNP, or transporting manure to an off-site recipient without appropriate certification) then they would not be subject to permitting as CAFOs. (They could, however, still be subject to NPDES permitting as other, non-CAFO types of point sources, as discussed elsewhere in this preamble.)

4. NPDES Permit Application Form 2B

EPA is proposing to amend the NPDES permit application form 2B for CAFOs and Aquatic Animal Production Facilities in order to reflect the revisions included in today's proposed rulemaking, and in order to facilitate consideration of the permit application. EPA is proposing to require applicants for individual CAFO permits to submit the following information:

- acreage available for agricultural use of manure and wastewater;
- estimated amount of manure and wastewater to be transferred off-site.

• name and address of any person or entity that owns animals to be raised at the facility, directs the activity of persons working at the CAFO, specifies how the animals are grown, fed, or medicated; or otherwise exercises control over the operations of the facility, in other words, that may exercise substantial operational control.

• provide a copy of the draft PNP.

• whether buffers, setbacks or conservation tillage are implemented to protect water quality.

• On the topographic map required by Form 1, identify latitude and longitude of the production area, and identify depth to ground water that may be hydrologically connected to surface water, if any.

See proposed § 122.21(i)(1).

The existing Form 2B currently only requires: whether the application is for a proposed or existing facility; type and number of animals in confinement (open confinement or housed under roof); number of acres for confinement feeding; if there is open confinement, whether a runoff diversion and control system has been constructed and, if so, indicate whether the design basis is for a 10-year, 24-hour storm, a 25-year, 24-hour storm, or other, including inches; number of acres contributing to drainage; design safety factor; name and official title, phone number, and signature. In addition, § 122.21(f) of the current NPDES regulation requires applicants to submit a topographic map extending one mile beyond the facility's boundary that shows discharge points and surface water bodies in the area.

EPA is proposing to update form 2B and requests comment on what information should be required of applicants for individual permits.

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See the instructions on the reverse.

EPA I.D. NUMBER *(copy from Item 1 of Form 1)*

DRAFT - 11/00

FORM **2B** NPDES

EPA

U.S. ENVIRONMENTAL PROTECTION AGENCY
APPLICATION FOR PERMIT TO DISCHARGE WASTEWATER
CONCENTRATED ANIMAL FEEDING OPERATIONS AND AQUATIC ANIMAL PRODUCTION FACILITIES
Consolidated Permits Program

I. GENERAL INFORMATION

A. TYPE OF BUSINESS	B. LEGAL DESCRIPTION OF FACILITY LOCATION	C. FACILITY OPERATION STATUS
☐ 1. Concentrated Animal Feeding Operation (complete items B, C, D, and section II) ☐ 2. Concentrated Aquatic Animal Production Facility (complete items B, C, and section III)		☐ 1. Existing Facility ☐ 2. Proposed Facility

D. FACILITY OWNERSHIP

1. Does an entity other than the applicant direct the activity of persons working at the facility identified in Form 1 and I.B.? ☐ No ☐ Yes
2. Does an entity other than the applicant own the animals at the facility identified in Form 1 and I.B.? ☐ No ☐ Yes
3. Does an entity other than the applicant specify how the animals at the facility identified in I.B. are grown, fed or medicated? ☐ No ☐ Yes
4. If yes was the answer for questions D1, D2, or D3, what is the name and address of the responsible entity?

Responsible Entity Name: _____ Responsible Entity Address: _____

II. CONCENTRATED ANIMAL FEEDING/OPERATION CHARACTERISTICS

A. TYPE AND NUMBER OF ANIMALS

1. TYPE	2. ANIMALS	
	NO. IN OPEN CONFINEMENT	NO. HOUSED UNDER ROOF

C. TOTAL NUMBER OF ANIMALS CONFINED AT THE FACILITY _____

D. NUMBER OF ACRES FOR CONFINEMENT FEEDING _____

B. LAND APPLICATION

1. How much manure is generated annually by the facility? _____ tons
2. Is manure generated by the CAFO land applied?
   ☐ Yes ☐ No
   If Yes, how many acres of land under the control of the applicant are available for applying the CAFOs manure/wastewater? _____acres
3. Is manure generated by the CAFO transferred to off-site recipients? ☐ Yes ☐ No. If yes, what is the estimated quantity transferred annually? _____ tons

E. IF THERE IS OPEN CONFINEMENT, HAS A RUNOFF DIVERSION AND CONTROL SYSTEM BEEN CONSTRUCTED?

☐ Yes (complete Items 1, 2, & 3 below) ☐ No (go to section IV.)

1. What is the design basis for the control system? ☐ a. 10 year, 24-Hour Storm (specify inches ____) ☐ b. 25 year, 24-Hour Storm (specify inches ____) ☐ c. Other (specify inches and type_____)
2. Report the number of acres of contributing drainage. _____ acres.
3. Report the design safety factor. _____

F. PERMIT NUTRIENT PLAN (PNP)

Has a certified PNP been developed and is being implemented for the facility? ☐ Yes ☐ No

If yes, the applicant is to include a copy of the PNP with the application.

If No, when will the certified PNP be developed and implemented. Date: _____. A draft PNP must be submitted with this application that, at a minimum, demonstrates that there is adequate land available to the CAFO operator to comply with the land application provisions of 40 CFR Part 412 or describes an alternative to land application that is being implemented.

G. CONSERVATION PRACTICES

Please check any of the following conservation practices that are being implemented at the facility to control runoff and protect water quality.

☐ Buffers ☐ Setbacks ☐ Conservation Tillage

III. CONCENTRATED AQUATIC ANIMAL PRODUCTION FACIITY CHARACTERISTICS

A. For each outfall give the maximum daily flow, maximum 30-day flow, and the long-term average flow.				B. Indicate the total number of ponds, raceways, and similar structures in your facility.		
1. Outfall No.	2. Flow *(gallons per day)*			1. Ponds	2. Raceways	3. Other
	a. Maximum Daily	b. Maximum 30 Day	c. Long Term Average			
				C. Provide the name of the receiving water and the source of water used by your facility.		
				1. Receiving Water	2. Water Source	

D. List the species of fish or aquatic animals held and fed at your facility. For each species, give the total weight produced by your facility per year in pounds of harvestable weight, and also give the maximum weight present at any one time

1. Cold Water Species			2. Warm Water Species		
a. Species	b. Harvestable Weight *(pounds)*		a. Species	b. Harvestable Weight *(pounds)*	
	(1) Total Yearly	(2) Maximum		(1) Total Yearly	(2) Maximum

E. Report the total pounds of food fed during the calendar month of maximum feeding.	1. Month	2. Pounds of Food

IV. CERTIFICATION

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this application and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

A. Name and Official Title *(print or type)*	B. Phone No. (area code and no.)
C. Signature	D. Date Signed

INSTRUCTIONS

General

This form must be completed by all applicants who check "yes" to Item II-B in Form 1. Not all animal feeding operations or fish farms are required to obtain NPDES permits. Exclusions are based on size and occurrence of discharge. See the description of these statutory and regulatory exclusions in the General Instructions that accompany Form 1.

For aquatic animal production facilities, the size cutoffs are based on whether the species are warm water or cold water, on the production weight per year in harvestable pounds, and on the amount of feeding in pounds of food (*for cold water species*). Also, facilities which discharge less than 30 days per year, or only during periods of excess runoff (*for warm water fish*) are not required to have a permit.

Refer to the Form 1 instructions to determine where to file this form.

Item I-A

See the note above and the General Instructions which accompany Form 1 to be sure that your facility is a "concentrated animal feeding operation" (CAFO).

Item I-B

Use this space to give a complete legal description of your facilities location including name, address, and latitude/longitude.

Item I-C

Check "proposed " if your facility is not now in operation or does not currently meet the definition of a CAFO in accordance with the information found in the General Instructions that accompany Form 1.

Item I-D

The applicant must answer questions I.D. 1-3 to provide information concerning whether an entity other than the applicant exercises substantial operational control over the facility. If the answer is yes to any of the questions contained in Item I.D. the name and address of the entity are to be provided by the applicant.

Item II

Supply all information in item II if you checked (1) in Item I-A.

Item II-A

Give the maximum number of each type of animal in open confinement or housed under roof (either partially or totally) which are held at your facility for a total of 45 days or more in any 12 month period.

Use the following categories for types of animal:

Mature Dairy Cattle; Veal; Cattle (other than mature dairy or veal); Swine (over 25 kilograms); Swine (less than 25 kilograms); Horses; Sheep or Lambs; Turkeys; Chickens (Laying Hens/Broilers); Ducks.

Item II-B

Provide the total amount of manure generated annually by the facility. Identify if manure generated by the facility is to be land applied and the number of acres, under the control of the CAFO operator, suitable for application. If the answer to question 3. is yes, provide the estimated annual quantity of manure and wastewater that the applicant plans to transfer off-site.

Item II-C

Provide the total number of animals confined at the facility.

Item II-D

Give only the area used for the animal confinement or feeding facility. Do not include any area used for growing or operating feed.

Item II-E

Check "yes" if any system for collection of runoff has been constructed. Supply the information under (1), (2), and (3) to the best of your knowledge.

Item II-F

Provide information concerning the status of the development of a certified PNP for the facility. (Note: for new facilities the certified PNP must be included with Form 2B.) In those cases where the certified PNP has not been completed, provide a draft PNP and an estimated completion date. The draft plan must, at a minimum, demonstrate that there is adequate land available to the operator to comply with the land application provisions of 40 CFR Part 412 or describe an alternative to land application that the operator intends to implement.

Item II-G

Check any of the identified conservation practices that are being implemented at the facility to control runoff and protect water quality.

Item III

Supply all information n Item III if you checked (2) in Item I-A.

Item III-A

Outfalls should be numbered to correspond with the map submitted in Item XI of Form 1. Values given for flow should be representative of your normal operation. The maximum daily flow is the maximum measured flow occurring over a calendar day. The maximum 30-day flow is the average of measured daily flows over the calendar month of highest flow. The long-term average flow is the average of measure daily flows over a calendar year.

Item III-B

Give the total number of discrete ponds or raceways in you facility. Under "other," give a descriptive name of any structure which is not a pond or a raceway but which results in discharge to waters of the United States.

Item III-C

Use names for the receiving water and source of water which correspond to the map submitted in Item XI of Form 1.

Item III-D

The names of fish species should be proper, common, or scientific names as given in special Publication No. 6 of the American Fisheries Society. "A List of Common and Scientific Names of Fishes from the United States and Canada." The values given for total weight produced by your facility per year and the maximum weight present at any one time should be representative of your normal operation.

Item III-E

The value given for maximum monthly pounds of food should be representative of your normal operation.

Item IV

The Clean Water Act provides for severe penalties for submitting false information on this application form.

Section 309©(2) of the Clean Water Act provides that "Any person who knowingly makes any false statement, representation, or certification in any application,...shall upon conviction, be punished by a fine of no more than $10,000 or by imprisonment for not more than six months, or both."

Federal regulations require the certification to be signed as follows:

A. For corporation, by a principal executive officer of at least the level of vice president;

B. For a partnership or sole proprietorship, by a general partner or the proprietor, respectively; or

C. For a municipality, State, Federal, or other public facility, by either a principal executive officer or ranking elected official.

Paper Reduction Act Notice

The Public reporting burden for this collection of information estimated to average 4 hours per response. This estimate includes time for reviewing instructions, searching existing data sources, gathering and maintaining the needed data, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information to the chief, Information Policy Branch (PM-223), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460, and the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked Attention: Desk Officer for EPA.

********DRAFT – 11/00*******

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It is anticipated that as a result of the requirement that all CAFOs have a duty to apply, there will be a large number of CAFOs applying for NPDES permits. Some of these operations represent a greater risk to water quality than others. In order for the permit writer to prioritize NPDES permit writing activities based on the risk to water quality, Section G is being proposed to add to Form 2B as a screening mechanism. Those facilities without

buffers, setbacks, or conservation tillage potentially pose a greater risk to water quality; therefore the permit writer could use this information to develop and issue NPDES permits to these facilities on an expedited basis.

VIII. What Changes to the Feedlot Effluent Limitations Guidelines Are Being Proposed?

A. Expedited Guidelines Approach

EPA has developed today's proposed regulation using an expedited rulemaking process which relies on communication between EPA, the regulated community, and other stakeholders, rather than formal data and information gathering mechanisms. At various stages of information gathering, USDA personnel, representatives of industry and the national trade associations, university researchers, Agricultural Extension agencies, States, and various EPA offices and other stakeholders have presented their ideas, identified advantages and disadvantages to various approaches, and discussed their preferred options.

EPA encourages full public participation in commenting on these proposals.

B. Changes to Effluent Guidelines Applicability

1. Who is Regulated by the Effluent Guidelines?

The existing effluent guidelines regulations for feedlots apply to operations with 1,000 AU and greater. EPA is proposing to establish effluent guidelines requirements for the beef, dairy, swine, chicken and turkey subcategories that would apply to any operations in these subcategories that are defined as a CAFO under either the two-tier or three-tier structure. Also as discussed in detail in Section VII.B.3, EPA is also requesting comment on an option under which the effluent guidelines proposed today would not be applicable to facilities under 1,000 AU. Under this approach, AFOs below this threshold would be permitted based on an alternate set of effluent guidelines, or the best professional judgment of the permit writer. After evaluating public comments EPA may decide to consider this option. At that time EPA would develop and make available for comment an analysis of why it is appropriate to promulgate different effluent guidelines requirements or no effluent guidelines for CAFOs that have between 300 and 1,000 AU as compared to the effluent guidelines for operations with greater than 1,000 AU.

EPA also proposes to establish a new subcategory that applies to the production of veal cattle. Veal production is included in the beef subcategory in the existing regulation. However, veal production practices and wastewater and manure handling are very different from the practices used at beef feedlots; therefore, EPA proposes to establish a separate subcategory for veal.

Under the three-tier structure the proposed effluent guidelines requirements for the beef, dairy, swine, veal and poultry subcategories will apply to all operations defined as CAFOs by today's proposal having at least as many animals as listed below.

200 mature dairy cattle (whether milked or dry);
300 veal;
300 cattle other than mature dairy cattle or veal;
750 swine weighing over 55 pounds;
3,000 swine weighing 55 pounds or less;
16,500 turkeys; or
30,000 chickens.

Under the two-tier structure, the proposed requirements for the beef, dairy, swine, veal and poultry subcategories will apply to all operations defined as CAFOs by today's proposal having at least as many animals as listed below.

350 mature dairy cattle (whether milked or dry);
500 veal;
500 cattle other than mature dairy cattle or veal;
1,250 swine weighing over 55 pounds;
5,000 swine weighing 55 pounds or less;
27,500 turkeys; or
50,000 chickens.

EPA is proposing to apply the Effluent guidelines requirements for the beef, dairy, veal, swine, chicken and turkey subcategories, to all operations in these subcategories that are defined as CAFOs under either of today's proposed permitting scenarios. Operations designated as CAFOs are not subject to the proposed effluent guidelines.

EPA is proposing to rename the Effluent Guidelines Regulations, which is entitled Feedlots Point Source Category. Today's proposal changes the name to the Effluent Guidelines Regulation for the CAFOs Point Source Category. EPA is proposing this change for consistency and to avoid confusion between who is defined as a CAFO under Part 122 and whether the Effluent guidelines apply to the operation.

EPA is not proposing to revise the Effluent guidelines requirements or the applicability for the horses, sheep and lambs and ducks subcategories even though the definition of CAFO for these subcategories is changing as described previously in Section VII. These sectors have not undergone the same level of growth and consolidation that the other livestock sectors have experienced in the past 25 years. In 1992, an estimated 260 farms in these sectors were potentially CAFOs based on size, and relatively few of these operations were expected to maintain horses or sheep in confinement. Finally, the CAFOs in these sectors have not been identified as significant contributors of wastewater pollutants that result in water quality impairment.

EPA has evaluated the technology options described in this section and evaluated the economic achievability for these technologies for all operations with at least as many animals listed above for both the two-tier and three-tier NPDES structures. The technology requirements for operations defined as CAFOs under the two-tier structure are the same requirements for operations defined as CAFOs under the three-tier structure. *Therefore for the purpose of simplifying this discussion and emphasizing the differences in technology requirements for the various technology options, the following discussion will not distinguish between the two CAFO definition scenarios.* For more discussion of the costs and differences in costs between the different CAFO definition scenarios, refer to Section X of this preamble or the EA. For discussion of the benefits achieved for the different technology options and scenarios, refer to Section XI of this preamble.

EPA proposes to make the Effluent guidelines and standards applicable to those operations that are defined as CAFOs as described previously under Section VII. EPA is not proposing to apply the Effluent guidelines to those operations that fall below the proposed thresholds but are still designated as CAFOs. As described in Section VII, EPA anticipates that few AFOs will be designated as CAFOs and that these operations will generally be designated due to site-specific conditions. Examples of these conditions could include, not capturing barnyard runoff which runs directly into the stream, or siting open stockpiles of manure inappropriately. EPA believes that establishing national technology based requirements for designated CAFOs is not efficient or appropriate because historically a small number of facilities has been designated and facilities which are designated in the future will be designated for a wide variety of reasons. EPA believes that a permit will best control pollutant discharges from those operations if it is based on the permit writer's best professional judgment and is tailored to address the specific

problems which caused the facility to be designated.

EPA is proposing to make substantial changes to the applicability for chickens, mixed animal operations and immature animals as described below.

Chickens. The current regulations apply to chicken operations with liquid manure handling systems or continuous flow watering systems. Unlimited continuous flow watering systems have been replaced by more efficient systems for providing drinking water to the birds. Consequently, many state permitting authorities and members of the regulated community contend that the existing effluent guidelines do not apply to most broiler and laying hen operations, despite the fact that chicken production poses risks to surface water and groundwater quality from improper storage of dry manure, and improper land application. EPA is proposing to clarify the effluent guidelines to ensure coverage of broiler and laying hen operations with dry manure handling. The proposed applicability is identical to the definition of chicken CAFOs described in Section VII.C.2.f. EPA is thus proposing to establish effluent guidelines for chicken operations that use dry manure handling systems regardless of the type of watering system or manure handling system used. EPA is using the term chicken in the regulation to include laying hens, pullets, broilers and other meat type chickens. See Section VII for more details on the proposed applicability threshold for chickens.

Mixed Animal Types. Consistent with the proposed changes to the definition of CAFO as described in Section VII.C.2.b, EPA is proposing to eliminate the calculation in the existing regulation that apply to mixed animals operations.

Immature Animals. EPA is proposing to apply technology based standards to swine nurseries and to operations that confine immature dairy cows or heifers apart from the dairy. EPA currently applies technology based standards to operations based on numbers of swine each weighing over 55 pounds. Modern swine production has a phase of production called a nursery that only confines swine weighing under 55 pounds. These types of operations are currently excluded from the technology based standards, but are increasing in both number and size. Therefore, EPA proposes to establish technology based standards to operations confining immature pigs. Under the two-tier structure EPA proposes to establish a threshold of 5,000 immature pigs or pigs weighing 55 pounds or less. Under the proposed three-tier structure operations that confine between 3,000 and 10,000 immature pigs could be defined as CAFOs and all operations with more than 10,000 immature pigs would be CAFOs. EPA also proposes to establish requirements for immature heifers when they are confined apart from the dairy, at either stand alone heifer operations similar in management to beef feedlots, or at cattle feedlots. Therefore EPA proposes to include heifer confinement off-site from the dairy under the beef feedlot subcategory, and today's proposed technology standards for beef feedlots would apply to those stand alone heifer operations defined as CAFOs. Also any feedlot that confines heifers along with cattle for slaughter is subject to the beef feedlot requirements.

EPA is proposing to establish a new subcategory for the effluent guidelines regulations which applies to veal operations. The existing regulation includes veal production in the beef cattle subcategory. EPA is proposing to create a distinct subcategory for veal operations because these operations use different production practices than other operations in the beef subcategory however, we are proposing to retain the sized threshold that pertained to veal while included in the beef subcategory. Veal operations maintain their animals in confinement housing as opposed to open outdoor lots as most beef feedlots operate. They also manage their manure very differently than typical operations in the beef cattle subcategory. Due in large part to the diet the animals are fed, the manure has a lower solids content and is handled through liquid manure handling systems, such as lagoons, whereas beef feedlots use dry manure handling systems and only collect stormwater runoff in retention ponds. EPA is proposing to define a veal CAFO as any veal operation which confines 300 veal calves or greater under the three-tier structure, or 500 veal calves or greater under two-tier structure.

C. Changes to Effluent Limitations and Standards

EPA is today proposing to revise BAT and new source performance standards for the beef, dairy, veal, swine and poultry subcategories. EPA is proposing to establish technology-based limitations on land application of manure to lands owned or operated by the CAFO, maintain the zero discharge standard and establish management practices at the production area.

1. Current Requirements

The existing regulations, which apply to operations with 1,000 AU or greater, require zero discharge of wastewater pollutants from the production area except when rainfall events, either chronic or catastrophic cause an overflow of process wastewater from a facility designed, constructed and operated to contain all process generated wastewaters plus runoff from a 10-year, 24-hour event under the BPT requirements and a 25-year, 24-hour event under the BAT and NSPS requirements. In other words, wastewater and wastewater pollutants are allowed to be discharged as the result of a chronic or catastrophic rainfall event so long as the operation has designed, constructed and operated a manure storage and/or runoff collection system to contain all process generated wastewater, including the runoff from a specific rainfall event. The effluent guidelines do not set discharge limitations on the pollutants in the overflow.

2. Authority to Establish Requirements Based on Best Management Practices

The regulations proposed today establish a zero discharge limitation and include provisions requiring CAFOs to implement best management practices (BMPs) to prevent or otherwise contain CAFO waste to meet that limitation at the production area. The regulations also establish non-numeric effluent limitations in the form of other BMPs when CAFO waste is applied to land under the control of the CAFO owner or operator. For toxic pollutants of concern in CAFO waste, specifically cadmium, copper, lead, nickel, zinc and arsenic, EPA is authorized to establish BMPs for those pollutants under CWA section 304(e). EPA also expects reductions in conventional and nonconventional water pollutants as a result of BMPs. To the extent these pollutants are in the waste streams subject to 304(e), EPA has authority under that section to regulate them. EPA also has independent authority under CWA sections 402(a) and 501(a) and 40 CFR 122.44(k) to require CAFOs to implement BMPs for pollutants not subject to section 304(e). In addition, EPA has authority to establish non-numeric effluent limitations guidelines, such as the BMPs proposed today, when it is infeasible to establish numeric effluent limits. Finally, EPA is authorized to impose the BMP monitoring requirements under section 308(a).

Production Area. EPA has determined that the BMPs for the production area are necessary because the requirement of zero discharge has historically not been attained. As described in Section V, of this preamble, there are numerous reports of discharges from CAFOs that are unrelated to storm events which would be less likely to occur if the

proposed BMPs described below were required.

Section 304(e) provides that ''[t]he Administrator, after consultation with appropriate Federal and State agencies and other interested persons, may publish regulations, supplemental to any effluent limitations specified under (b) and (c) of this section for a class or category of point sources, for any specific pollutant which the Administrator is charged with a duty to regulate as a toxic or hazardous pollutant under section 1317(a)(1) or 1321 of this title, to control plant site runoff, spillage or leaks, sludge or waste disposal, and drainage from raw material storage which the Administrator determines are associated with or ancillary to industrial manufacturing or treatment process within such class or category of point sources and may contribute significant amounts of such pollutants to navigable waters.'' § 304(e). There are studies showing the presence of a number of listed metals in animal manure. Numerous sources such as the American Society of Agricultural Engineers, and Universities such as North Carolina State University have acknowledged the presence of metals in manure. Metals are present in the manure because they are added or present in the animal feed. EPA has estimated metal loadings being applied to land before and after this regulation would take effect. Although the concentration of metals present in untreated manure are less than the limits for metals established in EPA's biosolids regulations (40 CFR Part 503), EPA still anticipates that there would be a substantial reduction in pollutant loadings reaching the edge of the field through use of the land application practices included in today's proposal. See the Development Document for more discussion.

EPA's authority to require these BMPs does not require a determination that the toxics present in CAFO waste are significant. The federal courts have held that EPA has extensive authority to carry out its duties under the Clean Water Act:

EPA is not limited by statute to the task of establishing effluent standards and issuing permits, but is empowered by section 501(a) of the Act to prescribe regulations necessary to carry out its functions under the Act. 33 U.S.C. § 1361(a). It is also clear that permissible conditions set forth in NPDES permits are not limited to establishing limits on effluent discharge. To the contrary, Congress has seen fit to empower EPA to prescribe as wide a range of permit conditions as the agency deems appropriate in order to assure compliance with applicable effluent limits. 33 U.S.C. § 1342(a)(2); *see also id.* § 1314(e). *NRDC* v. *EPA*, 822 F.2d 104, 122 (D.C. Cir. 1987).

This authority operates independent of section 304(e). EPA's authority under section 402(a)(2) to establish NPDES permit conditions, including BMPs, for any pollutant when such conditions are necessary to carry out the provisions of the statute has been further implemented through regulations at 40 CFR 122.44(k). Although a requirement to establish and implement BMPs of the type proposed in this regulation could be imposed on a case-by-case basis, EPA has decided to promulgate this requirement on a categorical basis for those facilities which are CAFOs by definition. In light of the more than twenty years of experience with the regulation of CAFOs and their failure to achieve the zero discharge limit originally promulgated, EPA has determined that certain management practices are necessary to ensure that the zero discharge limit is actually met. The stated goal of the Clean Water Act is to eliminate the discharge of pollutants into the Nation's waters. CWA section 101(a)(1). EPA has determined that these BMPs, by preventing or controlling overflows, leaks or intentional diversions, are an important step toward that goal.

Finally, EPA has authority to impose monitoring and recordkeeping requirements under section 308 of the Act. As described below EPA is proposing to require that CAFOs periodically sample their manure and soils to analyze for nutrient content. This is necessary to both determine what is the appropriate rate to land apply manure and to ensure that the application rate is appropriate. The proposed rule would also require CAFOs to conduct routine inspections around the production area to ensure that automated watering lines are functioning properly, and to ensure that the manure level for liquid systems is not threatening a potential discharge. The CAFO would also maintain records that document manure application, including equipment calibration, volume or amount of manure applied, acreage receiving manure, application rate, weather conditions and timing of manure application, application method, crops grown and crop yields. These records will provide documentation that the manure was applied in accordance with the PNP and has not resulted in a discharge of pollutants in excess of the agricultural use. EPA has determined that these practices are necessary in order to determine whether an owner or operator of a CAFO is complying with the effluent limitation. Establishment and maintenance of records, reporting, and the installation, use and maintenance of monitoring equipment are all requirements EPA has the authority to impose. 33 U.S.C. § 1318(a).

Land Application Areas. For the land application areas of a CAFO, EPA is proposing a nonnumeric effluent limitation consisting of best management practices. The D.C. Circuit has concluded that ''[w]hen numerical effluent limitations are infeasible, EPA may issue permits with conditions designed to reduce the level of effluent discharges to acceptable levels.'' *NRDC* v. *Costle*, 568 F.2d 1369, 1380 (D.C. Cir. 1977); 40 CFR 122.44(k)(3). EPA has determined that it is infeasible to establish a numeric effluent limitation for discharges of land applied CAFO waste and has also determined that the proposed BMPs are the appropriate ones to reduce the level of discharge from land application areas.

The proposed BMPs constitute the effluent limitation for one wastestream from CAFOs. The statutory and regulatory definition of ''effluent limitation'' is very broad—''any restriction'' imposed by the permitting authority on quantities, discharge rates and concentrations of a pollutant discharged into a water of the United States. Clean Water Act § 502(11), 40 CFR 122.2. Neither definition requires an effluent limitation to be expressed as a numeric limit. Moreover, nowhere in the CWA does the term ''numeric effluent limitation'' even appear and the courts have upheld non-numeric restrictions promulgated by EPA as effluent limitations. *See NRDC* v. *EPA,* 656 F.2d 768, 776 (D.C. Cir. 1981) (holding that a regulation which allows municipalities to apply for a variance from the normal requirements of secondary sewage treatment is an ''effluent limitation'' for purposes of review under § 509(b): ''[W]hile the regulations do not contain specific number limitations in all cases, their purpose is to prescribe in technical terms what the Agency will require of section 1311(h) permit applicants.''). Thus, the statutory definition of ''effluent limitation'' is not limited to a single type of restriction, but rather contemplates a range of restrictions that may be used as appropriate. Likewise, the legislative history does not indicate that Congress envisioned a single specific type of effluent limitation to be applied in all circumstances. Therefore, EPA has a large degree of discretion in interpreting the term ''effluent limitation,'' and determining whether an effluent limitation must be expressed

as a numeric standard. EPA has defined BMPs as ''schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States.'' 40 CFR 122.2. A BMP may take any number of forms, depending upon the problem to be addressed. Because a BMP must, by definition, ''prevent or reduce the pollution of waters of the United States,'' the practices and prohibitions a BMP embodies represent restrictions consistent with the definition of an effluent limitation set out in CWA § 502(11).

Effluent limitations in the form of BMPs are particularly suited to the regulation of CAFOs. The regulation of CAFOs often consists of the regulation of discharges associated with storm water. Storm water discharges can be highly intermittent, are usually characterized by very high flows occurring over relatively short time intervals, and carry a variety of pollutants whose nature and extent varies according to geography and local land use. Water quality impacts, in turn, also depend on a wide range of factors, including the magnitude and duration of rainfall events, the time period between events, soil conditions, the fraction of land that is impervious to rainfall, other land use activities, and the ratio of storm water discharge to receiving water flow. CAFOs would be required to apply their manure and wastewater to land in a manner and rate that represents agricultural use. The manure provides nutrients, organic matter and micronutrients which are very beneficial to crop production when applied appropriately. The amount or rate at which manure can be applied to provide the nutrient benefits without causing excessive pollutant discharge will vary based on site specific factors at the CAFO. These factors include the crop being grown, the expected crop yield, the soil types, and soil concentration of nutrients (especially phosphorus), and the amount of other nutrient sources to be applied. For these reasons, EPA has determined that establishing a numeric effluent limitation guideline is infeasible.

EPA has determined that the various BMPs specified in today's proposed regulation represent the minimum elements of an effective BMP program. By codifying them into a regulation of general applicability, EPA intends to promote expeditious implementation of a BMP program and to ensure uniform and fair application of the baseline requirements. EPA is proposing only those BMPs which are appropriate on a nationwide basis, while giving both States and permittees the flexibility to determine the appropriate practices at a local level to achieve the effluent limitations. The BMP's (described below) that are included in the proposed technology options are necessary to ensure that manure and wastewater are utilized for their nutrient content in accordance with agricultural requirements for producing crops or pastures. EPA also believes that the proposed regulations represent an appropriate and efficient use of its technical expertise and resources that, when exercised at the national level, relieves state permit writers of the burden of implementing this aspect of the Clean Water Act on a case-by-case basis.

3. Best Practicable Control Technology Limitations Currently Available (BPT)

EPA is proposing to establish BPT limitations for the beef, dairy, swine, veal chicken and turkey subcategories. There are BPT limitations in the existing regulations which apply to CAFOs with 1,000 AU or more in the beef, dairy swine and turkey subcategories. BPT requires that these operations achieve zero discharge of process wastewater from the production area except in the event of a 10-year, 24-hour storm event. EPA is proposing to revise this BPT requirement and to expand the applicability of BPT to all operations defined as CAFOs in these subcategories including CAFOs with fewer than 1,000 AU.

The Clean Water Act requires that BPT limitations reflect the consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such applications. EPA considered two options as the basis for BPT limitations.

Option 1. This option would require zero discharge from a facility designed, maintained and operated to hold the waste and wastewater, including storm water, from runoff plus the 25-year 24-hour storm event. Both this option and Option 2 would add record keeping requirements and practices that ensure this zero discharge standard is met. As described in Section V there are numerous reports of operations discharging pollutants from the production area during dry weather. The reason for these discharges varies from intentional discharge to poor maintenance of the manure storage area or confinement area. EPA's cost models reflect the different precipitation and climatic factors that affect an operations ability to meet this requirement; see Section X and the Development Document for further details.

Option 1 would require weekly inspection to ensure that any storm water diversions at the animal confinement and manure storage areas are free from debris, and daily inspections of the automated systems providing water to the animals to ensure they are not leaking or spilling. The manure storage or treatment facility would have to be inspected weekly to ensure structural integrity. For liquid impoundments, the berms would need to be inspected for leaking, seepage, erosion and other signs of structural weakness. The proposal requires that records of these inspections would be maintained on-site, as well as records documenting any problems noted and corrective actions taken. EPA believes these inspections are necessary to ensure proper maintenance of the production area and prevent discharges apart from those associated with a storm event from a catastrophic or chronic storm.

Liquid impoundments (e.g., lagoons, ponds and tanks) that are open and capture precipitation would be required to have depth markers installed. The depth marker indicates the maximum volume that should be maintained under normal operating conditions allowing for the volume necessary to contain the 25-year, 24-hour storm event. The depth of the impoundment would have to be noted during each week's inspection and when the depth of manure and wastewater in the impoundment exceeds this maximum depth, the operation would be required to notify the Permit Authority and inform him or her of the action will be taken to address this exceedance. Closed or covered liquid impoundments must also have depth markers installed, with the depth of the impoundment noted during each week's inspection. In all cases, this liquid may be land applied only if done in accordance with the permit nutrient plan (PNP) described below. Without such a depth marker, a CAFO operator may fill the lagoons such that even a storm less than a 25-year, 24-hour storm causes the lagoon to overflow, contrary to the discharge limit proposed by the BPT requirements.

An alternative technology for monitoring lagoon and impound meat levels is remote sensors which monitor liquid levels in lagoons or impoundments. This sensor technology can be used to monitor changes in liquid levels, either rising or dropping levels, when the level is changing rapidly can trigger an alarm. These sensors can also trigger an alarm when the liquid level has reached a critical level. The alarm can transmit to a wireless receiver to alert the CAFO

owner or operator and can also alert the permit authority. The advantages of this type of system is the real time warning it can provide the CAFO owner or operator that his lagoon or impoundment is in danger of overflowing. It can provide the CAFO operator an opportunity to better manage their operations and prevent catastrophic failures. These sensors are more expensive than depth markers; however, the added assurance they provide in preventing catastrophic failures may make them attractive to some operations.

Option 1 would require operations to handle dead animals in ways that prevent contributing pollutants to waters of the U.S. EPA proposes to prohibit any disposal of dead animals in any liquid impoundments or lagoons. The majority of operations have mortality handling practices that prevent contamination of surface water. These practices include transferring mortality to a rendering facility, burial in properly sited lined pits, and composting.

Option 1 also would establish requirements to ensure the proper land application of manure and other process wastes and wastewaters. Under Option 1 land application of manure and wastewater to land owned or operated by the CAFO would have to be performed in accordance with a PNP that establishes application rates for manure and wastewater based on the nitrogen requirements for the crop. EPA believes that application of manure and wastewater in excess of the crop's nitrogen requirements would increase the pollutant runoff from fields, because the crop would not need this nitrogen, increasing the likelihood of it being released to the environment.

In addition, Option 1 includes a requirement that manure be sampled at least once per year and analyzed for its nutrient content including nitrogen, phosphorus and potassium. EPA believes that annual sampling of manure is the minimum frequency to provide the necessary nutrient content on which to establish the appropriate rate. If the CAFO applies its manure more frequently than once per year, it may choose to sample the manure more frequently. Sampling the manure as close to the time of application as practical provides the CAFO with a better measure of the nitrogen content of the manure. Generally, nitrogen content decreases through volatilization during manure storage when the manure is exposed to air.

The manure application rate established in the PNP would have to be based on the following factors: (1) the nitrogen requirement of the crop to be grown based on the agricultural extension or land grant university recommendation for the operation's soil type and crop; and (2) realistic crop yields that reflect the yields obtained for the given field in prior years or, if not available, from yields obtained for same crop at nearby farms or county records. Once the nitrogen requirement for the crop is established the manure application rate would be determined by subtracting any other sources of nitrogen available to the crop from the crop's nitrogen requirement. These other sources of nitrogen can include residual nitrogen in the soil from previous applications of organic nitrogen, nitrogen credits from previous crops of legumes, and crop residues, or applications of commercial fertilizer, irrigation water and biosolids. Application rates would be based on the nitrogen content in the manure and should also account for application methods, such as incorporation, and other site specific practices.

The CAFO would have to maintain the PNP on-site, along with records of the application of manure and wastewater including: (1) the amount of manure applied to each field; (2) the nutrient content of manure; (3) the amount and type of commercial fertilizer and other nutrient sources applied; and (4) crop yields obtained. Records must also indicate when manure was applied, application method and weather conditions at the time of application.

While Option 1 would require manure to be sampled annually, it would not require soil sampling and analysis for the nitrogen content in the soil. Nitrogen is present in the soil in different forms and depending on the form the nitrogen will have different potential to move from the field. Nitrogen is present in an organic form from to the decay of proteins and urea, or from other organic compounds that result from decaying plant material or organic fertilizers such as manure or biosolids. These organic compounds are broken down by soil bacteria to inorganic forms of nitrogen such as nitrate and ammonia. Inorganic nitrogen or urea may be applied to crop or pasture land as commercial fertilizer. Inorganic nitrogen is the form taken up by the plant. It is also more soluble and readily volatile, and can leave the field through runoff or emissions. Nitrogen can also be added to the soil primarily through cultivation of legumes which will ''fix'' nitrogen in the soil. At all times nitrogen is cycling through the soil, water, and air, and does not become adsorbed or built up in the soil in the way that phosphorus does, as discussed under Option 2. Thus, EPA is not proposing to require soil sampling for nitrogen. EPA would, however, require that, in developing the appropriate application rate for nitrogen, any soil residue of nitrogen resulting from previous contributions by organic fertilizers, crop residue or legume crops should be taken into account when determining the appropriate nitrogen application rate. State Agricultural Departments and Land Grant Universities have developed methods for accounting for residual nitrogen contributed from legume crops, crop residue and organic fertilizers.

Option 1 would also prohibit application of manure and wastewater within 100 feet of surface waters, tile drain inlets, sinkholes and agricultural drainage wells. EPA strongly encourages CAFOs to construct vegetated buffers, however, Option 1 only prohibits applying manure within 100 feet of surface water and would not require CAFOs to take crop land out of production to construct vegetated buffers. CAFOs may continue to use land within 100 feet of surface water to grow crops. Under Option 1, EPA included costs for facilities to construct minimal storage, typically three to six months, to comply with the manure application rates developed in the PNP. EPA included these costs because data indicate pathogen concentrations in surface waters adjacent to land receiving manure are often not significantly different from pathogen levels in surface waters near lands not receiving manure when the manure has been stored and aged prior to land application. EPA believes the 100 foot setback, in conjunction with proper manure application, will minimize the potential runoff of pathogens, hormones such as estrogen, and metals and reduce the nutrient and sediment runoff.

EPA is aware of concerns that the presence of tile drain inlets, sinkholes and agricultural drainage wells may be widespread in some parts of the country. This could effectively preclude manure based fertilization of large areas of crop land. EPA requests comment on the presence of such features in crop land and the extent to which a 100 foot setback around such features would interfere with land application of manure. EPA also requests comment on how it might revise the setback requirement to address such concerns and still adequately protect water quality.

EPA analysis shows application rates are the single most effective means of reducing runoff. Nevertheless, no combination of best management

practices can prevent pollutants from land application from reaching surface waters in all instances; vegetated buffers provide an extra level of protection. Buffers are not designed to reduce pollutants on their own; proper land application and buffers work in tandem to reduce pollutants from reaching surface waters. Data on the effectiveness of vegetated buffers indicate that a 35 to 66 foot vegetated buffer (depending primarily on slope) achieves the most cost-effective removal of sediment and pollutants from surface runoff. However, EPA chose not to propose requiring operations to take land out of production and construct a vegetated buffer because a buffer may not be the most cost-effective application to control erosion in all cases. There are a variety of field practices that should be considered for the control of erosion. EPA encourages CAFOs to obtain and implement a conservation management plan to minimize soil losses, and also to reduce losses of pollutant bound to the soils.

Today's proposal requires a greater setback distance than the optimum vegetated buffer distance. Since EPA is not requiring the construction of a vegetated buffer, the additional setback distance will compensate for the loss of pollutant reductions in the surface runoff leaving the field that would have been achieved with a vegetated buffer without requiring CAFOs to remove this land from production.

EPA solicits comment on additional options to control erosion which would, in turn, reduce the amount of pollutants reaching waters of the U.S. The options for controlling erosion include: (1) implementing one of the three NRCS Conservation Practice Standards for Residue Management: No-Till and Strip Till (329A), Mulch Till (329B), or Ridge Till (329C) in the state Field Office Technical Guide; (2) requiring a minimum 30% residue cover; (3) achieving soil loss tolerance or ''T'; or (4) implementing of the Erosion and Sediment Control Management Measure as found in EPA's draft *National Management Measures to Control Nonpoint Source Pollution from Agriculture.* This measure is substantially the same as EPA's 1993 *Guidance Specifying Management Measure for Sources of Nonpoint Pollution in Coastal Waters* which says to:

''* * * Apply the erosion control component of a Resource Management System (RMS) as defined in the 1993 Field Office Technical Guide of the U.S. Department of AgricultureBNational Resources Conservation Service to minimize delivery of sediment from agricultural lands to surface waters, or design and install a combination of management and physical practices to settle the settleable solids and associated pollutants in runoff delivered from the contributing area for storms of up to and including a 10-year, 24-hour frequency.''

Farmers entering stream buffers in the Conservation Reserve Program's (CRP) Continuous Sign-Up receive bonus payments, as an added incentive to enroll, include a 20 percent rental bonus, a $100 per acre payment up-front (at the time they sign up), and another bonus at the time they plant a cover. These bonus payments more than cover costs associated with enrolling stream buffers, (*i.e.,* rents forgone for the duration of their 10 or 15 year CRP contracts, and costs such as seed, fuel, machinery and labor for planting a cover crop). The bonuses provide a considerable incentive to enroll stream buffers because the farmers receive payments from USDA well in excess of what they could earn by renting the land for crop production. Farmers can enter buffers into the CRP program at any time.

EPA may also consider providing CAFOs the option of prohibiting manure application within 100 feet or constructing a 35 foot vegetated buffer. EPA solicits comment on any and all of these options.

Option 2. Option 2 retains all the same requirements for the feedlot and manure storage areas described under Option 1 with one exception: Option 2 would impose a BMP that requires manure application rates be phosphorus based where necessary, depending on the specific soil conditions at the CAFO.

Manure is phosphorus rich, so application of manure based on a nitrogen rate may result in application of phosphorus in excess of crop uptake requirements. Traditionally, this has not been a cause for concern, because the excess phosphorus does not usually cause harm to the plant and can be adsorbed by the soil where it was thought to be strongly bound and thus environmentally benign. However, the capacity for soil to adsorb phosphorus will vary according to soil type, and recent observations have shown that soils can and do become saturated with phosphorus. When saturation occurs, continued application of phosphorus in excess of what can be used by the crop and adsorbed by the soil results in the phosphorus leaving the field with storm water via leaching or runoff. Phosphorus bound to soil may also be lost from the field through erosion.

Repeated manure application at a nitrogen rate has now resulted in high to excessive soil phosphorus concentrations in some geographic locations across the country. Option 2 would require manure application be based on the crop removal rate for phosphorus in locations where soil concentrations or soil concentrations in combination with other factors indicate that there is an increased likelihood that phosphorus will leave the field and contribute pollutants to nearby surface water and groundwater. Further, when soil concentrations alone or in combination with other factors exceed a given threshold for phosphorus, the proposed rule would prohibit manure application. EPA included this restriction because the addition of more phosphorus under these conditions is unnecessary for ensuring optimum crop production.

Nutrient management under Option 2 includes all the steps described under Option 1, plus the requirement that all CAFOs collect and analyze soil samples at least once every 3 years from all fields that receive manure. EPA would require soil sampling at 3 year intervals because this reflects a minimal but common interval used in crop rotations. This frequency is also commonly adopted in nutrient management plans prepared voluntarily or under state programs. When soil conditions allow for manure application on a nitrogen basis, then the PNP and record keeping requirements are identical to Option 1. Permit nutrient plans would have to be reviewed and updated each year to reflect any changes in crops, animal production, or soil measurements and would be rewritten and certified at a minimum of once every five years or concurrent with each permit renewal. EPA solicits comment on conditions, such as no changes to the crops, or herd or flock size, under which rewriting the plan would not be necessary and would not require the involvement of a certified planner.

The CAFO's PNP would have to reflect conditions that require manure application on a phosphorus crop removal rate. The manure application rate based on phosphorus requirements takes into account the amount of phosphorus that will be removed from the field when the crop is harvested. This defines the amount of phosphorus and the amount of manure that may be applied to the field. The PNP must also account for the nitrogen requirements of the crop. Application of manure on a phosphorus basis will require the addition of commercial fertilizer to meet the crop requirements for nitrogen. Under Option 2, EPA believes there is an economic incentive to maximize proper handling of manure by conserving nitrogen and minimizing the

expense associated with commercial fertilizer. EPA expects manure handling and management practices will change in an effort to conserve the nitrogen content of the manure, and encourages such practices since they are likely to have the additional benefit of reducing the nitrogen losses to the atmosphere.

EPA believes management practices that promote nitrogen losses during storage will result in higher applications of phosphorus because in order to meet the crops requirements for nitrogen a larger amount of manure must be applied. Nitrogen volatilization exacerbates the imbalance in the ratio of nitrogen to phosphorus in the manure as compared to the crop's requirement. Thus application of manure to meet the nitrogen requirements of the crop will result in over application of phosphorus and the ability of the crops and soil to assimilate phosphorus will reach a point at which the facility must revise the PNP to reflect phosphorus based application rates. EPA solicits comment on additional incentives that can be used to discourage those manure storage, treatment, and handling practices that result in nitrogen volatilization.

Under both Option 1 (N) and Option 2 (P), the application of nitrogen from all sources may not exceed the crop nutrient requirements. Since a limited amount of nutrients can be applied to the field in a given year, EPA expects facilities will select the site-specific practices necessary to optimize use of those nutrients. Facilities that apply manure at inappropriate times run the risk of losing the value of nutrients and will not be permitted to reapply nutrients to compensate for this loss. Consequently crop yields may suffer, and in subsequent years, the allowable application rates will be lower. For these reasons, facilities with no storage are assumed to need a minimal storage capacity to allow improved use of nutrients.

Option 2 provides three methods for determining the manure application rate for a CAFO. These three methods are:

- Phosphorus Index
- Soil Phosphorus Threshold Level
- Soil Test Phosphorus Level

These three methods are adapted from NRCS' nutrient management standard (Standard 590), which is being used by States' Departments of Agriculture to develop State nutrient standards that incorporate one or a combination of these three methods. EPA is proposing to require that each authorized state Permit Authority adopt one of these three methods in consultation with the State Conservationist. CAFOs would then be required to develop their PNP based on the State's method for establishing the application rate. In those states where EPA is the permitting authority, the EPA Director would adopt one of these three methods in consultation with that State's Conservationist.

Phosphorus Index—This index assesses the risk that phosphorus will be transported off the field to surface water and establishes a relative value of low, medium, high or very high, as specified in § 412.33. Alternatively, it may establish a numeric ranking. At the present time there are several versions of the P-Index under development. Many states are working on a P-Index for their state in response to the NRCS 590 Standard, and NRCS itself developed a P-Index template in 1994 and is in the process of updating that template at the present time. There are efforts underway in the scientific community to standardize a phosphorus index and assign a numeric ranking.

At a minimum the phosphorus index must consider the following factors:

- Soil erosion
- Irrigation erosion
- Runoff class
- Soil P test
- P fertilizer application rate
- P fertilizer application method
- Organic P source application rate
- Organic P source application method

Other factors could also be included, such as:

- Subsurface drainage
- Leaching potential
- Distance from edge of field to surface water
- Priority of receiving water

Each of these factors is listed in a matrix with a score assigned to each factor. For example, the distance from edge of field to surface water assigns a score to different ranges of distance. The greater the measured distance, the lower the score. Other factors may not be as straightforward. For example, the surface runoff class relates field slope and soil permeability in a matrix, and determines a score for this element based on the combination of these factors. The same kind of approach could also be used for the subsurface drainage class, relating soil drainage class with the depth to the seasonal high water table. The values for all variables that go into determining a P-Index can either be directly measured, such as distance to surface water, or can be determined by data available from the state, such as soil drainage class that is based on soil types found in the state and assigned to all soil types. Finally, each factor is assigned a weight depending on its relative importance in the transport of phosphorus.

When a P-Index is used to determine the potential for phosphorus transport in a field and the overall score is high, the operations would apply manure on a phosphorus basis (e.g., apply to meet the crop removal rate for phosphorus). When a P-Index determines that the transport risk is very high, application of manure would be prohibited. If the P-Index results in a rating of low or medium, then manure may be applied to meet the nitrogen requirements of the crop as described under Option 1. However, the CAFO must continue to collect soil samples at least every three years. If the phosphorus concentration in the soil is sharply increasing, the CAFO may want to consider managing its manure differently. This may include changing the feed formulations to reduce the amount of phosphorus being fed to the animals, precision feeding to account for nutrient needs of different breeds and ages of animals. It may also include changing manure storage practices to reduce nitrogen losses. There is a great deal of research on feed management, including potential effects on milk production when phosphorus in rations fed to dairy cows is reduced, and the cost savings of split sex and multistage diets and the addition of or adding the enzyme phytase to make the phosphorus more digestible by poultry and swine. Phytase additions in the feed of monogastrics have proven effective at increasing the ability of the animal to assimilate phosphorus and can reduce the amount of phosphorus excreted. Phytase use is also reported to increase bioavailability of proteins and essential minerals, reducing the need for costly supplemental phosphorus, and reducing necessary calcium supplements for layers. The CAFO may also consider limiting the application of manure. For example, the CAFO may apply manure to one field to meet the nitrogen requirements for that crop but not return to that field until the crops have assimilated the phosphorus that was applied from the manure application.

Phosphorus Threshold—This threshold which would be developed for different soil types is a measure of phosphorus in the soil that reflects the level of phosphorus at which phosphorus movement in the field is acceptable. Scientists are currently using a soluble phosphorus concentration of 1 part per million (ppm) as a measure of acceptable phosphorus movement. When the soil concentration of phosphorus reaches this threshold the concentration of phosphorus in the runoff would be expected to be 1 ppm. The 1 ppm value

has been used as an indicator of acceptable phosphorus concentration because it is a concentration that has been applied to POTWs in their NPDES permits. An alternative phosphorus discharge value could be the water quality concentration for phosphorus in a given receiving stream.

States which adopt this method in their state nutrient management standard would need to establish a phosphorus threshold for all types of soils found in their state.

Use of the phosphorus threshold in developing an application rate allows for soils with a phosphorus concentration less than three quarters the phosphorus threshold to apply manure on a nitrogen basis. When soils have a phosphorus concentration between 3/4 and twice the phosphorus threshold then manure must be applied to meet the crop removal requirements for phosphorus. For soils which have phosphorus concentrations greater than twice the phosphorus threshold, no manure may be applied.

Soil Test Phosphorus—The soil test phosphorus is an agronomic soil test that measures for phosphorus. This method is intended to identify the point at which the phosphorus concentration in the soil is high enough to ensure optimum crop production. Once that concentration range (often reported as a ''high'' value from soil testing laboratories) is reached, phosphorus is applied at the crop removal rate. If the soil test phosphorus level reaches a very high concentration, then no manure may be applied. Most soils need to be nearly saturated with phosphorus to achieve optimum crop yields. The soil phosphorus concentration should take into account the crop response and phosphorus application should be restricted when crop yield begins to level off.

The soil test phosphorus method establishes requirements based on low, medium, high and very high soil condition, and applies the same restrictions to these measures as are used in the P-Index. States that adopt this method must establish the soil concentration ranges for each of these risk factors for each soil type and crop in their state.

EPA anticipates that in most states, the permit authority will incorporate the State's nutrient standard (590 Standard) into CAFO permits. For example, if the permit authority, in consultation with the State Conservationist, adopts a Phosphorus Index, then CAFO permits would include the entire P-Index as the permit condition dictating how the application rate must be developed. If a permit authority selects the Phosphorus Threshold, then the CAFO permits must contain soil concentration limitations that reflect phosphorus-based application, as well as the level at which manure application is prohibited.

Each State Conservationist, in consultation with land grant university scientists and the state, must develop a Phosphorus Index for that state by May 2001. EPA may consider eliminating the use of the soil phosphorus threshold level and the soil test phosphorus level as methods for determining the manure application rate for a CAFO and requiring the use of the state Phosphorus Index. Scientists studying phosphorus losses from agricultural lands are supporting the development and use of the Phosphorus Index since it combines the factors critical in determining risk of phosphorus rate and transport to surface waters, including the soil phosphorus threshold level, when developed. EPA is soliciting comment on this option.

Finally, under Option 2 EPA is proposing to require CAFOs that transfer manure off-site to provide the recipient of the manure with information as to the nutrient content of the manure and provide the recipient with information on the correct use of the manure. See Section VII.E.4, for a complete discussion of the requirements for off-site transfer of manure.

As discussed in Section VI, compliance costs for manure transfer assessed to the CAFO include hauling costs and record keeping. If the recipient is land applying the manure, the recipient is most likely a crop farmer, and the recipient is assumed to already have a nutrient management plan that considers typical yields and crop requirements. The recipient is also assumed to apply manure and wastes on a nitrogen basis, so the application costs are offset by the costs for commercial fertilizer purchase and application. EPA assumes the recipient may need to sample soils for phosphorus, and costs for sampling identically to the CAFO, i.e. every three years. EPA has not accounted for costs that would result from limiting the amount or way recipients are currently using manure. EPA solicits comment on the impact to recipients who currently use manure and may have to change their practices as a result of this requirement. In cases where manure is received for alternative uses, the recipient is deemed to already maintain the appropriate records.

EPA solicits comments on whether there should be required training for persons that will apply manure. There are some states which have these requirements. Proper application is critical to controlling pollutant discharges from crop fields. Some states have establish mandatory training for persons that apply manure. EPA will consult with USDA on the possibility of establishing a national training program for manure applicators.

Rotational Grazing. At the request of the environmental community, EPA has investigated rotational grazing as an alternative to confinement-based livestock production. Any pasture or grazing operation is by definition not a form of confinement, therefore use of these practices are outside of the scope of these regulations.

Intensive rotational grazing is known by many terms, including intensive grazing management, short duration grazing, savory grazing, controlled grazing management, and voisin grazing management. This practice involves rotating livestock and poultry among several pasture subunits or paddocks, often on a daily basis, to obtain maximum efficiency of the pasture land.

Due to the labor, fencing, water, and land requirements for intensive rotational grazing, typically only small dairy operations with less than 100 head use this practice. Few beef feedlots practice intensive rotational grazing. Poultry on pasture is usually housed in a portable building or pen holding up to 100 birds that is moved daily; rarely are more than 1,000 birds in total raised in this manner. Swine have also been successfully raised on pasture, most frequently as a seasonal farrowing operation in combination with seasonal sheep or cow grazing. Climate and associated growing seasons make it very difficult for operations to use an intensive rotational grazing system throughout the entire year. Most dairy operations and beef feedlots that use rotational grazing typically operate between 3 and 9 months of the year, with 12 months most likely only in the southern states. Poultry on pasture are produced for about 6 months, and pigs are typically farrowed once per year.

Grazing systems are not directly comparable to confined feeding operations, as one system can not readily switch to the other. Intensive rotational grazing systems are reported to have advantages over confined feeding operations: reduced housing and feed costs, improved animal health, less manure handling, and more economic flexibility. Intensive rotational grazing also encourages grass growth and development of healthy sod, which in turn reduces erosion. In a good rotational system, manure is more evenly distributed and will break up and disappear from the surface faster.

Despite these advantages, studies do not indicate significant reductions of

pathogens or nutrients in runoff to nearby streams as compared to manured fields. Rotational grazing systems may still require manure maintenance near watering areas and paths to and from the paddock areas. There are also limits to the implementation of intensive rotational grazing systems, which are highly dependent upon: available acreage, herd size, land resources, labor, water availability, proximity of pasture area to milking center for dairy operations, and feed storage capabilities. Grazing systems usually produce lower animal weight gain and milk production levels, provide limited manure handling options, and do not provide the level of biosecurity that confinement farms can obtain.

Proposed Basis for BPT Limitations. EPA is not proposing to establish BPT requirements for the beef, dairy, swine, veal and poultry subcategories on the basis of Option 1, because it does not represent the best practicable control technology. In areas that have high to very high phosphorus build up in the soils, Option 1 would not require that manure application be restricted or eliminated. Thus, the potential for phosphorus to be discharged from land owned or controlled by the CAFOs would not be controlled by Option 1. Consequently Option 1 would not adequately control discharges of phosphorus from these areas. Option 2 would reduce the discharge of phosphorus in field runoff by restricting the amount of phosphorus that may be applied to the amount that is appropriate for agricultural purposes or prohibiting the application of manure when phosphorus concentrations in the soil are very high and additional phosphorus is not needed to meet crop requirements.

EPA is proposing to establish BPT limitations for the beef, dairy, swine, veal and poultry subcategories on the basis of Option 2 with the exception that it is co-proposing options with and without the certification regulations for off-site land application of manure. EPA's decision to base BPT limitations on Option 2 treatment reflects consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application. Option 2 is expected to cost $549 million under the two-tier structure and achieve 107 million pounds of pollutant reductions for a total cost to pound ratio of $0.57. The three-tier structure is estimated to cost $551 for a total cost to pound ratio of $0.51.

The Option 2 technology is one that is readily applicable to all CAFOs. The production area requirements represent the level of control achieved by the majority of CAFOs in the beef, dairy, swine, poultry and veal subcategories. USDA and the American Society of Agricultural Engineers cite the 25-year, 24-hour storm as the standard to which storage structures should comply. This has been the standard for many years, and most existing lagoons and other open liquid containment structures are built to this standard. As described above, the land application requirements associated with Option 2 are believed to represent proper agricultural practice and to ensure that CAFO manure is applied to meet the requirements of the crops grown and not exceed the ability of the soil and crop to absorb nutrients.

EPA believes any of the three methods for determining when manure should be applied on a phosphorus basis would represent BPT. Each method has distinct advantages which, depending on the circumstances, could make one method preferred over another. There has been considerable work done in this area within the past few years and this work is continuing. EPA believes that this proposed BPT approach provides adequate flexibility to allow states to develop an approach that works best for the soils and crops being grown within their state. Nonetheless, EPA will continue to work with soil scientists and may consider standardizing the factors included in the phosphorus index to develop a standard rating scale, for the purpose of CAFO requirements. EPA also solicits comment on whether there should be some EPA oversight or approval of the phosphorus method developed by the states. Specifically EPA solicits comment whether of EPA should establish standards that must be included in a phosphorus index. These standards may include specifying additional criteria which should be considered in the index, such as distance to surface water. EPA also seeks comment on whether it should establish minimum standards on how these criteria must be factored into a Phosphorus Index, such as specifying the weight to be assigned to the various criteria included in the Index and assigning the values for specific ranges for each criteria. EPA may consider establishing a minimum standard for the phosphorus threshold method for example requiring that at a minimum the phosphorus threshold be based on the soil phosphorus concentration that would result in a soluble phosphorus concentration in the runoff of 1 ppm. EPA may also consider establishing specific sampling protocols for collecting manure and soil samples and analyzing for nutrients.

CAFOs must also develop and implement a PNP that establishes the appropriate manure application rate. EPA believes the land application rates established in accordance with one of the three methods described in today's proposed regulation, along with the prohibition of manure application within 100 feet of surface water, will ensure manure and wastewater are applied in a manner consistent with proper agricultural use. EPA has included a discussion of how to develop a PNP in section VIII.C.6.

EPA believes that state sampling and analytical protocols are effective; however, soil phosphorus levels can vary depending on how the soil samples are collected. For example, a CAFO that surface-applies manure will deposit phosphorus in the surface layer of the soil and should collect soil samples from the top layer of soil. If this CAFO collects soil samples to a depth of several inches the analysis may understate the phosphorus concentrations in the soil. EPA solicits comments on the need to establish sampling protocols for soil sampling.

4. Best Control Technology for Conventional Pollutants (BCT)

In evaluating possible BCT standards, EPA first considered whether there are any candidate technologies (*i.e.,* technology options); that are technologically feasible and achieve greater conventional pollutant reductions than the proposed BPT technologies. (Conventional pollutants are defined in the Clean Water Act as including: Total Suspended Solids (TSS), Biochemical Oxygen Demand (BOD), pH, oil and grease and fecal coliform.) EPA considered the same BAT technology options described below and their effectiveness at reducing conventional pollutants. EPA's analysis of pollutant reductions has focused primarily on the control of nutrients, nitrogen and phosphorus. However, the Agency has also analyzed what the technology options can achieve with respect to sediments (or TSS), metals, and pathogens. Although livestock waste also contains BOD, EPA did not analyze the loadings or loadings reductions associated with the technology options for BOD. Thus, the only conventional pollutant considered in the BCT analysis is TSS. EPA identified no technology option that achieves greater TSS removals than the proposed BPT technologies (see the Technical Development Document). EPA does not believe that these technology options would substantially

reduce BOD loads. There are therefore no candidate technologies for more stringent BCT limits. If EPA had identified technologies that achieve greater TSS reductions than the proposed BPT, EPA would have performed the two part BCT cost test. (See 51 FR 24974 for a description of the methodology EPA employs when setting BCT standards.) EPA solicits comment on the assumptions it used in considering BCT.

EPA is proposing to establish BCT limits for conventional pollutants equivalent to the proposed BPT limits.

5. Best Available Technology Economically Achievable (BAT)

EPA is considering six technology options to control discharges from CAFOs in the beef, veal and poultry subcategories, and seven technology options for the dairy and hog subcategories. All of the technology options include restrictions on land application of manure, best management practices (BMPs), inspections and record keeping for the animal confinement areas, and wastewater storage or treatment structures. The following table summarizes the requirements for each of the seven technology options. Note that a given technology option may include a combination of technologies.

TABLE 8–1.—REQUIREMENTS CONSIDERED IN THE TECHNOLOGY OPTIONS

	Option 1	Option 2	Option 3	Option 4	Option 5	Option 6	Option 7
Zero Discharge w/overflow when a 25–24 Design Standard is met	X	X	X	X	Cattle & Dairy	.....	.....
Depth markers for lagoons	X	X	X	X	Cattle & Dairy	X	X
Annual Manure Testing	X	X	X	X	X	X	X
N-based PNP	X	.....	.....	.....	.....	.....	.....
100' LA setback	X	X	X	X	X	X	X
P-based PNP (where necessary)	.....	X	X	X	X	X	X
Soil Test—every 3yrs.	.....	X	X	X	X	X	X
Zero discharge without any allowance for overflow	.....	.....	.....	.....	Swine & Poultry	.....	.....
Hydrologic Link Assessment & Zero Discharge to Groundwater beneath Production Area	.....	.....	X	X	.....	.....	.....
Ambient Surface Water Sampling (N,P,TSS)	.....	.....	.....	X	.....	.....	.....
Anaerobic Digestion w/power generation	.....	.....	.....	.....	Swine	Swine & Dairy	.....
Frozen/snow covered/saturated application prohibitions	.....	.....	.....	.....	.....	.....	X

X = All Subcategories.

Option 1. This option is equivalent to Option 1 described under BPT Section VIII.3. Option 1 would require zero discharge from the production area and that liquid storage be designed, constructed and maintained to handle all process wastewater and storm water runoff from the 25-year, 24-hour storm event. In addition, Option 1 requires management practices to ensure that the production area (which includes manure and wastewater storage) is being adequately maintained.

Option 1 also would establish a requirement to develop a PNP which establishes the proper land application rate for manure and wastewater to meet the nitrogen requirements for the crops being grown by the CAFO and require a 100 foot setback from surface water, sinkholes, tile drain inlets and agricultural drainage wells.

Option 2. This option is equivalent to Option 2 described under BPT (section VII.3). Option 2 includes all of the requirements established under Option 1. However, Option 2 would further restrict the amount of manure that can be applied to crop land owned or controlled by the CAFO. The CAFO would be required to apply manure and wastewater at the appropriate rate taking into account the nutrient requirements of the crop and soil conditions. Specifically, Option 2 would require that manure be applied at crop removal rate for phosphorus if soil conditions warrant and, if soils have a very high level phosphorus build-up, no manure or wastewater could be applied to the crop land owned or controlled by the CAFO.

Option 3. Option 3 includes all the requirements for Option 2 and would require that all operations perform an assessment to determine whether the ground water beneath the feedlot and manure storage area has a direct hydrological connection to surface water. As described in Section VII, EPA has authority to control discharges to surface water through ground water that has a direct hydrological connection to surface water. A hydrological connection refers to the interflow and exchange between surface impoundments and surface water through an underground corridor or ground water. EPA is relying on the permitting authority to establish the region-specific determination of what constitutes a direct hydrological link. Option 3 would require all CAFOs to determine whether they have a direct hydrological connection between the ground water beneath the production area and surface waters. If a link is established, the facility would have to monitor ground water up gradient and down gradient of the production area to ensure that they are achieving zero discharge to ground water. EPA has assumed that CAFOs would comply with the zero discharge requirement by installing liners of synthetic material beneath lagoons and ponds, and impervious pads below storage of dry manure stockpiles. EPA's costs for liners reflect both a synthetic liner and compacted clay to protect the liner and prolong its useful life.

CAFOs with a direct hydrologic link would be required to sample the groundwater from the monitoring wells (located up gradient and down gradient of the production area) at a minimum frequency of twice per year. These samples are necessary to ensure that pollutants are not being discharged through groundwater to surface water from the production area. The samples shall be monitored for nitrate, ammonia, total coliform, fecal coliform, Total Dissolved Solids (TDS) and total chloride. Differences in concentration of these pollutants between the monitoring

well(s) located up gradient and down gradient of the production area are assumed to represent a discharge of pollutants and must be prevented. As noted below, coliforms are not necessarily good indicators of livestock discharges. Also, it is difficult to determine ''concentrations'' of coliforms as they are not necessarily evenly distributed in the way chemical contaminants generally are. EPA requests comment on technical concerns associated with including total and fecal coliforms in the groundwater monitoring and protection requirements and on ways to address such concerns.

Option 4. Option 4 includes all the requirements for Option 3 and would require sampling of surface waters adjacent to feedlots and/or land under control of the feedlot to which manure is applied. This option would require CAFOs to sample surface water both upstream and downstream from the feedlot and land application areas following a one half inch rain fall (not to exceed 12 sample events per year). The samples would be analyzed for concentrations of nitrogen, phosphorus and total suspended solids (TSS). EPA selected these pollutants because it believes these pollutants provide an adequate indication of whether a discharge is occurring from the operation. All sampling results would be reported to the permit authority. Any difference in concentration between the upstream and downstream samples would be noted. This monitoring requirement could provide some indication of discharges from the land application or feedlot areas.

EPA also considered requiring that pathogens and BOD_5 be analyzed in samples collected. EPA decided that this would not be practical, because sampling under Option 4 is linked to storm events which limits the ability to plan in advance for analysis of the samples and making arrangements for shipping samples to laboratories. Fecal coliform and BOD samples all have very short holding times before they need to be analyzed. Most CAFOs are located in rural areas with limited access to overnight shipping services and are probably not near laboratories that can analyze for these pollutants. Further, fecal coliform and similar analytes that are typically used as indicators in municipal wastewater are not necessarily good indicators of livestock discharges. If CAFOs were required to monitor for pathogens which could indicate discharges of manure or CAFO wastewater, it would be better to require monitoring for fecal enterococci, or even specific pathogens such as salmonella, Giardia, and Cryptosporidium. However, the cost for analyzing these parameters is very high and the holding times for these parameters are also very short.

Furthermore, EPA determined pathogen analyses are also inappropriate because the pathogens in manure are found in areas without animal agriculture. For example Enterobacter, Klebsiella, Bacillus cereus, Clostridium, and Listeria are all naturally occurring soil and plant microorganisms and are found in soils that have never received manure. Pathogens may also be deposited onto land from wildlife. Thus, EPA concluded that requiring analysis for these pollutants was impractical at best and potentially very expensive.

Option 5. Option 5 includes the requirements established by Option 2 and would establish a zero discharge requirement from the production area that does not allow for an overflow under any circumstances. By keeping precipitation from contacting with the animals, raw materials, waste handling and storage areas, CAFOs could operate the confinement areas and meet zero discharge regardless of rainfall events. Option 5 includes the same land application requirements as Option 2, which would restrict the rate of manure and wastewater application to a crop removal rate for phosphorus where necessary depending on the specific soil conditions at the CAFO. Additionally, as in Option 2, application of manure and wastewater would be prohibited within 100 feet of surface water.

EPA considered Option 5 for the poultry, veal and hog subcategories, where it is common to keep the animals in total confinement, feed is generally maintained in enclosed hoppers and the manure and wastewater storage can be handled so as to prevent it from contacting storm water. EPA considered a number of ways a facility might meet the requirements of no discharge and no overflow. In estimating the costs associated with Option 5, EPA compared the total costs and selected the least expensive technology for a given farm size, geographic region, and manure management system. Costs also depend on whether the facility's PNP indicates land application must be based on nitrogen or phosphorus, and how many acres the facility controls. The technologies described below were used singularly or in combination to meet the requirements of Option 5.

Many facilities can achieve Option 5 by covering open manure and storage areas, and by constructing or modifying berms and diversions to control the flow of precipitation. EPA costed broiler and turkey operations for storage sheds sufficient to contain six months of storage. Some poultry facilities, particularly turkey facilities, compost used litter in the storage sheds, allowing recycle and reuse of the litter. EPA costed swine, veal, and poultry facilities which use lagoons or liquid impoundments for impoundment covers.

EPA believes that operations which have excess manure nutrients and use flush systems to move manure out of the confinement buildings will have an incentive to construct a second lagoon cell. A second storage or treatment cell should accomplish more decomposition of the waste and will allow flush water to be recycled out of the second cell or lagoon, thus reducing the addition of fresh water to the system. Reducing the total volume of stored waste reduces the risk of a catastrophic failure of the storage structure. In the absence of large volumes of water, facilities with an excess of manure nutrients will be able to transfer the excess manure off-site more economically due to a lower volume of waste needing to be hauled. Water reduction also results in a more concentrated product which would have a higher value as a fertilizer.

Covered systems substantially reduce air emissions, and help maintain the nutrient value of the manure. Covered systems also may benefit facilities by reducing odors emanating from open storage. This option also creates a strong incentive for facilities to utilize covered lagoon digesters or multistage covered systems for treatment. The use of covers will allow smaller and more stable liquid impoundments to be constructed. Finally, the use of covered impoundments encourages treatment and minimal holding times, resulting in pathogen die-off and reduction of BOD and volatile solids.

Other technologies can be effectively used at some facilities, such as conversion of flush systems to scrape systems, or by retrofit of slatted floor housing to V-shaped under house pits that facilitate solid liquid separation. Solids can be stored or composted in covered sheds, while the urine can be stored in small liquid impoundments.

In the event the facility has insufficient land to handle all nutrients generated, EPA evaluated additional nutrient management strategies. First, the manure could pass through solid separation, resulting in a smaller volume of more concentrated nutrients that is more effectively transported offsite. Second, land application could be based on the uppermost portion of a covered lagoon containing a more dilute concentration of nutrients. Data indicates much of the phosphorus

accumulates in the bottom sludge, which is periodically removed and could be transported offsite for proper land application. Though many facilities report sludge removal of a properly operating lagoon may occur as infrequently as every 20 years, EPA assumed facilities would pump out the phosphorus and metals enriched sludge every three years. This is consistent with the ANSI/ASAE standards for anaerobic treatment lagoons (EP403.3 JUL99) that indicates periodic sludge removal and liquid drawdown is necessary to maintain the treatment volume of the lagoon. Third, swine and poultry farms can implement a variety of feeding strategies, as discussed under Option 2 (see Section VII.C.3). Feed management including phytase, multistage diets, split sex feeding, and precision feeding have been shown to reduce phosphorus content in the manure by up to 50%. This results in less excess nutrients to be transported offsite, and allows for more manure to be land applied at the CAFO.

EPA is aware of a small number of swine facilities that are potentially CAFOs and use either open lots or some type of building with outside access to confine the animals. EPA data indicate these types of operations are generally smaller operations that would need to implement different technologies than those described above. CAFOs that provide outdoor access for the animals need to capture contaminated storm water that falls on these open areas. Open hog lots would find it difficult to comply with a requirement that does not allow for overflows in the event of a large storm. EPA costed these facilities to replace the open lots with hoop houses to confine the animals and storage sheds to contain the manure. Hoop structures are naturally ventilated structures with short wooden or concrete sidewalls and a canvas, synthetic, or reflective roof supported by tubes or trusses. The floor of the house is covered with straw or similar bedding materials. The manure and bedding is periodically removed and stored. The drier nature of the manure lends to treatment such as composting as well as demonstrating reduced hauling costs as compared to liquid manure handling systems.

EPA considered a variation to Option 5 that would require CAFOs to use dry or drier manure handling practices. This variation assumed conversion to a completely dry manure handling system for hogs and laying hens using liquid manure handling systems. In addition to the advantages of reduced water use described above, a completely dry system is more likely to minimize leaching to ground water and, where directly connected hydrologically to surface water, will also reduce loads to surface waters. For the beef and dairy subcategories EPA assumes that the liquid stream would be treated to remove the solids and the solids would be composted. It is not practical to assume beef and dairy operations can avoid the generation of liquid waste because operations in both subcategories tend to have animals in open areas exposed to precipitation resulting in a contaminated storm water that must be captured. Also dairies generate a liquid waste stream from the washing of the milking parlor.

Option 6. Option 6 includes the requirements of Option 2 and requires that large hog and dairy operations (hog operations and dairies with 2,000 AUs) would install and implement enclosed anaerobic digestion to treat their manure and use the captured methane gas for energy or heat generation. With proper management, such a system can be used to generate additional on-farm revenue. The enclosed system will reduce air emissions, especially odor and hydrogen sulfide, and potentially reduces nitrogen losses from ammonia volatilization. The treated effluent will also have less odor and should be more transportable relative to undigested manure, making offsite transfer of manure more economical. Anaerobic digestion under thermophilic or heated conditions would achieve additional pathogen reductions.

Option 7. Option 7 includes the requirements of Option 2 and would prohibit manure application to frozen, snow covered or saturated ground. This prohibition requires that CAFOs have adequate storage to hold manure for the period of time during which the ground is frozen or saturated. The necessary period of storage ranges from 45 to 270 days depending on the region. In practice, this may result in some facilities needing storage to hold manure and wastes for 12 months. EPA requests comment on whether there are specific conditions which warrant a national standard that prohibits application when the ground is frozen, snow covered or saturated.

6. Proposed Basis for BAT

BAT Requirements for the Beef and Dairy Subcategories. EPA is proposing to establish BAT requirements for the beef and dairy subcategories based on the same technology option. The beef subcategory includes stand-alone heifer operations and applies to all confined cattle operations except for operations that confine mature dairy cattle or veal. Under the two-tier structure, the BAT requirements would apply to any beef operation with 500 head of cattle or more. Under the three-tier structure, the BAT requirements for beef would apply to any operation with more than 1,000 head of cattle and any operation with 300 to 1,000 head which meets the conditions identified in section VII.B.2 and 3 of this preamble.

EPA proposes to establish BAT requirements for dairy operations which meet the following definitions: under the two-tier structure, all dairy with 350 head of mature dairy cows or more would be subject to today's proposed BAT requirements. Under the three-tier approach any dairy with more than 700 head of mature dairy cows or 250 to 700 head of mature dairy cows which meets the conditions identified in section VII of this preamble would be subject to today's proposed BAT requirements.

EPA proposes to establish BAT requirements for the beef and dairy subcategories based on Option 3. BAT would require all beef and dairy CAFOs to monitor the ground water beneath the production area by drilling wells up gradient and down gradient to measure for a plume of pollutants discharged to ground water at the production area. A beef or dairy CAFO can avoid this ground water monitoring by demonstrating, to the permit writer's satisfaction, that it does not have a direct hydrological connection between the ground water beneath the production area and surface waters.

EPA proposes to require CAFOs in the beef and dairy subcategories to monitor their ground water unless they determine that the production area is located above ground water which has a direct hydrological connection to surface water. CAFOs would have to monitor for ammonia, nitrate, fecal coliform, total coliform, total chlorides and TDS. EPA selected these pollutants because they may be indicators of livestock waste and are pollutants of concern to ground water sources. If the down gradient concentrations are higher than the up gradient concentration this indicates a discharge which must be controlled. As discussed above, EPA requests comment on the inclusion of total and fecal coliforms among the required analytes. For operations that do not demonstrate that they do not have a direct hydrologic connection, EPA based the BAT zero discharge requirement on the installation of liners in liquid storage structures such as lagoons and storm water retention ponds and concrete pads for the storage of dry manure stockpiles.

Beef and dairy CAFOs must also develop and implement a PNP that is based on application of manure and

wastewater to crop land either at a crop removal rate for phosphorus where soil conditions require it, or on the nitrogen requirements of the crop. EPA believes the land application rates established in accordance with one of the three methods described in today's proposed regulation, along with the prohibition of manure application within 100 feet of that surface water will ensure manure and wastewater are applied in a manner consistent with proper agricultural use. See EPA's document entitled ''Managing Manure Nutrients at Concentrated Animal Feeding Operations'' for the detailed discussion of how a PNP is developed.

EPA believes that technology option 3 is economically achievable and represents the best available technology for the beef and dairy subcategories, and is therefore proposing this option as BAT for these subcategories. The incremental annual cost of Option 3 relative to Option 2 for these subcategories is $170 million pre-tax under the two-tier structure, and $1205 million pre-tax under the three tier structure. EPA estimated annual ground water protection benefits from the proposed requirements of $70–80 million. EPA estimates Option 3 for the beef and dairy subcategories will reduce loadings to surface waters from hydrologically connected ground water by 3 million pounds of nitrogen. To determine economic achievability, EPA analyzed how many facilities would experience financial stress severe enough to make them vulnerable to closure under each regulatory option. As explained in more detail in the *Economic Analysis,* the number of facilities experiencing stress may indicate that an option might not be economically achievable, subject to additional considerations. Under Option 2, no facilities in either the beef or dairy sectors were found to experience stress, while under Option 3, the analysis projects 10 beef and 329 dairy CAFOs would experience stress under the two-tier structure, and 40 beef and 610 dairy CAFOs would experience stress under the three-tier structure. Of these, EPA has determined that 40 beef operations are considered small businesses based on size standards established by the Small Business Administration. This analysis assumes that 76% of affected operations would be able to demonstrate that their ground water does not have a hydrological connection to surface water and would therefore not be subject to the proposed requirements. EPA projects the cost of making this demonstration to the average CAFO would be $3,000. EPA is aware that concerns have been raised about these cost estimates, and about its estimates of how many facilities would be able to avoid the groundwater monitoring and protection requirements on this basis. EPA requests comment on this analysis and on its proposed determination that Option 3 is economically achievable for the beef and dairy sectors.

EPA is not proposing to base BAT requirements for the beef and dairy subcategories on Option 2 because it does not as comprehensively control discharges of pollutants through ground water which has a direct hydrological connection with surface water. However, EPA is requesting comment on Option 2 as a possible basis for BAT in the beef and dairy subcategories. EPA notes that even under Option 2, permit writers would be required to consider whether a facility is located in an area where its hydrogeology makes it likely that the ground water underlying the facility is hydrologically connected to surface water and whether a discharge to surface water from the facility through such hydrologically connected ground water may cause or contribute to a violation of State water quality standards. In cases where such a determination was made by the permit writer, he or she would impose appropriate conditions to prevent discharge via a hydrologic connection would be included in the permit. The main difference between Option 2 and Option 3 is thus that under Option 3, the burden of proof would be on the facility to demonstrate that it does not discharge to ground water that is hydrologically connected to surface water, while under Option 2, ground water protection and monitoring requirements would only be included in the permit if there were an affirmative determination by the permitting authority that such requirements were necessary to prevent a discharge of pollutants to surface waters via hydrologically connected ground water that may be sufficient to cause a violation of State water quality standards. Under today's proposal, the Option 2 approach to preventing discharges via hydrologically connected ground water would be used for the veal, swine and poultry subcategories. EPA requests comment on applying this approach to the beef and dairy subcategories as well.

EPA is not proposing to establish BAT requirements for the beef and dairy subcategories on the basis of Option 4 due to the additional cost associated with ambient stream monitoring and because the addition of in-stream monitoring does not by itself achieve any better controls on the discharges from CAFOs as compared to the other options. In-stream monitoring could be an indicator of discharges occurring from the CAFO; however, it is equally likely that in-stream monitoring will measure discharges that may be occurring from adjacent non-CAFO agricultural sources. Through the use of commercial fertilizers these non-CAFO sources would likely be contributing the same pollutants being analyzed under Option 4. EPA has not identified a better indicator parameter which would isolate constituents from CAFO manure and wastewater from other possible sources contributing pollutants to a stream. Pathogen analysis could be an indicator if adjacent operations do not also have livestock or are not using manure or biosolids as fertilizer sources. However, as described earlier, EPA has concerns about the ability of CAFOs to collect and analyze samples for these pollutants because of the holding time constraints associated with the analytical methods for these parameters. Accordingly, EPA does not believe that specifying these additional in-stream monitoring BMP requirements would be appropriate; and would not be useful in ensuring compliance with the Clean Water Act. Moreover, in-stream monitoring would be a very costly requirement for CAFOs to comply with.

EPA is not proposing to establish BAT requirements for the beef and dairy subcategories on the basis of Option 5. Option 5 would require zero discharge with no overflow from the production area. Most beef feedlots are open lots which have large areas from which storm water must be collected; thus, it is not possible to assume that the operation can design a storm water impoundment that will never experience an overflow even under the most extreme storm. Stand alone heifer operations (other than those that are pasture-based) are configured and operated in a manner very similar to beef feedlots. Unlike the hog, veal and poultry subcategories, EPA is not aware of any beef operations that keep all cattle confined under roof at all times.

Dairies also frequently keep animals in open areas for some period of time, whether it is simply the pathway from the barn to the milk house or an open exercise lot. Storm water from these open areas must be collected in addition to any storm water that contacts food or silage. As is the case for beef feedlots, the runoff volume from the exposed areas is a function of the size of the area where the cattle are maintained, and the amount of precipitation. Since the CAFO operator cannot control the amount of precipitation, there always remains the possibility that an extreme storm event

can produce enough rainfall that the resulting runoff would exceed the capacity of the lagoon.

EPA did consider a new source option for new dairies that would enforce total confinement of all cattle at the dairy. This new source option poses a barrier to entry for new sources, therefore, EPA assumes that this option if applied to existing sources would be economically unachievable. Furthermore, EPA did evaluate a variation of Option 5 that would apply to existing beef and dairy operations and would require the use of technologies which achieve a less wet manure. These technologies include solid-liquid separation and composting the solids. EPA is not proposing to establish BAT on the use of these technologies, but does believe these technologies may result in cost savings at some operations. Additionally, composting will achieve pathogen reductions. As described in section VIII.C.9., EPA is continuing to examine pathogen controls and may promulgate requirements on the discharge of pathogens. If EPA set limitations on pathogens, composting technology would likely become a basis for achieving BAT limits. EPA invites comment on composting and its application to dry beef and dairy manure.

For any operation that has inadequate crop land on which to apply its manure and wastewater, solid-liquid separation and composting could benefit the CAFO, as these technologies will make the manure more transportable. Drier manure is easier to transport; and therefore, EPA believes solid liquid separation and composting will be used in some situations to reduce the transportation cost of excess manure. In addition, composting is a value-added process that improves the physical characteristics (e.g., reduces odor and creates a more homogenous product) of the manure. It can also make the manure a more marketable product. As a result, a CAFO with excess manure may find it easier to give away, or even sell, its excess manure. EPA encourages all CAFOs to consider technologies that will reduce the volume of manure requiring storage and make the manure easier to transport.

Option 6, which requires anaerobic digestion treatment with methane capture, was not considered for the beef subcategory, but was considered for the dairy subcategory for treatment of liquid manure. Anaerobic digestion can only be applied to liquid waste. As described previously in Section VI, beef feedlots maintain a dry manure, yet they capture storm water runoff from the dry lot and manure stockpile. The storm water runoff is generally too dilute to apply digestion technology.

Most dairies, however, handle manure as a liquid or slurry which is suited to treatment through anaerobic digestion. EPA concluded that application of anaerobic digesters at dairies will not necessarily lead to significant reductions in the pollutants discharges to surface waters from CAFOs. An anaerobic digester does not eliminate the need for liquid impoundments to store dairy parlor water and barn flush water and to capture storm water runoff from the open areas at the dairy. Neither do digesters reduce the nutrients, nitrogen or phosphorus. Thus, basing BAT on digester technology would not change the performance standard that a production area at a CAFO would achieve and would not reduce or eliminate the need for proper land application of manure. Digesters were considered because they achieve some degree of waste stabilization and more importantly they capture air emissions generated during manure storage. The emission of ammonia from manure storage structures is a potentially significant contributor of nitrogen to surface waters. Covered anaerobic digesters will prevent these emissions while the waste is in the digester, but the digester does not convert the ammonia into another form of nitrogen, such as nitrate, which is not as volatile. Thus as soon as the manure is exposed to air the ammonia will be lost. Operations may consider additional management strategies for land application such as incorporation in order to maintain the nitrogen value as fertilizer and to reduce emissions.

As mentioned above, the application of ambient temperature or mesophilic anaerobic digesters would not change the performance standard that a CAFO would achieve. EPA considered anaerobic digestion as a means to control pathogens. Thermophilic digestion which applies heat to the waste will reduce pathogens. As described in Section VIII.C.9. EPA is still evaluating effective controls for pathogens.

EPA is not proposing to base BAT requirements on Option 7 for the beef and dairy subcategories. Option 7 would prohibit manure application on saturated, snow covered or frozen ground. Pollutant runoff associated with application of manure or wastewater to saturated, snow covered or frozen ground is a site specific consideration, and depends on a number of site specific variables, including distance to surface water and slope of the land. EPA believes that establishing a national standard that prohibits manure or wastewater application is inappropriate because of the site specific nature of these requirements and the regional variability across the nation. This is described in Section VII.E.5.b, above. However, Section VII also explains that EPA is proposing to revise 40 CFR Part 122 to require the permit authority to include, on a case-by-case basis, restrictions on the application of CAFO waste to frozen, snow covered or saturated ground in CAFO permits. This permit condition should account for topographic and climatic conditions found in the state.

Requirements for the beef and dairy subcategories would still allow for an overflow in the event of a chronic or catastrophic storm that exceeds the 25-year, 24-hour storm. EPA believes this standard reflects the best available technology. Under the proposed revisions to Part 122, permits will require that any discharge from the feedlot or confinement area be reported to the permitting authority within 24 hours of the discharge event. The CAFO operator must also report the amount of rainfall and the approximate duration of the storm event.

BAT Requirements for the Swine, Veal and Poultry Subcategories. EPA is proposing to establish BAT requirements for the swine, veal and poultry subcategories based on Option 5. For the purpose of simplifying this discussion, the term poultry is used to include chickens and turkeys. Option 5 requires zero discharge of manure and process wastewater and provides no overflow allowance for manure and wastewater storage. Land application requirements for these operations would be the same as the requirements under Option 2.

EPA is proposing Option 5 because swine, veal and poultry operations can house the animals under roof and feed is also not exposed to the weather. Thus, there is no opportunity for storm water contamination. Broiler and turkey operations generate a dry manure which can be kept covered either under a shed or with tarps. Laying hens with dry manure handling usually store manure below the birds' cages and inside the confinement building. Veal and poultry operations confine the animals under roof, thus there are no open animal confinement areas to generate contaminated storm water. Those operations with liquid manure storage can comply with the restrictions proposed under this option by diverting uncontaminated storm water away from the structure, and covering the lagoons or impoundments.

The technology basis for the poultry BAT requirements at the production

area are litter sheds for broiler and turkey CAFOs, and underhouse storage for laying hens with dry manure handling systems. For laying hen CAFOs with liquid manure handling systems, EPA's technology basis is solid separation and covered storage for the solids and covered lagoons.

Laying hen farms may also have egg wash water from in-line or off-line processing areas. Only 10% of laying hen operations with fewer than 100,000 birds have on farm egg processing, while 35% of laying hen operations with more than 100,000 birds have on farm egg processing. The wash water is often passed through a settling system to remove calcium, then stored in above ground tanks, below ground tanks, or lagoons. Today's proposal is based on covered storage of the egg wash water from on-farm processing, to prevent contact with precipitation. The ultimate disposal of egg wash water is through land application which must be done in accordance with the land application rates established in the PNP. EPA believes the low nutrient value of egg washwater is unlikely to cause additional incremental costs to laying hen facilities to comply with the proposed land application requirements.

EPA assumes large swine operations (e.g., operations with more than 1,250 hogs weighing 55 pounds or greater) operate using total confinement practices. EPA based BAT Option 5 on the same approach described above of covering liquid manure storage. CAFOs can operate covered lagoons as anaerobic digesters which is an effective technology for achieving zero discharge and will provide the added benefits of waste stabilization, odor reduction and control of air emissions from manure storage structures. Anaerobic digesters also can be operated to generate electricity which can be used by the CAFO to offset operating costs.

Although Option 5 is the most expensive option for the hog subcategory, as shown on Table X.E.2(a), EPA believes this option reflects best available technology economically achievable because it prevents discharges resulting from liquid manure overflows that occur in open lagoons and pond. Similarly, the technology basis of covered treatment lagoons and drier manure storage is believed to reduce the likelihood of those catastrophic lagoon failures associated with heavy rainfalls. Option 5 also achieves the greatest level of pollutant reductions from runoff reaching the edge of the field. Non-water quality environmental impacts include reduced emissions and odor, with a concurrent increase in nitrogen value of the manure, however as mentioned previously, the ammonia concentration is not reduced and once the manure is exposed to air the ammonia will volatilize. Water conservation and recycling practices associated with Option 5 will promote increased nutrient value of the manure, reduced hauling costs via reduced water content, and less fresh water use.

The technology basis of Option 5, solid-liquid separation and storage of the solids, has the advantage of creating a solid fraction which is more transportable, thus hog CAFOs that have excess manure can use this technology to reduce the transportation costs.

EPA is aware of three open lot hog operations that have more than 1,250 hogs and there may be a small number of others, but the predominant practice is to house the animals in roofed buildings with total confinement. For open lot hog CAFOs, EPA is proposing to base BAT the application of hoop structures as described above.

Veal operations use liquid manure management and store manure in lagoons. EPA has based BAT on covered manure and feed storage. The animals are housed in buildings with no outside access. Thus, by covering feed and waste storage the need to capture contaminated storm water is avoided.

In evaluating the economic achievability of Option 5 for the swine, veal and poultry subcategories, EPA evaluated the costs and impacts of this option relative to Option 2. For these subcategories, the incremental annual cost of Option 5 over Option 2 would be $110 million pre-tax under the two-tier structure, and $140 million pre-tax under the three-tier structure. Almost all of these incremental costs are projected to be in the swine sector. Since the majority of the costs are borne by the swine subcategory, EPA solicits comment on establishing BAT on the basis Option 5 for the only the veal and poultry subcategories, and establishing BAT on the basis of Option 2 that the swine subcategory. EPA projects that there would be no additional costs under the two-tier structure, and only very small additional costs under the three-tier structure for the veal and poultry subcategories to move from Option 2 to Option 5. Under Option 2, EPA estimates 300 swine operations and 150 broiler operations would experience stress under the two-tier structure, and 300 swine operations and 330 broiler operations would experience stress under the three-tier structure. Under Option 5 an additional 1,120 swine operations would experience stress under both the two-tier and three-tier structures. All affected hog operations have more than 1000 AU. None of these affected hog operations are small businesses based on the Small Business Administration's size standards. There would be no additional broiler operations experiencing stress under Option 5, and no veal, layer, or turkey operations are projected to experience stress under either Option 2 or Option 5. EPA did not analyze the benefits of Option 5 relative to Option 2. Under Option 2 operations are required to be designed, constructed and operated to contain all process generated waste waters, plus the runoff from a 25-year, 24-hour rainfall event for the location of the point source. Thus, the benefit of Option 5 over Option 2 would be the value of eliminating discharges during chronic or catastrophic rainfall events of a magnitude of the 25-year, 24-hour rainfall event or greater. Further benefit would be realized as a result of increased flexibility on the timing of manure application to land. By preventing the rainfall and run-off from mixing with wastewater, CAFOs would not need to operate such that land application during storm events was necessary.

EPA is not proposing Option 2 for these sectors. However, EPA notes that at the time of the SBREFA outreach process, removing the 25-year, 24-hour design standard for any sector was not considered largely due to concern that a different design standard would lead to larger lagoons or impoundments. EPA staff explicitly stated this to the SERs and other member of the Panel. Although not extensively discussed, since it did not appear at that time to be an issue, retention of this standard was supported by both the SERs and the Panel. At that time, EPA was not planning to evaluate such an option because of the concern that this would encourage larger lagoons. Since the Panel concluded it outreach, EPA decided to evaluate, and ultimately propose removing this design standard for the veal, swine and poultry subcategories because of reports of lagoon failures resulting from rainfall and poor management. As mentioned previously, all of these sectors maintain their animals under roof eliminating the need to capture contaminated storm water from the animal confinement area. In addition, most poultry operations generate a dry manure, which when properly stored, under some type of cover, eliminates any possibility of an overflow in the event of a large storm. Therefore EPA believes that Option 5 technology which prevents the introduction of storm water into manure

storage is achievable and represents Best Available Technology, without redesigning the capacity of existing manure storage units. However, EPA requests comment on retaining te 25-year, 24-hour storm design standard (and thus basing BAT on Option 2) for these sectors, consistent with its intention at the time of the SBREFA outreach process.

EPA is not proposing to base BAT for the swine, poultry and veal subcategories on Option 3, because EPA believes Option 5 is more protective of the environment. If operators move towards dry manure handling technologies and practices to comply with Option 5, there should be less opportunity for ground water contamination and surface water contamination through a direct hydrological connection. EPA strongly encourages any newly constructed lagoons or anaerobic digesters to be done in such a manner as to minimize pollutant losses to ground water. A treatment lagoon should be lined with clay or synthetic liner or both and solid storage should be on a concrete pad or preferably a glass-lined steel tank as EPA has included in its estimates of BAT costs. Additionally, Option 5 provides the additional non-water quality benefit of achieving reductions in air emissions from liquid storage systems. EPA estimates that the cost of complying with both Option 3 and 5 at existing facilities would be economically unachievable.

EPA believes the proposed technology basis for broilers, turkeys and laying hens with dry manure management will avoid discharges to ground water since the manure is dry and stored in such a way as to prevent storm water from reaching it. Without some liquid to provide a transport mechanism, pollutants cannot move through the soil profile and reach the ground water and surface water through a direct hydrological connection.

EPA is not proposing to base BAT on Option 4 for the same reasons described above for the beef and dairy subcategories.

EPA is not proposing to base BAT on Option 6, because EPA believes that the zero discharge aspect of the selected option will encourage operations to consider and install anaerobic digestion in situations where it will be cost effective.

As with beef and dairy, EPA is not proposing to base BAT for swine, veal and poultry on Option 7, but believes that permit authorities should establish restrictions as necessary in permits issued to CAFOs. Swine, veal and poultry operations should take the timing of manure application into account when developing the PNP. Any areas that could result in pollutant discharge from application of manure to frozen, snow covered or saturated ground should be identified in the plan and manure or wastewater should not be applied to those areas when there is a risk of discharge.

EPA solicits comment on the use of remote liquid level monitoring at livestock operations. As described above in Section VIII.C.3, this technology could provide advanced notification that levels are reaching a critical point, and corrective actions could then be taken. This technology does not prevent precipitation from entering the lagoon and does not prevent overflows, therefore EPA chose not to propose this technology as BAT for swine or veal operations. However, EPA solicits comments on applicability of this technology to livestock operations, especially at swine and veal as an alternative to covers on lagoons.

PNP Requirements

There are a number of elements that are addressed by both USDA's ''Guidance for Comprehensive Nutrient Management Plans (CNMPs)'' and EPA's PNP which would be required by the effluent guidelines and NPDES proposed rules and is detailed in the guidance document ''Managing Manure Nutrients at Concentrated Animal Feeding Operations.'' EPA's proposed PNP would establish requirements for CAFOs that are consistent with the technical guidance published by USDA experts, but go beyond that guidance by identifying specific management practices that must be implemented. What follows is a brief description of what must be included in a PNP.

General Information. The PNP must have a Cover Sheet which contains the name and location of the operation, the name and title of the owner or operator and the name and title of the person who prepared the plan. The date (month, day, year) the plan was developed and amended must be clearly indicated on the Cover Sheet. The Executive Summary would briefly describe the operation in terms of herd or flock size, total animal waste produced annually, crop identity for the full 5 year period including a description of the expected crop rotation and, realistic yield goal. The Executive Summary must include indication of the field conditions for each field unit resulting from the phosphorus method used (e.g., phosphorus index), animal waste application rates, the total number of acres that will receive manure, nutrient content of manure and amount of manure that will be shipped off-site. It should also identify the manure collection, handling, storage, and treatment practices, for example animals kept on bedding which is stored in a shed after removal from confinement house, or animals on slatted floors over a shallow pull plug pit that is drained to an outdoor in-ground slurry storage inpoundment. Finally, the Executive Summary would have to identify the watershed(s) in which the fields receiving manure are located or the nearest surface water body. While the General Information section of a PNP would give a general overview of the CAFO and its nutrient management plan, subsequent sections would provide further detail.

Animal Waste Production. This subsection details types and quantities of animal waste produced along with manure nutrient sampling techniques and results. Information would be included on the maximum number of livestock ever confined and the maximum livestock capacity of the CAFO, in addition to the annual livestock production. This section would provide an estimate of the amount of animal waste collected each year. Each different animal waste source should be sampled annually and tested by an accredited laboratory for nitrogen, phosphorous, potassium, and pH.

Animal Waste Handling, Collection, Storage, and Treatment. This subsection details best management practices to protect surface and groundwater from contamination during the handling, collection, storage, and treatment of animal waste. A review would have to be conducted of potential water contamination sources from existing animal waste handling, collection, storage, and treatment practices. The capacity needed for storage would be calculated.

Feedlot runoff would have to be contained and adequately managed. Runoff diversion structures and animal waste storage structures would have to be visually inspected for: seepage, erosion, vegetation, animal access, reduced freeboard, and functioning rain gauges and irrigation equipment, on a weekly basis. Deficiencies based on visual inspections would have to be identified and corrected within a reasonable time frame. Depth markers would have to be permanently installed in all lagoons, ponds, and tanks. Lagoons, ponds, and tanks would have to be maintained to retain capacity for the 25-year, 24-hour storm event. Dead animals, required to be kept out of lagoons, would have to be properly handled and disposed of in a timely

manner. Finally, an emergency response plan for animal waste spills and releases would have to be developed.

Land Application Sites. This subsection details field identification and soil sampling. County(ies) and watershed code(s) where feedlot and land receiving animal waste applications are located would be identified. Total acres of operation under the control of the CAFO (owned and rented) and total acres where animal waste will be applied would be included. A detailed farm map or aerial photo, to be included, would have to indicate: location and boundaries of the operation, individual field boundaries, field identification and acreage, soil types and slopes, and the location of nearby surface waters and other environmentally sensitive areas (e.g., wetlands, sinkholes, agricultural drainage wells, and aboveground tile drain intakes) where animal waste application is restricted.

Separate soil sampling, using an approved method, would have to be conducted every 3 years on each field receiving animal waste. The samples shall be analyzed at an accredited laboratory for total phosphorous. Finally, the phosphorous site rating for each field would have to be recorded according to the selected assessment tool.

Land Application. This subsection details crop production and animal waste application to crop production areas. Details of crop production would have to include: Identification of all planned crops, expected crop yields and the basis for yield estimates, crop planting and harvesting dates, crop residue management practices, and nutrient requirements of the crops to be grown. Calculations used to develop the application rate, including nitrogen credits from legume crops, available nutrients from past animal waste applications, and nutrient credits from other fertilizer and/or biosolids applications would have to be included.

Animal waste application rates cannot exceed nitrogen requirements of the crops. However, animal waste application rates would be limited to the agronomic requirements for phosphorous if the soil phosphorous tests are rated ''high'', the soil phosphorous tests are equal to ¾, but not greater than twice the soil phosphorous threshold value, or the Phosphorous Index rating is ''high.'' Finally, animal waste could not be applied to land if the soil phosphorous tests are rated ''very high'', the soil phosphorous tests are greater than twice the soil phosphorous threshold value, or the Phosphorous Index rating is ''very high.'' In some cases, operators may choose to further restrict application rates to account for other limiting factors such as salinity or pH.

Animal wastes cannot be applied to wetlands or surface waters, within 100 feet of a sinkhole, or within 100 feet of water sources such as rivers, streams, lakes, ponds, and intakes to agricultural drainage systems (e.g., aboveground tile drain intakes, agricultural drainage wells, pipe outlet terraces). EPA requests comment on how serious would be the limitations imposed by these requirements. Manure spreader and irrigation equipment would have to be calibrated at a minimum once each year, but preferably before each application period. Finally, the date of animal waste application and calibration application equipment, and rainfall amounts 24-hours before and after application would be recorded.

Other Uses/Off-Site Transfer. The final required subsection for a PNP details any alternative uses and off-site transport of animal wastes. If used, a complete description of alternative uses of animal waste would have to be included. If animal wastes are transported off-site the following would have to be recorded: date (day, month, year), quantity, and name and location of the recipient of the animal waste.

Voluntary Measures. Many voluntary best management practices can be included within various subsections of a PNP. These voluntary best management plans are referenced in EPA's guidance document for PNP ''Managing Manure Nutrients at Concentrated Animal Feeding Operations.''

Annual Review and Revision. While a PNP is required to be renewed every 5 years (coinciding with NPDES permitting), an annual review of the PNP would have to occur and the PNP would be revised or amended as necessary.

The most likely factor which would necessitate an amendment or revision to a PNP is a change in the number of animals at the CAFO. A substantial increase in animal numbers (for example an increase of greater than 20%) would significantly increase the volume of manure and total nitrogen and phosphorous produced on the CAFO. Because of this, the CAFO will need to re-evaluate animal waste storage facilities to ensure adequate capacity, and may need to re-examine the land application sites and rates.

A second reason which would require an amendment or revision to a PNP is a change in the cropping program which would significantly alter land application of animal waste. Changes in crop rotation or crop acreage could significantly alter land application rates for fields receiving animal waste. Also the elimination or addition of fields receiving animal waste application would require a change in the PNP.

Changes in animal waste collection, storage facilities, treatment, or land application method would require an amendment or revision to a PNP. For example, the addition of a solid-liquid separator would change the nutrient content of the various animal waste fractions and the method of land application thereby necessitating a revision in a PNP. Changing from surface application to soil injection would alter ammonia volatilization subsequently altering animal waste nutrient composition requiring a revision of land application rates.

When CAFOs Must Have PNPs. EPA proposes to allow two groups of CAFOs up to 90 days to obtain a PNP:

3. Existing CAFOs which are being covered by a NPDES permit for the first time; or

4. Existing CAFOs that are already covered under an existing permit which is reissued within 3 years from the date of promulgation of these regulations.

EPA proposes that all other existing CAFOs must have a PNP at the time permits are issued or renewed.

7. New Source Performance Standards

For purposes of applying the new source performance standards (NSPS) being proposed today, a source would be a new source if it commences construction after the effective date of the forthcoming final rule. (EPA expects to take final action on this proposal in December 2002, which is more than 120 days after the date of proposal—see 40 CFR 122.2). Each source that meets this definition would be required to achieve any newly promulgated NSPS upon commencing discharge.

In addition, EPA is proposing additional criteria to define ''new source'' that would apply specifically to CAFOs under Part 412. EPA intends that permit writers will consult the specific ''new source'' criteria in Part 412 rather than the more general criteria set forth in 40 CFR 122.29(b)(1). The other provisions of 40 CFR 122.29 continue to apply. EPA proposes to consider an operation as a new source if any of the following three criteria apply.

The definition of new source being proposed for Part 412 states three criteria that determine whether a source is a ''new source.''

First, a facility would be a new source if it is constructed at a site at which no other source is located. These new sources have the advantage of not

having to retrofit the operation to comply with BAT requirements, and thus can design to comply with more stringent and protective requirements.

The second criterion for defining a new source would be where new construction at the facility ''replaces the housing, waste handling system, production process, or production equipment that causes the discharge or potential to discharge pollutants at an existing source.'' Confinement housing and barns are periodically replaced, allowing the opportunity to install improved systems that provide increased environmental protection. The modern confinement housing used at many swine, dairy, veal, and poultry farms allows for waste handling and storage in a fashion that generates little or no process water. Such systems negate the need for traditional flush systems and storage lagoons, reduce the risks of uncontrollable spills, and decrease the costs of transporting manure.

Third, a source would be a new source if construction is begun after the date this rule is promulgated and its production area and processes are substantially independent of an existing source at the same site. Facilities may construct additional production areas that are located on one contiguous property, without sharing waste management systems or commingling waste streams. Separate production areas may also be constructed to help control biosecurity. New production areas may also be constructed for entirely different animal types, in which case the more stringent NSPS requirements for that subcategory would apply to the separate and newly constructed production area. In determining whether production and processes are substantially independent, the permit authority is directed to consider such factors as the extent to which the new production areas are integrated with the existing production areas, and the extent to which the new operation is engaging in the same general type of activity as the existing source.

EPA also considered whether a certain level of facility expansion, measured as an increase in animal production, should cause an operation to be subject to new source performance standards. If so, upon facility expansion, the CAFO would need to go beyond compliance with BAT requirements to meet the more stringent standards represented by NSPS. In today's proposal, that increment of additional control, for the swine, poultry and veal subcategories, would amount to the need to monitor ground water and install liners in lagoons and impoundments to prevent discharges to ground water that has a direct hydrological connection to surface water; unless the CAFO could demonstrate that no such direct hydrological link existed. In the beef and dairy subcategories, the NSPS proposed today are the same as the BAT standards.

The Agency, however, decided against proposing to identify facility expansion as a trigger for the application of NSPS. Many CAFOs oversize or over-engineer their waste handling systems to accommodate future increases in production. Thus, in many cases, the actual increases in production may not present a new opportunity for the CAFO to install the additional NSPS technologies—e.g. liners. To install liners, these operations would need to retrofit their facilities the same as existing sources would. EPA has explained above that such retrofitting would not be economically achievable in these animal sectors. Similarly, the costs associated with these requirements would represent a barrier to the expansion. Therefore, it would not be appropriate to require these operations, upon facility expansion, to meet the additional ground water-related requirements that are a part of today's proposed NSPS.

EPA considered the same seven options for new source performance standards (NSPS) as it considered for BAT. EPA also considered an additional option for new dairies, which if selected, would prohibit dairies from discharging any manure or process wastewater from animal confinement and manure storage areas (i.e., eliminating the allowance for discharging overflows associated with a storm event). New sources have the advantage of not having to retrofit the operation to comply with the requirements and thus can design the operation to comply with more stringent requirements. In selecting new source performance standards, EPA evaluates whether the requirements under consideration would impose a barrier to entry to new operations.

EPA is proposing to select Option 3 as the basis for NSPS for the beef and dairy subcategories. Option 3 includes all the requirements proposed for existing sources including complying with zero discharge from the production area except in the event of a 25-year, 24-hour storm and the requirement to develop a PNP which establishes the rate at which manure and wastewater can be applied to crop or pasture land owned or controlled by the CAFO. The application of manure and wastewater would be restricted to a phosphorus based rate where necessary depending on the specific soil conditions at the CAFO. Additionally, other best management practice requirements would apply, including the prohibition of manure and wastewater application within 100 feet of surface water. The proposed new source standard for the beef and dairy subcategories includes a requirement for assessing whether the ground water beneath the production area has a direct hydrological connection to surface water. If a direct hydrological connection exists, the operation must conduct additional monitoring of ground water up gradient and down gradient from the production area, and implement any necessary controls based on the monitoring results to ensure that zero discharge to surface water via the ground water route is achieved for manure stockpiles and liquid impoundments or lagoons. For the purpose of estimating compliance costs, EPA has assumed that operations located in areas with a direct hydrological connection will install synthetic material or compacted clay liners beneath any liquid manure storage and construct impervious pads for any dry manure storage areas. The operator would be required to collect and analyze ground water samples twice per year for total dissolved solids, chlorides, nitrate, ammonia, total coliforms and fecal coliform. EPA believes that Option 3 is economically achievable for existing sources. Since new sources are able to install impermeable liners at the time the lagoon or impoundment is being constructed, rather than retrofitting impoundments at existing source, costs associated with this requirement should be less for new sources in comparison to existing sources. EPA has concluded that Option 3 requirements will not pose a barrier to entry for new sources.

EPA is proposing to establish NSPS for all swine and poultry operations based on Option 5 and Option 3 combined. In addition the BAT requirements described in Section VIII.C.6, the proposed new source standards would require no discharge via any ground water that has a direct hydrological link to surface water. As described above, Option 3 requires all CAFOs to monitor the ground water and impose appropriate controls to ensure compliance with the zero discharge standard, unless the CAFO has demonstrated that there is no direct hydrological link between the ground water and any surface waters. The proposed new source standard also restricts land application of manure and

wastewater to a phosphorus based rate where necessary depending on the specific soil conditions at the CAFO. Additionally, other best management practice requirements would apply, including that application of manure and wastewater would be prohibited within 100 feet of surface water.

EPA encourages new swine and poultry facilities to be constructed to use dry manure handling. Dry manure handling is currently the standard practice at broiler and turkey operations. As described previously, some existing laying hen operations and most hog operations use liquid manure handling systems. The proposed new source performance standard would not require the use of dry manure handling technologies, but EPA believes this is the most efficient technology to comply with its requirements.

EPA has analyzed costs of installing dry manure handling at new laying hen and swine operations. Both sectors have operations which demonstrate dry manure handling can be used as an effective manure management system. The dry manure handling systems considered for both sectors require that the housing for the animals be constructed in a certain fashion, thus making this practice less practical for existing sources. Both sectors have developed a high rise housing system, which houses the animals on the second floor of the building allowing the manure to drop to the first floor or pit. In the laying hen sector this is currently a common practice and with aggressive ventilation, the manure can be maintained as a dry product. Hog manure has a lower solids content, thus the manure must be mixed with a bedding material (*e.g.,* wood chips, rice or peanut hulls and other types of bedding) which will absorb the liquid. To further aid in drying the hog manure, air is forced up through pipes installed in the concrete floor of the pit. With some management on the part of the CAFO operator, involving mixing and turning the hog manure in the pit periodically, the manure can be composted while it is being stored. The advantages of the high rise system for hogs and laying hens include a more transportable manure, which, in the case of the hog high rise system, has also achieved a fairly thorough decomposition. The air quality inside the high rise house is greatly improved, and the potential for leaching pollutants into the groundwater is greatly reduced. The design standard of these high rise houses include concrete floors and also assume that the manure would be retained in the building until it will be land applied, thus there is no opportunity for storm water to reach the manure storage and virtually no opportunity for pollutants to leach to groundwater beneath the confinement house. EPA believes that the cost savings associated with ease of manure transportation, as well as improved animal health and performance, with the dry manure handling system for hogs will off-set the increased cost of operation and maintenance associated with the high rise hog system. Thus, EPA concludes the high-rise house does not pose a barrier to entry and is the basis for NSPS in both the laying hen and hog sectors. Although the high rise house is the basis of the new source standards for the swine and laying hen sectors, operations are not prevented from constructing a liquid manure handling system. If new sources in these sectors choose to construct a liquid manure handling system, they would be required to line the lagoons if the operation is located in an area that has a direct hydrologic connection, but the cost associated with lining a lagoon at the time it is being constructed is much less than the cost to retrofit lagoon liners.

EPA proposes to establish new source requirements for the veal subcategory on the basis of Option 5 which requires zero discharge with no overflow from the production area and Option 3 which requires zero discharge of pollutants to groundwater which has a direct hydrological connection to surface water, with the ground water monitoring or hydrological assessment requirements described above. EPA believes that a zero discharge standard without any overflow will promote the use of covered lagoons, anaerobic digesters or other types of manure treatment systems. Additionally, this will minimize the use of open air manure storage systems, thus reducing emission of pollutants from CAFOs.

New veal CAFOs would not be expected to modify existing housing conditions since EPA is not aware of any existing veal operations that use dry manure handling systems. New veal CAFOs would be expected to also use covered lagoons, or anaerobic digesters to comply with the zero discharge standard. New veal CAFOs would be required to line their liquid manure treatment or storage structures with either synthetic material or compacted clay to prevent the discharge of pollutants to ground water which has a direct hydrological connection to surface water. In addition, the CAFO would have to monitor the groundwater beneath the production area to ensure compliance with the zero discharge requirement. The CAFO would not need to install liners or monitor ground water if it demonstrates that there is no direct hydrologic link between the ground water and any surface waters.

In addition to the seven options considered for both existing and new sources, EPA also investigated a new source option for dairies that would prohibit all discharges of manure and process wastewater to surface waters, eliminating the current allowance for the discharge of the overflow of runoff from the production area. To comply with a zero discharge requirement, dairies would need to transform the operation so they could have full control over the amount of manure and wastewater, including any runoff, entering impoundments. Many dairies have drylot areas where calves, heifers, and bulls are confined, as well as similar drylot areas where the mature cows are allowed access. EPA estimated compliance costs for a zero discharge requirements assuming that the following changes would occur at new dairies:

(1) Freestall barns for mature cows would be constructed with six months underpit manure storage, rather than typical flush systems with lagoon storage;

(2) Freestall barns with six months underpit manure storage would be constructed to house heifers;

(3) Calf barns with a scrape system would be constructed with a scrape system and six months of adjacent manure storage; and

(4) New dairies would include covered walkways, exercise areas, parlor holding, and handling areas.

Drylot areas are continually exposed to precipitation. The amount of contaminated runoff from such areas that must be captured is directly related to the size of the exposed area and the amount of precipitation. Under the current regulations, dairies use the 25-year, 24-hour rainfall event (in addition to other considerations) when determining the necessary storage capacity for a facility. Imposing a zero discharge requirement that prevents any discharge from impoundments would force dairies to reconfigure in a way that provides complete control over all sources of wastewater. EPA considered the structural changes in dairy design described here to create a facility that eliminates the potential for contaminated runoff.

While EPA believes that confining all mature and immature dairy cattle is technically feasible, the costs of zero discharge relative to the costs for Option 3 are very high. Capital costs to comply with zero discharge increase by two orders of magnitude. EPA estimates

annual operating and maintenance costs would rise between one to two orders of magnitude above the costs for Option 3. These costs may create a barrier to entry for new sources. In addition, EPA believes selecting this option could have the unintended consequence of encouraging dairies to shift calves and heifers offsite to standalone heifer raising operations (either on land owned by the dairy or at contract operations) to avoid building calf and heifer barns. If these offsite calf/heifer operations are of a size that they avoid being defined as a CAFO, the manure from the immature animals would not be subject to the effluent guidelines.

EPA is not basing requirements for new dairies on the zero discharge option for the reasons discussed above. EPA solicits comment on the approach used to estimate the costs for new dairies to comply with a zero discharge requirement. Comments are particularly solicited on aspects such as: converting from flush systems to underpit manure storage; types of housing for calves and heifers; and whether the potential for uncontrollable amounts of precipitation runoff have been sufficiently eliminated (including from silage). EPA also solicits comment on a regulatory scenario that would establish a zero discharge requirement for manure and process wastewater from barns (housing either mature or immature dairy cattle) and the milking parlor, but would maintain the current allowance for overflow of runoff from drylot areas.

As an alternative to underpit manure storage, dairies could achieve zero discharge for parlor wastes and barn flush water by constructing systems such as anaerobic digesters and covered lagoons. These covered systems, if properly operated, can facilitate treatment of the manure and offer opportunities to reduce air emissions. The resulting liquid and solid wastes would be more stable than untreated manure. EPA solicits comment on the usefulness of applying stabilization or treatment standards to liquid and slurry manures prior to land application. Commenters encouraging the use of such standards should recommend appropriate measurement parameters such as volatile solids, BOD, COD, and indicator organism reduction(s) to establish stability or treatment levels.

EPA has not identified any basis for rejecting the zero discharge option for dairies solely due to animal health reasons. EPA solicits comment on the technical feasibility of confining mature and/or immature dairy cattle in barns at all times.

Ten-year protection period. The NSPS that are currently codified in part 412 will continue to have force and effect for a limited universe of CAFOs. For this reason, EPA is proposing to retain the NSPS promulgated in 1974 for part 412. Specifically, following promulgation of the final rule that revises part 412, the 1974 NSPS would continue to apply for a limited period of time to certain new sources and new dischargers. See CWA section 306(d) and 40 CFR 122.29(d). Thus, if EPA promulgates revised NSPS for part 412 in December 2002, and those regulations take effect in January 2003, qualified new sources and new dischargers that commenced discharge after January 1993 but before January 2003 would be subject to the currently codified NSPS for ten years from the date they commenced discharge or until the end of the period of depreciation or amortization of their facility, whichever comes first. See CWA section 306(d) and 40 CFR 122.29(d). After that ten year period expires, any new or revised BAT limitations would apply with respect to toxic and nonconventional pollutants. Limitations on conventional pollutants would be based on the1974 NSPS unless EPA promulgates revisions to BPT/BCT for conventional pollutants that are more stringent than the 1974 NSPS.

Rather than reproduce the 1974 NSPS in the proposed rule, EPA proposes to refer permitting authorities to the NSPS codified in the 2000 edition of the Code of Federal Regulations for use during the applicable ten-year period.

8. Pretreatment Standards for New or Existing Sources (PSES AND PSNS)

EPA is not proposing to establish Pretreatment Standards for either new or existing sources. Further, EPA is withdrawing the existing provisions entitled ''Pretreatment standards for existing sources'' at §§ 412.14, 412.16, 412.24, 412.26. Those existing provisions establish no limitations. The vast majority of CAFOs are located in rural areas that do not have access to municipal treatment systems. EPA is not aware of any existing CAFOs that discharge wastewater to POTWs at present and does not expect new sources to be constructed in areas where POTW access will be available. For those reasons, EPA is not establishing national pretreatment standards. However, EPA also wants to make it clear that if a CAFO discharged wastewater to a POTW, local pretreatment limitations could be established by the Control Authority. These local limits are similar to BPJ requirements in an NPDES permit.

9. Effluent Guidelines Controls for Pathogens

The third most common reason for waterbodies being listed on State § 303(d) lists as an impaired watershed is pathogens. Degradation of surface waters by excessive levels of pathogens has been attributed to several sources, including natural wildlife, faulty septic systems, and animal agriculture. As described in Section 5, stream water quality may be impacted by animal feeding operations due to feedlot surface runoff, spills from liquid impoundments, tile drain effluent, leaching and runoff from land receiving manure, and seepage from waste storage. Degradation of aquatic and riparian habitat also occurs when animal grazing operations are poorly managed.

In today's notice, EPA is not setting specific requirements for the control of pathogens. The proposed BAT is expected to reduce pathogens to surface waters through the implementation of the zero discharge requirements at the production area, and through the implementation of the PNP at the land application area. Even without explicit requirements or limits for pathogen controls, EPA expects considerable reduction in the discharge of pathogens for reasons described below. Runoff simulations and loadings analysis predict a 50% reduction in fecal coliforms and a 60% reduction in fecal streptococci under the regulatory scenario proposed today. Following this proposal, EPA intends to further analyze technologies for the treatment or reduction of pathogens in manure, and solicits comment on other approaches to control pathogens.

One mechanism for pathogen discharge to surface waters is catastrophic spills, whether caused by intentional discharges or through overflow following major storms. EPA expects the requirements for no discharge from the production area, as well as routine inspection and mandatory management practices for the control of liquid impoundment levels, will reduce catastrophic spills. For the swine and poultry sectors EPA believes the elimination of the storm event at which an overflow is allowed will also reduce discharge of pathogens. At the production area, operators would be required to handle animal mortalities in a manner so as to prevent contamination of surface water. The proper use of manure as a fertilizer, as specified in the proposed regulations, may result in increased storage capacity and longer retention times of both liquid and solid manure storage, allowing

increased opportunity for natural die-off of pathogens. For example, runoff from fields receiving poultry litter that had been stored prior to application showed no significant difference in pathogen content in runoff from control fields (GEIS, 1999), supporting the conclusion that pathogen reductions will occur from increased storage times.

Application rate has been identified as the single most important manure management practice affecting pollution of surface waters from fields receiving manure. Other practices affecting pathogen content in the runoff include amount of application, incorporation methods, tillage, saturation of the receiving field, and elapsed time following application before a rainfall. In one case study, swine lagoon effluent applied to tile drained fields at 1.1 inches showed no difference in runoff quality than the control fields, but application at three times the rate showed high levels of fecal coliform in the surface water. Fecal bacteria in runoff from land receiving fresh manure may often be a significant proportion of the fecal contamination measured in the surface waters. Vegetated filter strips are useful in removing pollutants from runoff on manured fields, particularly nutrients and sediment, but have not been identified as generally effective in reducing bacterial concentrations in the runoff. Surface applications of manure are more likely to result in fecal coliform transport when the soil is saturated, particularly in fine sandy loam soils.

EPA believes nutrient management practices and rates established in the PNP would limit the quantity of nutrients that may be applied to fields and will reduce the occurrence of manure application to saturated soils, or when a heavy storm event is predicted. Nutrient loss to surface water under these conditions would result in reduced crop yields and would be reflected in revisions made to the PNP in subsequent years translating to a lower manure application rate.

EPA has collected data on technologies useful in treating manure and wastes for pathogens. Anaerobic digesters and even simple manure storage for an extended period of time promote pathogen reductions through selective growth conditions and natural die-off over time. The addition of heat, such as is used in thermophilic digesters, further reduces pathogens. Proper composting processes also involve high temperatures—achieving temperatures approaching 140 degrees F in the pile. Heat treatment over several days is likely to kill protozoans such as Giardia and Cryptosporidium. The addition of lime to achieve high alkaline conditions, e.g., achieving a pH $\geq$ 12, also is effective at killing many pathogens by disrupting the cell membrane or disrupting virus viability.

EPA will continue to analyze the performance and applicability of treatments to reduce pathogens in CAFO waste, and will analyze the costs of these processes. The processes described above and others used to significantly reduce pathogens in biosolids or sewage sludge such as heat treatment, drying, thermophilic aerobic digestion, pasteurization, disinfection, and extended storage will be analyzed for their applicability to animal manures. EPA will give consideration to establishing the same performance standards as required for Class A sludge in Part 503. If supported by appropriate data, the final rule could establish these or other appropriate standards as performance standards that the wastes would be required to meet prior to land application. The CAFO would need to demonstrate achievement of these standards prior to land application because of the impracticability of measuring the pollutant loadings in any eventual runoff from the land application areas to the waters. EPA solicits comment on this possible approach and specifically requests data relating to pathogen treatment and reductions that are demonstrated to be effective on CAFO waste. EPA also solicits data on management practices that can be applied to the land application of manure, which may reduce pathogens in runoff.

10. Antibiotics

Related to concerns over pathogens in animal manures are concerns over antibiotics and other pharmaceuticals that may be present in the manure. As discussed in Section V, an estimated 60–80% of all livestock receive antibiotics. Some antibiotics are metabolized, and some are excreted with the manure. In cases where antimicrobials are administered to animals through the feed, spilt feed and wastelage may contribute to antibiotic content of the waste storage. The presence of antibiotics in manure and the environment has been shown to result in antibiotic resistant pathogens. EPA solicits comments on the direct effects of antibiotic residues and antimicrobial resistance, specifically on how manure management may contribute to the problem of antibiotics reaching the environment and contributing to pathogen resistance. EPA also solicits data and information on effective treatment or practices that may be implemented by CAFOs to reduce these releases.

IX. Implementation of Revised Regulations

A. How Do the Proposed Changes Affect State CAFO Programs?

EPA is proposing a number of changes to the effluent guidelines and the NPDES permit regulations for CAFOs in today's proposed rule. Under 40 CFR 123.25, authorized NPDES State programs must administer their permit programs in conformance with NPDES requirements, including the requirements that address concentrated animal feeding operations (§ 122.23) and the incorporation of technology-based effluent limitation guidelines and standards in permits (§ 122.44). Thus, today's proposed rule would require the 43 States [note that State is defined in § 122.2] with authorized NPDES permit programs for CAFOs to revise their programs as necessary to be consistent with the revised federal requirements. Current NPDES regulations note that authorized NPDES State permit programs are not required to be identical to the federal requirements; however, they must be at least as stringent as the federal program. States are not precluded from imposing requirements that are more stringent than those required under federal regulations.

Any State with an existing approved NPDES permitting program under section 402 must be revised to be consistent with changes to federal requirements within one year of the date of promulgation of final changes to the federal CAFO regulations [40 CFR 123.62(e)]. In cases where a State must amend or enact a statute to conform with the revised CAFO requirements, such revisions must take place within two years of final changes to the federal CAFO regulations. States that do not have an existing approved NPDES permitting program but who seek NPDES authorization after these CAFO regulatory provisions are promulgated must have authorities that meet or exceed the revised federal CAFO regulations at the time authorization is requested.

In States not authorized to administer the NPDES program, EPA will implement the revised requirements. Such States may still participate in water quality protection through participation in the CWA section 401 certification process (for any permits) as well as through other means (e.g., development of water quality standards, development of TMDLs, and coordination with EPA).

EPA is aware that the majority of States authorized to implement the NPDES program supplement the NPDES CAFO requirements with additional State requirements, and some States currently regulate or manage CAFOs predominantly under State non-NPDES programs. It has been suggested that EPA provide a mechanism through which State non-NPDES CAFO programs can be recognized alternatives that would be authorized under the CWA.

No permit issued by a non-NPDES program will satisfy the NPDES permit requirement. Facilities required to be covered by a NPDES permit must obtain a permit from an agency authorized to issue a NPDES permit. However, EPA believes that the current NPDES program provides a reasonable degree of flexibility consistent with CWA requirements, and that the proposed CAFO regulation provides opportunities to incorporate State programs in several ways.

It is possible for non-NPDES State programs that currently regulate AFOs to gain EPA's approval as NPDES-authorized programs. Such a change would require a formal modification of the State's approved NPDES program, and the State would have to demonstrate that its program meets all of the minimum criteria specified in 40 CFR Part 123, Subpart B for substantive and procedural regulations. Among other things, these criteria include the restriction that permit terms may not exceed 5 years, and include provisions on public participation in permit development and enforcement, and EPA enforcement authority.

In addition, today's proposal provides specific flexibility on particular issues. First, with regard to the off-site transfer of manure, EPA is requiring under one co-proposed option that the CAFO operator obtain a certification from recipients that, if they intend to land apply the manure, it will be done according to appropriate agricultural practices. EPA is proposing to waive this requirement in a State that is implementing an effective program for addressing excess manure generated by CAFOs. Second, EPA is proposing to require that processors be permitted, or co-permitted, along with their contract producers. EPA is requesting comment on an option that would waive this requirement in certain instances in States with effective programs for managing excess manure. EPA is also soliciting comment on one particular type of program, an Environmental Management System developed by the processor, as sufficient to waive co-permitting requirements. EPA is interested in comments on other specific requirements of today's proposal that might be satisfied in whole or in part by State program requirements. This could include ways to ensure that states with unique programs that meet or exceed the provisions of the revised regulations and the CWA requirements could utilize their own programs that include similar objectives such as enhanced water quality protection, public participation and accountability.

A third possible means of providing flexibility for States would be available if the three-tier regulatory structure is adopted in the final regulation. In the three-tier structure, all facilities over 1,000 AU would be considered CAFOs by definition, and those between 300 AU and 1,000 AU would be CAFOs only if they meet one of several conditions, described in detail in Section VII.B.3, or if designated by the permit authority as a significant contributor of pollution to waters of the U.S. Those with fewer that 300 AU would become CAFOs only if designated by the permit authority. A State with an effective non-NPDES program could succeed in helping many operations avoid permits by ensuring they do not meet any of the conditions that would define them as CAFOs.

EPA is also soliciting comment on whether or not to adopt both the two-tier and the three-tier structures, and to provide a mechanism to allow States to select which of the two alternative proposed structures to adopt in their State NPDES program. Under this option, a State could adopt the structure that best fits with the administrative structure of their program, and that best serves the character of the industries located in their State and the associated environmental problems. This option is viable only if the Agency is able to determine that the two structures provide substantially similar environmental benefits by regulating equivalent numbers of facilities and amounts of manure. Otherwise, States would be in a position to choose a less stringent regulation, contrary to the requirements of the Clean Water Act. A discussion of this option can be found in Section VII.B.4.

The requirements for State NPDES program authorization are specified under § 402(b) of the CWA and within the broad NPDES regulations (40 CFR Part 123). These provisions set out specific requirements for State authorization applicable to the entire NPDES program and the Agency does not believe that broad changes to these requirements are appropriate in this proposed rulemaking.

B. How Would EPA's Proposal to Designate CAFOs Affect NPDES Authorized States?

Today's proposal would provide explicit authority, even in States with approved NPDES programs, for the EPA Regional Administrator to designate an AFO as a CAFO if it meets the designation criteria in the regulations. EPA's authority to designate AFOs as CAFOs would be subject to the same criteria and limitations to which State designation authority is subject. However, EPA does not propose to assume authority or jurisdiction to issue permits to the CAFOs that the Agency designates in approved NPDES States. That authority would remain with the approved State. EPA requests comment on this prosed new designation authority.

C. How and When Will the Revised Regulations be Implemented?

EPA anticipates that this these proposed regulations will be promulgated as final regulations in December, 2002, and published in the **Federal Register** shortly thereafter (approximately January, 2003). As mentioned, authorized States programs will need up to two years after that date to revise their programs to reflect the new regulations. Following a State's revision of its program and approval of the revisions by EPA, we expect many States to want additional time to develop new or revised CAFO general permits. EPA believes it is reasonable to allow States one additional year to develop these new or revised general permits. To summarize, some States will need until approximately January 2006—i.e., three years after the final rule is published—before they can make CAFO general permits available that reflect the new regulations in the State.

At the same time, once these regulations are finalized, we estimate that there will be a large number of operations that will need to apply for a permit, described in Section VII.B.4. It is important to take into account that some States will not be making CAFO general permits available to these facilities until three years after the final rule. If EPA were to make the new Part 122 regulations effective shortly after we issue the final rule (January 2003), there would be large numbers of facilities that would be newly defined as CAFOs at that time. They would be required to apply for a permit right away, but States would not be able to issue general permits at that time or a large number of individual permits all at once. This would leave the facilities potentially in

the detrimental position of being unpermitted dischargers.

To avoid this situation, EPA proposes that the revisions to the CAFO definition in part 122 (including, for example, changes to the threshold number of animals to qualify as a CAFO and other changes such as the elimination of the 25-year, 24-hour storm exemption) would not take effect until three years after publication of the final rules. See proposed section 122.23(f). We expect, therefore, that these changes would not take effect until approximately January, 2006. Operations that are brought within the regulatory definition of a CAFO for the first time under these regulatory revisions would not be defined as CAFOs under final and effective regulations until that date.

EPA also considered an alternate approach in which the effective date for the part 122 revisions would be different in each State, depending on when the State actually adopted and got approval for the changes and issued general permits. An advantage of this approach would be that the new regulations would potentially be effective at an earlier date, i.e., before January 2006, in some States. EPA is not proposing this approach, however. We decided that it would be preferable to provide one uniform effective date for these particular revisions, which would provide necessary clarity and consistency to the national NPDES program for CAFOs. EPA does seek comment, however, on which approach would be preferable to adopt in the final regulations. States, however, are free to implement more stringent requirements, and may choose to implement the revised CAFO definition at an earlier date.

It should be noted that EPA is proposing this delayed effective date only for the proposed regulatory changes that affect which operations would be defined as CAFOs. There is no need to delay the effective date of any of the other revisions EPA is proposing to the CAFO regulations at 40 CFR part 122, such as those that specify land application requirements and other requirements. These other revisions to the part 122 regulations would become effective 60 days after publication of the final regulations (January 2003). For any operation that is a CAFO according to the current definition and that is being permitted after that date, or having its permit renewed, the permit would be developed under these new part 122 provisions.

EPA is proposing that the revised effluent guidelines, once promulgated as final regulations, would be effective 60 days after promulgation. The 1989 statutory deadline for meeting BAT has long passed, and we do not believe there is any reason why permit writers could not begin incorporating the revised effluent guidelines into permits beginning 60 days after promulgation.

If a CAFO submits a timely application for a permit renewal, but has not received a decision on that application prior to the expiration date of the original permit, then the original permit would be administratively ''continued'' until there is a decision from the permit authority on the new application (in EPA-administered States and States with comparable administrative procedure laws). If that continuance lasts beyond the date that is the effective date of the revised NPDES regulations and effluent guidelines, then the CAFO's new permit would reflect both sets of new regulations.

EPA also proposes to adopt specific timing requirements in the permit with respect to the CAFO's development of PNPs. As described in Section VIII, EPA proposes to establish BAT as encompassing the following timing requirements: (1) for all new permittees and for applicants who hold existing individual permits, compliance with the PNP would be an immediate requirement of the permit. Therefore, the draft PNP must be submitted to the permit authority along with the permit application or NOI; the final PNP must be adopted by the permittee within 90 days of being permitted; (2) for applicants who are authorized under an existing general permit, the permittee must develop a Permit Nutrient Plan within 90 days of submittal of the NOI; and (3) the PNP for all CAFOs would need to include milestones for implementation. This time is necessary because, while operators can begin preparing necessary data, it would be difficult to develop a PNP before the permit authority issues a final permit that specifies the terms and conditions of the permit. (Operators of existing CAFOs with individual NPDES permits, who must submit their draft PNP with the permit application, are expected to reapply for coverage under the revised regulation early enough to provide time to develop its PNP without causing a lapse in coverage.) For facilities that have been designated as CAFOs, the permit writer will develop the implementation schedule in order to provide reasonable time to prepare the PNP.

Prior to the effective date of the revised regulations, State and EPA permit authorities will be issuing permits to facilities that currently meet the definition of a CAFO under the existing regulations or that have been designated as CAFOs. Consistent with the AFO Strategy, discussed in section III.B., during 2000 to 2005 States with authorized NPDES programs are to focus on issuing permits to the largest CAFOs, those with 1,000 AU or greater. In States where EPA is the permit authority, EPA will issue permits to operations defined as CAFOs that are over 300 AU. The permits are valid for a maximum of five years, at which time these facilities would obtain new permits under the revised regulation.

One of the significant changes to the NPDES and ELG regulation for CAFOs will be the requirement to develop and implement Permit Nutrient Plans that are developed, or reviewed and approved, by certified planners. Concern has been raised about the availability of the necessary expertise to develop and certify the plans. EPA believes that there will be sufficient lead time before this regulation is implemented to expect the market to have developed the CNMP and PNP planning expertise and infrastructure because, during this period, CNMPs will be developed under both the USDA voluntary program and EPA's Round I permitting.

For facilities subject to the requirements of the revised regulation, EPA anticipates that during the period between the time this regulation is promulgated and the time it is effective, operators will be able to anticipate the status of their facilities, and therefore can begin gathering data that will be needed for the Permit Nutrient Plan and other requirements, such as soil type, manure sampling, cropping information, and other data needed to calculate the allowable manure application rate. (Note: States are supposed to have adopted their NRCS 590 standard by May 2001.)

EPA also proposes that CAFOs that are new sources may not receive permit coverage until the PNP is developed. In this case, a complete application must include the PNP. The owner or operator of a new facility is expected to design and construct the new facility in a manner that anticipates the ELG and NPDES requirements for manure management, rather than incurring the costs of retrofitting an already constructed facility.

EPA recognizes that some practices such as liners and groundwater wells for beef and dairy operations may take time to implement. The PNP will include a schedule for implementing the provisions of the PNP, including milestones with dates.

Facilities Constructed After the Proposed Regulation is Published. EPA is soliciting comment on whether the revised regulations should apply 60 days after publication of the final rule to facilities that commence operation after that date, even if they would not be defined as a CAFO under the existing rules. Although EPA is proposing to delay for three years the effective date of the proposed regulations for existing facilities that are not currently defined as CAFOs, it is considering whether to require all facilities defined as CAFOs under the final rule that commence operation after the final rule is published to obtain an NPDES permit and comply with the other requirements of the final rule. For example, a dry poultry operation or an animal feeding operation of 501 cattle that is constructed during the three year period after publication of the final rule might be required to comply immediately with the revised regulations rather than remaining outside the scope of the NPDES program until three years after publication of the final rule.

Requiring newly constructed facilities to obtain permits does not pose the same problem as requiring all existing AFOs which are not defined as CAFOs under the current rule to obtain permits immediately after promulgation of the final rule. Once a new definition of a CAFO becomes effective, a large number of existing facilities would need a permit on the same date. EPA expects that most existing facilities will seek coverage under a general permit. However, EPA and authorized States will need some time after the final rule is promulgated to develop those general permits. An existing facility would face the dilemma of either ceasing operations or discharging without a permit if it was required to obtain a permit but none was available. By contrast, new facilities would commence operation over a period of time and present less of a burden on permit authorities. If a general permit was not available, issuing individual permits to the smaller number of newly constructed facilities would present less of a burden. If all else fails, a newly constructed facility could not commence operation until it had a permit. This approach would be consistent with EPA's general approach for regulation of new sources and new dischargers, who are required to obtain an NPDES permit (and comply with any applicable NSPS) prior to commencing operation. See 40 CFR 122.29, 124.60(a). Finally, unlike an existing facility, a newly constructed facility is in a better position to plan its facility to comply with the revised regulations.

If EPA did not delay the effective date for facilities that are constructed after the final rule is published, the rule would address additional sources sooner. On the other hand it would further complicate the regulatory structure because it would temporarily create another category of facilities. EPA solicits comments on whether all provisions of the rule should be effective 60 days after the final rule is published for facilities that are constructed after that date.

D. How Many CAFOs are Likely to be Permitted in Each State and EPA Region?

Tables 9–1 and 9–2 delineate the number of facilities, in each State and EPA Region, that are expected to be affected by either of today's proposed two-tier and three-tier structures, respectively. In both proposed structures, all CAFOs with more than 1,000 AU would be required to apply for a NPDES permit. The differences lie primarily in how the middle-sized operations are affected.

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Table 9-1. Projected Estimated Number of Potential CAFOs Potentially Regulated Under the Three-Tier Structure by Region, State and Size

EPA Region	State	<300 AU		300-1,000 AU		>1,000 AU		Total	
			Regional Subtotal		Regional Subtotal		Regional Subtotal		Regional Subtotal
Region 1	**Connecticut**	0		39		9		48	
	Maine	0		60		8		68	
	Massachusetts	0		41		7		48	
	New Hampshire	0		29		4		33	
	Rhode Island	0		5		0		5	
	Vermont	0		129		15		144	
			0		**303**		**43**		**346**
Region 2	**New Jersey**	0		27		6		33	
	New York	0		514		79		593	
			0		**542**		**85**		**627**
Region 3	**Delaware**	0		332		97		429	
	Maryland	0		437		137		573	
	Pennsylvania	0		628		321		949	
	Virginia	0		551		216		767	
	West Virginia	0		135		75		210	
			0		**2,084**		**845**		**2,929**
Region 4	**Alabama**	0		1,224		557		1,782	
	Florida	0		247		169		416	
	Georgia	0		1,360		834		2,193	
	Kentucky	0		233		179		412	
	Mississippi	0		766		433		1,199	
	N. Carolina	0		1,454		1,218		2,672	
	S. Carolina	0		306		201		508	
	Tennessee	0		265		114		378	
			0		**5,854**		**3,706**		**9,560**
Region 5	**Illinois**	1		461		377		839	
	Indiana	1		455		328		784	
	Michigan	1		345		144		490	
	Minnesota	2		785		496		1,283	
	Ohio	0		369		217		586	
	Wisconsin	3		574		141		718	
			8		**2,988**		**1,704**		**4,700**

EPA Region	State	<300 AU		300-1,000 AU		>1,000 AU		Total	
			Regional Subtotal		Regional Subtotal		Regional Subtotal		Regional Subtotal
Region 6	**Arkansas**	0		1,418		580		1,999	
	Louisiana	0		211		86		297	
	New Mexico	0		30		112		141	
	Oklahoma	0		289		175		464	
	Texas	0		841		675		1,516	
			0		**2,789**		**1,629**		**4,418**
Region 7	**Iowa**	2		1,440		1,318		2,760	
	Kansas	0		188		277		465	
	Missouri	0		449		321		770	
	Nebraska	0		442		641		1,083	
			2		**2,519**		**2,557**		**5,078**
Region 8	**Colorado**	0		121		210		331	
	Montana	0		32		55		87	
	North Dakota	0		35		28		63	
	South Dakota	0		181		177		358	
	Utah	0		123		53		176	
	Wyoming	0		18		24		42	
			0		**509**		**548**		**1,057**
Region 9	**Arizona**	0		30		83		113	
	California	0		956		1,031		1,988	
	Hawaii	0		16		16		33	
	Nevada	0		15		20		35	
			0		**1,017**		**1,151**		**2,168**
Region10	**Alaska**	0		3		1		4	
	Idaho	0		176		151		328	
	Oregon	0		156		72		228	
	Washington	0		320		168		488	
			0		**655**		**392**		**1,047**
Total Potential Permittees		**10**		**19,260**		**12,660**		**31,930**	

Note: An additional 7,000 facilities in the 300 AU to 1,000 AU size category would potentially be subject to the rule, but are projected to file a certification indicating that they do not need to apply for a permit.

Table 9-2. Projected Estimated Number of Potential CAFOs Potentially Regulated Under the Two-Tier Structure by Region, State and Size

EPA Region	State	<500 AU		500-1,000 AU		>1,000 AU		Grand Total	
			Regional Subtotal		Regional Subtotal		Regional Subtotal		Regional Subtotal
Region 1	**Connecticut**	1		22		9		32	
	Maine	1		30		8		39	
	Massachusetts	1		21		7		29	
	New Hampshire	1		15		4		20	
	Rhode Island	0		2		0		3	
	Vermont	3		64		15		82	
			7		**153**		**43**		**204**
Region 2	**New Jersey**	1		15		6		22	
	New York	21		259		79		359	
			22		**274**		**85**		**380**
Region 3	**Delaware**	3		169		97		268	
	Maryland	5		229		137		371	
	Pennsylvania	15		380		320		715	
	Virginia	10		325		216		552	
	West Virginia	1		94		75		170	
			34		**1,197**		**846**		**2,076**
Region 4	**Alabama**	1		719		557		1,278	
	Florida	1		178		170		349	
	Georgia	5		936		833		1,774	
	Kentucky	7		165		179		351	
	Mississippi	1		488		433		922	
	N. Carolina	0		911		1,221		2,133	
	S. Carolina	1		231		202		434	
	Tennessee	0		148		114		261	
			16		**3,776**		**3,710**		**7,502**
Region 5	**Illinois**	14		420		377		811	

EPA Region	State	<500 AU		500-1,000 AU		>1,000 AU		Grand Total	
			Regional Subtotal		Regional Subtotal		Regional Subtotal		Regional Subtotal
	Indiana	6		396		328		730	
	Michigan	9		222		144		375	
	Minnesota	30		621		496		1,147	
	Ohio	3		269		217		489	
	Wisconsin	25		309		141		475	
			87		**2,237**		**1,703**		**4,027**
Region 6	**Arkansas**	1		777		579		1,357	
	Louisiana	0		120		86		206	
	New Mexico	0		26		112		138	
	Oklahoma	0		165		175		340	
	Texas	0		532		676		1,208	
			1		**1,620**		**1,628**		**3,249**
Region 7	**Iowa**	58		1,374		1,318		2,750	
	Kansas	5		182		277		464	
	Missouri	9		323		321		652	
	Nebraska	11		437		640		1,087	
			83		**2,315**		**2,556**		**4,953**
Region 8	**Colorado**	0		81		210		291	
	Montana	0		25		55		80	
	North Dakota	0		27		28		54	
	South Dakota	0		149		177		326	
	Utah	0		65		53		118	
	Wyoming	0		9		24		33	
			0		**355**		**548**		**902**
Region 9	**Arizona**	0		23		83		106	
	California	0		545		1,029		1,574	
	Hawaii	0		10		16		26	
	Nevada	0		8		21		29	
			0		**586**		**1,149**		**1,735**
Region10	**Alaska**	0		2		1		3	
	Idaho	0		97		151		248	
	Oregon	0		82		72		153	
	Washington	0		167		169		336	
			0		**348**		**393**		**741**
Total Potential Permittees		**250**	**250**	**12,860**	**12,860**	**12,660**	**12,660**	**25,770**	**25,770**

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As described in today's preamble, the three-tier structure would affect more facilities because all AFOs with 300 AU or more would be required to do something. However, not all would be required to apply for a permit, and, depending on the vigor with which States and AFOs seek to avoid the conditions defining these facilities as CAFOs, the actual number of permittees could be smaller. EPA projects that a minimum of 4,000 middle-sized facilities and a maximum of 19,000 would apply for a permit under the three-tier structure. By contrast, the proposed two-tier structure would require all 13,000 facilities between 500 AU and 1,000 AU to apply for a permit.

Further, the number of small facilities likely to be designated differs between the two proposed structures. Under the three-tier structure, EPA expects very few AFOs to be designated, potentially 10 per year nationally. Under the two-tier structure, however, this number is likely to rise to 50 per year, given that AFOs from 300 AU to 499 AU have the potential to generate significant quantities of manure that, if not properly managed, may lead the facility to be a significant contributor of pollution to the waters.

E. Funding Issues

While most CAFO owners and operators are interested in taking appropriate measures to protect and preserve the environment, there are legitimate concerns over the costs of doing so. While EPA's cost analysis indicates that this rule is affordable, some businesses in some locales may experience economic stress. (See Section X). Further, concern has been expressed as to whether facilities below 1,000 AU that become CAFOs due to the changes in this proposed rulemaking may potentially cause operations to lose cost-share money available under EPA's Section 319 Nonpoint Source Program and USDA's Environmental Quality Incentive Program (EQIP). Once a facility is considered a point source under NPDES, the operation is not eligible for cost sharing under the Section 319 nonpoint source program. However, the USDA EQIP program is in fact available to most facilities, and being a permitted CAFO is not a reason for exclusion from the EQIP program. EQIP funds may not be used to pay for construction of storage facilities at operations with greater than 1,000 USDA animal units; however, EQIP is available to these facilities for technical assistance and financial assistance for other practices. One USDA animal unit equals 1,000 pounds of live weight of any given livestock species or any combination of livestock species. (The approximate number of animal equivalents would be: 1,000 head of beef; 741 dairy cows; 5,000 swine, 250,000 layers; and 500,000 broilers).

To this end, EPA anticipates that State and Federal Agencies will facilitate compliance with this rule by providing technical assistance and funding for smaller CAFOs, as available.

F. What Provisions are Made for Upset and Bypass?

A recurring issue of concern has been whether industry guidelines should include provisions authorizing noncompliance with effluent limitations during periods of ''upsets'' or ''bypasses''. An upset, sometimes called an ''excursion,'' is an unintentional noncompliance occurring for reasons beyond the reasonable control of the permittee. It has been argued that an upset provision is necessary in EPA's effluent limitations because such upsets will inevitably occur even in properly operated control equipment. Because technology based limitations require only what the technology can achieve, it is claimed that liability for such situations is improper. When confronted with this issue, courts have disagreed on whether an explicit upset exemption is necessary, or whether upset incidents may be handled through EPA's exercise of enforcement discretion. Compare *Marathon Oil Co.* v. *EPA,* 564 F.2d 1253 (9th Cir.1977), with *Weyerhaeuser* v. *Costle,* 594 F.2d 1223 (8th Cir. 1979). See also *Sierra Club* v. *Union Oil Co.,* 813 F.2d 1480 (9th Cir. 1987), *American Petroleum Institute* v. *EPA,* 540 F.2d 1023 (10th Cir. 1976), *CPC International, Inc.* v. *Train,* 540 F.2d 1320 (8th Cir. 1976), and *FMC Corp.* v. *Train,* 539 F.2d 973 (4th Cir. 1976).

A bypass, on the other hand, is an act of intentional noncompliance during which waste treatment facilities are circumvented because of an emergency situation. EPA has in the past included bypass provisions in NPDES permits. EPA has determined that both upset and bypass provisions should be included in NPDES permits and has promulgated permit regulations that include upset and bypass permit provisions. See 40 CFR 122.41. The upset provision establishes an upset as an affirmative defense to prosecution for violation of, among other requirements, technology-based effluent limitations. The bypass provision authorizes bypassing to prevent loss of life, personal injury, or severe property damage. Consequently, although permittees in the offshore oil and gas industry will be entitled to upset and bypass provisions in NPDES permits, this regulation does not address these issues.

G. How Would an Applicant Apply for Variances and Modifications to Today's Proposed Regulation?

Once this regulation is in effect, the effluent limitations must be applied in all NPDES permits thereafter issued to discharges covered under this effluent limitations guideline subcategory. The CWA, however, provides certain variances from BAT and BCT limitations. Under 301(l), the only variance available for discharges from the production area is an FDF variance under 301(m). For the land application area, 301(g) variances don't apply because EPA is not setting BAT effluent limitations for the five pollutants to which that provision applies. 301(c) and FDF variances are available for effluent limitations covering the land application area.

The Fundamentally Different Factors (FDF) variance considers those facility specific factors which a permittee may consider to be uniquely different from those considered in the formulation of an effluent guideline as to make the limitations inapplicable. *An FDF variance must be based only on information submitted to EPA during the rulemaking establishing the effluent limitations from which the variance is being requested, or on information the applicant did not have a reasonable opportunity to submit during the rulemaking process for these effluent limitations guidelines.* If fundamentally different factors are determined, by the permitting authority (or EPA), to exist, the alternative effluent limitations for the petitioner must be no less stringent than those justified by the fundamental difference from those facilities considered in the formulation of the specific effluent limitations guideline of concern. The alternative effluent limitation, if deemed appropriate, must not result in non-water quality environmental impacts significantly greater than those accepted by EPA in the promulgation of the effluent limitations guideline. FDF variance requests with all supporting information and data must be received by the permitting authority within 180 days of publication of the final effluent limitations guideline (Publication date here). The specific regulations covering the requirements for and the administration of FDF variances are found at 40 CFR 122.21(m)(1), and 40 CFR part 125, subpart D.

X. What Are the Costs and Economic Impacts of the Proposed Revisions?

A. Introduction and Overview

This section presents EPA's estimates of the costs and economic impacts that would occur as a result of today's proposed regulations. Costs and economic impacts are evaluated for each commodity sector, including the beef, veal, heifer, dairy, swine, broiler, turkey and egg laying sectors. A description of each of the ELG technology options and the NPDES scenarios considered by EPA, and the rationale for selecting the proposed BAT Option and NPDES Scenario, are provided in Sections VII and VIII of this document. Detailed information on estimated compliance costs are provided in the Development Document for the Proposed Revisions to the National Pollutant Discharge Elimination System Regulation and the Effluent Guidelines for Concentrated Animal Feeding Operations (referred to as the ''Development Document''). EPA's detailed economic assessment can be found in Economic Analysis of the Proposed Revisions to the National Pollutant Discharge Elimination System Regulation and the Effluent Guidelines for Concentrated Animal Feeding Operations (referred to as ''Economic Analysis''). EPA also prepared the Environmental and Economic Benefit Analysis of the Proposed Revisions to the National Pollutant Discharge Elimination System Regulation and the Effluent Guidelines for Concentrated Animal Feeding Operations (''Benefits Analysis'') in support of today's proposal. These documents are available at EPA's website at *http://www.epa.gov/owm/afo.htm.*

This section presents EPA's estimate of the total annual incremental costs and the economic impacts that would be incurred by the livestock and poultry industry as a result of today's proposed rule. This section also discusses EPA's estimated effects to small entities and presents the results of EPA's cost-effectiveness and cost-benefit analysis. All costs presented in this document are reported in 1999 pre-tax dollars (unless otherwise indicated).

B. Data Collection Activities

1. Sources of Data To Estimate Compliance Costs

As part of the expedited approach to this rulemaking, EPA has chosen not to conduct an industry-wide survey of all CAFOs using a Clean Water Act Section 308 questionnaire. Rather, EPA is relying on existing data sources and expertise provided by the U.S. Department of Agriculture (USDA), industry, State agriculture extension agencies, and several land grant universities. More detailed information on the data used for this analysis can be found in the Development Document and also the Economic Analysis.

EPA collected and evaluated data from a variety of sources. These sources include information compiled through EPA site visits to over 100 animal confinement operations and information from industry trade associations, government agencies, and other published literature. EPA also received information from environmental groups such as the Natural Resources Defense Council and the Clean Water Network. The Agency contacted university experts, state cooperatives and extension services, and state and EPA regional representatives to identify facilities for site visits. EPA also attended USDA-sponsored farm tours and site visits arranged by other groups, as well as industry, academic, and government conferences.

EPA obtained data and information from several agencies in USDA, including the National Agricultural Statistics Service (NASS), Natural Resources Conservation Service (NRCS), the Animal and Plant Health Inspection Service (APHIS), and the Economic Research Service (ERS). The collected data include statistical survey information and published reports.

EPA gathered information from a wide range of published NASS reports, including annual data summaries for each commodity group. USDA's NASS is responsible for objectively providing important, usable, and accurate statistical information and data support services on the structure and activities of agricultural production in the United States. Each year NASS conducts surveys and prepares reports covering virtually every facet of U.S. agricultural production. The primary sources of data are animal production facilities in the United States. NASS collects voluntary information using mail surveys, telephone and in-person interviews, and field observations. NASS is also responsible for conducting a Census of Agriculture.

EPA's main source of primary USDA data containing farm level descriptive information is USDA's Census of Agriculture (Census). USDA's Census is a complete accounting of United States agricultural production and is the only source of uniform, comprehensive agricultural data for every county in the nation. The Census is conducted every 5 years by NASS. The Census includes all farm operations from which $1,000 or more of agricultural products are produced and sold. The most recent Census reflects calendar year 1997 conditions. This database is maintained by USDA. Data used for this analysis were compiled with the assistance of staff at USDA's NASS. (USDA periodically publishes aggregated data from these databases and also compiles customized analyses of the data to members of the public and other government agencies. In providing such analyses, USDA maintains a sufficient level of aggregation to ensure the confidentiality of any individual operation's activities or holdings.)

USDA's NRCS publishes the Agricultural Waste Management Field Handbook, which is an agricultural engineering guidance manual that explains general waste management principles and provides detailed design information for particular waste management systems. USDA's Handbook reports specific design information on a variety of farm production and waste management practices at different types of feedlots. The Handbook also reports runoff calculations under normal and peak precipitation as well as information on manure and bedding characteristics. EPA used this information to develop its cost and environmental analyses. NRCS personnel also contributed technical expertise in the development of EPA's estimates of compliance costs and environmental assessment framework by providing EPA with estimates of manure generation in excess of expected crop uptake. This information is provided in the record that supports this rulemaking.

NRCS also compiled and performed analyses on Census data that EPA used for its analyses. These data identify the number of feedlots, their geographical distributions, and the amount of cropland available to land apply animal manure generated from their confined feeding operations (based on nitrogen and phosphorus availability relative to crop need).

EPA gathered information from several reports on the livestock and poultry industries from the National Animal Health Monitoring System (NAHMS). USDA's APHIS provides leadership in ensuring the health and care of animals and plants, improving agricultural productivity and competitiveness, and contributing to the national economy and public health. One of its main responsibilities is to enhance the care of animals. In 1983, APHIS initiated the NAHMS as an information-gathering program to collect, analyze, and disseminate data on animal health, management, and productivity. NAHMS conducts national studies to gather data and generate

descriptive statistics and information from data collected by other industry sources.

USDA's ERS provides economic analyses on efficiency, efficacy, and equity issues related to agriculture, food, the environment, and rural development to improve public and private decision-making. EPA's analysis of economic impacts at a model CAFO references a wide range of published ERS reports and available farm level statistical models. ERS also maintains farm level profiles of cost and returns compiled from NASS financial data.

Databases and reports containing the information and data used by EPA in support of this proposed rule are available in the rulemaking record.

2. Sources of Data To Estimate Economic Impacts

To estimate economic impacts, EPA used farm level data from USDA, industry, and land grant universities. The major source of primary USDA data on farm financial conditions is from the Agricultural Resources Management Study (ARMS). ARMS is USDA's primary vehicle for data collection on a broad range of issues about agricultural production practices and costs. These data provide a national perspective on the annual changes in the financial conditions of production agriculture.

USDA's ARMS data provide aggregate farm financial data, which EPA used for its cost impact analysis. The ARMS data provide complete income statement and balance sheet information for U.S. farms in each of the major commodity sectors, including those affected by the proposed regulations. The ARMS financial data span all types of farming operations within each sector, including full-time and part-time producers, independent owner operations and contract grower operations, and confinement and non-confinement production facilities.

ERS provided aggregated data for select representative farms through special tabulations of the ARMS data that differentiate the financial conditions among operations by commodity sector, facility size (based on number of animals on-site) and by major producing region for each sector. The 1997 ARMS data also provide corresponding farm level summary information that matches the reported average financial data to both the total number of farms and the total number of animals for each aggregated data category. As with the Census data, ERS aggregated the data provided to EPA to preserve both the statistical representativeness and confidentiality of the ARMS survey data. ARMS data used for this analysis are presented in the Economic Analysis and are available in the rulemaking record.

EPA obtained additional market data on the U.S. livestock and poultry industries as a whole from a wide variety of USDA publications and special reports. These include: Financial Performance of U.S. Commercial Farms, 1991–1994; USDA Baseline Projections 2000, Food Consumption, Prices and Expenditures, 1970–1997; Agricultural Prices Annual Summary; annual NASS statistical bulletins for these sectors; and data and information reported in Agricultural Outlook and ERS's Livestock, Dairy, and Poultry Situation and Outlook reports. Other source material is from ERS's cost of production series reports for some sectors and trade reports compiled by USDA's Foreign Agricultural Service (FAS). Information on the food processing segments of these industries is from the U.S. Department of Commerce's Census of Manufacturers data series. Industry information is also from USDA's Grain Inspection Packers and Stockyards Administration (GIPSA).

Industry and the associated trade groups also provided information for EPA's cost and market analyses. In particular, the National Cattlemen's Beef Association (NCBA) conducted a survey of its membership to obtain financial statistics specific to cattle feeding operations. EPA used these and other data to evaluate how well the ARMS data for beef operations represent conditions at cattle feedyards. EPA also obtained industry data from the National Milk Producers Federation (NMPF) and the National Pork Producers Council (NPPC).

EPA also used published research by various land grant universities and their affiliated research organizations, as well as information provided by environmental groups.

Databases and reports containing the information and data provided to and used by EPA in support of this proposed rule are available in the rulemaking record.

C. Method for Estimating Compliance Costs

1.Baseline Compliance

For the purpose of this analysis, EPA assumes that all CAFOs that would be subject to the proposed regulations are currently in compliance with the existing regulatory program (including the NPDES regulations and the effluent limitations guidelines and standards for feedlots) and existing state laws and regulations. As a practical matter, EPA recognizes that this is not true, since only 2,500 operations out of an estimated 12,700 CAFOs with more than 1,000 AU have actually obtained coverage under an NPDES permit and the remainder may in fact experience additional costs to comply with the existing requirements. EPA has not estimated these additional costs in the analysis that is presented in today's preamble because the Agency did not consider these costs part of the incremental costs of complying with today's proposed rule.

To assess the incremental costs attributable to the proposed rules, EPA evaluated current federal and state requirements for animal feeding operations and calculated compliance costs of the proposed requirements that exceed the current requirements. Operations located in states that currently have requirements that meet or exceed the proposed regulatory changes would already be in compliance with the proposed regulations and would not incur any additional cost. These operations are not included as part of the cost analysis. A review of current state waste management requirements for determining baseline conditions is included in the Development Document and also in other sections of the record (See State Compendium: Programs and Regulatory Activities Related to Animal Feeding Operations compiled by EPA and available at http://www.epa.gov/owm/afo.htm#Compendium).

EPA also accounted for current structures and practices that are assumed to be already in place at operations that may contribute to compliance with the proposed regulations. Additional information is also provided in the following section (X.C.2(a)). This information is also provided in the Development Document.

2. Method for Estimating Incremental CAFO Compliance Costs

a. *Compliance Costs to CAFO Operators.* For the purpose of estimating total costs and economic impacts, EPA calculated the costs of compliance for CAFOs to implement each of the regulatory options being considered (described in Section VIII of this preamble). EPA estimated costs associated with four broad cost components: nutrient management planning, facility upgrades, land application, and technologies for balancing on-farm nutrients. Nutrient management planning costs include manure and soil testing, record keeping, monitoring of surface water and groundwater, and plan development. Facility upgrades reflect costs for

manure storage, mortality handling, storm water and field runoff controls, reduction of fresh water use, and additional farm management practices. Land application costs address agricultural application of nutrients and reflect differences among operations based on cropland availability for manure application. Specific information on the capital costs, annual operating and maintenance costs, start-up or first year costs, and also recurring costs assumed by EPA to estimate costs and impacts of the proposed regulations is provided in the Development Document.

EPA evaluated compliance costs using a representative facility approach based on more than 170 farm level models that were developed to depict conditions and to evaluate compliance costs for select representative CAFOs. The major factors used to differentiate individual model CAFOs include the commodity sector, the farm production region, and the facility size (based on herd or flock size or the number of animals on-site). EPA's model CAFOs primarily reflect the major animal sector groups, including beef cattle, dairy, hog, broiler, turkey, and egg laying operations. Practices at other subsector operations are also reflected in the cost models, such as replacement heifer operations, veal operations, flushed caged layers, and hog grow- and farrow-finish facilities. EPA used model facilities with similar waste management and production practices to depict operations in regions that were not separately modeled.

Another key distinguishing factor incorporated into EPA's model CAFOs includes information on the availability of crop and pasture land for land application of manure nutrients. For this analysis, nitrogen and phosphorus rates of land application are evaluated for three categories of cropland availability: Category 1 CAFOs are assumed to have sufficient cropland for all on-farm nutrients generated, Category 2 CAFOs are assumed to have insufficient cropland, and Category 3 CAFOs are assumed to have no cropland. EPA used 1997 information from USDA to determine the number of CAFOs within each category. This information takes into account which nutrient (nitrogen or phosphorus) is used as the basis to assess land application and nutrient management costs.

For Category 2 and Category 3 CAFOs, EPA evaluated additional technologies that may be necessary to balance nutrients. EPA evaluated additional technologies that reduce off-site hauling costs associated with excess on-farm nutrients, as well as to address ammonia volatization, pathogens, trace metals, and antibiotic residuals. These technologies may include Best Management Practices (BMPs) and various farm production technologies, such as feed management strategies, solid-liquid separation, composting, anaerobic digestion, and other retrofits to existing technologies. EPA considered all these technologies for identification of ''best available technologies'' under the various options for BAT described in Section VIII.

EPA used soil sample information compiled by researchers at various land grant universities to determine areas of phosphorus and nitrogen saturation, as described in the Development Document. This information provides the basis for EPA's assumptions of which facilities would need to apply manure nutrients on a phosphorus- or nitrogen-based standard.

EPA's cost models also take into account other production factors, including climate and farmland geography, land application and waste management practices and other major production practices typically found in the key producing regions of the country. Model facilities reflect major production practices used by larger confined animal farms, generally those with more than 300 AU. Therefore, the models do not reflect pasture and grazing type farms, nor do they reflect typical costs to small farms. EPA's cost models also take into account practices required under existing state regulations and reflect cost differences within sectors depending on manure composition, bedding use, and process water volumes. More information on the development of EPA's cost models is provided in the Development Document.

To estimate aggregate incremental costs to the CAFO industry from implementing a particular technology option, EPA first estimated the total cost to a model facility to employ a given technology, including the full range of necessary capital, annual, start-up, and recurring costs. Additional detailed information on the baseline and compliance costs attributed to model CAFOs across all sectors and across all the technology options considered by EPA is provided in the Development Document.

After estimating the total cost to an individual facility to employ a given technology, EPA then weighted the average facility level cost to account for current use of the technology or management practice nationwide. This is done by multiplying the total cost of a particular technology or practice by the percent of operations that are believed to use this particular technology or practice in order to derive the average expected cost that could be incurred by a model CAFO. EPA refers to this adjustment factor as the ''frequency factor'' and has developed such a factor for each individual cost (i.e. each technology) and cost component (i.e. capital and annual costs) in each of its CAFO models. The frequency factor reflects the percentage of facilities that are, technically, already in compliance with a given regulatory option since they already employ technologies or practices that are protective of the environment. The frequency factor also accounts for compliance with existing federal and state regulatory requirements as well as the extent to which an animal sector has already adopted or established management practices to control discharges.

EPA developed its frequency factors based on data and information from USDA's NRCS and NAHMS, state agricultural extension agencies, industry trade groups and industry-sponsored surveys, academic literature, and EPA's farm site visits. More detailed information on how EPA developed and applied these weighting factors is provided in the Development Document. To identify where farm level costs may be masked by this weighting approach, EPA evaluated costs with and without frequency factors. The results of this sensitivity analysis indicate that the model CAFO costs used to estimate aggregate costs and impacts, as presented in this preamble, are stable across a range of possible frequency factor assumptions.

The data and information used to develop EPA's model CAFOs were compiled with the assistance of USDA, in combination with other information collected by EPA from extensive literature searches, more than 100 farm site visits, and numerous consultations with industry, universities, and agricultural extension agencies. Additional detailed information on the data and assumptions used to develop EPA's model CAFOs that were used to estimate aggregate incremental costs to the CAFO industry is provided in the Development Document.

b. *Compliance Costs to Recipients of CAFO Manure.* To calculate the cost to offsite recipients of CAFO manure under the proposed regulations, EPA builds upon the cropland availability information in the CAFO models, focusing on the two categories of farms that have excess manure nutrients and that need to haul manure offsite for alternative use or to be spread as

fertilizer (i.e., Category 2 and Category 3 CAFOs, where facilities are assumed to have insufficient or no available cropland to land apply nutrients, respectively). EPA also uses this information to determine the number of offsite recipients affected under select regulatory alternatives, shown in Tables 10–3 and 10–4.

USDA defines farm level ''excess'' of manure nutrients on a confined livestock farm as manure nutrient production less crop assimilative capacity. USDA has estimated manure nutrient production using the number of animals by species, standard manure production per animal unit, and nutrient composition of each type of manure. Recoverable manure is the amount that can be collected and disposed by spreading on fields or transporting off the producing farm.

Depending on the nutrient used to determine the rate of manure application (nitrogen or phosphorus), EPA estimates that approximately 7,500 to 10,000 CAFOs with more than 300 AU are expected to generate excess manure. This includes about 2,600 animal feeding operations that have no major crop or pasture land. These estimates were derived from a USDA analysis of manure nutrients relative to the capacity of cropland and pastureland to assimilate nutrients. EPA's estimate does not account for excess manure that is already disposed of via alternative uses such as pelletizing or incineration.

For the purpose of this analysis, EPA assumes that affected offsite facilities are field crop producers who use CAFO manure as a fertilizer substitute. Information on crop producers that currently receive animal manure for use as a fertilizer substitute is not available. Instead, EPA approximates the number of operations that receive CAFO manure and may be subject to the proposed regulations based on the number of acres that would be required to land apply manure nutrients generated by Category 2 and Category 3 CAFOs. EPA assumes that offsite recipients will only accept manure when soil conditions allow for application on a nitrogen basis. Therefore, the manure application rate at offsite acres in a given region is the nitrogen-based application rate for the typical crop rotation and yields obtained in that region. EPA then estimates the number of farms that receive CAFO manure by dividing the acres needed to assimilate excess manure nitrogen by the national average farm size of 487 acres, based on USDA data. The results of this analysis indicate that 18,000 to 21,000 offsite recipients would receive excess CAFO manure.

The costs assessed to manure recipients include the costs of soil testing and incremental recordkeeping. EPA evaluated these costs using the approach described in Section X.C.2(a). Excess manure hauling costs are already included in costs assessed to CAFOs with excess manure. For the purpose of this analysis, EPA has assumed that crop farmers already maintain records documenting crop yields, crop rotations, and fertilizer application, and that crop farmers already have some form of nutrient management plan for determining crop nutrient requirements. EPA estimates, on average, per-farm incremental costs of approximately $540 to non-CAFOs for complying with the offsite certification requirements. This analysis is provided in the Development Document.

3. Cost Annualization Methodology

As part of EPA's costing analysis, EPA converts the capital costs that are estimated to be incurred by a CAFO to comply with the proposed requirements, described in Section X.C.2, to incremental annualized costs. Annualized costs better describe the actual compliance costs that a model CAFO would incur, allowing for the effects of interest, depreciation, and taxes. EPA uses these annualized costs to estimate the total annual compliance costs and to assess the economic impacts of the proposed requirements to regulated CAFOs that are presented in Sections X.E and X.F.

Additional information on the approach used to annualize the incremental compliance costs developed by EPA is provided in Appendix A of the Economic Analysis. EPA uses a 10-year recovery period of depreciable property based on the Internal Revenue Code's guidance for single purpose agricultural or horticultural structures. The Internal Revenue Service defines a single purpose agricultural structure as any enclosure or structure specifically designed, constructed and used for housing, raising, and feeding a particular kind of livestock, including structures to contain produce or equipment necessary for housing, raising, and feeding of livestock. The method EPA uses to depreciate capital investments is the Modified Accelerated Cost Recovery System (MACRS).

EPA assumes a real private discount/interest rate of 7 percent, as recommended by the Office of Management and Budget. EPA also assumes standard federal and average state tax rates across the broad facility size categories to determine an operation's tax benefit or tax shield, which is assumed as an allowance to offset taxable income.

D. Method for Estimating Economic Impacts

To estimate economic impacts under the proposed regulations, EPA examined the impacts across three industry segments: regulated CAFOs, processors, and national markets.

1. CAFO Analysis

EPA estimates the economic impacts of today's proposed regulations using a representative farm approach. A representative farm approach is consistent with past research that USDA and many land grant universities have conducted to assess a wide range of policy issues, including environmental legislation pertaining to animal agriculture. A representative farm approach provides a means to assess average impacts across numerous facilities by grouping facilities into broader categories to account for the multitude of differences among animal confinement operations. Information on how EPA developed its model CAFOs is available in the Economic Analysis. Additional information on EPA's cost models is provided in the Development Document. At various stages in the proposed rulemaking, EPA presented its proposed methodological approach to USDA personnel and to researchers at various land grant universities for informal review and feedback.

Using a representative farm approach, EPA constructed a series of model facilities that reflect the EPA's estimated compliance costs and available financial data. EPA uses these model CAFOs to develop an average characterization for a group of operations. EPA's cost models were described earlier in Section X.C.2(a). From these models, EPA estimates total annualized compliance costs by aggregating the average facility costs across all operations that are identified for a representative group. EPA's cost models are compared to corresponding model CAFOs that characterize financial conditions across differently sized, differently managed, and geographically distinct operations. As with EPA's cost models, EPA's financial models are grouped according to certain distinguishing characteristics for each sector, such as facility size and production region, that may be shared across a broad range of facilities. Economic impacts under a post-regulatory scenario are approximated by extrapolating the average impacts for a given model CAFO across the larger

number of operations that share similar production characteristics and are identified by that CAFO model.

EPA compares its estimated compliance costs at select model CAFOs to corresponding financial conditions at these model facilities. For this analysis, EPA focuses on three financial measures that are used to assess the affordability of the proposed CAFO regulations. These include total gross revenue, net cash income, and debt-to-asset ratio. Financial data used by EPA to develop its financial models are from the 1997 ARMS data summaries prepared by ERS and form the basis for the financial characterization of the model CAFOs. To account for changes in an operation's income under post-compliance conditions, EPA estimated the present value of projected facility earnings, measured as a future cash flow stream. The present value of cash flow represents the value in terms of today's dollars of a series of future receipts. EPA calculated baseline cash flow as the present value of a 10-year stream of an operation's cash flow. EPA projected future earnings from the 1997 baseline using USDA's Agricultural Baseline Projections data. Section 4 of the Economic Analysis provides additional information on the baseline financial conditions attributed to EPA's model CAFO across all sectors as well as information on the data and assumptions used to develop these models.

EPA evaluates the economic achievability of the proposed requirements based on changes in representative financial conditions for select criteria, as described in Section X.F.1. For some sectors, EPA evaluates economic impacts at model CAFOs under varying scenarios of cost passthrough between the CAFO and the latter stages in the food marketing chain, such as the processing and retail sectors. These three scenarios include: zero cost passthrough, full (100 percent) cost passthrough, and partial cost passthrough (greater than zero). Partial cost passthrough values used for this analysis vary by sector and are based on estimates of price elasticity of supply and demand reported in the academic literature. This information is available in the docket.

Table 10–1 lists the range of annualized compliance costs developed for EPA's analysis. Annualized costs for each sector are summarized across the estimated range of minimum and maximum costs across all facility sizes and production regions and are broken out by land use category (described in Section X.C.2). In some cases, ''maximum'' costs reflect average costs for a representative facility that has a large number of animals on-site; EPA's cost models for very large CAFOs are intended to approximate the average unit costs at the very largest animal feeding operations. More detailed annualized costs broken out by production region, land use category, and broad facility size groupings are provided in the Economic Analysis.

Estimated annualized costs shown in Table 10–1 are presented in 1999 dollars (post-tax). All costs presented in today's preamble have been converted using the Construction Cost Index to 1999 dollars from the 1997 dollar estimates that are presented throughout the Development Document and the Economic Analysis. As shown in the table, costs for Category 3 CAFOs may be lower than those for Category 1 CAFOs since facilities without any land do not incur any additional incremental costs related to hauling. EPA has assumed that these operations are already hauling off-site in order to comply with existing requirements. More detailed cost estimates for individual technologies are provided in the Development Document.

To assess the impact of the regulations on offsite recipients of CAFO manure, EPA compares the estimated cost of this requirement to both aggregate and average per farm production costs and revenues (a sales test). This analysis uses EPA's estimated compliance costs and 1997 aggregate farm revenues and production costs reported by USDA. For the purpose of this analysis, EPA assumes that these costs will be incurred by non-CAFO farming operations (i.e., crop producers) that use animal manures as a fertilizer substitute and will not be borne by CAFOs.

TABLE 10–1.—RANGE OF ANNUALIZED MODEL CAFO COMPLIANCE COSTS ($1999, POST-TAX)

Sector	Category 1 [1]		Category 2 [1]		Category 3 [1]	
	Minimum	Maximum	Minimum	Maximum	Minimum	Maximum
	(1999 dollars per model CAFO across all size groups)					
Beef	2,100	986,000	8,500	1,219,800	1,000	896,700
Veal	1,500	8,100	1,100	6,100	1,000	6,000
Heifers	1,700	16,900	2,000	17,900	1,200	11,700
Dairy	5,200	44,600	14,700	67,700	4,200	40,300
Hogs: GF [2]	300	52,300	5,500	63,500	11,400	81,500
Hogs: FF [2]	300	82,900	8,800	100,600	10,000	115,500
Broilers	4,800	36,300	4,400	25,800	3,900	21,400
Layers: wet [3]	300	24,800	2,100	29,300	1,500	18,100
Layers: dry [3]	1,500	59,000	1,400	31,700	1,200	27,600
Turkeys	4,900	111,900	4,800	29,500	3,800	20,800

Source: EPA.
[1] Category 1 CAFOs have sufficient cropland for all on-farm nutrients generated; Category 2 CAFOs have insufficient cropland; and Category 3 CAFOs have no cropland.
[2] ''Hogs: FF'' are farrow-finish (includes breeder and nursery pigs); ''Hogs: GF'' are grower-finish only.
[3] ''Layers: wet'' are operations with liquid manure systems; ''Layers: dry'' are operations with dry systems.

2. Processor Analysis

As discussed in Section VI, EPA estimates that 94 meat packing plants that slaughter hogs and 270 poultry processing facilities may be subject to the proposed co-permitting requirements (Section VI). Given the structure of the beef and dairy sectors and the nature of their contract relationships, EPA expects that no meat packing or processing facilities in these sectors will be subject to the proposed co-permitting requirements. EPA bases these assumptions on data from the Department of Commerce on the number of slaughtering and meat packing facilities in these sectors and information from USDA on the degree of

animal ownership at U.S. farms, as described in Section VI of this document. Additional information is provided in Section 2 of the Economic Analysis. EPA is seeking comment on this assumption as part of today's notice.

EPA did not conduct a detailed estimate of the costs and impacts that would accrue to individual co-permittees. Information on contractual relationships between contract growers and processing firms is proprietary and EPA does not have the necessary market information and data to conduct such an analysis. Market information is not available on the number and location of firms that contract out the raising of animals to CAFOs or on the number and location of contract growers, and the share of production, that raise animals under a production contract. In addition, EPA does not have data on the exact terms of the contractual agreements between processors and CAFOs to assess when a processor would be subject to the proposed co-permitting requirements, and EPA does not have financial data for processing firms or contract growers that utilize production contracts.

EPA, however, believes that the framework used to estimate costs to CAFOs does provide a means to evaluate the possible upper bound of costs that could accrue to processing facilities in those industries where production contracts are more widely utilized and where EPA believes the proposed co-permitting requirements may affect processors. EPA's CAFO level analysis examines the potential share of (pre-tax) costs that may be passed on from the CAFO, based on market information for each sector. Assuming that a share of the costs that accrue to the CAFO are eventually borne by processors, EPA is proposing that this amount approximates the magnitude of the costs that may be incurred by processing firms in those industries that may be affected by the proposed co-permitting requirements. EPA solicits comment on this approach.

To assess the impact of the regulations on processors, EPA compares the passed through compliance costs to both aggregate processor costs of production and to revenues (a sales test). These analyses use estimated compliance costs, cost passthrough estimates, and aggregate revenues and production costs by processing sector. National processor cost and revenue data are from the U.S. Department of Commerce's Census of Manufacturers data series. For some sectors, EPA evaluates the impact of the proposed regulations on processors under two scenarios of cost passthrough from the animal production sectors (described in Section X.D.1), including full cost and partial cost passthrough. More detail on this approach is provided in Section 4 of the Economic Analysis.

This suggested approach does not assume any addition to the total costs of the rule as a result of co-permitting. This approach also does not assume that there will be a cost savings to contract growers as a result of a contractual arrangement with a processing firm. This approach merely attempts to quantify the potential magnitude of costs that could accrue to processors that may be affected by the co-permitting requirements. Due to lack of information and data, EPA has not analyzed the effect of relative market power between the contract grower and the integrator on the distribution of costs, nor the potential for additional costs to be imposed by the integrator's need to take steps to protect itself against liability and perhaps to indemnify itself against such liability through its production contracts. EPA has also not specifically analyzed the environmental effects of co-permitting. EPA has conducted an extensive review of the agricultural literature on market power in each of the livestock and poultry sectors and concluded that there is little evidence to suggest that increased production costs would be prevented from being passed on through the market levels. This information is provided in the rulemaking record. However, as discussed in Section VII.C.5, EPA recognizes that some industry representatives do not support these assumptions of cost passthrough from contract producers to integrators and requests comments on its cost passthrough assumptions, both in general and as they relate to the analysis of processor level impacts under the proposed co-permitting requirements.

EPA's processor analysis does not explicitly account for the few large corporate operations that are vertically integrated, to the extent that the corporation owns and operates all aspects of the operation, from animal production to final consumer product. These operations are covered by EPA's CAFO analysis to the extent that they are captured by USDA's farm survey and are included among EPA's model CAFOs. While the ARMS data may include information on CAFOs that are owned by corporate operations, these data cannot be broken out to create a model specifically designed to represent these operations. Since EPA's analysis uses farm financial data and not corporate data, this analysis does not reflect the ability of corporations to absorb compliance costs that may be incurred at CAFOs that are owned by that entity. EPA expects that its analysis overestimates the impact to corporate entities since revenues of corporate entities are, in most cases, no less than and are likely to exceed those at a privately-owned and operated CAFOs.

3. Market Analysis

EPA's market analysis evaluates the effects of the proposed regulations on national markets. This analysis uses a linear partial equilibrium model adapted from the COSTBEN model developed by USDA's Economic Research Service. The modified EPA model provides a means to conduct a long-run static analysis to measure the market effects of the proposed regulations in terms of predicted changes in farm and retail prices and product quantities. Market data used as inputs to this model are from a wide range of USDA data and land grant university research. EPA consulted researchers from USDA and the land grant universities in the development of this modeling framework. The details of this model are described in Appendix B of the Economic Analysis.

Once price and quantity changes are predicted by the model, EPA uses national multipliers that relate changes in sales to changes in total direct and indirect employment and also to national economic output. These estimated relationships are based on the Regional Input-Output Modeling System (RIMS II) from the U.S. Department of Commerce. This approach is described in Section 4 of the Economic Analysis.

E. Estimated Annual Costs of the Proposed Regulatory Options/Scenarios

As discussed in Section VII and VIII, EPA considered various technology options and also different scope scenarios as part of the development of today's proposed regulations. A summary overview of the ELG options and NPDES scenarios is provided in Table 10–2. More detail is available in Sections VII and VIII of today's preamble.

TABLE 10–2.—SUMMARY DESCRIPTION OF OPTIONS/SCENARIOS CONSIDERED BY EPA

Technology Options (ELG)	
Option 1	N-based land application controls and inspection and recordkeeping requirements for the production area (described in Section VIII.C.3).
Option 2	Same as Option 1, but restricts the rate of manure application to a P-based rate where necessary (depending on specific soil conditions at the CAFO).
Option 3 BAT (Beef/Heifers/Dairy)	Adds to Option 2 by requiring all operations to determine whether the groundwater beneath the production area has a direct hydrologic connection to surface water; if so, requires groundwater monitoring and controls.
Option 4	Adds to Option 3 by requiring sampling of surface waters adjacent to production area and/or land under control of the CAFO to which manure is applied.
Option 5 BAT (Swine/Poultry/Veal)	Adds to Option 2 by establishing a zero discharge requirement from the production area that does not allow for an overflow under any circumstances.
Option 6	Adds to Option 2 by requiring that large hog and dairy operations install and implement anaerobic digestion and gas combustion to treat their manure.
Option 7	Adds to Option 2 by prohibiting manure application to frozen, snow covered or saturated ground.
Regulatory Scope Options (NPDES)	
Scenario 1	Retains existing 3-tier framework and establishes additional requirements (described in Section VII.C.2).
Scenario 2	Same as Scenario 1; operations with 300–1,000 AU would be subject to the regulations based on certain ''risk-based'' conditions (described in VII.C.3.b).
Scenario 3 ''Three-Tier''	Same as Scenario 2, but allows operations with 300–1,000 AU to either apply for a NPDES permit or to certify to the permit authority that they do not meet any of the conditions and thus are not required to obtain a permit.
Scenario 4a ''Two-Tier'' (500 AU)	Establishes 2-tier framework and applies ELG standard to all operations with more than 500 AU.
Scenario 4b	Establishes 2-tier framework and applies ELG standard to all operations with more than 300 AU.
Scenario 5 ''Two-Tier'' (750 AU)	Establishes 2-tier framework and applies ELG standard to all operations with more than 750 AU.
Scenario 6	Retains existing 3-tier framework and establishes a simplified certification process (described in Section VII.C.2).

The ''BAT Option'' refers to EPA's proposal to require nitrogen-based and, where necessary, phosphorus-based land application controls of all livestock and poultry CAFOs (Option 2), with the additional requirement that all cattle and dairy operations must conduct groundwater monitoring and implement controls, if the groundwater beneath the production area has a direct hydrologic connection to surface water (Option 3 BAT), and with the additional requirement that all hog, veal, and poultry CAFOs must also achieve zero discharge from the animal production area with no exception for storm events (Option 5 BAT). For reasons outlined in Section VIII, EPA is not proposing that beef and dairy CAFOs meet the additional requirements under Option 5 or that hog and poultry CAFOs meet the additional requirements under Option 3. Section VIII discusses EPA's basis for the selection of these technology bases for the affected subcateogries.

EPA is jointly proposing two NPDES Scenarios that differ in terms of the manner in which operations are defined as a CAFO. Scenario 4a is to the two-tier alternative that defines as CAFOs all animal feeding operations with more than 500 AU (alternatively, Scenario 5 is the two-tier alternative that defines all animal feeding operations with more than 750 AU as CAFOs). Scenario 3 is three-tier structure that defines as CAFOs all animal feeding operations with more than 1,000 AU and any operation with more than 300 AU, if they meet certain ''risk-based'' conditions, as defined in Section VII. Under Scenario 3, EPA would require all confinement operations with between 300 and 1,000 AU to either apply for a NPDES permit or to certify to the permit authority that they do not meet certain conditions and thus are not required to obtain a permit.

For the purpose of this discussion, the ''two-tier structure'' refers to the combination of BAT Option 3 (beef and dairy subcategories) and BAT Option 5 (swine and poultry subcategories), and NPDES Scenario 4a that covers all operations with more than 500 AU. Where indicated, the two-tier structure may refer to the alternative threshold at 750 AU. The ''three-tier structure'' refers to the combination of ELG Option 3 (beef and dairy subcategories) and Option 5 (swine and poultry subcategories), and NPDES Scenario 3 that covers operations down to 300 AU based on certain conditions. More detail of the technology options considered by EPA is provided in Section VIII. Section VII of this preamble provides additional information on the alternative scope scenarios considered by EPA. EPA did not evaluate costs and economic impacts under the alternative three-tier structure that combines the BAT Option with Scenario 6, as described in Table 10–2.

Under the two-tier structure, EPA estimate that 25,540 CAFOs with more than 500 AU may be defined as CAFOs and subject to the proposed regulations. EPA estimates that 19,100 CAFOs may be defined as CAFOs under the alternative two-tier threshold of 750 AU. Under the three-tier structure, an estimated 31,930 CAFOs would be defined as CAFOs (Table 6–2) and an additional 7,400 operations in the 300 to 1,000 AU size range would need to certify that they do not need to apply for a permit. This total estimate counts operations with more than a single animal type only once. EPA's analysis computes total compliance costs based on the total number of CAFOs in each sector, including mixed operations that have more than 300 or 500 AU of at least one animal type. This approach avoids understating costs at operations with more than one animal type that may incur costs to comply with the proposed requirements for each type of animal that is raised on-site that meets the size threshold for a CAFO or is designated as a CAFO by the permitting authority. Therefore, EPA's compliance costs estimates likely represent the upper bound since costs at facilities with more than a single animal type may, in some cases, be lower due to shared production technologies and practices across all animal types that are produced on-site.

1. Costs to CAFOs Under the Proposed Regulations

Tables 10–3 and 10–4 summarize the total annualized compliance costs to CAFOs attributed to the proposed two-tier structure and three-tier structure. The table shows these costs broken out by sector and by broad facility size group. EPA calculated all estimated costs using the data, methodology and assumptions described in Sections X.B and X.C.

Under the two-tier structure, EPA estimates that the incremental annualized compliance cost to CAFO operators would be approximately $831 million annually (Table 10–3). Table 10–5 shows estimated costs for the two-tier structure at the 750 AU threshold, estimated by EPA to total $721 million annually. Most of this cost (roughly 70 percent) is incurred by CAFOs with more than 1,000 AU. Overall, about one-third of all estimated compliance costs are incurred within the hog sectors.

Under the three-tier structure, EPA estimates that the total cost to CAFO operators would be $925 million annually (Table 10–4). These costs are expressed in terms of pre-tax 1999 dollars. (Post-tax costs are estimated at $573 million and $635 million annually, respectively, and include tax savings to CAFOs. EPA uses estimated post-tax costs to evaluate impacts to regulated facilities, discussed in Section X.F.). Estimated total annualized costs for the three-tier structure include the cost to permitted CAFOs as well as the estimated cost to operations to certify to the permit authority that they do not meet any of the conditions and are thus are not required to obtain a permit. EPA estimates certification costs at about $80 million annually, which covers phosphorus-based PNP costs, facility upgrades, and letters of certification from manure recipient. More information on these costs and how they are calculated is provided in Section 5 of the Economic Analysis.

Estimated total annualized costs shown in Table 10–3 and 10–4 include costs to animal confinement operations that may be designated as CAFOs. Total annualized costs to designated facilities is estimated at less than one million dollars annually (Tables 10–3 and 10–4). As discussed in Section VI, EPA assumes that designation may bring an additional 50 operations each year under the two-tier structure; under the three-tier structure, EPA expects that an additional 10 operations may be designated each year. In this analysis, estimated costs to designated facilities are expressed on an average annual basis over a projected 10-year period. For the purpose of this analysis, EPA assumes that operations that may be designated as CAFOs and subject to the proposed regulations will consist of beef, dairy, farrow-finish hog, broiler and egg laying operations under the two-tier structure. Under the three-tier structure, EPA estimates that fewer operations would be designated as CAFOs, with 10 dairy and hog operations being designated each year, or 100 operations over a 10-year period. Additional information is provided in the Economic Analysis.

TABLE 10–3.—ANNUAL PRE-TAX COST OF TWO-TIER STRUCTURE (BAT OPTION/SCENARIO 4A), $1999

Sector	Number of operations	Total	>1000 AU	500–1000 AU	<500 AU [1]
	(number) [2]	($1999, millions, pre-tax)			
Regulated CAFOs					
Beef	3,080	216.4	191.5	24.7	0.1
Veal	90	0.3	0.03	0.3	NA
Heifer	800	11.6	3.7	7.9	NA
Dairy	3,760	177.6	108.6	65.4	3.6
Hog	8,550	294.0	225.5	67.0	1.5
Broiler	9,780	97.1	55.4	41.6	0.1
Layer	1,640	14.2	9.9	4.3	NA
Turkey	1,280	19.6	10.4	9.2	NA
Subtotal	25,540	830.7	605.0	220.2	5.4
Other Farming Operations					
Offsite Recipients	17,923	9.6	NA	NA	NA
Total	NA	840.3	NA	NA	NA

Source: USEPA. See Economic Analysis. Table 6–2 provides information on affected operations.
Numbers may not add due to rounding. NA = Not Applicable. Option/Scenario definitions provided in Table 10–2.
[1] Cost estimates shown are for designated CAFOs (see Section VI).
[2] "Total" adjusts for operations with more than a single animal type. The number of CAFOs shown includes expected defined CAFOs only and excludes designated facilities.

TABLE 10–4.—ANNUAL PRE-TAX COST OF THREE-TIER STRUCTURE (BAT OPTION/SCENARIO 3), $1999

Sector	Number of operations	Total	>1000 AU	300–1000 AU	<300 AU [1]
	(number) [2]	($1999, million, pre-tax)			
Regulated CAFOs					
Beef	3,210	227.7	191.5	36.2	0.0
Veal	140	0.8	0.03	0.8	0.0
Heifer	980	14.4	3.7	10.7	0.0
Dairy	6,480	224.6	108.6	115.3	0.7
Hog	8,350	306.1	225.5	80.4	0.2

TABLE 10–4.—ANNUAL PRE-TAX COST OF THREE-TIER STRUCTURE (BAT OPTION/SCENARIO 3), $1999—Continued

Sector	Number of operations	Total	>1000 AU	300–1000 AU	<300 AU [1]
Broiler	13,740	116.6	55.4	61.2	0.0
Layer	2,010	15.3	9.9	5.4	0.0
Turkey	2,060	24.9	10.4	14.5	0.0
Subtotal	31,930	930.4	605.0	324.5	0.8
Other Farming Operations					
Offsite Recipients	21,155	11.3	NA	NA	NA
Total	NA	936.7	NA	NA	NA

Source: USEPA. See Economic Analysis. Table 6–2 provides information on affected operations.
Numbers may not add due to rounding. NA = Not Applicable. Option/Scenario definitions provided in Table 10–2.
[1] Cost estimates shown are for designated CAFOs (see Section VI).
[2] "Total" adjusts for operations with more than a single animal type. The number of CAFOs shown includes expected defined CAFOs only and excludes designated facilities.

2. Costs to CAFOs of Alternative Regulatory Options and Scenarios

Alternative regulatory options considered by EPA during the development of today's proposed regulations include various technology options and also different regulatory scope scenarios. Sections VII and VIII present the Agency's rationale for each regulatory decision.

Table 10–5 summarizes the total annualized (pre-tax) costs of alternative technology options for each NPDES scenario and ELG technology basis considered by EPA. As shown in the table, the total estimated costs across these options range from $355 million (Option 1/Scenario 1) to $1.7 billion annually (Option 5, applicable to all the animal sectors, and Scenario 4b). By scenario, this reflects the fact that fewer CAFOs would be affected under Scenario 1 (a total of about 16,400 operations) as compared to Scenario 4b (about 39,300 operations affected). As noted in Section X.E, EPA's estimate of the number of CAFOs and corresponding compliance costs does not adjust for operations with mixed animal types and may be overstated. By technology option, with the exception of Options 1 and 4, costs are evaluated incremental to Option 2 (see Table 10–2). Compared to Option 2, Option 5 costs are greatest. Additional breakout of these costs by sector are provided in the Economic Analysis.

TABLE 10–5.—ANNUALIZED PRE-TAX COSTS FOR THE ALTERNATIVE NPDES SCENARIOS ($1999, MILLION)

Option/Scenario	Scenario 4a "Two-Tier"	Scenaro 2/3 "Three-Tier"	Scenario 1	Scenario 5 >750 AU	Scenario 4b >300 AU
Number of CAFOs [1]	25,540	28,860	16,420	25,770	39,320
Option 1	$432.1	$462.8	$354.6	$384.3	$493.6
Option 2	$548.8	$582.8	$444.4	$484.0	$633.3
Option 3	$746.7	$854.1	$587.0	$649.5	$883.6
Option 4	$903.9	$1,088.2	$707.0	$768.0	$1,121.2
Option 5	$1,515.9	$1,632.9	$1,340.9	$1,390.4	$1,671.3
Option 6	$621.6	$736.9	$501.5	$541.3	$706.6
Option 7	$671.3	$781.9	$542.4	$585.1	$756.6
BAT Option	$830.7	$925.1	$680.3	$720.8	$979.6

Source: USEPA. See Economic Analysis. Cost estimates shown include costs to designated operations.
Numbers may not add due to rounding. NA = Not Applicable. Option/Scenario definitions provided in Table 10–2.
[1] "Total" adjusts for operations with more than a single animal type. The number of CAFOs shown includes expected defined CAFOs only and excludes designated facilities.

3. Costs to Offsite Recipients of CAFO Manure Under the Proposed Regulations

As described in Section VII, EPA is proposing that offsite recipients of CAFO manure certify to the CAFO that manure will be land applied in accordance with proper agriculture practices. As shown in Table 10–3, EPA estimates that 18,000 non-CAFO farming operations will receive manure and therefore be required to certify proper manure utilization under the proposed two-tier structure. Under the alternative three-tier structure, up to 3,000 additional farming operations may be affected. EPA's analysis assumes that affected CAFO manure recipients are mostly field crop producers who use CAFO manure as a fertilizer substitute. EPA's analysis does not reflect manure hauled offsite for alternative uses such as incineration or pelletizing. EPA estimates the annualized cost of this requirement to offsite recipients to be $9.6 to $11.3 million across the co-proposed alternatives (Tables 10–3 and 10–4). This analysis is provided in the Development Document.

Estimated costs to recipients of CAFO manure include incremental recordkeeping and soil tests every 3 years. Conservation Technology Information Center (CTIC) Core 4 survey data suggest an average of 46 percent crop farmers regularly sample their soil. EPA believes crop farmers already maintain records pertaining to crop yields, nutrient requirements, and fertilizer applications. EPA also assumed that crop farmers have a nutrient management plan, though the plan is not necessarily a PNP (Permit Nutrient Plan) or CNMP (Comprehensive Nutrient Management Plan). EPA has evaluated alternative

approaches to ensuring that manure is handled properly, but is not proposing to establish specific requirements for offsite recipients. The costs to offsite recipients do not include the costs of spreading manure at the offsite location or any additional payments made to brokers or manure recipients in counties with excess manure. These costs are likely to be offset by the fertilizer savings and organic value associated with manure. EPA's analysis accounts for the costs incurred by the CAFO for offsite transfer of excess manure in the estimated industry compliance costs, described in Section X.E.1. These costs include the cost of soil and manure sampling at the CAFO site, training for manure applicators, application equipment calibration, and the hauling cost of excess manure generated by the CAFO.

Under the proposed regulations, CAFOs would be required to apply manure on a phosphorus basis where necessary, based on soil conditions, and on a nitrogen basis elsewhere. EPA anticipates that offsite recipients of CAFO manure will only accept manure when soil conditions allow for application on a nitrogen basis. EPA believes this is a reasonable assumption because crop farms are less likely to have a phosphorus buildup associated with long term application of manure. EPA's analysis assumes a nitrogen-based application rate for offsite locations that is identical to the rate used by CAFOs in the same geographic region. A summary of the data and methodology used by EPA to calculate the number of affected offsite recipients and to estimate costs is presented in Section X.C.2(b). EPA solicits comment on the costs and assumptions pertaining to offsite recipients.

F. Estimated Economic Impacts of the Proposed Regulatory Options/Scenarios

This section provides an overview of EPA's estimated economic impacts across four industry segments that are included for this analysis: CAFOs (both existing and new sources), non-CAFO recipients of manure, processors, and consumer markets. More detailed information on each of these analyses is available in the Economic Analysis.

1. CAFO Level Analysis

This section presents EPA's analysis of financial impacts to both existing and new CAFOs that will be affected by the proposed regulations, as well as impacts to offsite recipients of CAFO manure who will also be required to comply with the proposed PNP requirements.

a. *Economic Impacts to Existing CAFOs under the Proposed Regulations.* As discussed in Section X.C.1, EPA's CAFO level analysis examines compliance cost impacts for a representative ''model CAFO.'' EPA evaluates the economic achievability of the proposed regulatory options at existing animal feeding operations based on changes in representative financial conditions across three criteria. These criteria are: a comparison of incremental costs to total revenue (sales test), projected post-compliance cash flow over a 10-year period, and an assessment of an operation's debt-to-asset ratio under a post-compliance scenario. To evaluate economic impacts to CAFOs in some sectors, impacts are evaluated two ways'assuming that a portion of the costs may be passed on from the CAFO to the consumer and assuming that no costs passthrough so that all costs are absorbed by the CAFO.

EPA used the financial criteria to divide the impacts of the proposed regulations into three impact categories. The first category is the affordable category, which means that the regulations have little or no financial impact on CAFO operations. The second category is the moderate impact category, which means that the regulations will have some financial impact on operations at the affected CAFOs, but EPA does not consider these operations to be vulnerable to closure as a result of compliance. The third category is the financial stress category, which means that EPA considers these operations to be vulnerable to closure post-compliance. More information on these criteria is provided in Section 4 of the Economic Analysis.

The basis for EPA's economic achievability criteria for this rulemaking is as follows. USDA's financial classification of U.S. farms identifies an operation with negative income and a debt-asset ratio in excess of 40 percent as ''vulnerable.'' An operation with positive income and a debt-asset ratio of less than 40 percent is considered ''favorable.'' EPA adopted this classification scheme as part of its economic achievability criteria, using net cash flow to represent income. This threshold and cash flow criterion is established by USDA and other land grant universities, as further described in Section 4 of the Economic Analysis. The threshold values used for the cost-to-sales test (3 percent, 5 percent and 10 percent) are those determined by EPA to be appropriate for this rulemaking and are consistent with threshold levels used by EPA to measure impacts of regulations for other point source dischargers (as also documented in the Economic Analysis).

For this analysis, EPA's determination of economic achievability used all three criteria. EPA considered the proposed regulations to be economically achievable for a representative model CAFO if the average operation has a post-compliance sales test estimate within an acceptable range, positive post-compliance cash flow over a 10-year period, and a post-compliance debt-to-asset ratio not exceeding 40 percent. If the sales test shows that compliance costs are less than 3 percent of sales, or if post-compliance cash flow is positive and the post-compliance debt-to-asset ratio does not exceed 40 percent and compliance costs are less than 5 percent of sales, EPA considers the options to be ''Affordable'' for the representative CAFO group. A sales test of greater than 5 percent but less than 10 percent of sales with positive cash flow and a debt-to-asset ratio of less than 40 percent is considered indicative of some impact at the CAFO level, but at levels not as severe as those indicative of financial distress or vulnerability to closure. These impacts are labeled ''Moderate'' for the representative CAFO group. EPA considers both the ''Affordable'' and ''Moderate'' impact categories to be economically achievable by the CAFO.

If (with a sales test of greater than 3 percent) post-compliance cash flow is negative or the post-compliance debt-to-asset ratio exceeds 40 percent, or if the sales test shows costs equal to or exceeding 10 percent of sales, the proposed regulations are estimated to be associated with potential financial stress for the entire representative CAFO group. In such cases, each of the operations represented by that group may be vulnerable to closure. These impacts are labeled as ''Stress.'' EPA considers the ''Stress'' impact category to indicate that the proposed requirements may not be economically achievable by the CAFO, subject to other considerations.

Tables 10–6 and 10–7 present the estimated CAFO level impacts in terms of the number of operations that fall within the affordable, moderate, or stress impact categories for each of the co-proposed alternatives by sector and facility size group. For some sectors, impacts are shown for both the zero and the partial cost passthrough assumptions (discussed more fully below). Partial cost passthrough values vary by sector, as described in Section X.D.1.

EPA's costs model analyzes impacts under two sets of conditions for ELG Option 3. Option 3A assumes that there is a hydrologic connection from groundwater to surface waters at the

CAFO; Option 3 assumes average costs conditions across all operations—both operations with and without a hydrologic link. Based on available data and information, EPA's analysis assumes 24 percent of the affected operations have a hydrologic connection to surface waters. More detail on this assumption may be found in the rulemaking record. EPA solicits comment on this assumption as part of today's proposed rulemaking.

Based on results shown in Tables 10–6 and 10–7, EPA proposes that the regulatory alternatives are economically achievable for all representative model CAFOs in the veal, turkey and egg laying sectors. The proposed requirements under the two-tier structure are also expected to be economically achievable by all affected heifer operations. Furthermore, although operations across most sectors may experience moderate impacts, EPA does not expect moderate financial impacts to result in closure and considers this level of impact to be economically achievable.

In the beef cattle, heifer, dairy, hog and broiler sectors, however, EPA's analysis indicates that the proposed regulations will cause some operations to experience financial stress, assuming no cost passthrough. These operations may be vulnerable to closure by complying with the proposed regulations. Across all sectors, an estimated 1,890 operations would experience financial stress under the two-tier structure and an estimated 2,410 operations would experience stress under the three-tier structure. For both tier structures, EPA estimates that the percentage of operations that would experience impacts under the stress category represent 7 percent of all affected CAFOs or 8 percent of all affected operations in the sectors where impacts are estimated to cause financial stress (cattle, dairy, hog, and broiler sectors).

Tables 10–6 shows results for the two-tier structure at the 500 AU threshold. By sector, EPA estimates that 1,420 hog operations (17 percent of affected hog CAFOs), 320 dairies (9 percent of operations), 150 broiler operations (2 percent), and 10 beef operations (less than 1 percent) would experience financial stress. The broiler and hog operations with these impacts have more than 1,000 AU on-site (i.e., no operations with between 500 and 1,000 AU fall in the stress category). The dairy and cattle operations with stress impacts are those that have a ground water link to surface water. Although not presented here, the results of the two-tier structure at the 750 AU threshold are very similar in terms of number of operations affected. The results of this analysis are presented in the Economic Analysis.

Table 10–7 presents results for the three-tier structure, and show that 1,420 hog operations (17 percent of affected hog CAFOs under that alternative), 610 dairies (9 percent of operations), 330 broiler operations (2 percent), and 50 beef and heifer operations (1 percent) will be adversely impacted. Hog operations with stress impacts all have more than 1,000 AU. Affected broiler facilities include operations with more than 1,000 AU, as well as operations with less than 1,000 AU. Dairy and cattle operations in the stress category are operations that have a hydrologic link from ground water to surface water. Based on these results, EPA is proposing that the proposed regulations are economically achievable.

In the hog and broiler sectors, EPA also evaluated financial impacts with an assumption of cost passthrough. For the purpose of this analysis, EPA assumes that the hog sector could passthrough 46 percent of compliance costs and the broiler sector could passthrough 35 percent of compliance costs. EPA derived these estimates from price elasticities of supply and demand for each sector reported in the academic literature. More detailed information is provided in Section 4 and Appendix C of the Economic Analysis. Assuming these levels of cost passthrough in these sectors, the magnitude of the estimated impacts decreases to the affordable or moderate impact category. Even in light of the uncertainty of cost passthrough (both in terms of whether the operations are able to pass cost increases up the marketing chain and the amount of any cost passthrough), EPA proposes that the proposed regulations will be economically achievable to all hog and broiler operations.

Although EPA's analysis does not consider cost passthrough among cattle or dairy operations, EPA does expect that long-run market and structural adjustment by producers in this sector will diminish the estimated impacts. However, EPA did determine that an evaluation of economic impacts to dairy producers would require that EPA assume cost passthrough levels in excess of 50 percent before operations in the financial stress category would, instead, fall into the affordable or moderate impact category. EPA did not conduct a similar evaluation of estimated impacts to beef cattle and heifer operations.

EPA believes that the assumptions of cost passthrough are appropriate for the pork and poultry sectors. As discussed in Section VI, EPA expects that meat packing plants and slaughtering facilities in the pork and poultry industries may be affected by the proposed co-permitting requirements in today's proposed regulations. Given the efficiency of integration and closer producer-processor linkages, the processor has an incentive to ensure a continued production by contract growers. EPA expects that these operations will be able to pass on a portion of all incurred compliance costs and will, thus, more easily absorb the costs associated with today's proposed rule. This passthrough may be achieved either through higher contract prices or through processor-subsidized centralized off-site or on-site waste treatment and/or development of marketable uses for manure.

EPA recognizes, however, that some industry representatives do not support assumptions of cost passthrough from contract producers to integrators, as also noted by many small entity representatives during the SBREFA outreach process as well as by members of the SBAR Panel. These commenters have noted that integrators have a bargaining advantage in negotiating contracts, which may ultimately allow them to force producers to incur all compliance costs as well as allow them to pass any additional costs down to growers that may be incurred by the processing firm. To examine this issue, EPA conducted an extensive review of the agricultural literature on market power in each of the livestock and poultry sectors and concluded that there is little evidence to suggest that increased production costs would be prevented from being passed on through the market levels. This information is provided in the rulemaking record. Given the uncertainty of whether costs will be passed on, EPA's results are presented assuming some degree of cost passthrough and also no cost passthrough (*i.e.*, the highest level of impacts projected). EPA requests comment on its cost passthrough assumptions. Although EPA does consider the results of both of these analyses in making its determination of economic achievability, EPA's overall conclusions do not rely on assumptions of cost passthrough.

Finally, EPA believes its estimated impacts may be overstated since the analysis does not quantify various cost offsets that are available to most operations. One source of potential cost offset is cost share and technical assistance available to operators for on-site improvements that are available from various state and federal programs, such as the Environmental Quality

Incentives Program (EQIP) administered by USDA. Another source of cost offset is revenue from manure sales, particularly of relatively higher value dry poultry litter. EPA's analysis does not account for these possible sources of cost offsets because the amount of cost offset is likely variable among facilities, depending on certain site-specific conditions. If EPA were to quantify the potential cost offsets as part of its analysis, this would further support EPA's proposed determination that the proposed requirements are economically achievable to affected operations. This analysis and additional supporting documentation is provided in Section 6 of the Economic Analysis.

Appendix D of the Economic Analysis provides results of sensitivity analyses, conducted by EPA, to examine the impact under differing model assumptions. This analysis examines the change in the modeling results from varying the baseline assumptions on gross and net cash income, debt-to-asset ratios as well as other variability factors for model CAFOs. These sensitivity analyses conclude that the results presented here are stable across a range of possible modeling assumptions. EPA also conducted sensitivity analysis of the compliance costs developed for the purpose of estimating CAFO level impacts, as documented in the Development Document.

TABLE 10–6.—IMPACTED OPERATIONS UNDER THE TWO-TIER STRUCTURE (BAT OPTION/SCENARIO 4A)

Sector	Number of CAFOs	(Number of affected operations)					
		Zero cost passthrough			Partial cost passthrough		
		Affordable	Moderate	Stress	Affordable	Moderate	Stress
Fed Cattle	3,080	2,830	240	10	ND	ND	ND
Veal	90	90	0	0	ND	ND	ND
Heifer	800	680	120	0	ND	ND	ND
Dairy	3,760	3,240	200	320	ND	ND	ND
Hogs: GF [1]	2,690	1,710	180	810	2,690	0	0
Hogs: FF [1]	5,860	5,210	30	610	5,860	0	0
Broilers [4]	9,780	1,960	7,670	150	8,610	1,170	0
Layers—Wet [2]	360	360	0	0	ND	ND	ND
Layers—Dry [2]	1,280	1,280	0	0	ND	ND	ND
Turkeys	1,280	1,230	50	0	ND	ND	ND
Total [3]	28,970	18, 580	8,490	1,890	26,840	1,800	330

Source: USEPA. See Economic Analysis. Impact estimates shown include impacts to designated operations.
Numbers may not add due to rounding. ND=Not Determined. Option/Scenario definitions provided in Table 10–2.
Category definitions (''Affordable,'' ''Moderate'' and ''Stress'') are provided in Section X.F.1.
[1] ''Hogs: FF'' are farrow-finish (includes breeder and nursery pigs); ''Hogs: GF'' are grower-finish only.
[2] ''Layers: wet'' are operations with liquid manure systems; ''Layers: dry'' are operations with dry systems.
[3] ''Total'' does not adjust for operations with mixed animal types, for comparison purposes, to avoid understating costs at operations with more than one animal type that may incur costs to comply with the proposed requirements for each type of animal that is raised on-site.

TABLE 10–7.—IMPACTED OPERATIONS UNDER THE THREE-TIER STRUCTURE (BAT OPTION/SCENARIO 3)

Sector	Number of CAFOs	(Number of affected operations)					
		Zero cost passthrough			Partial cost passthrough		
		Affordable	Moderate	Stress	Affordable	Moderate	Stress
Fed Cattle	3,210	2,540	650	20	ND	ND	ND
Veal	140	140	0	0	ND	ND	ND
Heifer	980	800	150	30	ND	ND	ND
Dairy	6,480	5,300	560	610	ND	ND	ND
Hogs: GF [2]	2,650	1,660	190	810	2,650	0	0
Hogs: FF [1]	5,710	5,070	30	610	5,710	0	0
Broilers	13,740	1,850	11,560	330	12,320	1,440	0
Layers—Wet [2]	360	360	0	0	ND	ND	ND
Layers—Dry [2]	1,660	1,660	0	0	ND	ND	ND
Turkeys	2,060	1,950	110	0	ND	ND	ND
Total [3]	37,000	21,300	13,250	2,410	33,410	2,930	660

Source: USEPA. See Economic Analysis. Impact estimates shown include impacts to designated operations.
Numbers may not add due to rounding. ND=Not Determined. Option/Scenario definitions provided in Table 10–2.
Category definitions (''Affordable,'' ''Moderate'' and ''Stress'') are provided in Section X.F.1.
[1] ''Hogs: FF'' are farrow-finish (includes breeder and nursery pigs); ''Hogs: GF'' are grower-finish only.
[2] ''Layers: wet'' are operations with liquid manure systems; ''Layers: dry'' are operations with dry systems.
[3] ''Total'' does not adjust for operations with mixed animal types, for comparison purposes, to avoid understating costs at operations with more than one animal type that may incur costs to comply with the proposed requirements for each type of animal that is raised on-site.

b. *Economic Impacts to Existing CAFOs under Alternative Regulatory Options and Scenarios.* Table 10–8 presents estimated financial stress impacts to model CAFOs under alternative option and scenario combinations, assuming that no costs passthrough. The results shown are aggregated and combine impacts in the cattle sector (including all beef, veal and heifer operations), hog sector (including all phases of production), and poultry

sector (including all broiler, egg laying and turkey operations). Results are shown for Scenario 4a (two-tier), Scenario 3 (three-tier), and Scenario 4b. Results are shown for technology Options 1 through 5. Additional information is available in the Economic Analysis that supports today's rulemaking.

As shown in Table 10–8, the number of potential closures range from 610 operations (Option 1 in combination with all Scenarios) to more than 14,000 potential closures (Option 4/Scenario 4b). Among options, the number of possible closures are highest under the more stringent options, including Options 3A (i.e., requires groundwater controls at operations where there is a determined groundwater hydrologic connection to surface waters), Option 4 (groundwater controls and surface water sampling), and Option 5 (i.e., zero discharge from the animal production area with no exception for storm events). Differences across scenarios reflects differences in the number of affected operations; accordingly, the number of closures is greatest under Scenario 4b that would define as CAFOs all confinement operations with more than 300 AU.

TABLE 10–8.—"STRESS" IMPACTS AT CAFOS UNDER ALTERNATIVE OPTIONS/SCENARIOS

Sector	Number of CAFOs	(Number of operations)						
		Option 1	Option 2	Option 3	Option 3A [1]	Option 4	Option 5	BAT option
BAT Option/NPDES Scenario 4a (>500 AU)								
Cattle	3,960	0	0	0	10	0	30	10
Dairy	3,760	0	0	0	320	0	0	320
Hogs	8,550	610	300	230	310	570	1,420	1,420
Poultry	12,700	0	150	260	100	6,660	150	150
Total [2]	28,970	610	450	490	730	7,230	1,590	1,890
BAT Option/NPDES Scenario 4b (>300 AU)								
Cattle	5,330	0	0	0	90	30	180	90
Dairy	7,140	0	0	0	700	0	0	700
Hogs	14,370	610	300	230	330	570	1,420	1,420
Poultry	18,300	0	320	470	380	11,030	320	320
Total [2]	45,140	610	620	700	1,500	11,630	1,910	2,530
BAT Option/NPDES Scenario 3 (>300 AU with certification)								
Cattle	4,330	0	0	0	50	0	100	50
Dairy	6,480	0	0	0	610	0	0	610
Hogs	8,360	610	300	230	320	570	1,420	1,420
Poultry	17,830	0	330	470	370	10,740	330	330
Total [2]	37,000	610	630	700	1,350	11,310	1,850	2,410

Source: USEPA. See Economic Analysis. Impact estimates shown include impacts to designated operations.
Numbers may not add due to rounding. ND = Not Determined. Option/Scenario definitions provided in Table 10–2.
[1] Option 3A impacts reflect operations where there is a determined groundwater hydrologic connection to surface waters (assumed at 24 percent of the affected operations).
[2] "Total" does not adjust for operations with mixed animal types, for comparison purposes, to avoid understating costs at operations with more than one animal type that may incur costs to comply with the proposed requirements for each type of animal that is raised on-site. The number of CAFOs shown includes expected defined CAFOs only and excludes designated facilities.

c. *Economic Analysis of New CAFOs from NSPS under the Proposed Regulations.* For new sources, EPA is proposing that operations meet performance standards, as specified by the BAT requirements (Option 3 NSPS, beef and dairy subcategories, and Option 5 NSPS, swine and poultry subcategories), with the additional requirement that all new hog and poultry operations also implement groundwater controls where there is a hydrologic link to surface water (Option 3 NSPS, swine and poultry subcategories). Additional information on new source requirements is provided in Section VIII of this document.

In general, EPA believes that new CAFOs will be able to comply at costs that are similar to, or less than, the costs for existing sources, because new sources can apply control technologies more efficiently than sources that need to retrofit for those technologies. New sources will be able to avoid these costs that will be incurred by existing sources. Furthermore, EPA believes that new sources can avoid the costs associated with ground water protection through careful site selection. There is nothing about today's proposal that would give existing operators a cost advantage over new feedlot operators; therefore, new source standards are not expected to present a barrier to entry for new facilities.

EPA's analysis of the NSPS costs indicate that requiring Option 3 for new sources in the beef and dairy subcategories and both Option 3 NSPS and Option 5 NSPS for the swine and poultry subcategories ("Option 5+3 NSPS") would be affordable and would not create any barriers to entry into those sectors. The basis for this determination is as follows. Option 5+3 NSPS is considered equivalent to Option 5 for new sources in terms of cost. EPA is proposing that Option 3 NSPS for beef and dairy subcategories and Option 5 NSPS for swine and poultry subcategories is economically achievable for existing sources. Since the estimated costs for these options are the same as or less expensive than costs for these same options for existing sources, no barriers to entry are created.

Under Option 5+3 NSPS, costs for new sources in the swine and poultry subcategories would be the same as or

less than those for equivalent existing sources (BAT under Option 5), as long as new sources are not sited in areas where there is a hydrologic link to surface water. New operations are not expected to incur costs estimated under Option 3A, which includes groundwater controls, since they are not likely to establish a new operation where there is a hydrologic link to surface waters (and where operating expenses would be more costly). Thus EPA assumes that the costs for Option 5+3 NSPS are the same as those for Option 5 NSPS, which in turn are the same as those for Option 5 BAT. EPA is proposing that Option 5 BAT is economically achievable for existing sources in the swine and poultry subcategories and therefore this same option should be affordable to new sources. Furthermore, because costs to new sources for meeting Option 5 NSPS are no more expensive than the costs for existing sources to meet Option 5 BAT, there should be no barriers to entry.

The estimated costs of Option 3 NSPS for the beef and dairy subcategories are the same as or less than the costs for Option 3 BAT, which includes retrofitting costs. EPA is proposing that Option 3 BAT is economically achievable for existing sources in these sectors. Since Option 3 NSPS is no more expensive than Option 3 BAT, this option should also be economically achievable for new sources and should not create any barriers to entry. In fact, new sources may be able to avoid the cost of implementing groundwater controls through careful site selection, thus their costs may be substantially lower than similar existing sources.

EPA did not consider an option similar to Option 5+3 NSPS for the beef and dairy subcategories (Option 8 NSPS), but found this option to be substantially more expensive than Option 3 BAT for the dairy sector and could create barriers to entry for this sector. Therefore, EPA rejected this option. See Section 5 of the Economic Analysis for more details on these analyses.

d. *Economic Impacts to Offsite Recipients of CAFO Manure of the Proposed Regulations.* As discussed in Section X.D.1, EPA assesses the economic impact to offsite recipients of CAFO manure by comparing the estimated cost of this requirement to both aggregate and average per-farm production costs and revenues. For the purpose of this analysis, EPA assumes that these regulatory costs will be borne by a non-CAFO farming operation that uses animal manures as a fertilizer substitute.

EPA estimates that 17,900 to 21,200 farming operations will incur $9.6 million to $11.3 million in costs associated with requirements for the offsite transfer of CAFO manure (Tables 10–3 and Table 10–4). This translates to an average cost of roughly $540 per recipient. As reported by USDA, farm production expenses in 1997 totaled $150.6 billion nationwide. Revenue from farm sales totaled $196.9 billion. Averaged across the total number of farms, average per-farm costs and revenues were $78,800 and $113,000 in 1997, respectively. Using these data, the ratio of incremental costs to offsite recipients as a share of average operating expenses and average farm revenue is well under one percent. Total estimated compliance costs ($9.6 million to $11.3 million annually) as a share of aggregate farm expenses and sales is also under one percent. This analysis is provided in Section 5 of the Economic Analysis.

2. Processor Level Analysis

As discussed in Section X.D.2, EPA did not conduct a detailed estimate of the costs and impacts that would accrue to individual co-permittees due to lack of data and market information. However, EPA believes that the framework used to estimate costs to CAFO provides a means to evaluate the possible upper bound of costs that could accrue to potential co-permittees, based on the potential share of (pre-tax) costs that may be passed on from the CAFO (described in Section X.D.2). EPA is proposing that this amount approximates the magnitude of the costs that may be incurred by processing firms in those industries that may be affected by the proposed co-permitting requirements.

Table 10–9 presents the results of EPA's analysis. This analysis focuses on the potential magnitude of costs to co-permittees in the pork and poultry sectors only since these are the sectors where the proposed co-permitting requirements could affect processing facilities. However, EPA did not evaluate the potential magnitude of costs to egg and turkey processors because the compliance costs to CAFOs in these industries is projected to be easily absorbed by CAFOs (see Section X.F.1). The results presented in Table 10–9 are for the pork and broiler industries only. EPA also did not evaluate the potential costs to cattle and dairy processors because EPA does not expect that the proposed co-permitting requirements to affect meat packing and processing facilities in these industries, for reasons outlined in Section VI.

The potential magnitude of costs to co-permittees is derived from the amount of cost passthrough assumed in the CAFO level analysis, described in Section X.F.1. For this analysis, two scenarios of cost passthrough to processors are evaluated: partial cost passthrough (greater than zero) and also 100 percent cost passthrough. EPA's partial cost passthrough scenario assumes that 46 percent of all hog compliance costs and that 35 percent of all broiler compliance costs are passed on to the food processing sectors. Based on the results of this analysis, EPA estimates that the range of potential annual costs to hog processors is $135 million (partial cost passthrough) to $306 million (full cost passthrough). EPA estimates that the range of potential annual costs to broiler processors as $34 million (partial cost passthrough) to $117 million (full cost passthrough). These results are shown in Table 10–9 and are expressed in 1999 pre-tax dollars.

To assess the magnitude of impacts that could accrue to processors using this approach, EPA compares the passed through compliance costs to both aggregate processor costs of production and to revenues (a sales test). The results of this analysis are shown in Table 10–9 and are presented in terms of the equivalent 1997 compliance cost as compared to 1997 data from the Department of Commerce on the revenue and costs among processors in the hog and broiler industries. As shown, EPA estimates that, even under full cost passthrough, incremental cost changes are less than two percent and passed through compliance costs as a share of revenue are estimated at less than one percent. EPA solicits comment on this approach. Additional information is provided in the Economic Analysis.

TABLE 10–9.—IMPACT OF PASSED THROUGH COMPLIANCE COSTS UNDER CO-PROPOSED ALTERNATIVES

Sector	Passed through compliance cost		1997 revenues	1997 delivered cost	1997 Passed through cost-to-revenues		Passed through cost-to-delivered cost	
	Partial CPT	100% CPT			Partial CPT	100% CPT	Partial CPT	100% CPT
	($1999, million)		($1997, million)		(percent, comparing costs in $1997)			
Hog Processors								
Two-Tier	135	294	38,500	15,700	0.3%	0.7%	0.8%	1.8%
Three-Tier	141	306			0.4%	0.8%	0.9%	1.9%
Broiler Meat Processors								
Two-Tier	34	97	17,700	9,100	0.2%	0.5%	0.4%	1.0%
Three-Tier	41	117			0.2%	0.6%	0.4%	1.2%

Source: USEPA. 1997 processor revenues and costs are from the Department of Commerce. Option/Scenario definitions provided in Table 10–2. Estimated compliance costs are pre-tax. CPT = Cost passthrough. Partial CPT assumes 46% CPT for the hog sector and 35% CPT for the broiler sector.

3. Market Level Analysis

As discussed in Section X.D.3, EPA's market analysis evaluates the effects of the proposed regulations on commodity prices and quantities at the national level. EPA's market model predicts that the proposed regulations will not result in significant industry-level changes in production and prices for most sectors. Tables 10–10 and 10–11 show predicted farm and retail price changes across the two-tier (500 AU threshold) and three-tier structures. For comparison purposes, the average annual percentage change in price from 1990 to 1998 is shown. Analyses of other technology options and scenarios considered by EPA are provided in the record.

EPA expects that predicted changes in animal production may raise producer prices, as the market adjusts to the proposed regulatory requirements. For most sectors, EPA estimates that producer price changes will rise by less than one percent of the pre-regulation baseline price (Table 10–10). The exception is in the hog sector, where estimated compliance costs slightly exceed one percent of the baseline price. At the retail level, EPA expects that the proposed regulations will not have a substantial impact on overall production or consumer prices for value-added meat, eggs, and fluid milk and dairy products. EPA estimates that retail price increases resulting from the proposed regulations will be under one percent of baseline prices in all sectors, averaging below the rate of general price inflation for all foods (Table 10–11). In terms of retail level price changes, EPA estimates that poultry and red meat prices will rise about one cent per pound. EPA also estimates that egg prices will rise by about one cent per dozen and that milk prices will rise by about one cent per gallon.

Appendix D of the Economic Analysis provides results of sensitivity analyses, conducted by EPA, to examine the impact under differing model assumptions. EPA examined variations in the price elasticities and prices assumed for these industries, based on information reported in the agricultural literature and statistical compendiums. These sensitivity analyses demonstrate that the results presented here are stable across a range of possible modeling assumptions.

TABLE 10–10.—ESTIMATED INCREASES IN FARM PRICES UNDER THE CO-PROPOSED ALTERNATIVES

Option/Scenario	Beef ($/cwt)	Dairy ($/cwt)	Hogs ($/cwt)	Broilers (cents/lb)	Layers (cents/doz.)	Turkeys (cents/lb)
Pre-reg. Avg Price	$68.65	$13.90	$56.41	38.43	72.51	41.66
Avg. Chg 90–98	4.6%	8.0%	15.2%	5.7%	11.5%	4.4%
Two-Tier	0.22	0.06	0.61	0.19	0.14	0.13
Three-Tier	0.24	0.08	0.66	0.23	0.15	0.16

Source: USEPA, except historical data that are from USDA. Option/Scenario definitions provided in Table 10–2.

TABLE 10–11.—ESTIMATED INCREASES IN RETAIL PRICES UNDER THE CO-PROPOSED ALTERNATIVES

Option/Scenario	Beef ($/lb)	Dairy (Index)	Hogs ($/lb)	Broilers (cents/lb)	Layers (cents/doz.)	Turkeys (cents/lb)
Pre-reg. Avg Price	$2.91	145.50	$2.55	156.86	110.11	109.18
Avg. Chg 90–98 (%)	2.3%	2.4%	5.1%	3.0%	7.2%	2.4%
Two-Tier	0.00	0.61	0.01	0.19	0.14	0.13
Three-Tier	0.00	0.78	0.01	0.23	0.15	0.16

Source: USEPA, except historical data that are from USDA. Option/Scenario definitions provided in Table 10–2.

EPA does not expect that the proposed regulations will result in significant changes in aggregate employment or national economic output, measured in terms of Gross Domestic Product (GDP). EPA expects, however, that there will be losses in employment and economic output associated with decreases in animal production due to rising compliance costs. These losses are estimated throughout the entire economy, using

available modeling approaches, and are not attributable to the regulated community only. This analysis also does not adjust for offsetting increases in other parts of the economy and other sector employment that may be stimulated as a result of the proposed regulations, such as the construction and farm services sectors.

Table 10–12 show these predicted changes. Employment losses are measured in full-time equivalents (FTEs) per year, including both direct and indirect employment. Under the two-tier structure (500 AU threshold), EPA estimates that the reduction in aggregate national level of employment is 16,600 FTEs. Under the three-tier structure, EPA estimates total aggregate job losses at 18,900 FTEs. This projected change is modest when compared to total national employment, estimated at about 129.6 million jobs in 1997. EPA's estimate of the aggregate reductions in national economic output is $1.7 billion under the two-tier structure. Under the three-tier structure, EPA estimates the loss to GDP at $1.9 billion. This projected change is also modest when compared to total GDP, estimated at $8.3 trillion in 1997. Additional information is available in the Economic Analysis.

TABLE 10–12.—ESTIMATED DECREASES IN EMPLOYMENT AND ECONOMIC OUTPUT

Option/ Scenario	Beef	Dairy	Hogs	Poultry	Total
Estimated Decreases in Employment (Number of FTEs)					
Two-Tier	4,600	3,200	6,400	2,400	16,600
Three-Tier	4,900	4,100	6,900	3,000	18,900
Estimated Decreases in Economic Output ($GDP)					
Two-Tier	$476	$307	$681	$251	$1,715
Three-Tier	$510	$396	$734	$306	$1,946

Source: USEPA. Option/Scenario definitions provided in Table 10–2. FTE = Full-time equivalent.

G. Additional Impacts

1. Costs to the NPDES Permitting Authority

Additional costs will be incurred by the NPDES permitting authority to alter existing state programs and obtain EPA approval to develop new permits, review new permit applications and issue revised permits that meet the proposed regulatory requirements. Under the proposed rule, NPDES permitting authorities will incur administration costs related to the development, issuance, and tracking of general or individual permits.

State and federal administrative costs to issue a general permit include costs for permit development, public notice and response to comments, and public hearings. States and EPA may also incur costs each time a facility operator applies for coverage under a general permit due to the expenses associated with a Notice of Intent (NOI). These per-facility administrative costs include initial facility inspections and annual record keeping expenses associated with tracking NOIs. Administrative costs for an individual permit include application review by a permit writer, public notice, and response to comments. An initial facility inspection may also be necessary. EPA developed its unit permit costs assumed for this analysis based on information obtained from a state permitting personnel. The cost assumptions used to estimate develop, review, and approve permits and inspect facilities are presented in the Development Document.

EPA assumes that, under the two-tier structure, an estimated 25,590 CAFOs would be permitted. This estimate consists of 24,760 State permits (17,340 General and 7,420 Individual permits) and 1,030 Federal permits (720 General and 310 Individual permits). Under the three-tier structure, an estimated 31,930 CAFOs would be permitted, consisting of 30,650 State permits (21,460 General and 9,190 Individual permits) and 1,280 Federal permits (900 General and 380 Individual permits). Information on the estimated number of permits required under other regulatory alternatives is provided in the Economic Analysis. The basis for these estimates is described in the Development Document that supports this rulemaking.

As shown in Table 10–13, under the two-tier structure, EPA estimates State and Federal administrative costs to implement the permit program to be $6.2 million per year: $5.9 million for states and $350,000 for EPA. Under the three-tier structure, EPA estimates State and Federal administrative costs to implement the permit program to be $7.7 million per year: $7.3 million for states and $416,000 for EPA. EPA expects that the bulk (95 percent) of estimated administrative costs will be incurred by the state permitting authority. EPA has expressed these costs in 1999 dollars, annualized over the 5-year permit life using a seven percent discount rate. The range of costs across each of the regulatory options is $4.2 million to $9.1 million annually (alternatives Scenario 1 and Scenario 4b, respectively). See Table 10–13. (EPA did not estimate permit authority costs under alternative NPDES Scenarios 5 and 6, described in Table 10–2.) This analysis is available in the record and is summarized in Section 10 of the Economic Analysis.

This analysis was conducted to evaluate the costs of the proposed rule to governments, as required under the Unfunded Mandates Reform Act (UMRA), as discussed in Section XIII.C of this preamble.

TABLE 10–13.—ANNUAL STATE AND FEDERAL ADMINISTRATIVE COSTS, $1999

Regulatory scenario	State	Federal	Total
Scenario 1	3,922,990	268,630	4,191,620
Scenario 2	7,233,470	413,060	7,646,530
Scenario 3 (''Three-tier'')	7,279,560	415,600	7,695,160
Scenario 4a (''Two-tier'')	5,910,750	351,090	6,224,040

TABLE 10–13.—ANNUAL STATE AND FEDERAL ADMINISTRATIVE COSTS, $1999—Continued

Regulatory scenario	State	Federal	Total
Scenario 4b	8,645,520	483,010	9,128,530

Source: USEPA. See Economic Analysis. Other supporting documentation is in the Development Document.

2. Community Impacts

As discussed in Section X.F.3, EPA does not expect that the proposed regulations will result in significant increases in retail food prices or reductions in national level employment.

EPA also considered other community level impacts associated with this rulemaking. In particular, EPA considered whether the proposed rule could have community level and/or regional impacts if it substantially altered the competitive position of livestock and poultry production across the nation, or led to growth or reductions in farm production (in- or out-migration) in different regions and communities. Ongoing structural and technological change in these industries has influenced where farmers operate and has contributed to locational shifts between the more traditional production regions and the more emergent, nontraditional regions. Production is growing rapidly in these regions due to competitive pressures from more specialized producers who face lower per-unit costs of production. This is especially true in hog and dairy production.

To evaluate the potential for differential impacts among farm production regions, EPA examined employment impacts by region. EPA concluded from this analysis that more traditional agricultural regions would not be disproportionately affected by the proposed regulations. This analysis is provided in the Economic Analysis.

EPA does not expect that today's proposed requirements will have a significant impact on where animals are raised. On one hand, on-site improvements in waste management and disposal, as required by the proposed regulations, could accelerate recent shifts in production to more nontraditional regions as higher cost producers in some regions exit the market to avoid relatively higher retrofitting associated with bringing existing facilities into compliance. On the other hand, the proposed regulations may favor more traditional production systems where operators grow both livestock and crops, since these operations tend to have available cropland for land application of manure nutrients. These types of operations tend to be more diverse and not as specialized and, generally, tend to be smaller in size. Long-standing farm services and input supply industries in these areas could likewise benefit from the proposed rule, given the need to support on-site improvements in manure management and disposal. Local and regional governments, as well as other non-agricultural enterprises, would also benefit.

3. Foreign Trade Impacts

Foreign trade impacts are difficult to predict, since agricultural exports are determined by economic conditions in foreign markets and changes in the international exchange rate for the U.S. dollar. However, EPA predicts that foreign trade impacts as a result of the proposed regulations will be minor given the relatively small projected changes in overall supply and demand for these products and the slight increase in market prices, as described in Section X.F.3.

Despite its position as one of the largest agricultural producers in the world, historically the U.S. has not been a major player in world markets for red meat (beef and pork) or dairy products. In fact, until recently, the U.S. was a net importer of these products. The presence of a large domestic market for value-added meat and dairy products has limited U.S. reliance on developing export markets for its products. As the U.S. has taken steps to expand export markets for red meat and dairy products, one major obstacle has been that it remains a relatively high cost producer of these products compared to other net exporters, such as New Zealand, Australia, and Latin America, as well as other more established and government-subsidized exporting countries, including the European Union and Canada. Increasingly, however, continued efficiency gains and low-cost feed is making the U.S. more competitive in world markets for these products, particularly for red meat. While today's proposed regulations may raise production costs and potentially reduce production quantities that would otherwise be available for export, EPA believes that any quantity and price changes resulting from the proposed requirements will not significantly alter the competitiveness of U.S. export markets for red meat or dairy foods.

In contrast, U.S. poultry products account for a controlling share of world trade and exports account for a sizable and growing share of annual U.S. production. Given the established presence of the U.S. in world poultry markets and the relative strength in export demand for these products, EPA does not expect that the predicted quantity and price changes resulting from today's proposed regulations will have a significant impact on the competitiveness of U.S. poultry exports.

As part of its market analysis, EPA evaluated the potential for changes in traded volumes, such as increases in imports and decreases in exports, and concluded that volume trade will not be significantly impacts by today's proposed regulations. EPA estimates that imports (exports) will increase (decrease) by less than 1 percent compared to baseline (pre-regulation) levels in each of the commodity sectors. By sector, the potential change in imports compared to baseline trade levels ranges from a 0.02 percent increase in broiler imports to a 0.34 percent increase in dairy product imports. The predicted drop in U.S. exports ranges from a 0.01 percent reduction in turkey exports to a 0.25 percent reduction in hog exports.

H. Cost-Effectiveness Analysis

As part of the process of developing effluent limitations guidelines and standards, EPA typically conducts a cost-effectiveness analysis to compare the efficiencies of regulatory options for removing pollutants and to compare the proposed BAT option to other regulatory alternatives that were considered by EPA. For the purpose of this regulatory analysis, EPA defines cost-effectiveness as the incremental annualized cost of a technology option per incremental pound of pollutant removed annually by that option. The analyses presented in this section include a standard cost-effectiveness (C–E) analysis for toxic pollutants, but also expand upon EPA's more traditional approach to include an analysis of the cost-effectiveness of removing nutrients and sediments. This expanded approach is more appropriate for evaluating the broad range of pollutants in animal manure and wastewater.

The American Society of Agricultural Engineers (ASAE) reports that the constituents present in livestock and poultry manure include: boron, cadmium, calcium, chlorine, copper, iron, lead, magnesium, manganese, molybdenum, nickel, potassium, sodium, sulfur, zinc, nitrogen and phosphorus species, total suspended solids, and pathogens. Of these pollutants, EPA's standard C–E analysis is suitable to analyze only the removal of metals and metallic compounds. EPA's standard C–E analysis does not adequately address removals of nutrients, total suspended solids, and pathogens. To account for the estimated removals of nutrients and sediments under the proposed regulations in the analysis, the Agency has developed an alternative approach to evaluate the pollutant removal effectiveness relative to cost. At this time, EPA has not developed an approach that would allow a similar assessment of pathogen removals. Section 10 of the Economic Analysis describes the methodology, data, and results of this analysis. (EPA did not estimate cost-effectiveness for the alternative NPDES Scenarios 5 and 6, described in Table 10–2.)

For this analysis, EPA has estimated the expected reduction of select pollutants for each of the regulatory options considered. These estimates measure the amount of nutrients, sediments, metals and metallic compounds that originate from animal production areas that would be removed under a post-regulation scenario (as compared to a baseline scenario) and not reach U.S. waters. Additional information on EPA's estimated loadings and removals under post-compliance conditions is provided in the Development Document and the Benefits Analysis that support today's rulemaking.

1. Cost-Effectiveness: Priority Pollutants

For this rulemaking, EPA identified a subset of metallic compounds for use in the C–E

For this rulemaking, EPA identified a subset of metallic compounds for use in the C–E analysis: zinc, copper cadmium, nickel, arsenic, and lead. These six compounds are a subset of all the toxic compounds reported to be present in farm animal manure (varies by animal species). Therefore, if loading reductions of all priority pollutants in manure were evaluated, the proposed regulations would likely be even more cost-effective (i.e., lower cost per pound-equivalent removal).

EPA calculates cost-effectiveness as the incremental annual cost of a pollution control option per incremental pollutant removal. In C–E analyses, EPA measures pollutant removals in toxicity normalized units called ''pounds-equivalent,'' where the pounds-equivalent removed for a particular pollutant is determined by multiplying the number of pounds of a pollutant removed by each option by a toxicity weighting factor. The toxic weighting factors account for the differences in toxicity among pollutants and are derived using ambient water quality criteria. The cost-effectiveness value, therefore, represents the unit cost of removing an additional pound-equivalent of pollutants. EPA calculates the cost-effectiveness of a regulatory option as the ratio of pre-tax annualized costs of an option to the annual pounds-equivalent removed by that option, expressed as the average or incremental cost-effectiveness for that option. EPA typically presents C–E results in 1981 dollars for comparison purposes with other regulations. EPA uses these estimated compliance costs to calculate the cost-effectiveness of the proposed regulations, which include total estimated costs to CAFOs and offsite recipients of CAFO manure (Section X.E) and costs to the permitting authority (Section X.G.1). Additional detail on this approach is provided in Appendix E of the Economic Analysis.

Cost-effectiveness results for select regulatory alternatives are presented in Table 10–14. Results shown in Table 10–14 include the BAT Option (Option 3 for beef and dairy subcategories and Option 5 for the swine and poultry subcategories) and Option 3+5 (both Option 3 and 5 for all subcategories). Options are shown for four CAFO coverage scenarios, including CAFOs with more than 1,000 AU and CAFOs with more than 500 AU (two-tier structure), and operations with more than 300 AU, both under Scenario 4b and as defined under Scenario 3 (three-tier structure). The differences in CAFO coverage provide an upper and lower bound of the analysis to roughly depict the alternative NPDES scenarios. Both incremental and average C–E values are shown.

Incremental cost-effectiveness is the appropriate measure for comparing one regulatory alternative to another for the same subcategory. In general, the lower the incremental C–E value, the more cost-efficient the regulatory option is in removing pollutants, taking into account their toxicity. For this rulemaking, EPA compares the cost-effectiveness across alternative NPDES Scenarios to assess the Agency's decision to define as CAFO operations with more than 500 AU (two-tier structure) and, alternatively, some operations with more than 300 AU (two-tier structure).

As shown in Table 10–14, the BAT Option is the most cost-efficient under each of the co-proposed alternatives. Under both the two-tier (500 AU) and three-tier structures, EPA estimates an incremental cost-effectiveness value of about $30 per pounds-equivalent (lbs.-eq.) removed. This compares to the alternative Scenario 4b that have a higher estimated incremental cost-effectiveness ($76/lbs.-eq., if all CAFOs with more than 1,000 AU are regulated). (Since the change in removals between Scenario 3 and Scenario 4b is zero, the incremental C–E value is ''undefined.'') The BAT Option is also more efficient than requiring Option 3+5 for all subcategories, which has higher costs but results in no additional pollutant removals compared to the BAT Option. This is because the ELG options differ mostly in terms of their monitoring and sampling requirements but establish no additional pollutant controls. (Since the change in removals between the BAT Option and Option 3+5 is zero, the incremental C–E value is undefined.)

The average cost-effectiveness reflects the ''increment'' between no regulation and regulatory options shown. For the BAT Option, EPA estimates an average value at $55 per lbs.-eq. to $58 per lbs.-eq., depending on the proposed tier structure (Table 10–14). These estimated average values are low compared to the alternative NPDES scenarios since the average cost-effectiveness value is higher ($76/lbs.-eq., if all CAFOs with more than 1,000 AU are regulated; $62/lbs.-eq. for all CAFOs with more than 300 AU). This average cost is also low compared to previous ELG rulemakings, where estimated costs have, in some cases, exceeded $100/lbs.-eq. removed. This information is provided in the Economic Analysis. In addition, as shown in Table 10–14, average cost-effectiveness is nearly twice as high under the more stringent Option 3+5 for all subcategories (estimated at more than $100 per lbs.-eq. removed). Costs, but also removals, are lower under the less stringent Option 1 (also referred to as the ''nitrogen-based'' option) compared to other technology options. As described in Section VIII, EPA determined that this option would not represent the best available technology and so chose not to propose it. This analysis, along with additional results for each subcategory and other regulatory alternatives, is provided in Appendix E on the Economic Analysis.

TABLE 10–14.—COST-EFFECTIVENESS RESULTS BY SELECT OPTION/SCENARIO ($1981)

Option	Total annual		Average cost-effectiveness	Incremental cost-effectiveness
	Pound-equivalents removed [1]	Total cost [2]		
	(million pounds)	($ millions)	($/lbs.-eq.)	
"BAT Option" ELG Option 3 (Beef/Dairy) and 5 (Swine/Poultry)				
>1000 AU	5.3	402	76	76
>500 AU "Two-tier"	8.4	491	58	29
Scenario 3 "Three-tier"	9.4	518	55	28
>300 AU	9.4	579	62	ND
ELG Option 3+5 (All Subcategories)				
>1000 AU	5.3	1,047	197	197
>500 AU "Two-tier"	8.4	1,212	144	53
Scenario 3 "Three-tier"	9.4	1,251	133	40
>300 AU	9.4	1,353	144	ND

Source: USEPA. See Economic Analysis. Option/Scenario definitions provided in Table 10–2. ND=Not Determined.
[1] Pound-equivalent removals are calculated from removals estimated by EPA's loadings analysis, described in the Benefits Analysis and the Development Document, adjusting for each pollutants toxic weighting factor (as described in the Economic Analysis).
[1] Costs are pre-tax and indexed to 1981 dollars using the Construction Cost Index.

2. Cost-Effectiveness: Nutrients and Sediments

In addition to conducting a standard C–E analysis for select toxic pollutants (Section X.H.1), EPA also evaluated the cost-effectiveness of removing select non-conventional and conventional pollutants, including nitrogen, phosphorus, and sediments. For this analysis, sediments are used as a proxy for total suspended solids (TSS). This analysis does not follow the methodological approach of a standard C–E analysis. Instead, this analysis compares the estimated compliance cost per pound of pollutant removed to a recognized benchmark, such as EPA's benchmark for conventional pollutants or other criteria for existing treatment, as reported in available cost-effectiveness studies.

The research in this area has mostly been conducted at municipal facilities, including publicly owned treatment works (POTWs) and wastewater treatment plants (WWTPs). Additional information is available based on the effectiveness of various nonpoint source controls and BMPs (Best Management Practices) and other pollutant control technologies that are commonly used to control runoff from agricultural lands. A summary of this literature is provided in the Economic Analysis. Benchmark estimates are used to evaluate the efficiency of regulatory options in removing a range of pollutants and to compare the results for each of the co-proposed tier structures to other regulatory alternatives. This approach also allows for an assessment of the types of management practices that will be implemented to comply with the proposed regulations.

Cost-effectiveness results for select regulatory alternatives are presented in Table 10–15. Results shown in Table 10–15 include the BAT Option (Option 3 for beef and dairy subcategories and Option 5 for the swine and poultry subcategories) and Option 3+5 (both Option 3 and 5 for all subcategories). Options are shown for four CAFO coverage scenarios, including CAFOs with more than 1,000 AU and CAFOs with more than 500 AU (two-tier structure), and operations with more than 300 AU, both under Scenario 4b and as defined under Scenario 3 (three-tier structure). The differences in CAFO coverage provide an upper and lower bound of the analysis to roughly depict the alternative NPDES scenarios.

The values in Table 10–15 are average cost-effectiveness values that reflect the increment between no regulation and the considered regulatory options. All costs are expressed in pre-tax 1999 dollars. Estimated compliance costs used to calculate the cost-effectiveness of the proposed regulations include total estimated costs to CAFOs and offsite recipients of CAFO manure (Section X.E) and costs to the permitting authority (Section X.G.1).

Under the co-proposed tier structures, EPA estimates an average cost-effectiveness of nutrient removal at $4.60 per pound (two-tier) to $4.30 per pound (three-tier) of nitrogen removed. For phosphorus removal, removal costs are estimated at $2.10 to $2.20 per pound of phosphorus removed (Table 10–15). For nitrogen, EPA uses a cost-effectiveness benchmark established by EPA's Chesapeake Bay Program to assess the costs to WWTPs to implement BNR (biological nutrient removal) retrofits. EPA's average benchmark estimate is about $4 per pound of nitrogen removed at WWTPs in four states (MD, VA, PA, and NY), based on a range of costs of $0.80 to $5.90 per pound of nitrogen removed. Using this benchmark, EPA's estimated cost-effectiveness to remove nitrogen under the proposed regulations exceed EPA's average benchmark value, but falls within the estimated range of removal costs. However, EPA's estimated cost-effectiveness to remove phosphorus is lower than benchmark used for phosphorus of roughly $10 per pound, reported in the agricultural research as the costs to remove phosphorus using various nonpoint source controls and management practices. Available data on phosphorus removal costs for industrial point source dischargers are much higher (exceed $100 per pound of phosphorus removed). Based on these results, EPA concludes that these values are cost-effective.

Costs and removals are nearly twice as high under the more stringent Option 3+5 for all subcategories (Table 10–15). Costs and removals are lower under the less stringent Option 1, but EPA chose not to propose Option 1 because it does not represent the best available technology (also described in Section VIII of the preamble).

EPA estimates that the co-proposed thresholds (two-tier and three-tier structures) are more cost-effective compared to alternative AU thresholds, given slightly lower average cost-effectiveness values (Table 10–15). EPA

estimates that the average cost-effectiveness to remove nitrogen is $5.10 per pound of nitrogen removed at a threshold that would regulate as CAFOs all operations with more than 1,000 AU; the average cost-effectiveness is $4.80 per pound of nitrogen removed at the alternative 300 AU threshold (Table 10–15). EPA estimates that the average cost-effectiveness to remove phosphorus is $2.50 per pound and $2.30 per pound of phosphorus removed at the 1,000 AU and 300 AU threshold. EPA also estimates that the co-proposed tier structures are also the most cost-efficient, compared to other alternatives considered by EPA. These results, based on incremental cost-effectiveness values, are provided in the Economic Analysis.

Table 10–15 also shows that the cost to remove sediments under the BAT Option/Scenario is estimated at $0.003 per pound of sediment removal (1999 dollars). This estimated per-pound removal cost is low compared to EPA's POTW benchmark for conventional pollutants. This benchmark measures the potential costs per pound of TSS and BOD (biological nutrient demand) removed for an ''average'' POTW (see 51 FR 24982). Indexed to 1999 dollars, EPA's benchmark costs are about $0.70 per pound of TSS and BOD removed. The average cost-effectiveness of sediment removal under the BAT Option/Scenario is lower than under the alternative options. Option 1 results across the range of NPDES Scenarios are estimated at about $0.05 per-pound removal of sediments. This analysis, along with additional results for each subcategory and other regulatory alternatives, is provided in Appendix E on the Economic Analysis.

TABLE 10–5.—COST-EFFECTIVENESS RESULTS BY SELECT OPTION/SCENARIO ($1999)

Option/Scenario	Total cost [1]	Sediments	Nitrogen	Phosphorus	Sediments	Nitrogen	Phosphorus
	($m 1999)	(million pounds of removals)			(average $ per pound removed		
''BAT Option'' ELG Option 3 (Beef/Dairy) and 5 (Swine/Poultry)							
>1000 AU	$688	209050	136	280	$0.003	$5.1	$2.5
>500 AU ''Two-tier''	840	299708	182	377	0.003	4.6	2.2
>300 AU ''Three-tier''	887	335456	206	425	0.003	4.3	2.1
>300 AU	991	335456	206	425	0.003	4.8	2.3
ELG Option 3+5 (All subcategories							
>1000 AU	1,791	209050	136	280	0.009	13.2	6.4
>500 AU ''Two-tier''	2,074	299708	182	377	0.007	11.4	5.5
>300 AU ''Three-tier''	2,141	335456	206	425	0.006	10.4	5.0
>300 AU	2,316	335456	206	425	0.007	11.2	5.5

Source: USEPA. See Economic Analysis. Option/Scenario definitions provided in Table 10–2. ND=Not Determined.
[1] Costs are pre-tax.

I. Cost-Benefit Analysis

EPA estimated and compared the costs and benefits attributed to the proposed regulations. The cost and benefit categories that the Agency was able to quantify and monetize for the proposed regulations are shown in Table 10–16.

Total social costs of the proposed regulations range from $847 million to $949 million annually, depending on the co-proposed approach (Table 10–16). These costs include compliance costs to industry, costs to recipients of CAFO manure, and administrative costs to States and Federal governments.

Under the two-tier structure, EPA projects that total compliance cost to industry is $831 million per year (pre-tax)/$572 million (post-tax). By comparison, under the three-tier structure, EPA estimates that the cost to industry is $930 million per year (pre-tax)/$658 million (post-tax). Costs to industry include annualized capital costs, operating and maintenance costs, start-up and recurring costs, and also recordkeeping costs. Estimated costs cover four broad categories: nutrient management planning, facility upgrades, land application, and technologies for balancing on-farm nutrients. In addition, under the two-tier structure, EPA estimates that the cost to off-site recipients of CAFO manure is $10 million per year. The administrative cost to State and Federal governments to implement the permit program is $6 million per year. Under the three-tier structure, the annual cost to off-site recipients of manure is $11 million and State and Federal administrative costs are $8 million per year.

EPA estimates that the monetized benefits of the proposed regulations range from $146 million to $182 million annually, depending on the co-proposed approach (Table 10–16). Annual benefits are estimated to range from $146 million to $165 million under the two-tier structure; under the three-tier structure, estimated benefits range from $163 million to $182 million annually. EPA was only able to monetize (*i.e.,* place a dollar value on) a small subset of the range of potential benefits that may accrue under the proposed regulations. Data and methodological limitations restricted the number of benefits categories that EPA was able to reasonably quantify and monetize. The proposed regulations benefits are primarily in the areas of reduced health risks and improved water quality, as shown in Table 10–16. In addition to these monetized benefits, EPA expects that additional benefits will accrue under the regulations, including reduced drinking water treatment costs, reduced odor and air emissions, improved water quality in estuaries, and avoided loss in property value near CAFOs, among other benefits. These benefits are described in more detail in the Benefits Analysis and other supporting documentation provided in the record.

TABLE 10–16.—TOTAL ANNUAL SOCIAL COSTS AND MONETIZED BENEFITS, $1999

[In millions of dollars]

Total social costs	''Two-Tier'' structure (500 AU threshold)	Three-Tier structure (Scenario 3)
Industry Compliance Costs (pre-tax)	830.7	930.4
NPDES Permitting Costs	6.2	7.7
Offsite Recipients of CAFO Manure	9.6	11.3
Total Social Costs	846.5	949.4
Monetized Benefits		
Improved surface water quality	108.5	127.1
Reduced shellfish bed closures	0.2–2.4	0.2–2.7
Reduced fish kills	0.2–0.4	0.2–0.4
Improved water quality in private wells	36.6–53.9	35.4–52.1
Total Monetized Benefits	145.5–165.1	163.0–182.3

J. Initial Regulatory Flexibility Analysis

Pursuant to Section 603 of the Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), the Agency prepared an Initial Regulatory Flexibility Analysis (IRFA) to assess the impacts on small livestock and poultry feeding operations. EPA's IRFA and other supplemental economic analyses, as required under Section 607 of the RFA, are provided in Section 9 of the Economic Analysis. This section summarizes the estimated number of small entities to which the rule will apply and quantitatively describes the effects of the proposed regulations. Other information on EPA's approach for estimating the number of small businesses in these sectors is provided in the Final Report of the Small Business Advocacy Review Panel on EPA's Planned Proposed Rule on National Pollutant Discharge Elimination System (NPDES) and Effluent Limitations Guideline (ELG) Regulations for Concentrated Animal Feeding Operations (referred to as the ''Panel Report''). The Panel Report is available in the rulemaking record, as well as online at http://www.epa.gov/sbrefa. A summary of the Small Business Advocacy Review (SBAR) Panel proceedings and recommendations is provided in Section XII.G of this preamble. Section XIII.B of this preamble summarizes other requirements to comply with the RFA.

1. Definition of Small Business

The Small Business Administration (SBA) defines a ''small business'' in the livestock and poultry sectors in terms of average annual receipts (or gross revenue). SBA size standards for these industries define a ''small business'' as one with average annual revenues over a 3-year period of less than $0.5 million annually for dairy, hog, broiler, and turkey operations; $1.5 million for beef feedlots; and $9.0 million for egg operations. In today's rule, EPA is proposing to define a ''small'' egg laying operation for purposes of its regulatory flexibility assessments as an operation that generates less than $1.5 million in annual revenue. Because this definition of small business is not the definition established under the Regulatory Flexibility Act (RFA), EPA is specifically seeking comment on the use of this alternative definition as part of today's notice of the proposed rulemaking (see Section XIII.B and Section XIV). EPA also has consulted with the SBA Chief Counsel for Advocacy on the use of this alternative definition. EPA believes this definition better reflects the agricultural community's sense of what constitutes a small business and more closely aligns with the small business definitions codified by SBA for other animal operations. A summary of EPA's rationale and supporting analyses pertaining to this alternative definition is provided in the record and in the *Economic Analysis.*

2. Number of Small Businesses Affected under the Proposed Regulations

Table 10–17 shows EPA's estimates of the number of small businesses in the livestock and poultry sectors and the number of small businesses that are expected to be affected by the proposed regulations. The approach used to derive these estimates is described in more detail in Section 9 of the Economic Analysis and also in Sections 4 and 5 of the Panel Report. EPA presented this and other alternative approaches during the SBAR Panel proceedings, as discussed in Section XII.G.2.a of this document. EPA is requesting public comment on this approach.

EPA uses three steps to determine the number of small businesses that may be affected by the proposed regulations. First, EPA identifies small businesses in these sectors by equating SBA's annual revenue definition with the number of animals at an operation. Second, EPA estimates the total number of small businesses in these sectors using farm size distribution data from USDA. Third, based on the regulatory thresholds being proposed, EPA estimates the number of small businesses that would be subject to the proposed requirements. These steps are summarized below.

In the absence of farm or firm level revenue data, EPA identifies small businesses in these sectors by equating SBA's annual revenue definitions of ''small business'' to the number of animals at these operations (step 1). This step produces a threshold based on the number of animals that EPA uses to define small livestock and poultry operations and reflects the average farm inventory (number of animals) that would be expected at an operation with annual revenues that define a small business. This initial conversion is necessary because USDA collects data by farm size, not by business revenue. With the exception of egg laying operations, EPA uses SBA's small business definition to equate the revenue threshold with the number of animals raised on-site at an equivalent small business in each sector. For egg laying operations, EPA uses its alternative revenue definition of small business.

EPA estimates the number of animals at an operation to match SBA's

definitions using SBA's annual revenue size standard (expressed as annual revenue per entity) and USDA-reported farm revenue data that are scaled on a per-animal basis (expressed as annual revenue per inventory animal for an average facility). Financial data used for this calculation are from USDA's 1997 ARMS database. This approach and the data used for this calculation are outlined in Section 9 of the Economic Analysis. The resultant size threshold represents an average animal inventory for a small business. For the purpose of conducting its IRFA for this rulemaking, EPA is evaluating ''small business'' for these sectors as an operation that houses or confines less than: 1,400 fed beef cattle; 200 mature dairy cattle; 1,400 market hogs; 25,000 turkeys; 61,000 layers; or 260,000 broilers (Table 10–17).

EPA then estimates the total number of small businesses in these sectors using facility size distribution data from USDA (step 2). Using the threshold sizes identified for small businesses, identified above, EPA matches these thresholds with the number of operations associated with those size thresholds to estimate the total number of small animal confinement operations in these sectors. Finally, based on the regulatory thresholds being proposed—e.g., operations with more than 500 AU are CAFOs—EPA estimates the number of small businesses that will be subject to the proposed requirements (step 3). The 1997 Census constitutes the primary data source that EPA uses to match the small business thresholds (e.g., a small dairy operation has less than 200 milk cows) to the number of facilities that match that size group (e.g., the number of dairies with less than 200 cows, as reported by USDA). EPA also used other supplemental data, including other published USDA data and information from industry and the state extension agencies.

TABLE 10–17.—NUMBER OF SMALL CAFOS THAT MAY BE AFFECTED BY THE PROPOSED REGULATIONS

Sector	Total annual ($million) revenue [1] (a)	Revenue per head [2] (b)	No. of animals (Avg. U.S.) (c=a/b)	Estimated number of small AFOs	Two-Tier ''Small'' CAFOs	Three-Tier ''Small'' CAFOs
Cattle [3]	1.5	1,060	1,400	106,450	2,280	2,600
Dairy	0.5	2,573	200	109,740	50	50
Hogs	0.5	363	1,400	107,880	300	300
Broilers	0.5	2	260,000	34,530	9,470	13,410
Egg Layers	9.0	25	365,000	ND	ND	ND
	1.5	.....	61,000	73,710	200	590
Turkeys	0.5	20	25,000	12,320	0	500
All AFOs [4]	NA	NA	NA	355,650	10,550	14,630

NA=Not Applicable. ND = Not Determined. ''AFOs'' have confined animals on-site. ''CAFOs'' are assumed to have more than 500 AU.

[1] SBA Size Standards by SIC industry (13 CFR Part 121). EPA assumes an alternative definition of $1.5 million in annual revenues for egg layers.

[2] Average revenue per head across all operations for each sector derived from data obtained from USDA's 1997 ARMS data.

[3] Includes fed cattle, veal and heifers.

[4] Total adjusts for operations with mixed animal types and includes designated CAFOs (expressed over a 10-year period). See Section VI.1 of this document for estimates of the total number of AFOs (including operations that are not defined as small businesses by SBA).

EPA estimates that there were approximately 376,000 animal confinement facilities in 1997 (Table 6–1). Most of these (95 percent) are small businesses, as defined by this approach (Table 10–17). However, not all of these operations will be affected by the proposed regulations.

For this analysis, EPA has identified the number of CAFOs that are also small businesses that would be subject to today's proposal. Under the two-tier structure, EPA estimates that 10,550 operations that will be subject to the proposed requirements that are small businesses. Under the three-tier structure, an estimated 14,630 affected operations are small businesses. See Table 10–17. The difference in the number of affected small businesses is among poultry producers, particularly broiler operations.

Under the two-tier structure, EPA estimates that there are 10,050 operations with more than 500 AU that may be defined as CAFOs that also meet the ''small business'' definition. Under the three-tier structure, there are 14,530 operations with more than 300 AU that may be defined as CAFOs that are small businesses that meet the proposed risk-based conditions (described in Section VII). These totals adjusts for the number of operations with more than a single animal type. Under both co-proposed alternatives, most operations are in the broiler and cattle sectors. By broad facility size group, an estimated 4,060 operations have more than 1,000 AU, most of which are broiler operations (about 77 percent) and cattle operations (18 percent), including fed cattle, veal, and heifer operations. An estimated 6,490 operations have between 500 and 1,000 AU. The number of operations that would be regulated with between 300 and 1,000 AU is estimated at 10,570 operations (accounting for mixed operations).

Due to continued consolidation and facility closure since 1997, EPA's estimates may overstate the actual number of small businesses in these sectors. In addition, ongoing trends are causing some existing small and medium size operations to expand their inventories to achieve scale economies. Some of the CAFOs considered here as small businesses may no longer be counted as small businesses because they now have higher revenues. Furthermore, some CAFOs may be owned by a larger, vertically integrated firm, and may not be a small business. EPA expects that there are few such operations, but does not have data or information to reliably estimate the number of CAFOs that meet this description.

Under the two-tier structure, EPA estimates also include an additional 500 operations with fewer than 500 AU that may be designated as CAFOs under the proposed regulations over a 10-year period. See Section VI. Of these, 330 operations meet the small business definition: 50 dairies, 200 hog, 40 beef, 20 broiler, and 20 egg laying operations. Under the three-tier structure, EPA estimates that 100 operations with fewer than 300 AU may be designated over ten years, including 50 dairies and 50 hog operations, all of which are small businesses. As these facilities are designated, EPA did not adjust this total to reflect possible mixed animal

operations. Each of these operations are small businesses.

3. Estimated Economic Impacts to Small CAFOs under the Proposed Regulations

EPA conducted a preliminary assessment of the potential impacts to small CAFO businesses based on the results of a costs-to-sales test. This screen test indicated the need for additional analysis to characterize the nature and extent of impacts on small entities. The results of this screening test indicate that about 80 percent (about 9,600) of the estimated number of small businesses directly subject to the rule as CAFOs may incur costs in excess of three percent of sales (evaluated for all operations with more than 500 AU). Compared to the total number of all small animal confinement facilities estimated by EPA (356,000 facilities), operations that are estimated to incur costs in excess of three percent of sales comprise less than two percent of all small businesses in these sectors. The results of this analysis are provided in Section 9 of the Economic Analysis.

Based on the results of this initial assessment, EPA projected that it would likely not certify that the proposal, if promulgated, would not impose a significant economic impact on a substantial number of entities. Therefore, EPA convened a Small Business Advocacy Review Panel and prepared an Initial Regulatory Flexibility Analysis (IRFA) pursuant to Sections 609(b) and 603 of the RFA, respectively. Section XII.G provides more information on EPA's small business outreach and the Panel activities during the development of this rulemaking.

The results of EPA's assessment of the financial impacts of the proposed rule on small entities are as follows. To further examine small businesses effects, EPA used the same approach as that used to evaluate the impact to CAFOs under the proposed regulations described in Section X.D.1. Economic achievability is determined by applying the proposed criteria described in Section X.F.1. These criteria include a sales test and also analysis of post-compliance cash flow and debt-to-asset ratio for an average model CAFO.

Accordingly, if an average model facility is determined to incur economic impacts under regulation that are regarded as ''Affordable'' or ''Moderate,'' then the proposed regulations are considered economically achievable. (''Moderate'' impacts are not expected to result in closure and are considered to be economically achievable by EPA.) If an average operation is determined to incur ''Stress,'' then the proposed regulations are not considered to be economically achievable. ''Affordable'' and ''Moderate'' impacts are associated with positive post-compliance cash flow over a 10-year period and a debt-to-asset ratio not exceeding 40 percent, in conjunction with a sales test result that shows that compliance costs are less than 5 percent of sales (''Affordable'') or between 5 and 10 percent (''Moderate''). ''Stress'' impacts are associated with negative cash flow or if the post-compliance debt-to-asset ratio exceeds 40 percent, or sales test results that show costs equal to or exceeding 10 percent of sales. More detail on this classification scheme is provided in Section X.F.1.

EPA is proposing that the proposed regulations are economically achievable by small businesses in the livestock and poultry sectors. The results of this analysis are presented in Tables 10–18 and 10–19. As defined for this analysis, EPA's analysis indicates that the proposed requirements are economically achievable to all affected small businesses in the beef, veal, heifer, dairy, hog, and egg laying sectors (''Affordable'' and also ''Moderate''). Moderate impacts may be incurred by small businesses in some sectors, but these impacts are not associated with operational change at the CAFO. Under the two-tier structure, EPA expects that there are no small businesses in the turkey sector, as defined for this analysis. Under the three-tier structure, EPA expects that there are an estimated 500 small businesses in the turkey sector (operations with 16,500 to 25,000 birds) (Table 10–17).

EPA's IRFA analysis indicates that the proposed requirements will not result in financial stress to any affected small businesses in the veal, heifer (two-tier only), hog, dairy, egg laying, and turkey sectors. In the beef, heifer (three-tier only), and broiler sectors, however, EPA's analysis indicates that proposed regulations could result in financial stress to some small businesses, making these businesses vulnerable to closure. Overall, these operations comprise about 2 percent of all affected small CAFO businesses. For the two-tier structure, EPA estimates that 10 small beef operations and 150 small broiler operations will experience financial stress. For the three-tier structure, EPA estimates that 40 small beef and heifer operations and 280 small broiler operations will experience financial stress. Small broiler facilities with stress impacts are larger operations with more than 1,000 AU under both tier structures. Small cattle and heifer operations with stress impacts are those that have a ground water link to surface water. This analysis is conducted assuming that no costs are passed through between the CAFO and processor segments of these industries. Based on the results of this analysis, EPA is proposing that the proposed regulations are economically achievable to small businesses in these sectors.

EPA believes that the small business impacts presented are overstated for reasons summarized below. As noted in the Panel Report, EPA believes that the number of small broiler operations is overestimated. In the absence of business level revenue data, EPA estimated the number of ''small businesses'' using the approach described in Sections X.J.1 and X.J.2. Using this approach, virtually all (>99.9 percent) broiler operations are considered ''small'' businesses. This categorization may not accurately portray actual small operations in this sector since it classifies a 10-house broiler operation with 260,000 birds as a small business. Information from industry sources suggests that a two-house broiler operation with roughly 50,000 birds is more appropriately characterized as a small business in this sector. This information is available in the rulemaking record. Therefore, it is likely that the number of small broiler operations may reflect a number of medium and large size broiler operations being considered as small entities. (During the development of the rulemaking, EPA did consult with SBA on the use of an alternative definition for small businesses in all affected sectors based on animal inventory at an operation. Following discussions with SBA, EPA decided not to use this alternative definition. This information is provided in the record.)

EPA believes that the use of a costs-to-sales comparison is a crude measure of impacts on small business in sectors where production contracting is commonly used, such as in the broiler sector (but also in the turkey, egg, and hog sectors, though to a lesser extent). As documented in the Economic Analysis, lower reported operating revenues in the broiler sector reflect the predominance of contract growers in this sector. Contract growers receive a pre-negotiated contract price that is lower than the USDA-reported producer price, thus contributing to lower gross revenues at these operations. Lower producer prices among contract growers is often offset by lower overall production costs at these operations since the affiliated processor firm pays for a substantial portion of the grower's annual variable cash expenses. Inputs supplied by the integrator may include

feeder pigs or chicks, feed, veterinary services and medicines, technical support, and transportation of animals. These variable cash costs comprise a large component of annual operating costs, averaging more than 70 percent of total variable and fixed costs at livestock and poultry operations. The contract grower also faces reduced risk because the integrator guarantees the grower a fixed output price. Because production costs at a contract grower operation are lower than at an independently owned operation, a profit test (costs-to-profit comparison) is a more accurate measure of impacts at grower operations. However, financial data are not available that differentiate between contract grower and independent operations.

EPA's analysis also does not consider a range of potential cost offsets available to most operations. One source of potential cost offset is cost share and technical assistance available to operators for on-site improvements that are available from various state and federal programs, such as the Environmental Quality Incentives Program (EQIP) administered by USDA. These programs specifically target smaller farming operations. Another potential source of cost offset is manure sales, particularly of relatively higher value dry poultry litter. More information on how these potential sources of cost offset would reduce the economic impacts to small operations is described in Section X.F.1 in this document and also in the Economic Analysis. EPA's analysis also does not account for eventual cost passthrough of estimated compliance costs through the marketing chain under longer run market adjustment. Finally, this analysis does not take into account certain non-economic factors that may influence a CAFO's decision to weather the boom and bust cycles that are commonplace in agricultural markets. These other industry-specific factors are discussed in more detail throughout the Economic Analysis.

EPA expects that the proposed regulations will benefit the smallest businesses in these sectors since it may create a comparative advantage for smaller operations (less than 500 AU), especially those operations which are not subject to the regulations. Except for the few AFOs which are designated as CAFOs, these operations will not incur costs associated with the proposed requirements but could benefit from eventual higher producer prices as these markets adjust to higher production costs in the longer term.

As detailed in Sections XII.G and XIII.B of this document, EPA convened a Small Business Advocacy Review Panel during the development of this rule. As described in the Panel Report, EPA considered certain regulatory alternatives to provide relief for small businesses. Some of these alternatives are discussed in other sections of this document, including Section VII and Section VIII. These alternative options are summarized in the following section and are described in more detail in Section 9 of the Economic Analysis.

TABLE 10–18.—RESULTS OF EPA'S SMALL BUSINESS ANALYSIS UNDER THE BAT OPTION/SCENARIO 4A

Sector	Number of small CAFOs	Zero cost passthrough					
		(Number of operations			(% Affected operations)		
		Affordable	Moderate	Stress	Affordable	Moderate	Stress
Fed Cattle	1,390	1,130	250	10	81	18	1
Veal	90	90	0	0	100	0	0
Heifer	800	680	120	0	85	15	0
Dairy	50	40	10	0	80	20	0
Hogs	300	300	0	0	100	0	0
Broilers	9,470	1,860	7,460	150	20	79	2
Layers	200	200	0	0	100	0	0
Turkeys	0	0	0	0	NA	NA	NA
Total	10,550	4,300	7,840	160	41	74	2

Source: USEPA. Impact estimates shown include impacts to designated operations. Option/Scenario definitions provided in Table 10–2. Category definitions (''Affordable,'' ''Moderate'' and ''Stress'') are provided in Section X.F.1. Numbers may not add due to rounding. NA = Not Applicable.

[1] ''Total'' does not adjust for operations with mixed animal types, for comparison purposes, to avoid understating costs at operations with more than one animal type that may incur costs to comply with the proposed requirements for each type of animal that is raised on-site. The number of CAFOs shown includes expected defined CAFOs only and excludes designated facilities.

TABLE 10–19.—RESULTS OF EPA'S SMALL BUSINESS ANALYSIS UNDER THE BAT OPTION/SCENARIO 3

Sector	Number of small CAFOs	Zero cost passthrough					
		(Number of operations			(% Affected operations)		
		Affordable	Moderate	Stress	Affordable	Moderate	Stress
Fed Cattle	1,490	1,100	380	10	74	26	1
Veal	140	140	0	0	100	0	0
Heifer	980	800	150	30	82	15	3
Dairy	50	40	10	0	80	20	0
Hogs	300	300	0	0	100	0	0
Broilers	13,410	1,910	11,220	280	14	84	2
Layers	590	590	0	0	100	0	0
Turkeys	500	460	40	0	92	8	0

TABLE 10–19.—RESULTS OF EPA'S SMALL BUSINESS ANALYSIS UNDER THE BAT OPTION/SCENARIO 3—Continued

Sector	Number of small CAFOs	Zero cost passthrough					
		(Number of operations			(% Affected operations)		
		Affordable	Moderate	Stress	Affordable	Moderate	Stress
Total	14,630	5,340	11,800	320	37	81	2

Source: USEPA. Impact estimates shown include impacts to designated operations. Option/Scenario definitions provided in Table 10–2. Category definitions (''Affordable,'' ''Moderate'' and ''Stress'') are provided in Section X.F.1. Numbers may not add due to rounding. NA = Not Applicable.

[1] ''Total'' does not adjust for operations with mixed animal types, for comparison purposes, to avoid understating costs at operations with more than one animal type that may incur costs to comply with the proposed requirements for each type of animal that is raised on-site. The number of CAFOs shown includes expected defined CAFOs only and excludes designated facilities.

4. Regulatory Relief to Small Livestock and Poultry Businesses

EPA proposes to focus the regulatory revisions in this proposal on the largest operations, which present the greatest risk of causing environmental harm, and in so doing, has minimized the effects of the proposed regulations on small livestock and poultry operations. First, EPA is proposing to establish a two-tier structure with a 500 AU threshold. Unlike the current regulations, under which some operations with 300 to 500 AU are defined as CAFOs, operations of this size under the revised regulations would be CAFOs only by designation. Second, EPA is proposing to eliminate the ''mixed'' animal calculation for operations with more than a single animal type for determining which AFOs are CAFOs. Third, EPA is proposing to raise the size standard for defining egg laying operations as CAFOs.

EPA estimates that under the co-proposed alternatives, between 64 percent (two-tier) and 72 percent (three-tier) of all CAFO manure would be covered by the regulation. (See Section IV.A of this preamble.) Under the two-tier structure, the inclusion of all operations with more than 300 AU instead of operations with more than 500 AU, the CAFO definition would result in 13,800 additional operations being regulated, along with an additional 8 percent of all manure. An estimated 80 percent of these additional 13,800 CAFOs are small businesses (about 10,870 CAFOs). EPA estimates that by not extending the regulatory definition to operations with between 300 and 500 AU, these 10,870 small businesses will not be defined as CAFOs and will therefore not be subject to the proposed regulations. The additional costs of extending the regulations to these small CAFO businesses is estimated at almost $150 million across all sectors. The difference in costs between the two-tier and the three-tier structures may be approximated by comparing the estimated costs for these regulatory options, which are shown in Table 10–5. Also, under the two-tier structure, EPA is proposing to raise the size standard for defining egg laying operations as CAFOs. This alternative would remove from the CAFO definition egg operations with between 30,000 and 50,000 laying hens (or 75,000 hens) that under the current rules are defined as CAFOs, if they utilize a liquid manure management system.

In addition, under both co-proposed alternatives, EPA is proposing to exclude mixed operations with more than a single animal type. The Agency determined that the inclusion of these operations would disproportionately burden small businesses while resulting in little additional environmental benefit. Since most mixed operations tend to be smaller in size, this exclusion represents important accommodations for small businesses. If certain of these smaller operations are determined to be discharging to waters of the U.S., States can later designate them as CAFOs and subject them to the regulations.

XI. What are the Environmental Benefits of the Proposed Revisions?

A. Non-Water Quality Environmental Impacts

The regulatory options developed for this proposed rule are intended to ensure the protection of surface water in and around animal feeding operations. However, one or more of the requirements included in these options may also have an impact on the amount and form of compounds released to air, as well as the energy that is required to operate the feedlot. Under sections 304(b) and 306 of the CWA, EPA is to consider the non-water quality environmental impacts (NWQI) when setting effluent limitations guidelines and standards. This section describes the methodology EPA used to estimate the NWQI for each of the options considered for this proposed rule. These non-water quality environmental impacts include:

- Air emissions from the feedlot operation, including animal housing and animal waste storage and treatment areas;
- Air emissions from land application activities;
- Air emissions from vehicles, including the off-site transport of waste and on-site composting operations; and
- Energy impacts from land application activities and the use of digesters.

For each regulatory option, EPA estimated the potential for new water pollution control requirements to cause cross-media pollutant transfers. Consistent with the approach used to estimate compliance costs, EPA used a model-facility approach to estimate NWQIs and to define baseline conditions. Industry-level non-water quality impacts for each animal sector (i.e., beef, dairy, swine, and poultry) were then estimated by multiplying the model farm impacts by the number of facilities represented by that model farm. These results are presented in Tables 11–1 through 11–4 for the population of operations defined as CAFOs under the two-tier structure (operations with more than 500 AU) and Tables 11–5 through 11–8 for the population defined as CAFOs under the three tier structure. For details on the derivation of the model farms, including definitions of geographic location, method of determining model farm populations, and data on waste generation, see the Technical Development Document.

1. Sources of Air Emissions

Animal feeding operations generate various types of animal wastes, including manure (feces and urine), waste feed, water, bedding, dust, and wastewater. Air emissions are generated from the decomposition of these wastes from the point of generation through the management and treatment of these wastes on site. The rate of generation of these emissions varies based on a number of operational variables (e.g., animal species, type of housing, waste

management system), as well as weather conditions (temperature, humidity, wind, time of release). A fraction of the air emissions from AFOs are subsequently redeposited on land or in surface waters. This atmospheric redeposition in turn can be a source for water quality impacts.

a. *Air Emissions from the Feedlot Operation.* Animal housing and manure management systems can be a significant source of air emissions. Little data exist on these releases to allow a complete analysis of all possible compounds. For this proposed rule, EPA has focused on the release of greenhouse gases (methane, carbon dioxide, and nitrous oxide), ammonia, and certain criteria air pollutants (carbon monoxide, nitrogen oxides, volatile organic compounds, and particulate matter).

i. *Greenhouse Gas Emissions from Manure Management Systems.* Manure management systems, including animal housing, produce methane (CH_4), carbon dioxide (CO_2), and nitrous oxide (N_2O) emissions. Methane and carbon dioxide are produced by the anaerobic decomposition of manure. Nitrous oxide is produced as part of the agricultural nitrogen cycle through the denitrification of the organic nitrogen in livestock manure and urine. Greenhouse gas emissions for methane and nitrous oxide were estimated for this proposed rule based on methodologies previously used by EPA's Office of Air and Radiation. Emission estimates for carbon dioxide are based on the relationship of carbon dioxide generation compared to methane generation.

Methane. Methane production is directly related to the quantity of waste, the type of waste management system used, and the temperature and moisture of the waste. Some of the regulatory options evaluated for animal feeding operations are based on the use of different waste management systems which may increase or decrease methane emissions from animal operations. In general, manure that is handled as a liquid or in anaerobic management systems tends to produce more methane, while manure that is handled as a solid or in aerobic management systems produces little methane. The methane producing capacity of animal waste is related to the maximum quantity of methane that can be produced per kilogram of volatile solids. Values for the methane producing capacity are available from literature and are based on animal diet. EPA estimated methane emissions for each type of waste management system included in the cost models. These values vary by animal type, geographic region (the methane conversion factor is a function of the mean ambient temperature), and type of waste management system (e.g., anaerobic lagoon, composting, drylot, stacked solids, or runoff storage pond).

Methane is also produced from the digestive processes of ruminant livestock due to enteric fermentation. Certain animal populations, such as beef cattle on feedlots, tend to produce more methane because of higher energy diets that produce manure with a high methane-producing capacity. However, since the proposed regulatory options do not impose requirements forcing CAFOs to use specific feeding strategies, potential impacts on enteric fermentation methane emissions are speculative and were not estimated.

Carbon Dioxide. Carbon dioxide is a naturally occurring greenhouse gas and is continually emitted to and removed from the atmosphere. Certain human activities, such as fossil fuel burning, cause additional quantities of carbon dioxide to be emitted to the atmosphere. In the case of feedlot operations, the anaerobic degradation of manure results not only in methane emissions, but also carbon dioxide emissions. These carbon dioxide emissions due to anaerobic degradation were estimated for each regulatory option. In addition, under Option 6, large dairies and swine operations would install and operate anaerobic digestion systems with energy recovery units. The biogas produced in the digester is burned in an engine to recover energy. EPA's emission estimates for Option 6 include the carbon dioxide produced during this combustion process.

Nitrous Oxide. The emission of nitrous oxide from manure management systems is based on the nitrogen content of the manure, as well as the length of time the manure is stored and the specific type of system used. In general, manure that is handled as a liquid tends to produce less nitrous oxide than manure that is handled as a solid. Some of the regulatory options evaluated for animal feeding operations are based on the use of waste management systems which may increase nitrous oxide emissions from animal operations. Values for total Kjeldahl nitrogen (TKN), a measure of organic nitrogen plus ammonia nitrogen, vary by animal type and are typically available in the literature for animal waste. EPA estimated nitrous oxide emissions by adjusting these literature values with an emission factor that accounts for the varying degree of nitrous oxide production, based on the type of manure management system.

ii. *Ammonia Emissions and Other Nitrogen Losses from Housing and Manure Management Systems.* Much of the nitrogen emitted from animal feeding operations is in the form of ammonia. Ammonia is an important component responsible for acidification and overnutrification of the environment. The loss of ammonia occurs at both the point of generation of manure, typically from urine, as well as during the storage and treatment of animal waste. As the pH of a system rises above 7, nitrogen in the form of ammonium is transformed into ammonia. A number of variables affect the volatilization of ammonia from animal waste, including the method in which the waste is stored, transported, and treated on site and the environmental conditions present (e.g., temperature, pH, wind).

Animals at the feedlot operation may be housed in a number of different ways that have an impact on the type and amount of nitrogen emissions that will occur. Some animals are housed in traditional confined housing (e.g., tie stall barns, freestall barns), while others are housed in outdoor areas (e.g., drylots, paddocks). Studies have shown that the type of housing used has a great effect on the emission of ammonia. Management of waste within the housing area also affects emissions (e.g., litter system, deep pit, freestall).

Anaerobic lagoons and waste storage ponds are a major component of the waste management systems. EPA has estimated volatilization of total nitrogen and ammonia from lagoons and ponds based on emission factors published in the scientific literature.

iii. *Criteria Air Emissions from Energy Recovery Systems.* Option 6 requires the implementation of anaerobic digestion systems with energy recovery for large dairy and swine operations. The operation of the digestion system greatly reduces the emission of methane through the capture of the biogas. However, the use of the biogas in an energy recovery system does generate certain criteria air pollutants when burned for fuel. Literature values for emission factors for carbon monoxide (CO), oxides of nitrogen (NO_X), and volatile organic compounds (VOCs) were used to estimate releases of criteria air pollutants.

b. *Air Emissions from Land Application Activities.* Animal feeding operations generate air emissions from the land application of animal waste on cropland. Air emissions are primarily generated from the volatilization of ammonia at the point the material is applied to land. Additional emissions of nitrous oxide are liberated from

agricultural soils when nitrogen applied to the soil undergoes nitrification and denitrification. Loss through denitrification is dependent on the oxygen levels of the soil to which manure is applied. Low oxygen levels, resulting from wet, compacted, or warm soil, increase the amount of nitrate-nitrogen released to the air as nitrogen gas or nitrous oxide. The analysis of air emissions from land application activities for this proposed rule focused on the volatilization of nitrogen as ammonia because the emission of other constituents is expected to be less significant.

The amount of nitrogen released to the environment from the application of animal waste is affected by the rate and method in which it is applied, the quantity of material applied, and site-specific factors such as air temperature, wind speed, and soil pH. There is insufficient data to quantify the effect of site-specific factors.

Since regulatory options in this proposed rule do not dictate particular application methods, EPA assumed that the application methods used by animal feeding operations will not significantly change from baseline.

Because EPA expects application methods to remain stable, EPA assumed that only the quantity of waste applied to cropland will change. On-site nitrogen volatilization will decrease as the quantity of waste applied to cropland decreases. The reductions of nitrogen volatilization will be the result of reductions in the total amount of manure applied on site. However, when both on-site and off-site nitrogen volatilization are considered, total nitrogen volatilization from manure is expected to remain constant. The movement of waste off-site changes the location of the nitrogen releases but not the quantity released. On-site, however, the volatilization rate will decrease, reflecting the decrease in the quantity of applied waste.

EPA used the same assumptions that were used to estimate compliance costs for land application of animal waste in order to estimate the change in air emissions from the application of nitrogen under baseline conditions and for each regulatory option. The cost methodology defines three types of animal feeding operations: Category 1 facilities currently have sufficient land to apply all manure on site; Category 2 facilities currently do not have enough land to apply all manure on site; and Category 3 facilities currently apply no manure on site (this manure is already being spread offsite). Neither Category 1 nor Category 3 facilities will show a change in nitrogen emission rates from the land application of animal manure under the proposed regulatory options. However, Category 2 facilities will be required to apply their waste at the agricultural rate under the regulatory options, thus reducing the amount of manure applied on site and subsequently reducing air emissions from on-site land application.

Under a phosphorus-based application scenario, facilities will have to apply supplemental nitrogen fertilizer to meet crop nutrient needs. The cost model assumes facilities will apply commercial ammonium nitrate or urea. The application of commercial fertilizer represents an increase in applied nutrients on site. While losses from applied commercial nitrogen are expected to be less than those from applied manure, data from Ohio State Extension states that both of these fertilizers can experience losses through denitrification if placed on wet or compacted soils. There is also a possibility that urea will volatilize if it is dry for several days after soil application. Ammonium nitrate fertilizer (when injected) is less likely to volatilize because it quickly converts to nitrate nitrogen which will not volatilize.

EPA estimated a ''worst-case scenario'' for ammonia emissions due to commercial fertilizer application based on a 35% loss of applied nitrogen.

c. *Air Emissions from Vehicles.* i. *Off-Site Transportation.* All options are expected to result in increasing the amount of manure hauled off-site, at least for some operations. Consistent with the cost model, EPA has grouped operations into three possible transportation categories. Category 1 facilities currently land apply all manure on site and Category 3 facilities currently transport all manure off site. Neither Category 1 nor Category 3 facilities require additional transportation of manure and will not have an increase in criteria air emissions. Category 2 facilities do not have enough land to apply all waste on site and do not currently transport waste. These facilities are expected to transport manure off site and therefore will have an increase in the amount of criteria air pollutants generated by the facility.

Hauling emissions estimates are based on calculations of the annual amount of waste generated, the annual number of miles traveled, and truck sizes. The number of trucks, number of trips per truck, the amount of waste and transportation distance are all calculated within the cost model. Vehicle emissions are calculated based on emission factors for diesel-fueled vehicles presented in ''Compilation of Air Pollution Emission Factors'' (AP–42). Estimates were calculated for volatile organic compounds, nitrogen oxides, particulate matter, and carbon monoxide.

ii. *On-Site Composting Activities.* Farm equipment used for on-site composting activities also affect the generation of air emissions, although composting of waste may also result in a reduction in transportation air emissions. While composting waste prior to hauling offsite can increase the marketability of the manure and may decrease hauling costs per ton of waste for some operations, not all operations can be expected to realize such benefits. Under Option 5, beef and dairy operations would be required to compost their solid manure. The criteria air emissions from on-site composting of manure were estimated for beef and dairy operations under Option 5. The source of criteria air emissions from composting are tractors and associated windrow-turning equipment.

2. Summary of Air Emission Impacts

Option 1: Emissions of methane and carbon dioxide from beef and dairy operations decrease under Option 1 due to the addition of solids separation in the waste management system. The separated solids are stockpiled rather than held in waste storage ponds or anaerobic lagoons. Anaerobic conditions, and the potential of the volatile solids to convert to methane, decrease using this drier method of handling the waste. However, this method also results in greater conversion of nitrogen to nitrous oxide. An increase in nitrous oxide emissions from dairies occurs for this reason. Greenhouse gas emissions from dry poultry operations (broilers, turkeys, and dry layers) do not change under Option 1 since no change to the waste handling practices are expected. These operations are already handling the waste as a dry material. Although indoor storage of poultry litter is included in the options, it is not expected to significantly alter the air emissions from the litter. Emissions of greenhouse gases from swine and wet poultry operations also do not change since no change to the waste handling practices are expected.

Ammonia emissions occur primarily from liquid waste storage areas, including ponds and lagoons. Under Option 1, all facilities are required to contain surface runoff from the feedlot, thereby increasing ammonia emissions from smaller beef and dairy CAFOs that do not currently have runoff control ponds or lagoons. Ammonia emissions

for the poultry and swine sectors are not expected to change under Option 1.

Option 1 requires the application of animal waste to cropland at agronomic rates for nitrogen. Animal feeding operations that have excess nitrogen for their crops will need to transport their waste to another location. The generation of criteria pollutants for all animal sectors are expected to increase from baseline to Option 1 due to the additional transportation of waste off-site.

Options 2–4 and 7: No change in emissions of methane, carbon dioxide, or nitrous oxide occurs for all sectors relative to Option 1 because no significant changes in waste management are anticipated. Likewise, no large changes are expected for ammonia emissions.

These options require the application of animal waste to cropland at agronomic rates for phosphorus. Animal feeding operations that have excess phosphorus for their crops will need to transport their waste to another location. The generation of criteria pollutants are expected to increase from Option 1 to these options because more waste will need to be transported off site to meet agronomic rates for phosphorus.

Option 5A: Option 5A does not apply to the beef and dairy sectors. Emissions of greenhouse gases at swine operations significantly decrease under Option 5A, due to covering lagoons. The swine operations are expected to flare the gas that is generated in the lagoon. The methane will be converted, although carbon dioxide emissions will increase. In addition, the emissions of NO_X and SO_X increase because of the flaring of biogas collected from the covered lagoon.

On-site ammonia emissions at swine operations will decrease because the lagoon cover prevents the ammonia from leaving solution. Ammonia in the effluent from the covered lagoon will volatilize, however, soon after it is exposed to air.

Option 5B: Emissions of greenhouse gases from beef and dairy operations increase under Option 5B (i.e., mandated technology of composting), relative to Options 1 and 2. Compost operations include the addition of organic material to the waste pile to aid in the decomposition of the waste. This additional material also decomposes and contributes to increased methane emissions compared to other options. In addition, compost operations liberate more methane than stockpiles because the windrows are turned regularly. Stockpiles tend to form outer crusts that reduce the potential for air emissions to occur.

Emissions of greenhouse gases for swine operations under Option 5B are less than Option 2 due to the conversion of liquid manure handling systems (e.g., flush lagoons) to dry manure handling systems. Dry manure generates less methane than liquid systems. However, the emissions are higher than either Options 5A or 6, which allow liquid manure systems, but include destruction of the biogas generated from those systems.

Ammonia emissions at beef and dairy operations are expected to increase. During composting operations, the aeration of the compost pile liberates nitrogen in the form of ammonia. Ammonia emissions at swine operations are expected to decrease compared to Option 2, because of liquid manure systems converting to dry operations.

Option 5B generates the least criteria air pollutants compared to any other option for beef operations. Although composting operations include the operation of turning equipment which uses fuel and generates additional tractor air emissions, the process reduces the overall volume of waste to be transported. However, for dairy, additional organic material is added to the compost pile, which results in slightly higher transportation emissions than Option 2. Option 5B emissions of criteria pollutants for poultry operations are equal to the emissions for Options 2–4 and 7, since there is no difference in the amount of waste transported off site. The emissions from swine operations are significantly lower than Option 2 because the conversion of flush operations to dry housing significantly decreases the volume of waste to be transported off site.

Option 6: Relative to Option 2, only the dairy and swine sectors see any changes in air emissions. Emissions of methane from swine and dairy waste under Option 6 significantly decrease due to the addition of the anaerobic digester. A significant portion of the methane generated is collected as biogas and converted to energy. Drylot areas at dairies, however, will continue to generate methane that is uncollected. Carbon dioxide emissions significantly increase as methane is converted during the combustion process.

Although waste at large swine and dairy CAFOs will be digested, no significant changes to ammonia emissions are expected. The ammonia nitrogen, which is highly soluble, remains in solution in the digester. When the digester effluent is stored in an open lagoon, the ammonia will then be released.

Emissions of criteria pollutants from swine and dairy operations increase due to the addition of anaerobic digestion for large dairy operations. The digester collects biogas, which is subsequently combusted and converted into VOCs, NO_X, and CO. Hydrogen sulfide contained in swine waste will be converted to Sox.

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Table 11-1. Air Emissions and Energy Use for Beef (Including Heifer) Operations Under the Two-Tier Structure (≥500 AU)

NWQI	Baseline	Regulatory Option							
		Option 1	Option 2	Option 3	Option 4	Option 5A	Option 5B	Option 6	Option 7
Air Emissions									
Methane (CH_4) (Gg/yr)	72	69	69	69	69		93	69	69
Carbon Dioxide (CO_2) (Gg/yr)	31	30	30	30	30		40	30	30
Nitrous Oxide (N_2O) (Gg/yr)	34	34	34	34	34		49	34	34
Ammonia (NH_3) (1000 Tons/yr)	581	582	582	582	582		902	582	568
Volatile Organic Compounds (VOCs) (Tons/yr)	NC	Baseline + 235	Baseline + 284	Baseline + 284	Baseline + 284		Baseline + 75	Baseline + 284	Baseline + 284
Nitrogen Oxides (NOx) (Tons/yr)	NC	Baseline + 905	Baseline + 1,091	Baseline + 1,091	Baseline + 1,091		Baseline + 291	Baseline + 1,091	Baseline + 1,091
Particulate Matter (PM) (Tons/yr)	NC	Baseline + 18	Baseline + 22	Baseline + 22	Baseline + 22		Baseline + 6	Baseline + 22	Baseline + 22
Carbon Monoxide (CO) (Tons/yr)	NC	Baseline + 2,800	Baseline + 3,400	Baseline + 3,400	Baseline + 3,400		Baseline + 900	Baseline + 3,400	Baseline + 3,400
Energy Usage									
Electricity Usage (1000 kW-hr/yr)	NC	Baseline + 11,082	Baseline + 45,109	Baseline + 45,109	Baseline + 45,109		Baseline + 45,109	Baseline + 45,109	Baseline + 45,109
Fuel Usage (1000 gallons/yr)	NC	Baseline + 1,917	Baseline + 2,311	Baseline + 2,311	Baseline + 2,311		Baseline + 420	Baseline + 2,311	Baseline + 2,311

Table 11-2. Air Emissions and Energy Use for Dairy Operations Under the Two-Tier Structure (≥500 AU)

NWQI	Baseline	Regulatory Option							
		Option 1	Option 2	Option 3	Option 4	Option 5A	Option 5B	Option 6	Option 7
Air Emissions									
Methane (CH_4) (Gg/yr)	216	138	138	138	138		163	11	138
Carbon Dioxide (CO_2) (Gg/yr)	93	59	59	59	59		70	1,289	59
Nitrous Oxide (N_2O) (Gg/yr)	4	8	8	8	8		28	8	8
Ammonia (NH_3) (1000 Tons/yr)	217	220	220	220	220		257	207	218
Volatile Organic Compounds (VOCs) (Tons/yr)	NC	Baseline + 222	Baseline + 201	Baseline + 201	Baseline + 201		Baseline + 213	Baseline + 262	Baseline + 201
Nitrogen Oxides (NOx) (Tons/yr)	NC	Baseline + 855	Baseline + 772	Baseline + 772	Baseline + 772		Baseline + 821	Baseline + 4,454	Baseline + 772
Particulate Matter (PM) (Tons/yr)	NC	Baseline + 17	Baseline + 15	Baseline + 15	Baseline + 15		Baseline + 17	Baseline + 15	Baseline + 15
Carbon Monoxide (CO) (Tons/yr)	NC	Baseline + 2,700	Baseline + 2,400	Baseline + 2,400	Baseline + 2,400		Baseline + 2,500	Baseline + 2,900	Baseline + 2,400
Energy Usage									
Electricity Usage (1000 kW-hr/yr)	NC	Baseline + 8,759	Baseline + 9,899	Baseline + 9,899	Baseline + 9,899		Baseline + 9,899	Baseline + (1,139,200)	Baseline + 9,899
Fuel Usage (1000 Gallons/yr)	NC	Baseline + 1,811	Baseline + 1,635	Baseline + 1,635	Baseline + 1,635		Baseline + 1,646	Baseline + 1,605	Baseline + 1,635

Table 11-3. Air Emissions and Energy Use for Swine Operations under the Two-Tier Structure (≥500 AU)

NWQI	Baseline	Regulatory Option							
		Option 1	Option 2	Option 3	Option 4	Option 5A	Option 5B	Option 6	Option 7
Air Emissions									
Methane (CH_4) (Gg/yr)	281	281	281	281	281	118	188	164	281
Carbon Dioxide (CO_2) (Gg/yr)	120	120	120	120	120	147	80	73	120
Nitrous Oxide (N_2O) (Gg/yr)	0.5	0.5	0.5	0.5	0.5	0.3	0.5	0.4	0.5
Ammonia (NH_3) (1000 Tons/yr)	128	128	128	128	128	113	93	126	135
Hydrogen Sulfide (H_2S) (1000 Tons/yr)	70	70	70	70	70	0	12	0	101
Volatile Organic Compounds (VOCs) (Tons/yr)	NC	Baseline + 12	Baseline + 31	Baseline + 31	Baseline + 31	Baseline + 50	Baseline + 16	Baseline + 11	Baseline + 31
Nitrogen Oxides (Tons/yr)	NC	Baseline + 43	Baseline + 115	Baseline + 115	Baseline + 115	Baseline + 15,300	Baseline + 63	Baseline + 9,600	Baseline + 115
Particulate Matter (PM) (Tons/yr)	NC	Baseline + 0.9	Baseline + 2	Baseline + 2	Baseline + 2	Baseline + 4	Baseline + 1	Baseline + 1	Baseline + 2
Carbon Monoxide (CO) (Tons/yr)	NC	Baseline + 130	Baseline + 360	Baseline + 360	Baseline + 360	Baseline + 590	Baseline + 200	Baseline + 130	Baseline + 360
Sulfur Oxides (1000 Tons/yr)	NC	Baseline	Baseline	Baseline	Baseline	Baseline + 59	Baseline	Baseline + 37	Baseline
Energy Usage									
Electricity Usage (1000 kW-hr/yr)	NC	Baseline	Baseline	Baseline	Baseline	Baseline	Baseline	Baseline + (848,900)	Baseline
Fuel Usage (1000 Gallons/yr)	NC	Baseline + 65	Baseline + 121	Baseline + 121	Baseline + 121	Baseline + 290	Baseline + 4	Baseline + 45	Baseline + 121

Table 11-4. Air Emissions and Energy Use for Poultry Operations Under the Two Tier Structure (≥500 AU)

NWQI	Baseline	Regulatory Option							
		Option 1	Option 2	Option 3	Option 4	Option 5A	Option 5B	Option 6	Option 7
Air Emissions									
Methane (CH_4) (Gg/yr)	70	70	70	70	70	26	27	70	70
Carbon Dioxide (CO_2) (Gg/yr)	30	30	30	30	30	255	12	30	30
Nitrous Oxide (N_2O) (Gg/yr)	16	16	16	16	16	16	17	16	16
Ammonia (NH_3) (1000 Tons/yr)	17	17	17	17	17	15	14	17	19
Volatile Organic Compounds (VOCs) (Tons/yr)	NC	Baseline + 3	Baseline + 9	Baseline + 9	Baseline + 9	Baseline + 9	Baseline + 9	Baseline + 9	Baseline + 9
Nitrogen Oxides (Tons/yr)	NC	Baseline + 13	Baseline + 36	Baseline + 36	Baseline + 36	Baseline + 3,000	Baseline + 36	Baseline + 36	Baseline + 36
Particulate Matter (PM) (Tons/yr)	NC	Baseline + 0	Baseline + 1	Baseline + 1	Baseline + 1	Baseline + 1	Baseline + 1	Baseline + 1	Baseline + 1
Carbon Monoxide (CO) (Tons/yr)	NC	Baseline + 41	Baseline + 110	Baseline + 110	Baseline + 110	Baseline + 110	Baseline + 110	Baseline + 110	Baseline + 110
Energy Usage									
Electricity Usage (kW-hr/yr)	NC	Baseline	Baseline	Baseline	Baseline	Baseline	Baseline	Baseline	Baseline
Fuel Usage (1000 Gallons/yr)	NC	Baseline + 427	Baseline + 1,253	Baseline + 1,253	Baseline + 1,253	Baseline + 1,253	Baseline + 1,253	Baseline + 1,253	Baseline + 1,253

Table 11-5. Air Emissions and Energy Use for Beef Operations Under the Three-Tier Structure (Includes Heifers)

NWQI	Baseline	Regulatory Option							
		Option 1	Option 2	Option 3	Option 4	Option 5A	Option 5B	Option 6	Option 7
Air Emissions									
Methane (CH_4) (Gg/yr)	70.20	67.32	67.32	67.32	67.32		90.52	67.32	67.32
Carbon Dioxide (CO_2) (Gg/yr)	30.08	28.85	28.85	28.85	28.85		38.79	28.85	28.85
Nitrous Oxide (N_2O) (Gg/yr)	32.55	32.54	32.54	32.54	32.54		47.56	32.54	32.54
Total Kjeldhl Nitrogen (TKN) (Tons/yr)	660580	657464	653382	653382	653382		653382	653382	649063
Ammonia (NH_3) (Tons/yr)	562404	563461	563461	563461	563461		872675	563461	550052
Volatile Organic Compounds (VOCs) (Tons/yr)	NC	Baseline + 234	Baseline + 282	Baseline + 282	Baseline + 282		Baseline + 74	Baseline + 282	Baseline + 282
Nitrogen Oxides (NOx) (Tons/yr)	NC	Baseline + 901	Baseline + 1086	Baseline + 1086	Baseline + 1086		Baseline + 286	Baseline + 1086	Baseline + 1086
Particulate Matter (PM) (Tons/yr)	NC	Baseline + 18	Baseline + 22	Baseline + 22	Baseline + 22		Baseline + 6	Baseline + 22	Baseline + 22
Carbon Monoxide (CO) (Tons/yr)	NC	Baseline + 2794	Baseline + 3367	Baseline + 3367	Baseline + 3367		Baseline + 889	Baseline + 3367	Baseline + 3367
Energy Usage									
Electricity Usage (kW-hr/yr)	NC	Baseline + 26801558	Baseline + 21706406	Baseline + 21706406	Baseline + 21706406		Baseline + 21706406	Baseline + 21706406	Baseline + 21706406
Fuel Usage (gallons/yr)	NC	Baseline + 1909749	Baseline + 2300912	Baseline + 2300970	Baseline + 2300970		Baseline + 409593	Baseline + 2300996	Baseline + 2300912

Table 11-6. Air Emissions and Energy Use for Dairy Operations Under the Three-Tier Structure

NWQI	Baseline	Regulatory Option							
		Option 1	Option 2	Option 3	Option 4	Option 5A	Option 5B	Option 6	Option 7
Air Emissions									
Methane (CH_4) (Gg/yr)	213.87	136.19	136.19	136.19	136.19		161.64	11.12	136.19
Carbon Dioxide (CO_2) (Gg/yr)	91.66	58.37	58.37	58.37	58.37		69.27	1290	58.37
Nitrous Oxide (N_2O) (Gg/yr)	4.17	7.56	7.56	7.56	7.56		23.07	7.56	7.56
Total Kjeldhl Nitrogen (TKN) (Tons/yr)	159703	153360	151810	151810	151810		151810	151810	151810
Ammonia (NH_3) (Tons/yr)	218368	221407	221407	221407	221407		258543	207969	218397
Volatile Organic Compounds (VOCs) (Tons/yr)	NC	Baseline + 211	Baseline + 178	Baseline + 178	Baseline + 178		Baseline + 192	Baseline + 242	Baseline + 178
Nitrogen Oxides (NOx) (Tons/yr)	NC	Baseline + 811	Baseline + 691	Baseline + 691	Baseline + 691		Baseline + 741	Baseline + 4377	Baseline + 691
Particulate Matter (PM) (Tons/yr)	NC	Baseline + 16	Baseline + 14	Baseline + 14	Baseline + 14		Baseline + 15	Baseline + 14	Baseline + 14
Carbon Monoxide (CO) (Tons/yr)	NC	Baseline + 2516	Baseline + 2143	Baseline + 2143	Baseline + 2143		Baseline + 2296	Baseline + 2647	Baseline + 2143
Energy Usage									
Electricity Usage (kW-hr/yr)	NC	Baseline + 11074220	Baseline + 16066951	Baseline + 16066951	Baseline + 16066951		Baseline + 16066951	Baseline + (1,139,200,000)	Baseline + 16066951
Fuel Usage (Gallons/yr)	NC	Baseline + 17192511	Baseline + 1464917	Baseline + 1464917	Baseline + 1464917		Baseline + 1477361	Baseline + 1440274	Baseline + 1464917

Table 11-7. Air Emissions and Energy Use for Swine Operations Under the Three-Tier Structure

NWQI	Baseline	Regulatory Option							
		Option 1	Option 2	Option 3	Option 4	Option 5A	Option 5B	Option 6	Option 7
Air Emissions									
Methane (CH_4) (Gg/yr)	256.32	256.32	256.32	256.32	256.32	100.84	167.74	139.59	256.32
Carbon Dioxide (CO_2) (Gg/yr)	109.85	109.85	109.85	109.85	109.85	141.79	71.89	62.90	109.85
Nitrous Oxide (N_2O) (Gg/yr)	0.46	0.46	0.46	0.46	0.46	0.28	0.46	0.32	0.46
Total Kjeldhl Nitrogen (TKN) (Tons/yr)	57143	56753	56663	56663	56663	56831	23779	41891	56663
Ammonia (NH_3) (Tons/yr)	115346	115346	115346	115346	115346	101312	82276	115346	122363
Hydrogen Sulfide (H_2S) (Tons/yr)	64511	64511	64511	64511	64511	0	10570	0	93477
Volatile Organic Compounds (VOCs) (Tons/yr)	NC	Baseline + 11	Baseline + 28	Baseline + 28	Baseline + 28	Baseline + 28	Baseline + 16	Baseline + 11	Baseline + 28
Nitrogen Oxides (NOx-N) (Tons/yr)	NC	Baseline + 42	Baseline + 109	Baseline + 109	Baseline + 109	Baseline + 14143	Baseline + 61	Baseline + 9554	Baseline + 109
Particulate Matter (PM) (Tons/yr)	NC	Baseline + 0.88	Baseline + 2	Baseline + 2	Baseline + 2	Baseline + 2	Baseline + 1	Baseline + 0.84	Baseline + 2
Carbon Monoxide (CO) (Tons/yr)	NC	Baseline + 129	Baseline + 338	Baseline + 338	Baseline + 338	Baseline + 338	Baseline + 189	Baseline + 126	Baseline + 338
Sulfur Oxides (Sox-S) (Tons/yr)	NC	Baseline	Baseline	Baseline	Baseline	Baseline + 54525	Baseline	Baseline + 36961	Baseline
Energy Usage									
Electricity Usage (kW-hr/yr)	NC	Baseline	Baseline	Baseline	Baseline	Baseline	Baseline	Baseline + (848,900,000)	Baseline
Fuel Usage (Gallons/yr)	NC	Baseline + 61940	Baseline + 111033	Baseline + 111033	Baseline + 111033	Baseline + 110122	Baseline + 3577	Baseline + 41082	Baseline + 111033

Table 11-8. Air Emissions and Energy Use for Poultry Operations Under the Three-Tier Structure

NWQI	Baseline	Regulatory Option							
		Option 1	Option 2	Option 3	Option 4	Option 5A	Option 5B	Option 6	Option 7
Air Emissions									
Methane (CH_4) (Gg/yr)	67.19	67.19	67.19	67.19	67.19	25.79	26.63	67.19	67.19
Carbon Dioxide (CO_2) (Gg/yr)	28.79	28.79	28.79	28.79	28.79	239.24	11.41	28.79	28.79
Nitrous Oxide (N_2O) (Gg/yr)	16.30	16.30	16.30	16.30	16.30	16.27	16.80	16.30	16.30
Total Kjeldhl Nitrogen (TKN) (Tons/yr)	341627	340325	329444	329444	329444	329444	45285	329444	329444
Ammonia (NH_3) (Tons/yr)	16507	16507	16507	16507	16507	14191	14485	16507	18003
Volatile Organic Compounds (VOCs) (Tons/yr)	NC	Baseline + 3	Baseline + 7	Baseline + 7	Baseline + 7	Baseline + 7	Baseline + 7	Baseline + 7	Baseline + 7
Nitrogen Oxides (NOx-N) (Tons/yr)	NC	Baseline + 10	Baseline + 27	Baseline + 27	Baseline + 27	Baseline + 2343	Baseline + 27	Baseline + 27	Baseline + 27
Particulate Matter (PM) (Tons/yr)	NC	Baseline + 0.21	Baseline + 1	Baseline + 1	Baseline + 1	Baseline + 1	Baseline + 1	Baseline + 1	Baseline + 1
Carbon Monoxide (CO) (Tons/yr)	NC	Baseline + 32	Baseline + 82	Baseline + 82	Baseline + 82	Baseline + 82	Baseline + 82	Baseline + 82	Baseline + 82
Energy Usage									
Electricity Usage (kW-hr/yr)	NC	Baseline	Baseline	Baseline	Baseline	Baseline	Baseline	Baseline	Baseline
Fuel Usage (Gallons/yr)	NC	Baseline + 314265	Baseline + 893365	Baseline + 893365	Baseline + 893365	Baseline + 893365	Baseline + 893365	Baseline + 893365	Baseline + 893365

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3. Energy Impacts

The proposed regulatory options may result in increased energy use for operations that currently do not capture their runoff or other process wastewater. These operations would need to capture the feedlot runoff, divert it to a waste management system, and use this wastewater for irrigation or dispose of it by some alternative means.

For the land application areas, the proposed regulatory options assume all CAFOs will apply their manure and wastewater using agricultural application rates. In many instances this means that facilities would have to limit the amount of manure applied to the land which may result in decreased energy usage at the CAFO. However, total energy requirements for land application increase under all options due to the increased transportation of waste off-site. Additional energy is also required to operate composting equipment, and at swine CAFOs to operate recirculating pumps to reuse lagoon effluent as flush water.

Option 6 includes the use of anaerobic digesters with energy recovery to manage animal waste for large dairy and swine operations. Digesters require a continuous input of energy to operate the holding tank mixer and an engine to convert captured methane into energy. The energy required to continuously operate these devices, as well as the amount of energy generated by the system, have been determined from the FarmWare model, which was also used for estimating compliance costs. Under Option 6, EPA anticipates a net decrease in electricity use due to the energy savings from methane recovery.

B. Quantitative and Monetized Benefits

In addition to costs and impacts, EPA also estimated the environmental and human health benefits of today's proposed requirements. Benefits identified as a result of this proposed rule are associated with improvements in water quality.

EPA is not currently able to evaluate all human health and ecosystem benefits associated with water quality improvements quantitatively. EPA is even more limited in its ability to assign monetary values to these benefits. The economic benefit values described below and in the ''Environmental and Economic Benefits of the NPDES/ELG CAFO Rules'' (Benefit Report) should be considered a subset of the total benefits of this rule and should be evaluated along with descriptive assessments of benefits and the acknowledgment that even these may fall short of the real-world benefits that may result from this rule. For example, the economic valuation considers the effects of nitrogen, phosphorous, pathogens and sediment but does not evaluate the economic impacts of metals or hormones which can produce significant adverse environmental impacts.

Within these confines, EPA analyzed the effects of current water discharges and assessed the benefits of reductions in these discharges resulting from this proposed regulation. The CAFO industry waste effluents contain pollutants that, when discharged into freshwater and estuarine ecosystems, may alter aquatic habitats, affect aquatic life, and adversely affect human health.

For this proposed rule, EPA conducted four benefit studies to estimate the impacts of controlling CAFO manure. The first study is a national water quality model (National Water Pollution Control Assessment Model) that estimates runoff from land application areas to rivers, streams, lakes and impoundments in the U.S. This study estimates the value society places in improvements in surface water quality associated with the different regulatory scenarios. Another study examines the expected improvements in shellfish harvesting as a result of CAFO regulation. A third study looks at incidences of fish kills that are attributed to animal feeding operations and estimates the cost of replacing the lost fish stocks. A fourth study estimates the benefits associated with reduced groundwater contamination. Each of these studies is described below.

1. Benefit Scenarios

There are eight benefit scenarios under consideration, four scenarios (1, 2/3, 4a and 4b) using a nitrogen application rate and the same 4 scenarios using a phosphorus application rate. Scenarios 1 ⅔ have a three-tiered structure similar to the current rule. Tier 1 is 1,000 AU and greater; Tier 2 is 300—999 AU; Tier 3 is less than 300 AU. Scenarios 4a and 4b have a two-tiered structure. Under Scenario 4a, Tier 1 is 500 AU and greater; Tier 2 is less than 500 AU. Under Scenario 4b, Tier 1 is 300 AU and greater; Tier 2 is less than 300 AU. EPA is co-proposing a two-tier and a three-tier structure (phosphorus—Scenario ⅔ and Phosphorus—Scenario 4a). Table 11–9 summarizes the regulatory scenarios considered in the benefits analysis.

TABLE 11–9.—REGULATORY SCENARIOS CONSIDERED IN THE BENEFITS ANALYSIS

Regulatory scenario	NPDES revisions	Effluent guidelines revisions
Baseline	CAFOs include any AFO with over 1,000 AUs, as well as AFOs with 300 or more AUs that meet certain requirements.	Manure application not regulated.
Nitrogen—Scenario 1	Baseline scenario plus dry poultry and immature swine and heifer operations.	Nitrogen-based manure application.
Nitrogen—Scenario 2/3	New NPDES conditions for identifying CAFOs among AFOs with 300–1000 AUs, plus dry poultry and immature swine and heifer operations.	Nitrogen-based manure application.
Nitrogen—Scenario 4a	CAFOs include all AFOs with 500 or more AUs, plus dry poultry, immature swine and heifer manure operations.	Nitrogen-based manure application.
Nitrogen—Scenario 4b	CAFOs include all AFOs with 300 or more AUs, plus dry poultry, immature swine and heifer operations.	Nitrogen-based manure application.
Phosphorus Scenario 1	Baseline scenario plus dry poultry and immature swine and heifer operations.	Phosphorus-based manure application.
Phosphorus Scenario 2/3*	New NPDES conditions for identifying CAFOs among AFOs with 300–1000 AUs, plus dry poultry and immature swine and heifer operations.	Phosphorus-based manure application.
Phosphorus Scenario 4a*	CAFOs include all AFOs with 500 or more AUs, plus dry poultry, immature swine and heifer operations.	Phosphorus-based manure application.

TABLE 11–9.—REGULATORY SCENARIOS CONSIDERED IN THE BENEFITS ANALYSIS—Continued

Regulatory scenario	NPDES revisions	Effluent guidelines revisions
Phosphorus Scenario 4b	CAFOs include all AFOs with 300 or more AUs, plus dry poultry, immature swine and heifer operations.	Phosphorus-based manure application.

* Proposed scenarios.

EPA has developed a model facility analysis to assess changes in pollutant loadings under baseline conditions and proposed regulatory scenarios. First, the analysis disaggregates the universe of AFOs according to a suite of characteristics directly affecting manure generation, manure management, and pollutant loadings. AFOs are then grouped into five geographic regions. Within each geographic region, EPA defines model facilities by production sector, subsector, and size (number of animals).

EPA then calculates manure production and the associated production of pollutants for each model facility. EPA multiplies the number of animal units per model facility by the manure production per animal unit to determine total manure production. EPA then calculates total generation of nutrients based on the typical pollutant concentrations per unit of recoverable manure for each animal type.

The core modeling analysis focuses on land application practices for each model facility and the capacity for soil and crop removal of nutrients applied to the land.[1] EPA divides the total nitrogen and phosphorus generated in manure by the average total acreage available for land application for an operation in the given region, size class, and production sector. The ratio of nutrients applied to crop nutrient requirements provides a measure of the excess nutrients applied in the manure. This in turn forms the foundation for loadings analyses of regulatory scenarios that call for adherence to agronomic rates of nutrient application.

EPA models ''edge-of-field'' loadings (i.e., pollutant loadings at the boundary of the model facility) using the Groundwater Loading Effects of Agricultural Management Systems (GLEAMS) model. This field-scale model simulates hydrologic transport, erosion, and biochemical processes such as chemical transformation and plant uptake. The model uses information on soil characteristics and climate, along with nutrient production data, to model losses of nutrients in surface runoff, sediment, and groundwater leachate. Loadings are modeled for the pre- and post-regulatory scenarios to estimate changes in loadings attributable to the proposed standards.

Finally, EPA extrapolates from the model facilities to develop national estimates of baseline and post-regulatory pollutant loadings from AFOs. Using the USDA Census of Agriculture, EPA determines the number of operations that raise animals under confinement. Then, EPA determines the number of CAFOs based on operations that are defined as CAFOs and smaller operations that are designated as CAFOs based on site-specific conditions, as established by the permitting authority. Finally, AFOs and CAFOs by region are placed into counties (and eventually watersheds) using published county level Census data. Therefore, the end product of the GLEAMS modeling is a spatial distribution of aggregated edge-of-field loadings that can be used in the water quality modeling and benefits monetization process described below.

National Surface Water Pollution Study. The National Water Pollution Control Assessment Model (NWPCAM) was employed to estimate national economic benefits to surface water quality resulting from implementation of various scenarios for regulating CAFOs. NWPCAM is a national-scale water quality model for simulating the water quality and economic benefits that can result from various water pollution control policies. NWPCAM is designed to characterize water quality for the Nation's network of rivers and streams, and, to a more limited extent, its lakes. Using GLEAMS output data, NWPCAM is able to translate spatially varying water quality changes resulting from different pollution control policies into terms that reflect the value individuals place on water quality improvements. In this way, NWPCAM is capable of deriving economic benefit estimates for scenarios for regulating CAFOs.

NWPCAM estimates pollutant loadings to the stream (nitrogen, phosphorous, metals, pathogens and sediment) for each regulatory scenario. These loadings by scenario (NWPCAM output) are used as input to the other studies. Thus, all stream loading estimates are derived from NWPCAM.

1. NWPCAM Loading reductions

Table 11–10 shows the estimated pollutant reduction for nitrogen, phosphorus, fecal coliform, fecal streptococci, and sediment for each of the five NPDES regulatory scenarios based on either nitrogen or phosphorus manure land application. Nitrogen reductions range from 14 million to 33 million kgs per year; phosphorus ranges from 35 million to 59 million kgs per year; fecal coliform from 26 billion to 38 billion colonies per year; fecal streptococci from 37 to 65 billion colonies per year; and sediment from 0 kgs to 38 million kgs per year.

The proposed Phosphorus—Scenario 2/3 shows a reduction of 30 M kg (66M lbs) of nitrogen, 54M kg (119M lbs) of phosphorus, 34 billion colonies of fecal coliform, 60 billion colonies of fecal strep, and 35B kg (77B lbs) of sediment. Phosphorus—Scenario 4a shows a reduction of 29 million kg (64M lbs)of nitrogen, 52 million kg (115 M lbs) of phosphorus, 32 billion and 58 billion colonies of fecal coliform and fecal streptococci, respectively and 34 billion kg (75B lbs) of sediment to our nation's waters each year.

[1] In addition to modeling loadings based on manure application, EPA develops two complementary analyses to examine loadings from storage structures and feedlots.

TABLE 11–10.—POLLUTANT REDUCTION BASED ON NITROGEN OR PHOSPHORUS MANURE APPLICATION RATES BY NPDES SCENARIO

	Nitrogen (million kg)	Phosphorus (million kg)	Fecal Coliform (billion colonies)	Fecal Strep (billion colonies)	Sediment (billion (billion kg)
Nitrogen—Scenario 1	14	35	26	37	0
Nitrogen—Scenario 2/3	16	45	31	45	0
Nitrogen—Scenario 4a	15	42	29	44	0
Nitrogen—Scenario 4b	18	48	34	47	0
Phosphorus—Scenario 1	25	42	29	50	26
Phosphorus—Scenario 2/3*	30	54	34	60	35
Phosphorus— Scenario 4a*	29	52	32	58	34
Phosphorus—Scenario 4b	33	59	38	65	38

*proposed scenarios.

In addition, EPA estimated loadings reductions to surface waters for various metals found in manure: zinc, copper, cadmium, nickel and lead. The range of loadings reductions is shown in Table 11–11.

TABLE 11–11.—RANGE OF METAL LOADING REDUCTIONS ACROSS SCENARIOS

Metal	low (kg)	high (kg)
Zinc	10 M	19 M
Copper	546 K	1,051 K
Cadmium	23 K	39 K
Nickel	219 K	418 K
Lead	395 K	777 K

Table 11–12 is a list of metals and load reductions per year for the proposed scenarios.

TABLE 11–12.—METAL LOADING REDUCTIONS FOR SCENARIO 2/3–SCENARIO 4A

Metal	Kilograms*
Zinc	18 million/17 million.
Copper	1 million/895 thousand.
Cadmium	37 thousand/35 thousand.
Nickel	400 thousand/345 thousand.
Lead	740/690 thousand.

*rounded to the nearest 10.

The methods used to develop these loading reduction estimates are outlined in detail in the Environmental and Economic Benefits of the NPDES/ELG CAFO Rules.

2. Monetized Benefits

a. National Water Pollution Control Assessment Model (NWPCAM). Economic benefits associated with the various AFO/CAFO scenarios are based on changes in water quality use-support (i.e., boatable, fishable, swimmable) and the population benefitting from the changes. Benefits are calculated state-by-state at the State (local) scale as well as at the national level. For each State, benefits at the local-scale represent the value that the State population is willing to pay for improvements to waters within the State or adjoining the State. For each State, benefits at the national-scale represent the value that the State population is willing to pay for improvements to waters in all other states in the continental United States.

Based on the NWPCAM analysis, the total national willingness-to-pay (WTP) benefits at the local-scale for all water quality use-supports ranged from approximately $4.3 million (1999 dollars) for the least stringent scenario to $122.1 million for the most stringent scenario. The total national WTP benefits at the national-scale for all water quality use-supports ranged from approximately $0.4 million (1999 dollars) for the least stringent scenario to $22.7 million for the most stringent scenario. Total WTP benefits (i.e., sum of local-scale and national-scale) for all water quality use-supports ranged from approximately $4.9 million (1999 dollars) for the least stringent scenario to $145 million for the most stringent scenario.

Table 11–13 summarizes the resulting estimates of economic benefits for each of the six regulatory scenarios analyzed. EPA estimates that the annual benefits of Phosphorus—Scenario 2/3 is approximately $127 million per year; for Phosphorus—Scenario 4a is $108 million per year.

TABLE 11–13.—ECONOMIC BENEFIT OF ESTIMATED IMPROVEMENTS IN SURFACE WATER QUALITY

[In millions of 1999 dollars]

Regulatory scenario	Annual benefits
Nitrogen—Scenario 1	$4.9
Nitrogen—Scenario 2/3	6.3
Nitrogen—Scenario 4a	5.5

TABLE 11–13.—ECONOMIC BENEFIT OF ESTIMATED IMPROVEMENTS IN SURFACE WATER QUALITY—Continued

[In millions of 1999 dollars]

Regulatory scenario	Annual benefits
Nitrogen—Scenario 4b	7.2
Phosphorus—Scenario 1	87.6
Phosphorus—Scenario 2/3*	127.1
Phosphorus—Scenario 4a*	108.5
Phosphorus—Scenario 4b	145.0

*Proposed scenarios.

b. *Shellfish Beds.* Pathogen contamination of coastal waters is a leading cause of shellfish bed harvest restrictions and closures. Sources of pathogens include runoff from agricultural land and activities. Using *The 1995 National Shellfish Register of Classified Growing Waters* (shellfish register) published by the National Oceanic and Atmospheric Administration (NOAA), EPA estimated the possible improvements to shellfish bed harvesting due to expected pathogen reductions of each regulatory scenario.

First, EPA characterized the baseline annual shellfish bed loadings. Then, EPA estimated the area of shellfish-growing waters for which current loadings are harvested. For the third step, EPA calculated the average annual per-acre yield of shellfish form harvested waters. Next, EPA estimated the area of shellfish-growing waters that are currently unharvested as a result of pollution from AFOs. From this, EPA calculated the potential harvest of shellfish from waters that are currently unharvested as a result of pollution from AFOs. Estimates for all scenarios range from $1.8 million to $2.9 million. Phosphorus—Scenario3 is $2.7 million and Phosphorus—Scenario 4a is $2.4 million.

c. *Fishkills.* Episodic fish kill events resulting from spills, manure runoff, and other discharges of manure from animal waste feeding operations continue to remain a serious problem in the United States. The impacts from these incidents range from immediate and dramatic kill events to less dramatic but more widespread events. Manure dumped into and along the West Branch of the Pecatonica River in Wisconsin resulted in a complete kill of smallmouth bass, catfish, forage fish, and all but the hardiest insects in a 13 mile stretch of the river. Less immediate catastrophic impacts on water quality from manure runoff, but equally important, are increased algae growth or algae blooms which remove oxygen from the water and may result in the death of fish. Manure runoff into a shallow lake in Arkansas resulted in a heavy algae bloom which depleted the lake of oxygen, killing many fish.

Fish health and fish kills are an indication of water quality. If fish cannot survive or are sick in their natural habitat then the public may view the water as unsuitable for recreational activities and fish unfit for human consumption. Parts of the Eastern Shore of the United States have been plagued with problems related to pfiesteria, a dinoflagellate algae that exist in rivers at all times, but can transform itself into a toxin that eats fish. Fish attacked by pfiesteria have lesions or large, gaping holes on them as their skin tissue is broken down; the lesions often result in death. The transformation of pfiesteria to the toxic form is believed to be the result of high levels of nutrients. Fish kills related to pfiesteria in the Neuse River in North Carolina have been blamed on the booming hog industry and the associated waste spills and runoff from the hog farms.

There is preliminary evidence that suggests that there are human health problems associated with exposure to pfiesteria. As a result, people most likely would limit or avoid recreational activities in waters with pfiesteria-related fish kills. The town of New Bern, a popular summer vacation spot along the Neuse River in North Carolina, was concerned about a decline in tourism after several major fish kills in the summer of 1995. Not only were fish killed, people became sick after swimming or fishing in the waters. People swimming in the waters reported welts and sores on their body. Summer camps canceled boating classes and children were urged to stay out of the water. Fishing boats were concerned about taking people fishing on the river. People were warned not to eat fish that were diseased or sick. At one point, after seeing miles and miles of dead fish, a top environmental official issued a warning urging people not to swim, fish, or boat in the fish-kill zone. Many blame the heavy rainfall which pumped pollutants from overflowing sewage plants and hog lagoons into the river, creating algae blooms, low oxygen and pfeisteria outbreaks as the cause of the fish kills.

Reports on fish kill events in the United States were collected by the Natural Resources Defense Council and the Izaak Walton League. Nineteen states reported information on historical and current fish kills. Using these data, EPA estimated the benefits related to reduced fish being killed for each regulatory scenario. At a seven percent discount rate, benefits range from $2 million to $42 million. Benefots for Phosphorus—Scenario 3 range from $2.4 million to $30.6 million; for Phosphorus—Scenario 4a, from $2.8 million to $34.5 million.

d. *Groundwater Contamination.* CAFOs can contaminate groundwater and thereby cause health risks and welfare losses to people relying on groundwater sources for their potable supplies or other uses. Of particular concern are nitrogen and other animal waste-related contaminants (originating from manure and liquid wastes) that leach through the soils and the unsaturated zone and ultimately reach groundwaters. Nitrogen loadings convert to elevated nitrate concentrations at household and community system wells, and elevated nitrate levels in turn pose a risk to human health in households with private wells (nitrate levels in community wells are regulated to protect human health). The proposed regulation will generate benefits by reducing nitrate levels in household wells, and there is clear empirical evidence that households have a positive willingness to pay to reduce nitrate concentrations in their water supplies.

The federal health-based National Primary Drinking Water Standard for nitrate is 10 mg/L, and this Maximum Contaminant Level (MCL) applies to all Community Water Supply systems. Households relying on private wells are not subject to the federal MCL for nitrate but levels above 10 mg/L are considered unsafe for sensitive subpopulations (e.g., infants). Several economic studies indicate a considerable WTP by households to reduce the likelihood of nitrate levels exceeding 10 mg/L (e.g., $448 per year per household (Poe and Bishop, 1991)). There also is evidence of a positive household WTP to reduce nitrate levels even when baseline concentrations are considerably below the MCL (approximately $2 per mg/L of reduced nitrate concentration (Crutchfield *et al.,* 1997, De Zoysa, 1995)).

Based on extensive U.S. Geologic Survey (USGS) data on nitrate levels in wells throughout the country, an empirical model was developed to predict how each regulatory option would affect the distribution of nitrate concentrations in household wells. Table 11–14 indicates the number of household wells that are estimated to have baseline (i.e., without regulation) concentrations above 10 mg/L and that will have these concentration reduced to levels below the MCL for each option.

Also shown are the households with predicted nitrate levels that are below the MCL at baseline, but that will experience further reductions in nitrate levels due to the proposed regulation.

TABLE 11–14.—REDUCTION IN HOUSEHOLDS EXCEEDING MCL AND MG/L OF NITRATE IN WELLS

Regulatory Scenario	Reduction, from baseline, in # households exceeding 10 mg/L	Total number of mg/L reduced in wells at 1–10 mg/L baseline
Baseline # of households affected	1,277,137	6,195,332
Nitrogen—Scenario 1	152,204	961,741
Nitrogen—Scenario 2/3	152,204	1,007,611
Nitrogen—Scenario 4a	161,384	1,186,423
Nitrogen—Scenario 4b	161,384	1,186,423
Phos.—Scenario 1	161,384	1,103,166
Phos—Scenario 2/3*	161,384	1,159,907
Phos—Scenario 4a*	165.974	1,374,990
Phos—Scenario 4b	165,974	1,374,990

* Proposed scenarios.

The monetized benefits of these nitrate concentration reductions is estimated to be $49.4 million per year for Phosphorus—Scenario 2/3, as shown in Table 11–15. The total benefits of this scenario consist of $47.8 million for the households that have nitrate levels reduced to below the MCL from baseline concentrations above 10 mg/L, plus an additional $1.5 million for those households with nitrate reductions relative to baseline levels below the MCL. The monetized benefits of these nitrate concentration reductions is estimated to be $51.0 million per year for Phosphorus—Scenario 4a. The total benefits of this option consist of $49.2 million for the households that have nitrate levels reduced to below the MCL from baseline concentrations above 10 mg/L, plus an additional $1.7 million for those households with nitrate reductions relative to baseline levels below the MCL. The household benefits of the other options are also shown in the table, and range from $46.4–$50.1 million per year.

TABLE 11–15.— ANNUALIZED MONETARY BENEFITS ATTRIBUTABLE TO REDUCED NITRATE CONCENTRATIONS

Regulatory scenario	Total benefits	Benefits from households exceeding MCL at baseline	Benefits from households between 1 and 10 mg/L at baseline
Nitrogen—Scenario 1	$46,372,457	$45,118,803	$1,219,763
Nitrogen—Scenario 2/3	46,432,250	45,118,803	1,276,293
Nitrogen—Scenario 4a	49,386,622	47,840,089	1,498,104
Nitrogen—Scenario 4b	49,386,622	47,840,089	1,498,104
Phosphorus—Scenario 1	49,278,094	47,840,089	1,396,043
Phosphorus—Scenario 2/3*	49,352,058	47,840,089	1,465,648
Phosphorus—Scenario 4a*	50,993,067	49,200,732	1,729,337
Phosphorus—Scenario 4b	50,993,067	49,200,732	1,729,337

* Proposed scenarios.

e. *Total Benefit of Proposed Regulatory Scenario.* Table 11–16 shows the annualized benefits for each of the studies conducted. Table 11–17 shows the summary of annualized benefits for three discount rates (3, 5, and 7 percent). The total monetized benefits for this proposed rule are, at a minimum, $163 million for Phosphorus—Scenario 2/3 and $146 million for Phosphorus—Scenario 4a, discounted at seven percent. At a three percent discount rate, the annualized benefits for Phosphorus—Scenario 3 are $180 million and for Phosphorus—Scenario 4a, $163 million. These represent the lower bound estimates for this analysis. The upper end of the range would include estimates for drinking water treatment plant cost savings, surface water improvements from nonboatable to boatable water quality conditions, and other benefits that we were unable to estimate at this time. We plan to include some of these monetized benefits in the final rule.

TABLE 11–16.—ESTIMATED ANNUALIZED BENEFITS OF REVISED CAFO REGULATIONS

[1999 dollars, millions]

Regulatory Scenario	Recreational and non-use benefits	Reduced fish kills	Improved shellfishing	Reduced private well contamination
Nitrogen—Scenario 1	4.9	0.1–0.2	0.1–1.8	33.3–49.0
Nitrogen—Scenario 2/3	6.3	0.1–0.3	0.2–2.4	33.3–49.1
Nitrogen—Scenario 4a	5.5	0.1–0.3	0.2–2.2	35.5–52.2
Nitrogen—Scenario 4b	7.2	0.1–0.3	0.2–2.6	35.5–52.2

TABLE 11–16.—ESTIMATED ANNUALIZED BENEFITS OF REVISED CAFO REGULATIONS—Continued

[1999 dollars, millions]

Regulatory Scenario	Recreational and non-use benefits	Reduced fish kills	Improved shellfishing	Reduced private well contamination
Phosphorus—Scebarui 1	87.6	0.2–0.3	0.2–2.1	35.4–52.1
Phosphorus—Scenario 2/3*	127.1	0.2–0.4	0.2–2.7	35.4–52.1
Phosphorus—Scenario 4a*	108.5	0.2–0.4	0.2–2.4	36.6–53.9
Phosphorus—Scenario 4b	145.0	0.2–0.4	0.2–3.0	36.6–53.9

* Proposed scenarios.

TABLE 11–17.—SUMMARY OF ANNUALIZED BENEFITS

[1999 dollars, millions]

Regulatory scenario	Discount rates					
	3 percent		5 percent		7 percent	
	Low	High	Low	High	Low	High
Nitrogen—Scenario 1	54.1	55.9	45.0	46.9	38.4	40.2
Nitrogen—Scenario 2/3	55.7	58.0	46.6	48.9	39.9	42.3
Nitrogen—Scenario 4a	58.0	60.2	48.3	50.5	41.2	43.4
Nitrogen—Scenario 4b	59.7	62.3	50.1	52.6	43.0	45.5
Phosphorus—Scenario 1	140.0	142.1	130.4	132.4	123.3	125.4
Phosphorus—Scenario 2/3*	179.7	182.3	170.0	172.7	163.0	165.6
Phosphorus—Scenario 4a*	162.8	165.1	152.8	155.2	145.5	147.9
Phosphorus—Scenario 4b	199.4	202.2	189.4	192.2	182.1	185.0

* Proposed scenarios.

XII. Public Outreach

A. Introduction and Overview

EPA has actively involved interested parties to assist it in developing a protective, practical, cost-effective regulatory proposal. EPA has provided many opportunities for input in this rulemaking process. EPA has met with various members of the stakeholder community on a continuing basis through meeting requests and invitations to attend meetings, conferences, and site visits. These meetings with environmental organizations, agricultural organizations, producer groups, and producers representing various agricultural sectors have allowed EPA to interact with and receive input from stakeholders about the Unified Strategy and the NPDES and effluent limitations regulatory revisions. In addition, EPA convened a Small Business Advocacy Review Panel to address small entity concerns. EPA also sent an outreach package to and met with several national organizations representing State and local governments. More detailed information on EPA's public outreach is provided in the rulemaking record.

B. Joint USDA/EPA Unified AFO Strategy Listening Sessions

In the fall of 1998, EPA and USDA announced eleven public outreach meetings designed to allow public comment on the Draft Unified National AFO Strategy. The meetings were held in the following cities: Tulsa, Oklahoma; Harrisburg, Pennsylvania; Ontario, California; Madison, Wisconsin; Seattle, Washington; Des Moines, Iowa; Chattanooga, Tennessee; Indianapolis, Indiana; Fort Worth, Texas; Denver, Colorado; and Annapolis, Maryland. Each meeting included a pre-meeting among state and regional officials, EPA, and USDA representatives to discuss the draft strategy and the issues posed by CAFOs in general. All participants in the public sessions, including numerous small entities, were given the opportunity to sign up and provide their comments to a panel consisting of EPA, USDA, and local representatives. Many of the commenters made points or raised issues germane to small entities. A transcript of these comments was used by EPA and USDA in developing the final Unified National AFO Strategy. These comments and concerns have been considered by EPA in the development of the revised NPDES CAFO regulations. The transcripts of these meetings are available on the OWM Web Site (www.epa.gov/owm/afo.htm) and are available in the record.

C. Advisory Committee Meeting

EPA was invited to meet with the Local Government Advisory Committee, Small Community Advisory Subcommittee on September 8, 1999. At this Federal Advisory Committee Act meeting, EPA described the CAFO regulatory revisions being considered, and responded to questions concerning the effect of EPA's regulatory actions on small communities. While the CAFO regulations do not directly affect small communities, AFOs do have an effect on local economies and on the local environment. Thus, how they are regulated (or not regulated) has implications for local governments. EPA is keeping local government concerns in mind as it proceeds with the CAFO regulatory revisions and general public outreach activities.

D. Farm Site Visits

EPA conducted approximately 110 site visits to collect information about waste management practices at livestock and poultry operations. Agency staff visited a wide range of operations, including those demonstrating centralized treatment or new and innovative technologies. EPA staff visited livestock and poultry operations throughout the United States, the majority of which were chosen with the assistance of the leading industry trade associations and also by the Natural Resources Defense Council, the Clean Water Network, university experts, State cooperative and extension agencies, and state and EPA regional representatives.

EPA also attended USDA-sponsored farm tours, as well as tours offered at industry, academic, and government conferences. Details on these visits are provided in the rulemaking record.

EPA staff visited cattle feeding operations in Texas, Oklahoma, Kansas, Colorado, California, Indiana, Nebraska, and Iowa, as well as veal operations in Indiana. The capacities of the beef feedlots varied from 500 to 120,000 head. EPA also visited dairies in Pennsylvania, Florida, California, Colorado, and Wisconsin, with the total mature dairy cattle at the operations ranging from 40 to 4,000 cows. In addition, EPA visited broiler, layer and turkey facilities in Georgia, Arkansas, North Carolina, Virginia, West Virginia, Maryland, Delaware, Pennsylvania, Ohio, Indiana, and Wisconsin. EPA visited hog facilities in North Carolina, Ohio, Iowa, Minnesota, Texas, Colorado, Oklahoma, and Utah.

E. Industry Trade Associations

Throughout regulatory development, EPA has worked with representatives from the national trade groups, including: National Cattlemen's Beef Association (NCBA); American Veal Association (AVA); National Milk Producers Federation (NMPF); Professional Dairy Heifers Growers Association (PDHGA); Western United Dairymen (WUD); National Pork Producers Council (NPPC); United Egg Producers and United Egg Association (UEP/UEA); National Turkey Federation (NTF); and the National Chicken Council (NCC). All of the above organizations have provided assistance by helping with site visit selection, submitting supplemental data, reviewing descriptions of the industry and waste management practices, and participating in and hosting industry meetings with EPA.

F. CAFO Regulation Workgroup

EPA established a workgroup that included representatives from USDA and seven states, as well as EPA Regions and headquarters offices. The workgroup considered input from stakeholders and developed the regulatory options presented in today's proposal.

G. Small Business Advocacy Review Panel

1. Summary of Panel Activities

To address small business concerns, EPA's Small Business Advocacy Chairperson convened a Small Business Advocacy Review (SBAR) Panel under section 609(b) of the Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA). Participants included representatives of EPA, the Small Business Administration (SBA) and the Office of Management and Budget (OMB). ''Small Entity Representatives'' (SERs), who advised the Panel, included small livestock and poultry producers as well as representatives of the major commodity and agricultural trade associations. Information on the Panel's proceedings and recommendations is in the Final Report of the Small Business Advocacy Review Panel on EPA's Planned Proposed Rule on National Pollutant Discharge Elimination System (NPDES) and Effluent Limitations Guideline (Effluent Guidelines) Regulations for Concentrated Animal Feeding Operations (hereinafter called the ''Panel Report''), along with other supporting documentation included as part of the Panel process. This information can be found in the rulemaking record.

Prior to convening a SBAR Panel, EPA distributed background information and materials to potential SERs on September 3, 1999 and September 9, 1999. On September 17, 1999, EPA held a conference call from Washington, D.C. which served as a pre-panel forum for small business representatives to provide input on key issues relating to the proposed regulatory changes to the ''CAFO Rule.'' Twenty-seven small business representatives from the beef, dairy, swine, poultry, and exotic animal livestock industries participated in the conference call. A summary of the conference call is included in the Panel Report. Following the conference call, 19 of the 41 small business advisors and national organizations invited to participate on the conference call submitted written comments. These written comments are included in the Panel Report.

The SBAR Panel for the ''CAFO Rule'' was formally convened on December 16, 1999. On December 28, 1999, the Panel distributed an outreach package to the final group of SERs, which included many of the participants in EPA's September 17, 1999 outreach conference call. The package included: a SER outreach document, which provided a definition of a small business and described those entities most likely to be affected by the rule; an executive summary of EPA's cost methodology; regulatory flexibility alternatives; a cost methodology overview for the swine, poultry, beef, and dairy sectors; a cost annualization approach; and a list of questions for SERs. Additional modeling information was also sent to SERs on January 7, 2000 and January 10, 2000. A complete list of these documents can be found in the Panel Report; all information sent to the SERs is included in the record.

The SERs were asked to review the information package and provide verbal comments to the Panel during a January 5, 2000 conference call, in which 22 SERs participated. During this conference call, SERs were also encouraged to submit written comments. SERs were given an additional opportunity to make verbal comments during a second conference call held on January 11, 2000, in which 20 SERs participated. During both conference calls, SERs were asked to comment on the costs and viability of the proposed alternatives under consideration by EPA. A summary of both conference calls can be found in the Panel Report. Following the calls, the Panel received 20 sets of written comments from 14 SERs. A complete set of these comments is included in the Panel Report.

2. Summary of Panel Recommendations

A full discussion of the comments received from SERs and Panel recommendations is included in the Panel Report. The major issues summarized are as follows.

a. *Number of Small Entities.* The Panel reviewed EPA's methodology to develop its estimate of the small entities to which the proposed rule will likely apply. EPA proposed two alternative approaches to estimate the number of small businesses in these sectors. Both approaches identify small businesses in these sectors by equating SBA's annual revenue definition with the number of animals at an operation and estimate the total number of small businesses in these sectors using farm size distribution data from USDA. One approach equates SBA's annual revenue definition with operation size using farm revenue data, as described in Section X.J.2 of this document. Another approach equates SBA's annual revenue definition with the operation size using a modeling approach developed by EPA that calculates the amount of livestock revenue at an operation based market data, including the USDA-reported price received by producers, average yield, and the number of annual marketing cycles. (Additional information on this latter approach is in the rulemaking record.)

During the Panel process, and following formal consultation with SBA, the Panel participants agreed to use the first approach to estimate the number of small businesses in these sectors. More details on this approach is provided in Section X.J.2 and in Section 9 of the

Economic Analysis. More detail on the Panel's deliberation of the approach used to determine the number of small businesses is provided Sections 4 and 5 of the Panel Report and in other support documentation developed during the SBAR Panel process. The Panel noted that the revised methodology may not accurately portray actual small businesses in all cases across all sectors. The Panel also recognized that, under this small business definition, EPA would be regulating some small facilities, but urged EPA to consider the small business impacts of doing so.

b. *Potential Reporting, Record Keeping, and Compliance Requirements. Record Keeping Related to Off-Site Transfer of Manure.* The Panel reviewed EPA's consideration of record keeping and reporting requirements in connection with off-site transfer of manure. The Panel recommended that EPA review and streamline the requirements for small entities. In response to this recommendation, EPA is limiting its proposal to keep records of the name and address of the entity to which the CAFO is transferring manure, how much is being transferred and the nutrient content of the manure on-site. This information would allow EPA to track manure, and to follow-up with the third party recipient to ascertain whether the manure was applied in accordance with Clean Water Act requirements that may apply. EPA is also proposing under one co-proposed option that a CAFO obtain a certification from recipients that land application is done in accordance with proper agricultural practices. EPA assumes recipients of manure are mostly field crop producers who already maintain appropriate records relating to nutrient management. EPA is not proposing to establish specific requirements for these offsite recipients.

Permit Application and Certification Requirements. The Panel asked EPA to consider the burden associated with increasing the number of entities subject to permit between 300 AU and 1,000 AU. Furthermore, the Panel recommended that EPA carefully consider appropriate streamlining options before considering a more burdensome approach. EPA considered several alternative scenarios for the scope of permit coverage of facilities in this size group, and decided to simultaneously co-propose two scenarios, as each offers different means of accomplishing similar environmental outcomes.

The first alternative proposal would retain the current three-tier structure, but would require an operation in the 300–1,000 AU size tier to certify to the permitting authority that it does not meet any of the ''risk-based'' conditions (described in Section VII), and thus is not required to obtain a permit. The three-tier structure would require all AFOs with 300 AU or more to, at a minimum, obtain a permit nutrient plan and submit a certification to the permit authority. This alternative would provide the permit authority the opportunity to implement effective programs to assist AFOs in order to minimize how many would be required to apply for a permit. Because those certifying would not be CAFOs, however, they would have access to section 319 nonpoint source funds. This co-proposed alternative does not meet one of the goals of today's proposal, as recommended by the Panel, that is, to simplify the regulations to improve understanding and therefore compliance by the regulated community. Further, the conditions are such that all facilities with 300 AU or more would incur some cost associated with certifying they do not meet any of the conditions. EPA is also requesting comment on a variation of the three-tier structure that was presented to the SERs and generally favorably received by the Panel (see detailed discussion in Section VII.B.3).

The second alternative proposal would adopt a two-tier structure that defines all operations with 500 AU or more as CAFOs. (EPA is also requesting comment on a 750 AU threshold.) This proposal would provide regulatory relief for operations between 300 AU and 500 AU that may be considered CAFOs under the existing regulations. Operations in this size group would not be subject to the certification process and would not incur the costs associated with certification, such as the costs to obtain a certified Permit Nutrient Plan and to submit a certification to the permit authority. Under the two-tier structure, operations with more than 500 AU would all be required to apply for a permit. All facilities with fewer than 500 AU would be subject to permitting as CAFOs only through case-by-case designation based on a finding that the operation is a significant contributor of pollution by the permit authority. This proposal offers simplicity and clarity as to which entities will be subject to the proposed regulations and those that will not, which was recommended by the Panel, as well as indicated by the regulated community as one of the goals of today's proposal. Representatives of some State programs, however, have indicated that they would prefer an option that allows State non-NPDES programs to address issues at CAFOs in their states, rather than being required to write permits.

EPA is also proposing to provide regulatory relief to small businesses by eliminating the mixed animal calculation. As a result, smaller operations that house a mixture of animal types where none of these animal types independently meets the regulatory threshold are not considered CAFOs under either of today's proposals, unless they are individually designated. EPA believes that this will provide maximum flexibility for these operations since most are now participating in USDA's voluntary CNMP program, as outlined in the AFO Strategy. For more information, see discussion in Section VII. A summary of EPA's economic analysis is provided in Section X.J of this preamble.

Frequency of Testing. The Panel reviewed EPA's consideration of requiring periodic soil testing. The Panel agreed that testing manure and soil at different rates may be appropriate, but expressed concern about the burden of any inflexible testing requirements on small businesses. The Panel recommended that EPA consider leaving the frequency of required testing to the discretion of local permit writers, and request comment on any testing requirements that are included in the proposed rule. The Panel further recommended that EPA weigh the burden of testing requirements to the need for such information.

EPA is proposing to require soil testing of each field every three years and manure testing once per year. The proposed frequency is consistent with standards in many states and also recommendations from agricultural extension services. To ensure that soils have not reached a critical concentration of phosphorus, EPA believes that it is necessary to establish a minimum sampling frequency and testing requirements for all CAFOs, regardless of size. Since it is believed that much of the water pollution from agriculture comes from field runoff, information on manure and soil content is essential for the operator to determine at what rate manure should be applied. EPA believes this information is essential for the permitting authority to know whether the manure is being land applied at proper rates. The local permit writer retains the discretion to require more frequent testing.

Groundwater Requirements Where Linked to Surface Water. The Panel reviewed EPA's consideration of an option that would require groundwater controls at facilities that are determined to have a direct hydrological connection

to surface water since there is reasonable potential for discharges to surface water via ground water at these facilities (''Option 3''). Because of the potentially high costs to small operators associated with both making a determination of a hydrologic link and installing controls (such as lagoon liners, mortality composting devices, groundwater monitoring wells, concrete pads, and other technologies), the Panel recommended that EPA examine this requirement, giving careful consideration to the associated small entity impacts, in light of the expected environmental benefits resulting from this option. The Panel further recommended that if EPA decides to propose any such requirements that it consider streamlining the requirements for small entities (*e.g.,* sampling at reduced rates) or exempting them altogether.

(i) *Existing CAFOs.* EPA is proposing to require existing beef and dairy CAFOs to install groundwater controls when the groundwater beneath the production area has a direct hydrologic connection to surface water (Option 3, as described in Section VIII). This includes installation of wells and biannual sampling to monitor for any potential discharge from the production area. CAFOs are also expected to construct concrete pads or impermeable surfaces, as well as install synthetic liners if necessary to prevent discharges to surface water via direct hydrologic connection. The groundwater controls which are part of the proposed BAT requirements are in addition to the land application requirements which ensure that the manure and wastewater application to land owned or controlled by the CAFO is done in accordance with a PNP and does not exceed the nutrient requirements of the soil and crop. EPA has determined that this option represents the best available technology for existing beef and dairy CAFOs and that this requirement is economically achievable under both proposed permitting scenarios (*i.e.* the two-tier and three-tier structures), although some CAFOs in these sectors may experience increased financial burden. Because the risks from discharged pollutants from groundwater to surface water are location-specific, EPA believes that the proposed groundwater requirements are necessary at CAFOs where there is a hydrologic connection to surface waters. EPA's is proposing that these requirements are economically achievable by operations that are defined as CAFOs and are also small businesses. The results of EPA's small business analysis is provided in Section X.J of this preamble. Moreover, EPA believes that the estimated benefits in terms of additional groundwater-surface water protections would be significant. EPA's pollution reduction estimates across options are presented in the Development Document.

EPA is not proposing BAT requirements for the existing swine, veal and poultry subcategories on the basis of Option 3, *i.e.,* EPA rejected proposing groundwater monitoring and controls in the effluent guidelines for these CAFOs. As described in Section VIII of this preamble, EPA is proposing Option 5 as the best available technology economically achievable, which requires zero discharge from the animal production area with no exception for storm events. Were EPA to add the requirement to control discharges to groundwater that is directly connected to surface waters in addition to the Option 5 requirements, the costs would result in much greater financial impacts to hog and poultry operations. EPA's analysis shows that the full cost of groundwater controls (''Option 3'') in addition to requirements under Option 5 would not be economically achievable by operations in these sectors.

(ii) *New CAFOs.* EPA is proposing to require that all new CAFOs in all subcategories install groundwater controls. EPA expects that requiring groundwater monitoring is affordable to new facilities since these facilities do not face the cost of retrofit. EPA's economic analysis of new facility costs is provided in Section X.F.1(b) of this preamble. More detailed information is provided in the Economic Analysis and the Development Document.

c. *Relevance of Other Federal Rules.* The Panel did not note any other Federal rules that may duplicate, overlap, or conflict with the proposed rule.

d. *Regulatory Alternatives.* The Panel considered a wide range of options and regulatory alternatives for reducing the burden on small business in complying with today's proposal. These included:

Revised Applicability Thresholds. The Panel recommended that EPA give serious consideration to the issues discussed by the Panel when determining whether to establish less stringent effluent limitations guidelines for smaller facilities, and whether to preserve maximum flexibility for the best professional judgement of local permit writers. The Panel also recommended that the Agency carefully evaluate the potential benefits of any expanded requirements for operations with between 300 and 1,000 AU and ensure that those benefits are sufficient to warrant the additional costs and administrative burden that would result for small entities.

EPA is proposing to apply the effluent limitation guidelines to all facilities that are defined as CAFOs, although EPA is also requesting comment on an option under which they would only apply to facilities with greater than 1,000 AUs. Thus, under the three-tier structure all CAFOs with 300 AU or more would be subject to the effluent guidelines. Under the two-tier structure, all CAFOs with 500 AU or more would be subject to the effluent guidelines. EPA is also requesting comment on a 750 AU threshold for the two-tier structure. Under both of the co-proposed alternatives, EPA is proposing to eliminate the ''mixed'' animal calculation for operations with more than a single animal type for determining which AFOs are CAFOs. As a result, smaller operations that house a mixture of animal types where none of these animal types independently meets the regulatory threshold are not considered CAFOs under today's proposed rulemaking, unless they are individually designated. EPA believes that this will provide maximum flexibility for these operations since most are now participating in USDA's voluntary CNMP program, as outlined in the AFO Strategy. For more information, see discussion in Section VII.

EPA's two-tier proposal provides additional relief to small businesses. Under the two-tier structure, EPA is proposing to establish a regulatory threshold that would define as CAFOs all operations with more than 500 AU. This co-proposed alternative would provide relief to small businesses since this would remove from the CAFO definition operations with between 300 AU to 500 AU that under the current rules are defined as CAFOs. These operations would no longer be defined as CAFOs and may avoid being designated as CAFOs if they take appropriate steps to prevent discharges. In addition, if operations of any size that would otherwise be defined as CAFOs can demonstrate that they have no potential to discharge, they would not need to obtain a permit. Also, under the two-tier structure, EPA is proposing to raise the size standard for defining egg laying operations as CAFOs from 30,000 to 50,000 laying hens. This alternative would remove from the CAFO definition egg operations of this size that under the current rules are defined as CAFOs, if they utilize a liquid manure management system.

EPA believes that revising the regulatory thresholds below 1,000 AU is necessary to protect the environment

from CAFO discharges. At the current 1,000 AU threshold, less than 50 percent of all manure and wastewater generated annually would be captured under the regulation. Under the co-proposed alternatives, between 64 percent (two-tier) and 72 percent (three-tier) would be covered. (See Section IV.A of this preamble.) Total pre-tax compliance costs to CAFOs with fewer than 1,000 AU is estimated to range between $226 million annually (two-tier) to $298 million annually (three-tier), or about one-third of the total estimated annual costs (see Section X.E.1). EPA believes that the estimated benefits in terms of additional manure coverage justify the estimated costs. EPA estimates that 60 percent (two-tier) to 70 percent (three-tier) of all operations that are defined as CAFOs and are also small businesses are operations with less than 1,000 AU. EPA's economic analysis, however, indicates that these small businesses will not be adversely impacted by the proposed requirements. EPA's estimates of the number of small businesses and the results of its economic analysis is provided in Section X.J of this preamble.

Under each co-proposed alternative, EPA is proposing that operations that are not defined as CAFO (*i.e.,* operations with fewer animals than the AU threshold proposed) could still be designated as CAFOs on a case-by-case basis. During the Panel process, the Panel urged EPA not to consider changing the designation criteria for operations with less than 300 AU. This includes the criterion that the permitting authority must conduct an on-site inspection of any AFO, in making a designation determination. EPA is not proposing to eliminate the on-site inspection requirement. EPA believes it is appropriate to retain the requirement for an on-site inspection before the permitting authority determines that an operation is a ''significant contributor of pollution.'' No inspection would be required to designate a facility that was previously defined or designated as a CAFO. EPA is, however, requesting comment on whether or not to eliminate this provision or to redefine the term ''on-site'' to include other forms of site-specific data gathering. In addition, EPA is proposing to delete two criteria, including discharge from manmade device and direct contact with waters of the U.S., as unnecessary to the determination of whether an operation should be designated as a CAFO. EPA is also proposing to clarify EPA's designation authority in States with NPDES approved programs. For more information, see Section VII.

25-year, 24-hour Storm Event. At the time of SBREFA outreach, EPA indicated to SERs and to the Panel that it was considering removing the exemption, but not changing the design requirement for permitted CAFOs. The Panel expressed concern about removing this exemption for operations with fewer than 1000 AU. The Panel recommended that if EPA removes the exemption, it should fully analyze the incremental costs associated with permit applications for those facilities that are not presently permitted that can demonstrate they do not discharge in less than a 25-year, 24-hour storm event, as well as any costs associated with additional conditions related to land application, nutrient management, or adoption of BMPs that the permit might contain. The Panel recommended that EPA carefully weigh the costs and benefits of removing the exemption for small entities. The Panel also urged EPA to consider reduced application requirements for small operations affected by the removal of the exemption.

EPA is proposing to require that all operations that are CAFOs apply for a permit. EPA is proposing to remove the 25-year, 24-hour storm exemption from the definition of a CAFO. It is difficult to monitor, and removal of this exemption will make the rule simpler and more equitable. However, we are proposing to retain the 25-year, 24-hour storm event as a design standard in the effluent limitation guidelines for certain animal sectors (specifically, the beef and dairy cattle sectors). As a result, operations in these sectors that discharge only in the event of a 25-year, 24-hour storm would not be exempt from being defined as CAFOs, but would be in compliance with their permit as long as they met the 25-year, 24-hour storm design standard. EPA is proposing to establish BAT for the swine, poultry, and veal subcategories on the basis of Option 5 which bans discharge from the production area under any circumstances. The technology basis for this option is covered lagoons, and does not establish a different design standard for these lagoons. Removal of the exemption from the CAFO definition should have no impact on operations that are already employing good management practices. More information is provided in Sections VII and VIII of this document. Prior to proposing to remove this exemption, EPA evaluated the incremental costs associated with permit applications for those facilities that are not presently permitted and other associated costs to regulated small entities. EPA's economic analysis is provided in Section X.J of this preamble. Estimated costs to the NPDES Permitting Authority are presented in Section X.G.1. Section X.I presents a comparison of the annualized compliance costs and the estimated monetized benefits.

Manure and Wastewater Storage Capacity. The Panel noted the SERs' concern about the high cost of additional storage capacity and recommended that EPA consider low-cost alternatives in its assessment of best available technologies economically achievable, especially for any subcategories that may include small businesses. The Panel was concerned about the high cost of poultry storage and asked EPA to consider low cost storage. EPA is proposing that facilities may not discharge pollutants to surface waters. To meet this requirement, facilities may choose to construct storage sheds, cover manure, collect all runoff, or any other equally effective combination of technologies and practices. The proposal does not directly impose any minimum storage requirements.

Land Application. The Panel recommended that EPA continue to work with USDA to explore ways to limit permitting requirements to the minimum necessary to deal with threats to water quality from over-application and to define what is ''appropriate'' land application, consistent with the agricultural stormwater exemption. The Panel recommended that EPA consider factors such as annual rainfall, local topography, and distance to the nearest stream when developing any certification and/or permitting requirements related to land application. The Panel also noted the high cost of P-based application relative to N-based application, and supported EPA's intent to require the use of P-based application rates only where necessary to protect water quality, if at all, keeping in mind its legal obligations under the CWA. The Panel recommended that EPA consider leaving the determination of whether to require the use of P-based rates to the permit writer's discretion, and continue to work with USDA in exploring such an option.

EPA recognizes that the rate of application of the manure and wastewater is a site-specific determination that accounts for the soil conditions at a CAFO. Depending on soil conditions at the CAFO, EPA is proposing to require that the operator apply the manure and wastewater either according to a nitrogen-standard or,

where necessary, on a phosphorus-standard. If the soil phosphorus levels in a region are very high, the CAFO would be prohibited from applying any manure or wastewater. EPA believes that this will improve water quality in some production regions where the amount of phosphorus in animal manure and wastewater being generated exceeds crop needs and has resulted in a phosphorus build-up in the soils in those regions. Evidence of manure-phosphorus generation in excess of crop needs is reported in analyses conducted by USDA. Other data show that larger operations tend to have less land to land apply manure nutrients that are generated on-site. EPA believes that each of the co-proposed alternatives establish a regulatory threshold that ensures that those operations with limited land on which to apply manure are permitted. Under the three-tier structure, EPA is proposing risk conditions that would require nutrient management (i.e., PNPs) at operations with 300 to 1,000 AU. In addition, EPA is proposing under one co-proposed option to require letters of certification be obtained from off-site recipients of CAFO manure. Operations that are not defined as CAFOs, but that are determined to be a ''significant contributor of pollution'' by the permit authority, may be designated as CAFOs.

EPA is proposing a method for assessing whether phosphorus-based application is necessary that is consistent with USDA's policy on nutrient management. In all other areas, a nitrogen-based application rate would apply. EPA's proposal grants flexibility to the states in determining the appropriate basis for land application rates. EPA will continue to work with USDA to evaluate appropriate measures to distinguish proper agricultural use of manure.

Co-Permitting. The Panel reviewed EPA's consideration of requiring corporate entities that exercise substantial operational control over a CAFO to be co-permitted. The Panel did not reach consensus on this issue. The Panel was concerned that any co-permitting requirements may entail additional costs and that co-permitting cannot prevent these costs from being passed on to small operators, to the extent that corporate entities enjoy a bargaining advantage during contract negotiations. The Panel thus recommended that EPA carefully consider whether the potential benefits from co-permitting warrant the costs particularly in light of the potential shifting of those costs from corporate entities to contract growers. The Panel also recommended that if EPA does require co-permitting in the proposed rule, EPA consider an approach in which responsibilities are allocated between the two parties such that only one entity is responsible for compliance with any given permit requirement. This would be the party that has primary control over that aspect of operations. Flexibility could also be given to local permit writers to determine the appropriate locus of responsibility for each permit component. Finally, the Panel recommended that if EPA does propose any form of co-permitting, it address in the preamble both the environmental benefits and any economic impacts on small entities that may result and request comment on its approach. If EPA does not propose a co-permitting approach, the Panel recommended that EPA discuss the strengths and weaknesses of this approach and request comment on it.

EPA is proposing in the rule to clarify that co-permitting is appropriate where a corporate or other entity exercises substantial operational control over a CAFO. Data show that some corporations concentrate growers geographically, thus producing a high concentration of nutrients over a limited area. EPA is leaving to the States decisions on how to structure co-permitting. A discussion of the strength and weaknesses of co-permitting is contained in Section VII.C.5 with several solicitations of comment. EPA is also soliciting comment on an Environmental Management System as a sufficient program to meet co-permitting requirements. Please refer to Section VII.C.5 for further discussion of Environmental Management Systems.

CNMP Preparer Requirements. The Panel reviewed EPA's consideration of requiring permittees to have CNMPs (Comprehensive Nutrient Management Plans) developed by certified planners. The Panel recommended that EPA work with USDA to develop low cost CNMP development services or allow operators to write their own plans. The Panel was concerned about the cost of having a certified planner develop the plans and urged EPA to continue to coordinate with other federal, state and local agencies in the provision of low-cost CNMP development services, and should facilitate operator preparation of plans by providing training, guidance and tools (e.g., computer programs).

EPA is proposing that CAFOs, regardless of size, have certified Permit Nutrient Plans (PNPs) that will be enforceable under the permit. The proposal states that USDA's Technical Guidance for Developing CNMPs may be used as a template for developing PNPs. EPA believes that USDA documentation and standards will be appropriate for use as the primary technical references for developing PNPs at CAFOs. In the proposal, EPA has identified certain practices that would be required elements of PNPs in order to protect surface water from CAFO pollutant discharges. These practices are consistent with some of the practices recommended in USDA's CNMP guidance; however, the PNP would not need to include all of the practices identified in the USDA guidance. As an enforceable part of the permit, the PNP would need to be written either by a certified planner or by someone else and reviewed and approved by a certified planner. EPA believes it is essential that the plans be certified by agriculture specialists because the permit writer will likely rely to a large extent on their expertise. The plans would need to be site specific and meet the requirements outlined in this rule. EPA is continuing to coordinate with other regulatory agencies and with USDA on the development of these proposed requirements. EPA has concluded that development of the PNP is affordable to small businesses in these sectors and will improve manure management and lead to cost savings at the CAFO. EPA's economic analysis is provided in Section X.J of this preamble. More detailed information on the cost to develop a PNP is in the Development Document.

General vs. Individual Permits. The Panel reviewed EPA's consideration of requiring individual permits for CAFOs that meet certain criteria, or increasing the level of public involvement in general permits for CAFOs. The Panel recommended that EPA not expand the use of individual permits for operations with less than 1,000 AU. EPA believes that individual permits may be warranted under certain conditions such as extremely large operations, operations with a history of compliance problems, or operations in environmentally sensitive areas. Accordingly, EPA is co-proposing two options. In one option, each State develops its own criteria, after soliciting public input, for determining which CAFOs would need to have individual rather than general permits. EPA is also coproposing an option that would establish a national criteria for issuing individual permits. The criteria identifies a threshold that represents the largest operations in each sector. (See Section XII for a detailed discussion.)

Immature Animals. The Panel reviewed EPA's consideration to include immature animals for all animal types in determining the total number of

animal units at a CAFO. The Panel recommended that EPA count immature animals proportionally to their waste generation. EPA is proposing to continue to account for only the mature animals at operations where all ages of animals are maintained (mostly dairy and hog operations). Once an operation is covered by the existing regulations, however, all manure and wastewater generated by immature animals that are confined at the same operation with mature animals would also be subject to the requirements. EPA is proposing to maintain this requirement because all young animals are not always confined and immature populations vary over time, whereas the mature herd is of a more constant size. Furthermore, the exclusion of immature animals adds to the simplicity we are seeking in this rulemaking. However, EPA is proposing to include immature animals as subject to the regulations only in stand-alone nursery pig and heifer operations. For stand-alone nursery pig operations, EPA is proposing to account for immature animals proportionate to their waste generation, as discussed in Section VIII. Stand-alone heifer operations are included under the beef subcategory and are subject to the proposed regulations if they confine more than 500 heifers (two-tier) or more than 300 AU, under certain conditions (three-tier).

e. *Other Recommendations. Benefits.* The Panel recommended that the EPA evaluate the benefits of the selected regulatory options and that EPA carefully evaluate, in a manner consistent with its legal obligations, the relative costs and benefits (including quantified benefits to the extent possible) of each option in order to ensure that the options selected are affordable (including to small farmers), cost-effective, and provide significant environmental benefits. EPA has conducted an extensive benefit analysis of all the options and scenarios considered. The findings of the benefit analysis are found in Section XI of this report. More detailed information is provided in the Benefits Analysis. Section X.I presents a comparison of the annualized compliance costs and the estimated monetized benefits.

Estimated Compliance Costs. The Panel recommended that EPA continue to refine the cost models and consider additional information provided. EPA has continued to refine the cost models and has reviewed all information provided to help improve the accuracy of the models. A summary of EPA's cost models is provided in Section X of this preamble. More detailed information is provided in the Economic Analysis and Development Document provided in the rulemaking record.

Public Availability of CNMP. The Panel urged EPA to consider proprietary business concerns when determining what to make publicly available. To the extent allowed under the law, EPA should continue to explore ways to balance the operators' concerns over the confidentiality of information that could be detrimental if revealed to the operators' competitors, with the public's interest in knowing whether adequate practices are being implemented to protect water quality. EPA is not requiring CAFOs to submit the PNPs to the permit authority. However, EPA is proposing that the PNPs must be available upon the request of States and EPA. The agencies would make the plans available to the public on request. EPA is proposing to require the operator of a permitted CAFO to make a copy of the PNP cover sheet and executive summary available for public review. EPA is also requesting comment as to whether CAFOs should be able to claim these elements of the PNP as confidential business information and withhold those elements of the PNP from public review on that basis, or alternately, that whether other portions of the PNP should be made available as well.

Dry Manure. The Panel asked EPA to consider the least costly requirements for poultry operations with dry manure management systems. The Panel recommended that in evaluating potential requirements for dry manure poultry operations, EPA consider the effects of any such requirements on small entities. EPA is not mandating a specific storage technology or practice, but is proposing a zero discharge performance standard and a requirement that poultry operations develop and implement a PNP. EPA is also proposing that certain monitoring and recordkeeping requirements would be appropriate. EPA's economic analysis is provided in Section X.J of this preamble. More detailed cost information is provided in the Development Document.

Coordination with State Programs. The Panel recommended that EPA consider the impact of any new requirements on existing state programs and include in the proposed rule sufficient flexibility to accommodate such programs where they meet the minimum requirements of federal NPDES regulations. The Panel further recommended that EPA continue to consult with states in an effort to promote compatibility between federal and state programs. EPA has consulted with states. There were seven states represented on the CAFO workgroup (see Section XII.G.1). In addition, EPA asked for comment on the proposed options from nine national associations that represent state and local government officials. (See Section XIII.G.) In conducting its analyses for this rulemaking, EPA accounted for requirements under existing state programs. A summary of EPA's estimated costs to the NPDES Permitting Authority are presented in Section X.G.1 and Section XIII.B.

XIII. Administrative Requirements

A. Executive Order 12866: ''Regulatory Planning and Review''

Under Executive Order 12866 [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:

(1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.''

It has been determined that this proposed rule is a ''significant regulatory action'' under the terms of Executive Order 12866. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

The RFA generally requires an agency to prepare a regulatory flexibility analysis for any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Small entities include small businesses, small organizations, and small governmental jurisdictions.

The RFA provides default definitions for each type of small entity. It also authorizes an agency to use alternative definitions for each category of small entity, ''which are appropriate to the activities of the agency'' after proposing the alternative definition in the **Federal Register** and taking comment. 5 U.S.C. § 601(3)–(5). In addition to the above, to establish an alternative small business definition, agencies must consult with the Small Business Administration (SBA) Chief Counsel for Advocacy.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) a small business based on annual revenue standards established by SBA, with the exception of one of the six industry sectors where an alternative definition to SBA's is proposed; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

The definitions of small business for the livestock and poultry industries are in SBA's regulations at 13 CFR 121.201. These size standards were updated in September, 2000. SBA size standards for these industries define a ''small business'' as one with average revenues over a 3-year period of less than $0.5 million annually for dairy, hog, broiler, and turkey operations, $1.5 million for beef feedlots, and $9.0 million for egg operations. In today's rule, EPA is proposing to define a ''small'' egg laying operation for purposes of its regulatory flexibility assessments under the RFA as an operation that generates less than $1.5 million in annual revenue. Because this definition of small business is not the definition established under the RFA, EPA is specifically seeking comment on the use of this alternative definition as part of today's notice of the proposed rulemaking. EPA has consulted with the SBA Chief Counsel for Advocacy on the use of this alternative definition. EPA believes this definition better reflects the agricultural community's sense of what constitutes a small business and more closely aligns with the small business definitions codified by SBA for other animal operations. A summary of EPA's analysis pertaining to the alternative definition is provided in Section 9 of the Economic Analysis. A summary of EPA's consultation with SBA is provided in the record.

In accordance with Section 603 of the RFA, EPA prepared an initial regulatory flexibility analysis (IRFA) that examines the impact of the proposed rule on small entities along with regulatory alternatives that could reduce that impact. The IRFA is available for review in the docket (see Section 9 of the Economic Analysis). This analysis is summarized in Section X.J of this preamble. Based on available information, there are no small governmental operations or nonprofit organizations that operate animal feeding operations that will be affected by today's proposed regulations.

The majority (95 percent) of the estimated 376,000 AFOs are small businesses, as defined by SBA. Of these, EPA estimates that there are 10,550 operations that will be subject to the proposed requirements that are small businesses under the two-tier structure. Under the three-tier structure, an estimated 14,630 affected operations are small businesses. The difference in the number of affected small businesses is among poultry producers, particularly broiler operations. Section X.J.2 provides additional detail on how EPA estimated the number of small businesses.

Based on the IRFA, EPA is proposing concludes that the proposed regulations are economically achievable to small businesses in the livestock and poultry sectors. EPA's economic analysis concludes that the proposed requirements will not result in financial stress to small businesses in the veal, dairy, hog, turkey, and egg sectors. However, EPA's analysis concludes that the proposed regulations may result in financial stress to 150 to 280 small broiler operations under the two-tier and three-tier structure, respectively. In addition, EPA estimates that 10 to 40 small beef and heifer operations may also experience financial stress under each of the proposed tier structures. EPA considers these operations—comprising about 2 percent of all affected small CAFO businesses—may be vulnerable to closure. Details of this economic assessment are provided in Section X.J.

EPA believes that moderate financial impacts that may be imposed on some operations in some sectors is justified given the magnitude of the documented environmental problems associated with animal feeding operations, as described in Section V of this document. Section IV further summarizes EPA's rationale for revising the existing regulations, including: (1) address reports of continued discharge and runoff from livestock and poultry operations in spite of the existing requirements; (2) update the existing regulations to reflect structural changes in these industries over the last few decades; and (3) improve the effectiveness of the existing regulations. Additional discussion of the objectives of and legal basis for the proposed rule is presented in Sections I through III.

Section XIII.F summarizes the expected reporting and recordkeeping requirements required under the proposed regulation based on information compiled as part of the Information Collection Request (ICR) document prepared by EPA.

Section X.J.4 summarizes the principal regulatory accommodations that are expected to mitigate future impacts to small businesses under the proposed regulations. Under both of the co-proposed alternatives, EPA is proposing to eliminate the ''mixed'' animal calculation for operations with more than a single animal type for determining which AFOs are CAFOs. As a result, smaller operations that house a mixture of animal types where none of these animal types independently meets the regulatory threshold are not considered CAFOs under today's proposed rulemaking, unless they are individually designated. Additional accommodations are being proposed under the two-tier structure. Under the two-tier structure, EPA is proposing to establish a regulatory threshold that would define as CAFOs all operations with more than 500 AU. EPA is also considering a two-tier alternative that would define all operations with more than 750 AU as CAFOs. The two-tier structure would provide relief to small businesses since this would remove from the CAFO definition operations with between 300 AU and 500 AU (or 750 AU) that under the current rules may be defined as CAFOs. Also, under the two-tier structure, EPA is proposing to raise the size standard for defining egg laying operations as CAFOs. This alternative would remove from the CAFO definition egg operations with between 30,000 and 50,000 laying hens (or 75,000 hens) that under the current rules are defined as CAFOs, if they utilize a liquid manure management system. Additional information on the regulatory relief provisions being proposed by EPA is provided in Section VII of this preamble.

As required by section 609(b) of the RFA, as amended by SBREFA, EPA also conducted outreach to small entities and convened a Small Business Advocacy Review Panel to obtain advice and recommendations from representatives of the small entities that potentially would be subject to the rule's requirements. Consistent with the

RFA/SBREFA requirements, the Panel evaluated the assembled materials and small entity comments on issues related to the elements of the IRFA. A complete summary of the Panel's recommendations is provided in the Final Report of the Small Business Advocacy Review Panel on EPA's Planned Proposed Rule on National Pollutant Discharge Elimination System (NPDES) and Effluent Limitations Guideline (Effluent Guidelines) Regulations for Concentrated Animal Feeding Operations (April 7, 2000). This document is included in the public record. As documented in the panel report, the participants of the Small Business Advocacy Review Panel did not identify any Federal rules that duplicate or interfere with the requirements of the proposed regulation.

Section XII.G of this document provides a full summary of the Panel's activities and recommendations. This summary also describes each of the subsequent actions taken by the Agency, detailing how EPA addressed each of the Panel's recommendations. EPA is interested in receiving comments on all aspects of today's proposal and its impacts on small entities.

C. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year.

Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative, if the Administrator publishes with the final rule an explanation why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that today's proposed regulations contain a Federal mandate that may result in expenditures of $100 million or more for the private sector in any one year. Accordingly, EPA has prepared the written statement required by section 202 of the UMRA. This statement is contained in the Economic Analysis and also the Benefits Analysis for the rule. These support documents are contained in the record. In addition, EPA has determined that the rules contain no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's rules are not subject to the requirements of section 203 of the UMRA. Additional information that supports this finding is provided below.

A detailed discussion of the objectives and legal basis for the proposed CAFO regulations is presented in Sections I and III of the preamble. A consent decree with the Natural Resources Defense Council established a deadline of December 2000 for EPA to propose effluent limitations for this industry.

EPA prepared several supporting analyses for the final rules. Throughout this preamble and in those supporting analyses, EPA has responded to the UMRA section 202 requirements. Costs, benefits, and regulatory alternatives are addressed in the Economic Analysis and the Benefits Analysis for the rule. These analyses are summarized in Section X and Section XI of this preamble. The results of these analyses are summarized below.

EPA prepared a qualitative and quantitative cost-benefit assessment of the Federal requirements imposed by today's final rules. In large part, the private sector, not State, local and tribal governments, will incur the costs of the proposed regulations. Under the two-tier structure, total annualized compliance costs to industry are projected at $831 million (pre-tax)/$572 million (post-tax). The cost to off-site recipients of CAFO manure is estimated at $10 million per year. Under the three-tier structure, costs to industry are estimated at $930 million per year (pre-tax)/$658 million (post-tax), and the annual cost to off-site recipients of manure is estimated at $11 million. This analysis is summarized in Section X.E.1 of this preamble.

Authorized States are expected to incur costs to implement the standards, but these costs will not exceed the thresholds established by UMRA. Under the two-tier structure, State and Federal administrative costs to implement the permit program are estimated to be $6.2 million per year: $5.9 million for States and $350,000 for EPA. Under the three-tier structure, State and Federal administrative costs to implement the permit program are estimated by EPA at $7.7 million per year, estimated at $7.3 million for States and $416,000 for EPA. This analysis is summarized in Section X.G.1 of this preamble. More detailed information is provided in the Economic Analysis. The Federal resources (i.e., water pollution control grants) that are generally available for financial assistance to States are included in Section 106 of the Clean Water Act. There are no Federal funds available to defray the costs of this rule on local governments. Since these rules do not affect local or tribal governments, they will not result in significant or unique impacts to small governments.

Overall, under the two-tier structure, the projected total costs of the proposed regulations are $847 million annually. Under the three-tier structure, total social costs are estimated at $949 million annually.

The results of EPA's economic impact analysis show that the percentage of operations that would experience financial stress under each of the proposed tier structures represent 7 percent of all affected CAFOs (Section X.F.1). This analysis is conducted without taking into account possible financial assistance to agricultural producers that could offset the estimated compliance costs to CAFOs to comply with the proposed regulations, thus mitigating the estimated impacts to these operations. Federal programs, such as USDA's Environmental Quality Incentives Program (EQIP), and other State and local conservation programs provide cost-share and technical assistance to farmers and ranchers who install structural improvements and implement farm management practices, including many of the requirements that are being proposed today by EPA. EQIP funds are limited to livestock and poultry operations with fewer than 1,000 animal units (AUs), as defined by USDA, but could provide assistance to operations with less than 1,000 AU as well as to some larger operations in the poultry and hog sectors.

EPA also conducted an analysis that predicts and quantifies the broader market changes that may result due to compliance. This analysis examines changes throughout the economy as impacts are absorbed at various stages of the food marketing chain. The results of this analysis show that consumer and farm level price changes will be modest. This analysis is summarized in Section X.F.3.

EPA does not believe that there will be any disproportionate budgetary effects of the rules on any particular area of the country, particular types of communities, or particular industry segments. EPA's basis for this finding with respect to the private sector is addressed in Section 5 of the Economic Analysis based on an analysis of community level impact, which is summarized in Section X.G.2 of the preamble. EPA considered the costs, impacts, and other effects for specific regions and individual communities, and found no disproportionate budgetary effects. EPA's basis for this finding with respect to the public sector is available in the record.

The proposed mandate's benefits are primarily in the areas of reduced health risks and improved water quality. The Benefits Analysis supporting the rulemaking describes, qualitatively, many such benefits. The analysis then quantifies a subset of the benefits and, for a subset of the quantified benefits, EPA monetizes (i.e., places a dollar value on) selected benefits. EPA's estimates of the monetized benefits of the proposed regulations are estimated to range from $146 million to $165 million under the two-tier structure. Under the three-tier structure, estimated benefits range from $163 million to $182 million annually. This analysis is summarized in Section XI of this preamble.

EPA consulted with several States during development of the proposed rules. Some raised concerns that the national rule would have workload and cost implications for the State. Some States with implementation programs underway or planned want to have their programs satisfy the requirements of the proposed rule. Other States expressed concerns about the loss of cost-share funds to AFOs once they are designated as point sources. There were additional comments regarding inconsistencies with the Unifed Strategy. See Section IX.A for a discussion of alternative State programs, Section X.G for a discussion of State costs and the workload analysis, Sections III.D and VII.B for a discussion of consistency with the AFO Strategy, and Section IX.E for a discussion of cost-share funds.

For the regulatory decisions in today's rules (allowing for the options reflected by the co-proposal), EPA has selected alternatives that are consistent with the requirements of UMRA in terms of cost, cost-effectiveness, and burden. The proposal is also consistent with the requirements of the CWA. This satisfies section 205 of the UMRA. As part of this rulemaking, EPA had identified and considered a reasonable number of regulatory alternatives. (See Section VII for NPDES Scenarios and Section VIII for effluent guidelines technology options). Section X.E compares the costs across these alternatives. Section X.H provides a cost-effectiveness analysis that shows that the proposed BAT Option is the most cost-effective of these alternatives. Sections VII and VIII of the preamble are devoted to describing the Agency's rationale for each regulatory decision. Section IV of this document further summarizes EPA's rationale for revising the existing regulations.

D. Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks''

Executive Order 13045 (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 and 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 proposed rule is subject to E.O. 13045 because it is an economically significant regulatory action as defined by E.O. 12866, and we believe that the environmental health or safety risks addressed by this action have or may have disproportionate effects on children. Accordingly, we have evaluated, to the extent possible, the environmental health or safety effects of pollutants from CAFOs on children. The results of this evaluation are contained in sections V.C and XI.B of the preamble as well as the Environmental Assessment and Benefits Assessment (these documents have been placed in the public docket for the rule).

The Agency believes that the following pollutants have or may have a disproportionate risk to children: nitrates, pathogens, trace metals such as zinc, arsenic, copper, and selenium, pesticides, hormones, and endocrine disruptors. These health risks are summarized in Section V.C and described in detail in the Environmental Assessment. With the exception of nitrates in drinking water, the Agency has very little of the detailed information necessary to conduct an assessment of these risks to children for these pollutants. The Agency solicits risk and exposure data and models that could be used to characterize the risks to children's health from CAFO pollutants.

There is evidence that infants under the age of six months may be at risk from methemoglobinemia caused by nitrates in private drinking water wells, typically when ingesting water with nitrate levels higher than 10 micrograms/liter. The Agency only has enough information to determine that a chronic dose of 10 micrograms/liter may cause an adverse health effect, but there is no dose-response function for nitrates, nor does the Agency have other information necessary to conduct a detailed health risk assessment (for example, the actual number of cases of methemoglobinemia are not reported and are thus highly uncertain). Instead, the Agency has estimated the reduction in the number of households that will be exposed to drinking water with nitrate levels above 10 micrograms/liter in Chapter 8 of the Benefits Assessment (noting that the Agency does not have information on the number of households exposed to nitrates that also have infants). The Agency assumes that nitrate levels lower than 10 micrograms/liter pose no risk of methemoglobinemia.

The Agency estimates that there are approximately 13.5 million households with drinking water wells in counties with animal feeding operations. Of these, the Agency estimates that approximately 1.3 million households are exposed to nitrate levels above 10 micrograms/liter. The Agency further estimates that approximately 166,000 households would have their nitrate levels brought below 10 micrograms/liter under the two-tier structure. Approximately 161,000 households would have their nitrate levels brought below 10 micrograms/liter under the three-tier structure. Furthermore, the Agency estimates that options more stringent than those proposed would have small incremental changes in pollutant loadings to groundwater (see the Technical Development Document). Thus, the Agency expects the number of additional households protected from nitrate levels greater than 10 micrograms/liter would be negligible under more stringent options. The Agency therefore does not believe that requirements more stringent than those

proposed would provide meaningful additional protection of children's health risks from methemoglobinemia. Furthermore, the Agency is only able to regulate groundwater quality through NPDES permits if there is a direct hydrologic connection to surface water (see Section VII.C.2.j).

Methemoglobinemia is only one children's health risk caused by CAFO pollutants, as discussed above, in Section V.C, and elsewhere in the record. It was the only risk to children's health which the Agency was able to quantify (if incompletely) in any way. The options considered by the Agency, as well as the rationale for the proposed options, are discussed in detail in Sections VII and VIII of this preamble. To the extent possible under the authority of the CWA, EPA chose options that were protective of environmental and human health, including children's health. These option selections were based on the best risk assessments possible given the limited data available. The public is invited to submit or identify peer-reviewed studies and data, of which the Agency might not be aware that assessed results of early life exposure to nitrates or any other pollutant discharged by CAFOS.

E. Executive Order 13084: Consultation and Coordination With Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, 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 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 nor imposes substantial direct compliance costs on them. First, there are currently no tribal governments that have been authorized to issue NPDES permits. Thus, there will be no burden to tribal governments. Second, few CAFO operations are located on tribal land. Therefore, compliance costs to tribal communities will not be significant. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

However, EPA has let tribal communities know about this rulemaking through a presentation of potential rule changes at the National Environmental Justice Advisory Committee meeting in Atlanta in June, 2000 and through notices in tribal publications.

F. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An Information Collection Request (ICR) document has been prepared by EPA (ICR No. 1989.01) and a copy may be obtained from Sandy Farmer by mail at Collection Strategies Division; U.S. Environmental Protection Agency (2822); 1200 Pennsylvania Ave., NW, Washington, DC 20460, by email at farmer.sandy@epamail.epa.gov, or by calling (202) 260–2740. A copy may also be downloaded off the internet at http://www.epa.gov/icr.

Today's proposed rule would require all animal feeding operations (AFOs) that meet the proposed CAFO definition to apply for a permit and develop a certified permit nutrient plan and to implement that plan. Implementation of the plan includes the cost of recording animal inventories, manure generation, field application of manure and other nutrients (amount, rate, method, incorporation, dates), manure and soil analysis compilation, crop yield goals and harvested yields, crop rotations, tillage practices, rainfall and irrigation, lime applications, findings from visual inspections of feedlot areas and fields, lagoon emptying, and other activities on a monthly basis. Records may include manure spreader calibration worksheets, manure application worksheets, maintenance logs, and soil and manure test results.

The average annual burden for this rule covering both the private and public sector for the three-tiered option is 1.6 million hours and $37 million annually; for the two-tiered option, burden is 1.2 million hours annually at $29 million annually. These values do not account for State programs that may already be requiring some of the recordkeeping and reporting requirements already. Thus, this burden would be an overestimate to the degree that some States already require such actions.

For the three-tiered structure, the average annual CAFO burden is estimated to be 80 hours with the frequency of responses based on requirements ranging from two times per year to once every five years. There are 19,519 likely CAFO respondents and 28 states. Under this scenario, the state annual average burden is estimated at 3,214 hours. The average annual operation and maintenance costs are estimated at $4.3 million for CAFOs and $60,000 for States; labor costs are estimated at $28.9 million for CAFOs and $2.6 million for States; capital costs are estimated at $1.6 million for CAFOs and $0.0 for States.

For the two-tiered structure, CAFO average annual burden per respondent is 81 hours and the State burden is 2,500 hours. There are 15,015 likely CAFO respondents and 28 states. The 28 state count is an average over three years assuming that half the delegated states will have a program established in year one, half in year 2 and all in year three. Average annual operation and maintenance costs are $3.3 million for CAFOs and $60,000 for States; labor costs are $22.6 million for CAFOs and $2.0 million for States; capital costs are $1.3 million for CAFOs and $0.0 for States.

The burden required for this rulemaking will allow EPA to determine whether a CAFO operator is monitoring his waste management system in an environmentally safe way. This data will be used to assess compliance with the rule and help determine enforcement cases. The Permit Nutrient Plan data requirements ensure that the CAFO owner has established the appropriate application rate for their fields on which they spread manure; is providing adequate operation and maintenance for the storage area and feedlot, and is meeting the requirements to keep agriculture waste out of the Nation's waters. The information requested herein is mandatory (33 U.S.C. 1318 (Section 308 of the Clean Water Act)). Twqhe Agency is requesting comment in this proposal on how much, if any of this information should be confidential business information.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal

agency. Burden estimates include the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. Additional burden has been estimated for off-site recipients who must certify that they are applying manure in an appropriate manner.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless the collection form displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15.

Comments are requested on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques. Send comments on the ICR to the Director, Collection Strategies Division; U.S. Environmental Protection Agency (2822); 1200 Pennsylvania Ave., NW, Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., N.W., Washington, DC 20503, marked ''Attention: Desk Officer for EPA.'' Include the ICR number in any correspondence. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after [January 12, 2001 **Federal Register**], a comment to OMB is best assured of having its full effect if OMB receives it by February 12, 2001. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

G. Executive Order 13132: ''Federalism''

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications.'' ''Policies that have Federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This proposed rule does not have Federalism implications. It will not have substantial direct effects on the States, on this relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. EPA estimates that the average annual impact on all authorized States together is $6.0 million. EPA does not consider an annual impact of $6 million on States a substantial effect. In addition, EPA does not expect this rule to have any impact on local governments.

Further, the revised regulations would not alter the basic State-Federal scheme established in the Clean Water Act under which EPA authorizes States to carry out the NPDES permitting program. EPA expects the revised regulations to have little effect on the relationship between, or the distribution of power and responsibilities among, the Federal and State governments. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy, EPA consulted with representatives of State and local governments in developing this proposed rule. EPA sent a summary package outlining the proposed changes to the State and local associations that represent elected officials including the National Governor's Association, National Conference of State Legislators, U.S. Conference of Mayors, Council of State Governments, International City/County Management Association, National Association of Counties, National Association of Towns and Townships, and County Executives of America. In addition, as discussed in Section XII.F., there was State representation on the CAFO Regulation Workgroup.

EPA received four responses from these national associations, the National Governor's Council, the National League of Cities, the National Council of State Legislators and the National Association of Conservation Districts. EPA also received a letter from the Governor of Delaware and the Delaware Congressional delegation. The National Governor's Association (NGA), the National League of Cities (NLC) and the National Association of Conservation Districts (NACD) disagree with EPA's assessment that the rule would have minimal impact on the States. Except for this issue, the NLC supported the rule package especially the coverage of poultry and immature animals, the clarification of stormwater runoff exemptions, the lower threshold, and the seven strategic issues EPA listed to address pollution from animal feeding operations. NLC encouraged EPA to exercise its authority to issue NPDES permits where a delegated State has not taken appropriate action.

NGA and Delaware want the flexibility to design functionally equivalent programs. NGA and NACD expressed concern regarding lowering the threshold as this would bring in more entities to be permitted and the States already have a permit backlog. In addition, they are concerned that 319 and EQIP funds will no longer be available to operations that are defined as CAFOs. Another concern is the elimination of the 25 year/24 hour exemption. NGA comments address the burden on the State permitting authority (backlog issue) and the unfairness of facilities that work with states to eliminate discharges would still have to get a permit. On the issue of adequate public involvement in general permits as well as the site specific requirements of the Effluent Limitation Guideline, NGA is concerned the advantage of general permits as a time saver for the states may be lost. In response to NGA's concerns, EPA met with NGA and discussed the package and its potential impacts. EPA, also upon request, met with the National Association of State Legislators to review the package and answer their questions. (See Section IX for discussion of alternative State programs. See Section VII.B for a discussion of rule scope. See Section X.G for costs to permitting authorities. See Section VII.C for discussion of the 25 year/24 hour storm exemption. See Section VII.E for discussion of public involvement.)

The primary concern raised by the States represented on the CAFO Regulation Workgroup was to clarify and simplify the rules to make them more understandable and easier to implement. Many of the proposed changes were made with this objective in mind. Also, the States wanted EPA to accept functionally equivalent State programs. To address this concern, as stated in the Joint Unified USDA/EPA AFO Strategy (see ''Strategic Issue #3''), where a State can demonstrate that its program meets the requirements of an NPDES program consistent with 40 CFR Part 123, EPA is proposing to amend the current NPDES authorization to recognize the State program. In addition, States were concerned about the cost of implementing any changes to the program. EPA believes the costs to the States for implementing this

proposed rule will not be high. EPA is assuming that all States will adopt the sample general permit. Some States already have a general permit that would just need to be modified.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

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

The requirements of the Environmental Justice Executive Order are that* * *'' EPA will * * * review the environmental effects of major Federal actions significantly affecting the quality of the human environment. For such actions, EPA reviewers will focus on the spatial distribution of human health, social and economic effects to ensure that agency decisionmakers are aware of the extent to which those impacts fall disproportionately on covered communities.'' EPA has determined that this rulemaking is economically significant. However, the Agency does not believethis rulemaking will have a disproportionate effect on minority or low income communities. The proposed regulation will reduce the negative affects of CAFO waste in our nation's waters to benefit all of society, including minority communities.

The National Environmental Justice Advisory Committee (NEJAC) submitted a set of recommendations to EPA regarding CAFOs that included recommendations to be addressed in revisions to EPA's regulations for CAFO's. Each recommendation is addressed below.

The NEJAC recommended that EPA ''promulgate new, effective regulations that set uniform, minimum rules for all AFOs and CAFOs in the United States.'' In response, EPA believes that today's proposed rule revisions would represent new, uniform and effective requirements for CAFOs (AFOs by definition are not point sources and so would not be subject to today's proposed CAFO rules).

The Committee requested that EPA impose a zero discharge standard on runoff from land application of CAFO wastes. For the reasons described in section VIII. C.3., BAT Options Considered, of today's notice, EPA believes it is not appropriate to set a technology-based standard at this level with respect to land application runoff.

NEJAC requested that EPA prohibit or restrict the siting of facilities in certain areas such as flood plains. Siting of private industry is primarily a local issue and should be addressed at the local level. Discharge limitations proposed today should, however, discourage operators from locating in flood plains. Proposed requirements for swine, veal and poultry CAFOs would require no discharge under any circumstances. Beef and dairy CAFOs would have to comply with zero discharge except in the event of a chronic or catastrophic storm which exceeds the 25 year, 24 hour storm. If existing operations are located in flood plains it is in their best interest to divert uncontaminated storm water away from their production area to avoid inundation of the production area and potential breaching of their manure storage system during flood events. EPA proposes to prohibit manure application to crop or pasture land within 100 feet of surface waters, tile intake structures, agricultural drainage wells, and sinkholes which will also minimize the risk of discharge under flood conditions.

NEJAC requested monitoring requirements in the rule. EPA has proposed an appropriate set of monitoring requirements to be included in CAFO permits (See section XIII of today's notice).

NEJAC also requested public notification of the construction or expansion of CAFOs or issuance of permits. Under today's proposed rules, EPA would require individual permits, which are subject to individual public notice and comment, for facilities that are located in an environmentally sensitive area; have a history of operational or compliance problems; are an exceptionally large or significantly expanding facility; or where the Director is aware of significant public concern about water quality impacts from the CAFO. For all other facilities that are to be covered by general permits, for purposes of public notice, today's proposal would require the permitting authority to publish on a quarterly basis its receipt of Notices of Intent (NOIs) submitted by CAFOs.

NEJAC further recommended that EPA require States and tribes to develop inspection programs that allow unannounced inspections of all CAFOs and to make these programs available for public comment. This concern is already addressed by existing Clean Water Act requirements. Specifically, under the Act, EPA may conduct unannounced inspections, and States must have the authority to inspect to the same extent as EPA. Although there is no specific requirement that State inspection plans be made publicly available, they may be available under State law.

NEJAC requested that EPA require the adoption of non-lagoon technology. Section XIII of today's notice describes the control technologies that EPA has investigated and which ones EPA proposes to identify in these regulations as the best available technologies. As described in Section XIII, this proposal finds that it would not be appropriate to prohibit the use of lagoon technologies.

NEJAC recommended requiring States and tribes to implement remediation programs for phased-out CAFO operations. In today's proposed rule, EPA proposes to require a CAFO to remain under permit coverage until it no longer has the potential to discharge manure or associated wastewaters.

Finally, NEJAC recommended that EPA impose stringent penalties on violating facilities. The Clean Water Act provides authority to subject violators to substantial penalties. The issue of which penalties are appropriate to impose in individual situations is beyond the scope of this rulemaking.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) of 1995, (Pub. L. No. 104–113 Sec. 12(d) 15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standard bodies. The NTTAA directs EPA to provide Congress, through the Office of Management and Budget (OMB), explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rulemaking involves technical standards. The rule requires operations defined as CAFOs in the beef and dairy subcategories to monitor groundwater for total dissolved solids (TDS), total chlorides, fecal coliform, total coliform, ammonia-nitrogen and TKN. EPA performed a search to identify potentially voluntary consensus standards that could be used to measure the analytes in today's proposed guideline. EPA's search revealed that consensus standards exist and are already specified in the tables at 40 CFR Part 136.3 for measurement of many of the analytes. All pollutants in today's proposed rule have voluntary consensus

methods. EPA welcomes comments on this aspect of the proposed rulemaking and, specifically, invites the public to identify potentially-applicable voluntary consensus standards and to explain why such standards should be used in this regulation.

XIV. Solicitation of Comments

A. Specific Solicitation of Comment and Data

EPA solicits comments on all aspects of today's proposal. In addition, throughout this preamble, EPA has solicited specific comments and data on many individual topics. The Agency reiterates its interest in receiving comments and data on the following issues:

1. EPA solicits comment on the use of a two tier structure based on lowering the existing 1,000 animal unit threshold to 500 for determining which AFOs are defined as CAFOs, and the elimination of the existing 300 to 1,000 animal unit category. EPA also solicits comment on the effect of a 500 AU threshold on the horse, sheep, lamb and duck sectors, as well as on the use of a 750 animal unit threshold for all sectors.

2. EPA solicits comment on the use of a three tier structure, including the proposed criteria that could result in an AFO in the middle Group being defined as a CAFO and on whether to use different criteria that provide more flexibility than those in today's proposal.

3. EPA solicits comment on revising the requirements for designation to eliminate the direct contact and man-made device criteria from the designation requirements of the CAFO regulations, and allow the designation of CAFOs by EPA in States with NPDES authorized programs. EPA also solicits comment on whether or not to eliminate the ''on-site'' requirement for conducting inspections and, instead, allow other forms of site-specific information gathering to be used.

4. EPA solicits comment on its proposal to clarify the definition of an AFO to clearly distinguish feedlots from pasture land and clarify coverage of winter feeding operations.

5. EPA solicits comment on eliminating the use of the term ''animal unit'' or AU and the mixed animal calculation in determining which AFOs are CAFOs.

6. EPA solicits comment on removing the 25-year, 24-hour storm event exemption from the definition of a CAFO.

7. EPA solicits comment on the proposal to remove the limitation on the type of manure handling or watering system employed at poultry operations (i.e., subjecting dry poultry operations to the CAFO regulations). With regard to a two tier structure, EPA solicits comment on establishing the threshold for poultry operations at 50,000 birds or greater.

8. EPA solicits comment on including immature swine and dairy cattle, or heifers, when confined apart from the dairy, for purposes of defining potential CAFOs. With regard to a two tier structure, EPA solicits comment on establishing the threshold limit for immature swine (weighing 55 pounds or less) at 5,000.

9. EPA solicits comment on requiring, under a two tier structure, all CAFOs to apply for a NPDES permit and issuing permits to those operations that cannot demonstrate they have no potential to discharge pollutants.

10. EPA solicits comment on requiring, under a three tier structure, all AFOs from 300 AU to 1000 AU to certify they do not meet threshold conditions, receive a determination they have no potential to discharge, or apply for a permit.

11. EPA solicits comments on the proposed co-permitting provisions and the factors for determining substantial operational control. EPA solicits comment on whether there are additional factors that indicate substantial operational control which should be included in the regulation. EPA also requests comment on how to structure the co-permitting provisions of the rulemaking to achieve the intended environmental outcome without causing negative impacts on growers. EPA requests comments on its cost passthrough assumptions in general and as they relate to the analysis of processor level impacts under the proposed co-permitting requirements.

12. EPA solicits comment on addressing discharges to ground water with a direct hydrological connection to surface water. EPA requests comment on how a permit writer might identify CAFOs at risk of discharging to surface water via ground water. EPA is also requesting comment on the proposal to place the burden on the permit applicant to provide a hydrologist's statement when rebutting the presumption that a CAFO has potential to discharge to surface water via direct hydrological connection with ground water. EPA solicits comment on the assumption that 24 percent of the affected operations have a hydrologic connection to surface waters.

13. EPA solicits comment on the definition of CAFO including the production area and land application area, and on the proposed requirements that would subject land application to specified permit requirements.

14. EPA solicits comment on defining the agricultural storm water discharge exemption to apply only to those discharges which occurred despite the implementation of all the practices required by today's proposal at CAFO land application areas. EPA also requests comments on the alternative applications of the agricultural storm water discharge exemption discussed.

15. EPA solicits comment on requiring a certification from off-site recipients of CAFO-generated manure that such manure is being land applied according to proper agricultural practices or, the alternative of tracking such off-site transfers through record keeping and providing information to the recipients regarding proper management.

16. EPA solicits comment on restricting the land application of manure to those conditions where it serves an agricultural purpose and does not result in pollutant discharges to waters of the U.S. (potentially including prohibiting land application at certain times or using certain methods).

17. EPA solicits comment on requiring CAFO operators to develop and implement a PNP for managing manure and wastewater at both the production area and land application area.

18. EPA invites comment on today's proposal to define PNPs as the effluent guideline subset of elements addressed in the CNMP. EPA is especially interested in knowing whether PNP is the best term to use to refer to the regulatory components of the CNMP, and whether EPA's explanation of both the differences and relationship between these two terms (PNP and CNMP) is clear and unambiguous. EPA is also soliciting comments on whether a PNP with the addition of erosion control practices would be sufficient additional controls to prevent runoff. EPA further requests comment on the proposal to require that PNPs be developed, or reviewed and modified, by certified planners, as well as on conditions, such as no changes to the crops, herd or flock size, under which rewriting the PNP would not be necessary and therefore, would not require the involvement of a certified planner.

19. EPA requests comment on the public availability of PNPs, including whether it is proper to determine that the PNPs must be publicly available under CWA Section 402(j) and under CWA Section 308 as ''effluent data,'' or whether only a portion of PNP information should be publically

available. EPA solicits comment on today's proposal that the operator of a permitted CAFO must make a copy of the PNP cover sheet and executive summary available for public review. EPA is also requesting comment on whether CAFOs should be able to claim these elements of the PNP as confidential business information and withhold those elements of the PNP from public review on that basis, or alternately, that whether other portions of the PNP should be made available as well. EPA also requests comment on the proposal to require new facilities seeking coverage under a general permit, as well as applicants for individual permits, to submit a copy of the PNP to the permit authority along with the NOI or permit application, and whether, for individual permits, the PNP should be part of the public notice and comment process along with the permit.

20. EPA is requesting public comment on the suitability of requiring erosion control as a special condition of a NPDES permit to protect water quality from sediment eroding from fields where CAFO manure is applied to crops. If erosion control is desirable, EPA is soliciting comment as to which approach would be the most cost-efficient. EPA solicits comment and data on the costs and benefits of controlling erosion and whether erosion control should be a required component of PNPs.

21. EPA solicits comment on requiring an operator of a permitted CAFO that ceases to be a CAFO to maintain permit coverage until his or her facility is properly closed.

22. EPA requests comment on whether the procedures discussed regarding general permits are adequate to ensure public participation or whether individual permits should be required for any of the categories of facilities discussed above. Specifically, EPA requests comment on whether individual permits should be required for (a) Facilities over a certain size threshold; (b) all new facilities; (c) facilities that are significantly expanding; (d) facilities that have historical compliance problems; or (e) operations that are located in areas with significant environmental concerns.

23. EPA solicits comment on the applicability of the proposed revised effluent limitations guidelines, including the thresholds under the two tier and three tier structure, the inclusion of veal production as a new subcategory, and the changes regarding applicability to chickens, mixed animals, and immature swine and dairy. EPA also requests comment on another three-tier option for defining a CAFO under which the effluent guidelines proposed today would not be applicable to facilities with 1,000 AU or less.

24. EPA solicits comment on the proposed revised effluent limitations guidelines for CAFOs, specifically today's proposed requirements on the land application of manure and wastewater. EPA solicits comment on the proposal to allow States to establish the appropriate phosphorus-based method to be used as the basis for the land application rate at CAFOs.

25. EPA requests comment on its analysis and on its proposed determination that Option 3 is economically achievable as BAT for the beef and dairy sectors. In addition, consistent with its intention at the time of the SBREFA outreach process, EPA requests comment on retaining the 25-year, 24-hour storm design standard (and thus basing BAT on Option 2) for the swine, veal and poultry subcategories.

26. EPA solicits comment on the assumptions used for estimating the compliance cost impacts for feedlots to implement each of the model technologies considered for the proposed standards. EPA also solicits comment on the proposal's impact on small businesses.

27. EPA solicits comment on the new source option for dairies that would prohibit any wastewater discharge from the production area. Specifically whether this option is technically feasible, since it assumes that all animals in confinement will be maintained under roof.

28. EPA solicits comment on establishing BAT requirements on pathogens. Specifically on the appropriate technologies that will reduce pathogens and the estimated cost for these technologies.

B. General Solicitation of Comment

EPA encourages public participation in this rulemaking. EPA asks that comments address any perceived deficiencies in the record supporting this proposal and that suggested revisions or corrections be supported by data.

EPA invites all parties to coordinate their data collection activities with the Agency to facilitate mutually beneficial and cost-effective data submissions. Please refer to the **FOR FURTHER INFORMATION** section at the beginning of this preamble for technical contacts at EPA.

List of Subjects

40 CFR Part 122

Administrative practice and procedure, confidential business information, Hazardous substances, Reporting and recordkeeping requirements, water pollution control.

40 CFR Part 412

Environmental protection, Feedlots, livestock, waste treatment and disposal, Water pollution control.

Dated: December 15, 2000.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Amend § 122.21 by adding paragraphs (i)(1)(iv) through (ix) to read as follows:

§ 122.21 Application for a permit (applicable to State programs, see § 123.25).

* * * * *

(i) * * *

(1) * * *

(iv) Either a copy of the cover sheet and executive summary of the permittee's current Permit Nutrient Plan that meet the criteria in 40 CFR 412.37(b) and is being implemented, or draft copies of these documents together with a statement on the status of the development of its Permit Nutrient Plan. If the CAFO is subject to 40 CFR part 412 and draft copies are submitted, they must, at a minimum, demonstrate that there is adequate land available to the CAFO operator to comply with the land application provisions of part 412 of this chapter, if applicable, or describe an alternative to land application that the operator intends to implement.

(v) Acreage available for application of manure and wastewater;

(vi) Estimated amount of manure and wastewater that the applicant plans to transfer off-site;

(vii) Name and address of any person or entity that owns animals to be raised at the facility, directs the activity of persons working at the CAFO, specifies how the animals are grown, fed, or medicated, or otherwise exercises control over the operations of the facility;

(viii) Indicate whether buffers, setbacks or conservation tillage are implemented at the facility to control runoff and protect water quality; and

(ix) Latitude and longitude of the CAFO, to the nearest second.

3. Section 122.23 is revised to read as follows:

§ 122.23 Concentrated animal feeding operations (applicable to State NPDES programs, see § 123.25).

(a) *Definitions applicable to this section:* (1) For land on which manure from an animal feeding operation or concentrated animal feeding operation has been applied, the term ''*agricultural storm water discharge*'' means a discharge composed entirely of storm water, as defined in § 122.26(a)(13), from a land area upon which manure and/or wastewater has been applied in accordance with proper agricultural practices, including land application of manure or wastewater in accordance with either a nitrogen-based or, as required, a phosphorus-based manure application rate.

(2) An *animal feeding operation or AFO* is a facility where animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period. Animals are not considered to be stabled or confined when they are in areas such as pastures or rangeland that sustain crops or forage growth during the entire time that animals are present. Animal feeding operations include both the production area and land application area as defined below.

Option 1 for Paragraph (a)(3)

(3) *Concentrated animal feeding operation or CAFO* means an AFO that either:

(i) Confines a number of animals equal to or greater than the number specified in any one or more of the following categories. For the purposes of determining the number of animals at an operation, two or more AFOs under common ownership are considered to be a single AFO if they adjoin each other or if they use a common area or system for the disposal of wastes. Once an operation is defined as a CAFO, the requirements of this section apply with respect to all animals in confinement at the operation and all wastes and waste waters generated by those animals, regardless of the type of animal.

(A) 350 mature dairy cattle;

(B) 500 veal;

(C) 500 cattle other than veal or mature dairy cattle;

(D) 1,250 swine each weighing over 25 kilograms (approximately 55 pounds);

(E) 5000 swine each weighing less than 25 kilograms (approximately 55 pounds);

(F) 250 horses;

(G) 5,000 sheep or lambs;

(H) 27,500 turkeys;

(I) 50,000 chickens; or

(J) 2,500 ducks; or

(ii) Is designated as a CAFO under paragraph (b) of this section.

Option 2 for Paragraph (a)(3):

(3) *Concentrated animal feeding operation or CAFO* means an AFO which either is defined as a CAFO under paragraph (a)(3)(i) or (ii) of this section, or is designated as a CAFO under paragraph (b) of this section. Two or more AFOs under common ownership are considered to be a single AFO for the purposes of determining the number of animals at an operation, if they adjoin each other or if they use a common area or system for the disposal of wastes. Once an operation is defined as a CAFO, the requirements of this section apply with respect to all animals in confinement at the operation and all wastes and waste waters generated by those animals, regardless of the type of animal.

(i) Tier 1 AFOs. An AFO is a CAFO if more than the numbers of animals specified in any of the following categories are confined:

(A) 700 mature dairy cattle;

(B) 1,000 veal;

(C) 1,000 cattle other than veal or mature dairy cattle;

(D) 2,500 swine each weighing over 25 kilograms (approximately 55 pounds);

(E) 10,000 swine each weighing less than 25 kilograms (approximately 55 pounds);

(F) 500 horses;

(G) 10,000 sheep or lambs;

(H) 55,000 turkeys;

(I) 100,000 chickens; or

(J) 5,000 ducks.

(ii) Tier 2 AFOs. (A) If the number of animals confined at the operation falls within the following ranges for any of the following categories, the operation is a Tier 2 AFO. A Tier 2 AFO is a CAFO unless it meets all of the conditions in paragraph (a)(3)(ii)(B) of this section and its operator submits to the Director a certification that it meets those conditions. The certification shall take the form specified in section 122.22(d).

(*1*) 200 to 700 mature dairy cattle,

(*2*) 300 to 1,000 veal,

(*3*) 300 to 1,000 cattle other than veal or mature dairy cattle,

(*4*) 750 to 2,500 swine each weighing over 25 kilograms (approximately 55 pounds),

(*5*) 3,000 to 10,000 swine each weighing less than 25 kilograms (approximately 55 pounds),

(*6*) 150 to 500 horses,

(*7*) 3,000 to 10,000 sheep or lambs,

(*8*) 16,500 to 55,000 turkeys,

(*9*) 30,000 to 100,000 chickens, or

(*10*) 1,500 to 5,000 ducks.

(B) A Tier 2 AFO is not a CAFO if it meets all of the following conditions and its operator submits to the Director a certification that it meets the following conditions:

(*1*) Waters of the United States do not come into direct contact with the animals confined in the operation;

(*2*) There is sufficient storage and containment to prevent all pollutants from the production area from entering waters of the United States as specified in 40 CFR Part 412.

(*3*) There has not been a discharge from the production area within the last five years;

(*4*) No part of the production area is located within 100 feet of waters of the United States;

(*5*) In cases where manure or process-generated wastewaters are land applied, they will be land applied in accordance with a Permit Nutrient Plan that includes the BMP requirements identified at 40 CFR 412.31(b) and 412.37; and

Option 2a for Paragraph (a)(3)(ii)(B)(*6*)

(*6*) With respect to the off-site transfer of manure or process-generated wastewaters to persons who receive 12 tons or more of manure or wastewater in any year, the owner or operator will first obtain assurances that, if the manure will be land applied, it will be applied in accordance with proper agriculture practices, which means that the recipient shall determine the nutrient needs of its crops based on realistic crop yields for its area, sample its soil at least once every three years to determine existing nutrient content, and not apply the manure in quantities that exceed the land application rates calculated using one of the methods specified in 40 CFR 412.31(b)(1)(iv); adequate assurances include a certification from the recipient, the fact that the recipient has a permit, or the existence of a State program that requires the recipient to comply with requirements similar to 40 CFR 412.31(b). The owner or operator will provide the recipient of the manure with a brochure to be provided by the state permitting authority or EPA that describes the recipient's responsibilities for appropriate manure management.

Option 2b for Paragraph (a)(3)(ii)(B)(*6*)

(*6*) With respect to manure or process-generated wastewaters that are

transferred off-site, the owner or operator will first provide the recipient of the manure with an analysis of its content and a brochure to be provided by the State permitting authority or EPA that describes the recipient's responsibilities for appropriate manure management.

(4) The term *land application area* means any land under the control of the owner or operator of the production area whether it is owned, rented, or leased, to which manure and process wastewater from the production area is or may be applied.

(5) The term *operator,* for purposes of this section, means:

(i) An operator as that term is defined in § 122.2; or

(ii) A person who the Director determines to be an operator on the basis that the person exercises substantial operational control of a CAFO. Whether a person exercises substantial operational control depends on factors that include, but are not limited to, whether the person:

(A) Directs the activity of persons working at the CAFO either through a contract or direct supervision of, or on-site participation in, activities at the facility;

(B) Owns the animals; or

(C) Specifies how the animals are grown, fed, or medicated.

(6) The term *production area* means that part of the AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyard, exercise yards, animal walkways, and stables. The manure storage area includes but is not limited to lagoons, sheds, liquid impoundments, static piles, and composting piles. The raw materials storage area includes but is not limited to feed silos, silage bunkers, and bedding materials. The waste containment area includes but is not limited to settling basins, and areas within berms, and diversions which separate uncontaminated storm water Also included in the definition of production area is any eggwash or egg processing facility.

(b) *Designation as a CAFO.* The EPA Regional Administrator, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, may designate any AFO as a CAFO upon determining that it is a significant contributor of pollutants to the waters of the United States.

(1) In making this designation, the Director or the EPA Regional Administrator shall consider the following factors:

(i) The size of the AFO and the amount of wastes reaching waters of the United States;

(ii) The location of the AFO relative to waters of the United States;

(iii) The means of conveyance of animal wastes and process waste waters into waters of the United States;

(iv) The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes and process waste waters into waters of the United States; and,

(v) Other relevant factors.

Option 1 for Paragraph (b)(2)

(2) No AFO shall be designated under this paragraph (b) until the Director or the EPA Regional Administrator has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program; except that no inspection is required to designate a facility that was previously defined or designated as a CAFO.

Option 2 for Paragraph (b)(2)

(2) No AFO shall be designated under this paragraph (b) until the Director or the EPA Regional Administrator has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program; except that no inspection is required to designate a facility that was previously defined or designated as a CAFO. In addition, no AFO with less than 300 animal units may be designated as a concentrated animal feeding operation unless:

(i) Pollutants are discharged into waters of the United States through a manmade ditch, flushing system, or other similar manmade device; or

(ii) Pollutants are discharged directly into waters of the United States which originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(c) *Who must apply for an NPDES permit?* (1) *All CAFOs must apply for a permit.* For all CAFOs, the CAFO owner or operator must apply for an NPDES permit, except as provided in paragraph (c)(2) of this section. Specifically, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under a CAFO general permit. If the Director has not made a general permit available to the CAFO, the CAFO owner or operator must apply for an individual permit.

(2) *Exception.* The CAFO owner or operator does not need to apply for an NPDES permit if the owner or operator has received from the Director a determination under paragraph (e) of this section that the CAFO has no potential to discharge.

(3) *Co-permitting.* Any person who is an ''operator'' of a CAFO on the basis that the person exercises substantial operational control of a CAFO (see § 122.23(a)(5)(ii)) must apply for a permit. Such operators may apply for an NPDES permit either alone or together as co-permittees with other owners or operators of the CAFO.

(d) *In which case will the Director not issue an NPDES permit?* The Director shall not issue an NPDES permit if the Director has determined that the CAFO has ''no potential to discharge'' pursuant to paragraph (e) of this section.

(e) *''No potential to discharge'' determinations.* (1) *Determination by Director.* The Director, upon request, may make a case-specific determination that a CAFO has no potential to discharge pollutants to waters of the United States. In making this determination, the Director must consider the potential for discharges from both the production area and any land application areas, and must also consider any potential discharges via ground waters that have a direct hydrologic connection to surface waters. For purposes of this subsection, the term ''no potential to discharge'' means that there is no potential for any CAFO manure or waste waters to be added to waters of the United States, without qualification. For example, a CAFO may not claim that there is no potential to discharge even if the only pollutants that the CAFO has a potential to discharge would be exempt from NPDES requirements. A CAFO has a potential to discharge if it has had a discharge within the preceding five years.

(2) *Supporting information.* In requesting a determination of no potential to discharge, the CAFO owner or operator must submit any supporting information along with the request. The Director has discretion to accept or reject any additional information that is submitted at a later date.

(3) *Requesting a ''no potential to discharge'' determination does not postpone the duty to apply for a permit.* The owner or operator must apply for a permit according to the date specified in section (f) unless it has received a no potential to discharge determination before that date.

(4) *CAFO bears the risk of any actual discharge.* Any unpermitted CAFO that discharges pollutants into the waters of the United States is in violation of the

Clean Water Act even if it has received a ''no potential to discharge'' determination from the Director.

(f) *By when must I apply for a permit for my CAFO?* (1) For all CAFOs, the owner or operator of the CAFO must apply for an NPDES permit no later than [insert date that is three years after the date of publication of the final rule], except as provided in paragraphs (f)(2) through (6) of this section.

(2) *Operations that are defined as CAFOs prior to [insert date that is three years after the date of publication of the final rule].* For operations that are CAFOs under regulations that are in effect prior to [insert date that is three years after the date of publication of the final rule], the owner or operator must apply for an NPDES permit under 40 CFR 122.21(a) within the time period specified in 40 CFR 122.21(c).

(3) *Operations that become CAFO new sources or new dischargers after [insert date that is three years after the date of publication of the final rule].* For operations that meet the criteria in 40 CFR 122.23 for being defined as a CAFO for the first time after [insert date that is three years after the date of publication of the final rule], the owner or operator must apply for an NPDES permit 180 days prior to the date on which they first meet those criteria.

(4) *Operations that are designated as CAFOs.* For operations for which EPA or the Director has issued a case-specific designation that the operation is a CAFO, the owner or operator must apply for a permit no later than 90 days after issuance of the designation.

(5) *Persons who are operators because they exercise ''substantial operational control'' over a CAFO.* Persons who the Director determines to be operators because they exercise substantial operational control over a CAFO must apply for a permit within 90 days of the Director's determination.

(6) *No potential to discharge.* Notwithstanding any other provision of this section, a CAFO that has received a ''no potential to discharge'' determination under paragraph (e) of this section is not required to apply for an NPDES permit.

(g) *Are AFOs subject to Clean Water Act requirements if they are not CAFOs?* AFOs that are neither defined nor designated as CAFOs are subject to NPDES permitting requirements if they discharge the following from a point source:

(1) *Non-wet weather discharges:* discharges from their production area or land application area that are not composed entirely of storm water as defined in § 122.26(b)(13).

(2) *Wet weather discharges:* discharges from their land application area that are composed entirely of storm water as defined in § 122.26(b)(13), if the discharge has been designated under § 122.26(a)(1)(v) as requiring an NPDES permit. Discharges may be designated under § 122.26(a)(1)(v) if they are not agricultural storm water discharges as defined in § 122.23(a)(1).

(h) *If I do not operate an AFO but I land apply manure, am I required to have a NPDES permit?* If you have not been designated by your permit authority, you do not need a NPDES permit to authorize the discharge of runoff composed entirely of storm water from your manure application area. The land application of manure that results in the point source discharge of pollutants to waters of the United States may be designated pursuant to § 122.26(a)(1)(v) as requiring a NPDES permit if the application is not in accordance with proper agriculture practices. Proper agricultural practices means that the recipient shall determine the nutrient needs of its crops based on realistic crop yields for its area, sample its soil at least once every three years to determine existing nutrient content, and not apply the manure in quantities that exceed the land application rates calculated using one of the methods specified in 40 CFR 412.31(b)(1)(iv).

(i) *What must be required in NPDES permits issued to CAFOs.* Permits issued to CAFOs must require compliance with the following:

(1) All other requirements of this part.

(2) The applicable provisions of part 412.

(3) Duty to Maintain Permit Coverage. No later than 180 days before the expiration of the permit, the permittee must submit an application to renew its permit. However, the permittee need not reapply for a permit if the facility is no longer a CAFO (*e.g.,* where the numbers of confined animals has been reduced below the level that meets the definition of a CAFO) and the permittee has demonstrated to the satisfaction of the Director that there is no remaining potential for a discharge of manure or associated waste waters that were generated while the operation was a CAFO. With respect to CAFOs, this section applies instead of §§ 122.21(d) and 122.41(b).

(4) Co-permittees. In the case of a permit issued to more than one owner or operator of the CAFO, the permit may allocate to one of the permit holders the sole responsibility for any permit requirement, except that all permit holders must be jointly responsible for the management of manure in excess of what can be applied on-site in compliance with part 412

(5) Permits issued to CAFOs that meet the applicability requirements of Subpart C (Beef and Dairy) or Subpart D (Swine, Poultry and Veal) of 40 CFR Part 412 shall also require compliance with paragraph (j) of this section.

(6) Permits issued to CAFOs that do not meet the applicability requirements of Subpart C or Subpart D of 40 CFR Part 412 (including beef, dairy, swine, poultry or veal facilities not subject to those parts, and facilities with other types of animals) shall also require compliance with paragraph (k) of this section.

(j) *What must be required in NPDES permits issued to CAFOs that are subject to part 412, Subparts C (Beef and Dairy) and D (Swine, Poultry and Veal)?* Permits issued to CAFOs that meet the applicability requirements of Subpart C or Subpart D of 40 CFR Part 412 must require compliance with all of the following:

(1) Requirements to use the method in 40 CFR 412.31(b)(1)(iv) chosen by the Director to determine phosphorous field conditions and to determine appropriate manure application rates. The permit shall specify the factors to be considered and the analytical methods to be employed when determining those rates.

(2) Prohibitions against or restrictions on applying manure to land during times and using methods which, in light of local crop needs, climate, soil types, slope and other factors, would not serve an agricultural purpose and would be likely to result in pollutant discharges to waters of the United States.

(3) Requirement to notify the Director when the permittee's Permit Nutrient Plan has been developed or revised. Notification of the development of the permittee's initial Permit Nutrient Plan must be submitted no later than 90 days after the CAFO submits its NOI or obtains coverage under an individual permit. With the notice, the permittee shall provide a copy of the cover sheet and executive summary of the permittee's current Permit Nutrient Plan that has been developed under 40 CFR 412.37(b).

Option 1 for Paragraphs (j)(4) and (5)

(4) *Transfer of manure to other persons.* The Director may waive the requirements of this paragraph if an enforceable state program subjects the recipient of CAFO wastes to land application requirements that are equivalent to the requirements in 40 CFR 412.31(b). The requirements of paragraph (f) of this section apply only to transfers to persons who receive 12

tons or more of wastes from the CAFO in any year. Prior to transferring manure and other wastes to other persons, the permittee shall:

(i) Obtain from each intended recipient of the CAFO waste (other than haulers that do not land apply the waste) a certification that the recipient will do one of the following. The certification must contain a statement that the recipient understands that the information is being collected on behalf of the U.S. Environmental Protection Agency or State and that there are penalties for falsely certifying. The permittee is not liable if the recipient violates its certification;

(A) Land apply the wastes in accordance with proper agriculture practices, which means that the recipient shall determine the nutrient needs of its crops based on realistic crop yields for its area, sample its soil at least once every three years to determine existing nutrient content, and not apply the manure in quantities that exceed the land application rates calculated using the method specified in 40 CFR 412.31(b)(1)(iv) chosen by the Director;

(B) Land apply the wastes in compliance with the terms of an NPDES permit that addresses for discharges from the land application area; or

(C) Use the manure for purposes other than land application.

(ii) Obtain from any commercial waste hauler the name and location of the recipient of the wastes, if known;

(iii) Provide the recipient of the manure with an analysis of its content; and

(iv) Provide the recipient of the manure with a brochure to be provided by the State permitting authority or EPA that describes the recipient's responsibilities for appropriate manure management.

(5) *Record keeping requirements.* Requirements to keep, maintain for five years and make available to the Director or the Regional Administrator:

(i) Records of the inspections and of the manure sampling and analysis required by 40 CFR 412.37(a);

(ii) Records required by 40 CFR 412.37(e) related to the development and implementation of Permit Nutrient Plans required by 40 CFR 412.37(b); and

(iii) Records of each transfer of wastes to a third party, including date, recipient name and address, quantity transferred, an analysis of manure content and a copy of the certifications required by paragraph (j)(4) of this section. If the waste is transferred to a commercial waste hauler, records of where the hauler indicated it would take the waste, if known. If the waste is to be packaged as fertilizer, incinerated or used for a purpose other than direct land application, records of the analysis of the manure are not required.

Option 2 for Paragraphs (j)(4) and (5):

(4) *Transfer of manure to other persons.* Prior to transferring manure and other wastes to other persons, the permittee shall:

(i) Provide the recipient of the manure with an analysis of its content;

(ii) Provide the recipient of the manure with a brochure to be provided by the State permitting authority or EPA that describes the recipient's responsibilities for appropriate manure management; and

(iii) Obtain from any commercial waste hauler the name and location of the recipient of the wastes, if known.

(5) *Record keeping requirements.* Requirements to keep, maintain for five years and make available to the Director or the Regional Administrator:

(i) Records of the inspections and of the manure sampling and analysis required by 40 CFR 412.37(a);

(ii) Records required by 40 CFR 412.37(e) related to the development and implementation of Permit Nutrient Plans required by 40 CFR 412.37(b); and

(iii) Records of each transfer of wastes to a third party, including date, recipient name and address, quantity transferred, and an analysis of manure content. If the waste is transferred to a commercial waste hauler, records of where the hauler indicated it would take the waste, if known. If the waste is to be packaged as fertilizer, incinerated or used for a purpose other than direct land application, records of the analysis of the manure are not required.

(6) For CAFOs subject to 40 CFR 412.43 (existing swine, poultry and veal facilities), the Director must determine based on topographical characteristics of the region whether there is a likelihood that a CAFO may discharge from the production area via ground water that has a direct hydrologic connection to waters of the United States. If the Director finds there is such a likelihood, and the Director determines there is the potential for an excursion of State water quality standards due to such discharge, the Director must impose any water quality-based effluent limits necessary to comply with § 122.44(d). The Director may omit such water quality-based effluent limits from the permit if the permittee has provided a hydrologist's statement that demonstrates to the Director's satisfaction that there is no direct hydrologic connection from the production area to waters of the United States.

(k) *What additional terms and conditions must be required in NPDES permits issued to CAFOs that are not subject to part 412, Subparts C and D?* (1) *All CAFOs not subject to part 412.* In cases where a CAFO has fewer than the number of animals necessary to make it subject to the requirements 40 CFR Part 412, and the Director is establishing effluent limitations on a case-by-case basis based on best professional judgment under section 402(a)(1)(B) of the Act, the Director shall consider the need for the following effluent limitations:

(i) Limits on the discharge of process wastewater pollutants from the production area, including limits based on the minimum duration and intensity of rainfall events for which the CAFO can design and construct a system to contain all process-generated wastewaters from such event;

(ii) Limits on discharges resulting from the application of manure to land, including restrictions on the rates of application of nitrogen and phosphorous;

(iii) Requirements to implement best management practices to ensure the CAFO achieves limitations under paragraphs (k)(1)(i) and (k)(1)(ii) of this section;

(iv) Requirements to develop and implement a Permit Nutrient Plan that addresses requirements developed under paragraphs (k)(1)(i), (ii), and (iii) of this section; and

(v) If the CAFO is in an area with topographic characteristics that indicate a likelihood that ground water has a direct hydrologic connection to waters of the United States, requirements necessary to comply with § 122.44, unless the permittee submits a hydrologist's statement that the production area is not connected to surface waters through a direct hydrologic connection.

(2) *CAFOs subject to part 412, Subparts A and B.* In addition to the applicable effluent limitations, when developing permits to be issued to CAFOs with horses, sheep or ducks subject to Subparts A and B of 40 CFR 412, the Director shall consider the need for effluent limitations for wastestreams not covered by Subparts A and B, including the need for the requirements described in paragraphs (k)(1)(ii) through (v) of this section.

(l) *How will the public know if a CAFO is implementing an adequate permit nutrient plan?*

(1) The Director shall make publicly available via the worldwide web or other publicly available source, and update every 90 days:

(i) A list of all CAFOs that have submitted a notice of intent for coverage under a general permit, and

(ii) A list of all CAFOs that have submitted a notice that their permit nutrient plan has been developed or revised.

(2) The Director shall make publicly available the notices of intent, notice of plan development, and the cover sheet and executive summary of the permittee's Permit Nutrient Plan. If the Director does not have a copy of the cover sheet and executive summary of the permittee's current Permit Nutrient Plan and the cover sheet and executive summary are not publicly available at the CAFO or other location, the Director shall, upon request from the public, obtain a copy of the cover sheet and executive summary. Until required by the Director, the CAFO operator is not required to submit cover sheet or executive summary to the Director.

(3) *Confidential business information.* The information required to be in Permit Nutrient Plan cover sheet and executive summary, and required soil sampling data, may not be claimed as confidential. Any claim of confidentiality by a CAFO in connection with the remaining information in the Permit Nutrient Plan will be subject to the procedure in 40 CFR Part 2.

4. Section 122.28 is amended by:

a. Removing the word ''or'' at the end of paragraph (a)(2)(i) and adding the word ''or'' at the end of paragraph (a)(2)(ii)(D).

b. Adding paragraph (a)(2)(iii).

c. Adding two sentences to the end paragraph (b)(2)(ii)

d. Redesignating paragraph (b)(3)(i)(G) as paragraph (b)(3)(i)(H) and adding a new paragraph (b)(3)(i)(G).

e. Adding paragraph (b)(3)(vi).

The additions read as follows:

§ 122.28 General permits (applicable to State NPDES programs, see § 123.25).

(a) * * *

(2) * * *

(iii) Concentrated animal feeding operations.

* * * * *

(b) * * *

(2) * * *

(ii) * * * Notices of intent for coverage under a general permit for confined animal feeding operations must include: a topographic map as described in § 122.21(f)(7); name and address of any other entity with substantial operational control; a statement whether the owner or operator has developed and is implementing its Permit Nutrient Plan and, if not, the status of the development of its Permit Nutrient Plan. New sources subject to 40 CFR Part 412 shall also provide a copy of a draft plan that, at a minimum, demonstrates that there is adequate land available to the CAFO operator to comply with the land application provisions of 40 CFR Part 412 or describes an alternative to land application that the operator intends to implement.

* * * * *

(3) * * *

(i) * * *

(G) The discharge is from a CAFO. In addition to the other criteria in paragraph (b)(3) of this section, the Director shall consider whether general permits are appropriate for the following CAFOs:

(*1*) CAFOs located in an environmentally or ecologically sensitive area;

(*2*) CAFOs with a history of operational or compliance problems;

(*3*) CAFOs that are exceptionally large operation as determined by the Director; or

(*4*) Significantly expanding CAFOs.

* * * * *

(vi) Prior to issuing any general permits for CAFOs, the Director, after considering input from the public, shall issue a written statement of its policy on which CAFOs will be eligible for general permits, including a statement of how it will apply the criteria in paragraph (b)(3)(i)(G) of this section.

Appendix B to Part 122 [Removed and Reserved]

6. Remove and reserve Appendix B to part 122.

9. Part 412 is revised to read as follows:

PART 412—CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFOs) POINT SOURCE CATEGORY

Sec.
412.0 General applicability.
412.1 General definitions.
412.2 General pretreatment standards.

Subpart A—Horses and Sheep

412.10 Applicability.
412.11 Special definitions.
412.12 Effluent limitations attainable by the application of the best practicable control technology currently available (BPT).
412.13 Effluent limitations attainable by the application of the best available control technology economically achievable (BAT).
412.15 New source performance standards (NSPS).

Subpart B—Ducks

412.20 Applicability.
412.21 Special definitions.
412.22 Effluent limitations attainable by the application of the best practicable control technology currently available (BPT).
412.25 New source performance standards (NSPS).
412.26 Pretreatment standards for new sources (PSNS).

Subpart C—Beef and Dairy

412.30 Applicability.
412.31 Effluent limitations attainable by the application of best practicable control technology currently available (BPT).
412.32 Effluent limitations attainable by the application of the best control technology for conventional pollutants (BCT).
412.33 Effluent limitations attainable by the application of the best available control technology economically achievable (BAT).
412.35 New source performance standards (NSPS).
412.37 Additional measures.

Subpart D—Swine, Veal and Poultry

412.40 Applicability.
412.41 Effluent limitations attainable by the application of best practicable control technology currently available (BPT).
412.42 Effluent limitations attainable by the application of the best control technology for conventional pollutants (BCT).
412.43 Effluent limitations attainable by the application of the best available control technology economically achievable (BAT).
412.45 New source performance standards (NSPS).

Authority: 33 U.S.C. 1311, 1314, 1316, 1317, 1318, 1342 and 1361.

§ 412.0 General applicability.

This part applies to process wastewater discharges resulting from concentrated animal feeding operations (CAFOs). Manufacturing activities which may be subject to this part are generally reported under one or more of the following Standard Industrial Classification (SIC) codes: SIC 0211, SIC 0213, SIC 0241, SIC 0259, or SIC 3523 (1987 SIC Manual).

§ 412.1 General Definitions.

As used in this part:

(a) The general definitions and abbreviations at 40 CFR part 401 shall apply.

(b) *Concentrated Animal Feeding Operation (CAFO)* is defined at 40 CFR 122.23(a)(3).

(c) *Fecal coliform* means the bacterial count (Parameter 1) at 40 CFR 136.3 in Table 1A, which also cites the approved methods of analysis.

(d) *Process wastewater* means water directly or indirectly used in the operation of the CAFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other CAFO

facilities; direct contact swimming, washing or spray cooling of animals; litter or bedding; dust control; and stormwater which comes into contact with any raw materials, products or by-products of the operation.

(e) *Certified specialist* shall mean someone who has been certified to prepare Comprehensive Nutrient Management Plans (CNMPs) by USDA or a USDA sanctioned organization.

(f) *Land application area* means any land under the control of the CAFO operator, whether it is owned, rented, or leased, to which manure and process wastewater is or may be applied.

(g) *New source* means a source that is subject to subparts C or D of this part and, not withstanding the criteria codified at 40 CFR 122.29(b)(1): Is constructed at a site at which no other source is located; or replaces the housing including animal holding areas, exercise yards, and feedlot, waste handling system, production process, or production equipment that causes the discharge or potential to discharge pollutants at an existing source; or constructs a production area that is substantially independent of an existing source at the same site. Whether processes are substantially independent of an existing source, depends on factors such as the extent to which the new facility is integrated with the existing facility; and the extent to which the new facility is engaged in the same general type of activity as the existing source.

(h) *Overflow* means the process wastewater discharge resulting from the filling of wastewater or liquid manure storage structures to the point at which no more liquid can be contained by the structure.

(i) *Production area* means that part of the CAFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyard, exercise yards, animal walkways, and stables. The manure storage area includes but is not limited to lagoons, sheds, under house or pit storage, liquid impoundments, static piles, and composting piles. The raw materials storage area includes but is not limited to feed silos, silage bunkers, and bedding materials. The waste containment area includes but is not limited to settling basins, and areas within berms, and diversions which separate uncontaminated stormwater. Also included in the definition of production area is any egg washing or egg processing facility.

(j) *Setback* means a specified distance from surface waters or potential conduits to surface waters where manure and wastewater may not be land applied. Examples of conduits to surface waters include, but are not limited to, tile line intake structures, sinkholes, and agricultural well heads.

(k) *Soil test phosphorus* is the measure of the phosphorus content in soil as reported by approved soil testing laboratories using a specified analytical method.

(l) *Phosphorus threshold or TH* level is a specific soil test concentration of phosphorus established by states. The concentration defines the point at which soluble phosphorus may pose a surface runoff risk.

(m) *Phosphorus index* means a system of weighing a number of measures that relate the potential for phosphorus loss due to site and transport characteristics. The phosphorus index must at a minimum include the following factors when evaluating the risk for phosphorus runoff from a given field or site:

(1) Soil erosion.

(2) Irrigation erosion.

(3) Run-off class.

(4) Soil phosphorus test.

(5) Phosphorus fertilizer application rate.

(6) Phosphorus fertilizer application method.

(7) Organic phosphorus application rate.

(8) Method of applying organic phosphorus.

(n) *Permit Nutrient Plan* means a plan developed in accordance with § 412.33 (b) and § 412.37. This plan shall define the appropriate rate for applying manure or wastewater to crop or pasture land. The plan accounts for soil conditions, concentration of nutrients in manure, crop requirements and realistic crop yields when determining the appropriate application rate.

(o) *Crop removal rate* is the application rate for manure or wastewater which is determined by the amount of phosphorus which will be taken up by the crop during the growing season and subsequently removed from the field through crop harvest. Field residues do not count towards the amount of phosphorus removed at harvest.

(p) *Ten(10)-year, 24-hour rainfall event and 25-year, 24-hour rainfall event* mean precipitation events with a probable recurrence interval of once in ten years, or twenty five years, respectively, as defined by the National Weather Service in Technical Paper No. 40, ''Rainfall Frequency Atlas of the United States,'' May, 1961, or equivalent regional or State rainfall probability information developed from this source. The technical paper is available at *http://www.nws.noaa.gov/er/hq/Tp40s.html.*

(q) The parameters that are regulated or referenced in this part and listed with approved methods of analysis in Table 1B at 40 CFR 136.3 are defined as follows:

(1) *Ammonia (as N)* means ammonia reported as nitrogen.

(2) BOD_5 means 5-day biochemical oxygen demand.

(3) *Chloride* means total chloride.

(4) *Nitrate (as N)* means nitrate reported as nitrogen.

(5) *Total dissolved solids* means non-filterable residue.

(r) The parameters that are regulated or referenced in this part and listed with approved methods of analysis in Table 1A at 40 CFR 136.3 are defined as follows:

(1) *Fecal coliform* means fecal coliform bacteria.

(2) *Total coliform* means all coliform bacteria.

§ 412.3 General pretreatment standards.

Any source subject to this part that introduces process wastewater pollutants into a publicly owned treatment works (POTW) must comply with 40 CFR part 403.

Subpart A—Horses and Sheep

§ 412.10 Applicability.

This subpart applies to discharges resulting from the production areas at CAFOs where sheep are confined in open or housed lots; and horses are confined in stables such as at racetracks. This subpart does not apply to such CAFOs with less than the following capacities:

APPLICABLE CAFOS

Livestock	Minimum capacity
Sheep	10,000
Horses	500

§ 412.11 Special definitions.

For the purpose of this subpart:

(a) *Housed lot* means totally roofed buildings, which may be open or completely enclosed on the sides, wherein animals are housed over floors of solid concrete or dirt and slotted (partially open) floors over pits or manure collection areas, in pens, stalls or cages, with or without bedding materials and mechanical ventilation.

(b) *Open lot* means pens or similar confinement areas with dirt, concrete paved or hard surfaces, wherein animals are substantially or entirely exposed to the outside environment, except where some protection is afforded by windbreaks or small shed-type shaded areas.

§ 412.12 Effluent limitations attainable by the application of the best practicable control technology currently available (BPT).

(a) Except as provided in 40 CFR 125.30 through 125.32 and when the provisions of paragraph (b) of this section apply, any existing point source subject to this subpart must achieve the following effluent limitations representing the application of BPT: There must be no discharge of process wastewater pollutants into U.S. waters.

(b) Whenever rainfall events cause an overflow of process wastewater from a facility designed, constructed and operated to contain all process-generated wastewaters plus the runoff from a 10-year, 24-hour rainfall event at the location of the point source, any process wastewater pollutants in the overflow may be allowed to be discharged into U.S. waters.

§ 412.13 Effluent limitations attainable by the application of the best available technology economically achievable (BAT).

(a) Except as provided in 40 CFR 125.30 through 125.32 and when the provisions of paragraph (b) of this section apply, any existing point source subject to this subpart must achieve the following effluent limitations representing the application of BAT: There must be no discharge of process wastewater pollutants into U.S. waters.

(b) Whenever rainfall events cause an overflow of process wastewater from a facility designed, constructed and operated to contain all process-generated wastewaters plus the runoff from a 25-year, 24-hour rainfall event at the location of the point source, any process wastewater pollutants in the overflow may be allowed to be discharged into U.S. waters.

§ 412.15 New source performance standards (NSPS).

(a) Except as provided in paragraph (b) of this section, any new point source subject to this subpart must achieve the following performance standards: There must be no discharge of process wastewater pollutants into U.S. waters.

(b) Whenever rainfall events cause an overflow of process wastewater from a facility designed, constructed and operated to contain all process-generated wastewaters plus the runoff from a 25-year, 24-hour rainfall event at the location of the point source, any process wastewater pollutants in the overflow may be allowed to be discharged into U.S. waters.

Subpart B—Ducks

§ 412.20 Applicability.

This subpart applies to discharges resulting from dry and wet duck feedlots with a capacity of at least 5000 ducks.

§ 412.21 Special definitions.

For the purpose of this subpart:

(a) *Dry lot* means a facility for growing ducks in confinement with a dry litter floor cover and no access to swimming areas.

(b) *Wet lot* means a confinement facility for raising ducks which is open to the environment, has a small number of sheltered areas, and with open water runs and swimming areas to which ducks have free access.

§ 412.22 Effluent limitations attainable by the application of the best practicable control technology currently available (BPT).

Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart shall achieve the following effluent limitations representing the application of BPT:

EFFLUENT LIMITATIONS

Regulated parameter	Maximum daily [1]	Maximum monthly avg.[1]	Maximum daily [2]	Maximum monthly avg.[2]
BOD_5	3.66	2.0	1.66	0.91
Fecal coliform	([3])	([3])	([3])	([3])

[1] Pounds per 1000 ducks.
[2] Kilograms per 1000 ducks.
[3] Not to exceed MPN of 400 per 100 ml at any time.

§ 412.25 New source performance standards (NSPS).

Any new source subject to this subpart must achieve the following standards:

(a) Except as provided in paragraph (b) of this section, there must be no discharge of process wastewater pollutants into U.S. waters.

(b) Whenever rainfall events cause an overflow of process wastewater from a facility designed, constructed and operated to contain all process-generated wastewaters plus the runoff from a 25-year, 24-hour rainfall event at the location of the point source, any process wastewater pollutants in the overflow may be allowed to be discharged into U.S. waters.

§ 412.26 Pretreatment standards for new sources (PSNS).

(a) Except as provided in 40 CFR § 403.7 and in paragraph (b) of this section, any new source subject to this subpart must achieve the following pretreatment standards: There must be no discharge of process wastewater pollutants into a POTW.

(b) Whenever rainfall events cause an overflow of process wastewater from a facility designed, constructed and operated to contain all process-generated wastewaters plus the runoff from a 25-year, 24-hour rainfall event at the location of the new source, the discharge of any process wastewater pollutants in the overflow may be allowed.

Subpart C—Beef and Dairy

§ 412.30 Applicability.

This subpart applies to concentrated animal feeding operations (CAFOs), as defined in 40 CFR § 122.23, and includes the following types of animals: Mature dairy cows, either milking or dry; and cattle other than mature dairy or veal.

§ 412.31 Effluent limitations attainable by the application of the best practicable control technology currently available (BPT).

Except as provided in 40 CFR § 125.30 through § 125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the application of BPT:

(a) For CAFO production areas:

(1) Except as provided in paragraph (a)(2) of this section, there must be no discharge of process wastewater pollutants into U.S. waters.

(2) Whenever rainfall causes an overflow of process wastewater, pollutants in the overflow may be discharged into U.S. waters during those periods subject to following conditions:

(i) The production area is designed and constructed to contain all process wastewaters including the runoff from a 25 year, 24 hour rainfall event; and

(ii) The production area is operated in accordance with the requirements of § 412.37(a)(1) through (3).

(b) For CAFO land application areas:

(1) Discharges resulting from the application of manure or process wastewater to land owned or under the control of the CAFO must achieve the following:

(i) Develop and implement a Permit Nutrient Plan (PNP) that includes the requirements specified at § 412.37; and establishes land application rates for manure in accordance with § 412.31 (b)(1)(iv).

(ii) The PNP must be developed or approved by a certified specialist.

(iii) The PNP must be written taking into account realistic yield goals based on historic yields from the CAFO, or county average data when historic yields are not appropriate. County average data may be used when a facility plants a crop that no yield data for that CAFO land application area has been obtained within the previous 10 years. CAFOs shall review the PNP annually and revise as necessary, and must rewrite the PNP at least once every five years.

(iv) Apply manure and process wastewater at a rate established in accordance with one of the three methods defined in tables 1 through 3 of this section. State approved indices, thresholds, and soil test limits shall be utilized such that application does not exceed the crop and soil requirements for nutrients:

TABLE 1.—PHOSPHORUS INDEX

Phosphorus index rating	Manure and wastewater application rate
Low Risk	Application of manure and wastewater may not exceed the nitrogen requirements of the crop.
Medium Risk	Application of manure and wastewater may not exceed the nitrogen requirements of the crop.
High Risk	Application of phosphorus in manure and wastewater may not exceed the amount of phosphorus removed from the field with crop harvest.
Very High Risk	No land application of manure or wastewater.

TABLE 2.—PHOSPHORUS THRESHOLD

Soil phosphorus threshold level	Manure and wastewater application rate
< ¾ TH application	Manure and wastewater may not exceed the nitrogen requirements of the crop.
> ¾ TH, < 2 TH application	Phosphorus in manure and wastewater may not exceed the amount of phosphorus removed from the field with crop harvest.
> 2 TH application	No land application of manure or wastewater.

TABLE 3.—SOIL TEST PHOSPHORUS

Soil test phosphorus level	Manure and wastewater application rate
Low	Application of manure and wastewater may not exceed the nitrogen requirements of the crop.
Medium	Application of manure and wastewater may not exceed the nitrogen requirements of the crop.
High	Application of phosphorus in manure and wastewater may not exceed the amount of phosphorus removed from the field with crop harvest.
Very High	No land application of manure and wastewater.

(2) Multi-year phosphorus applications are prohibited when either the P-Index is rated high, the soil phosphorus threshold is between ¾ and 2 times the TH value, or the soil test phosphorus level is high as determined in paragraph (b)(1) (iv) of this section unless:

(i) Manure application equipment designed for dry poultry manure or litter cannot obtain an application rate low enough to meet a phosphorus based application rate as determined by the PNP In the event a phosphorus application occurs during one given year which exceeds the crop removal rate for that given year, no additional manure or process wastewater shall be applied to the same land in subsequent years until all applied phosphorus has been removed from the field via harvest and crop removal.

(ii) [Reserved]

§ 412.32 Effluent limitations attainable by the application of the best control technology for conventional pollutants (BCT).

Except as provided in 40 CFR 125.30 through 125.32 and 412.41(2), any existing point source subject to this subpart must achieve the following effluent limitations representing the application of BCT:

(a) For CAFO production areas: Discharges must achieve the same requirements as specified in § 412.31(a).

(b) For CAFO land application areas:

Discharges resulting from the application of manure or process wastewater to crop or pasture land owned or under the control of the CAFO must achieve the same requirements as specified in § 412.31(b) and § 412.37.

§ 412.33 Effluent limitations attainable by the application of the best available technology economically achievable (BAT).

Except as provided in 40 CFR 125.30 through 125.32 and 412.33(a)(2), any existing point source subject to this

subpart must achieve the following effluent limitations representing the application of BAT:

(a) For CAFO production areas:

(1) There must be no discharge of process wastewater pollutants into U.S. waters, including any pollutants discharged to ground water which has a direct hydrologic connection to surface waters.

(2) Whenever rainfall causes an overflow of process wastewater, pollutants in the overflow may be discharged into U.S. waters during those periods when the following conditions are met:

(i) The production area is designed and constructed to contain all process wastewaters including the runoff from a 25 year, 24 hour rainfall event; and

(ii) The production area is operated in accordance with the requirements of § 412.37(a).

(3)(i) The ground water beneath the production area must be sampled twice annually to demonstrate compliance with the no discharge requirement unless the CAFO has determined to the satisfaction of the permitting authority that the ground water beneath the production area is not connected to surface waters through a direct hydrologic connection.

(ii) Ground water samples shall be collected up-gradient and down-gradient of the production area and analyzed for:

(A) Total coliforms.

(B) Fecal coliform.

(C) Total dissolved solids.

(D) Nitrates.

(E) Ammonia.

(F) Chloride

(b) For CAFO land application areas:

Discharges resulting from the application of manure or process wastewater to crop or pasture land owned or under the control of the CAFO must achieve the same requirements as specified in § 412.31(b) and § 412.37.

§ 412.35 New source performance standards (NSPS).

Any new source subject to this subpart must achieve the following standards:

(a) For CAFO production areas:

Subject to the provisions of paragraph (c) of this section, discharges must achieve the same requirements as specified in § 412.33(a).

(b) For CAFO land application areas:

Subject to the provisions of paragraph (c) of this section, discharges resulting from the application of manure or process wastewater to crop or pasture land owned or under the control of the CAFO must achieve the same requirements as specified in § 412.31(b) and § 412.37.

(c) Any new source subject to the provisions of this section that commenced discharging after [insert date 10 years prior to the date that is 60 days from the publication date of the final rule] and before [insert date that is 60 days from the publication date of the final rule] must continue to achieve the standards specified in the 2000 version of § 412.15, provided that the new source was constructed to meet those standards. For toxic and nonconventional pollutants, those standards shall not apply after the expiration of the applicable time period specified in 40 CFR 122.29(d)(1); thereafter, the source must achieve the standards specified in paragraphs (a) and (b) of this section.

§ 412.37 Additional measures.

(a) Each CAFO subject to this subpart must implement the following requirements:

(1) There must be routine visual inspections of the CAFO production area to check the following:

(i) Weekly inspections of all stormwater diversion devices, such as roof gutters, to ensure they are free of debris that could interfere with the diversion of clean stormwater;

(ii) Weekly inspections of all stormwater diversion devices which channel contaminated stormwater to the wastewater and manure storage and containment structure, to ensure that they are free of debris that could interfere with ensuring this contaminated stormwater reaches the storage or containment structure;

(iii) Daily inspections of all water lines providing drinking water to the animals to ensure there are no leaks in these lines that could contribute unnecessary volume to liquid storage systems or cause dry manure to become too wet;

(iv) Runoff diversion structures and animal waste storage structures must be visually inspected for: seepage, erosion, vegetation, animal access, reduced freeboard, and functioning rain gauges and irrigation equipment, on a weekly basis manure storage area to ensure integrity of the structure. All surface impoundments must have a depth marker which indicates the design volume and clearly indicates the minimum freeboard necessary to allow for the 25 year 24 hour rainfall event. The inspection shall also note the depth of the manure and process wastewater in the impoundment as indicated by this depth marker.

(2) Any deficiencies found as a result of these inspections shall be corrected as soon as possible. Deficiencies and corrective action taken shall be documented.

(3) Mortalities may not be disposed of in any liquid manure or stormwater storage or treatment system, and must be handled in such a way as to prevent discharge of pollutants to surface water.

(4) Land application of manure generated by the CAFO to land owned or controlled by the CAFO must be done in accordance with the following practices:

(i) Manure may not be applied closer than 100 feet to any surface water, tile line intake structure, sinkhole or agricultural well head.

(ii) The CAFO must take manure samples at least once per year and analyzed for nitrogen, phosphorus and potassium. Samples must be collected from all manure storage areas, both liquid and dry storage, as well as any wastewater or storm water storage. The CAFO must take soil samples once every three years if they apply manure to crop or pasture land under their control, and analyze the soil sample for phosphorus. Samples shall be collected in accordance with accepted Extension protocols and the analyses must be conducted in accordance with the state nutrient management standard. These protocols shall be documented in the PNP.

(iii) Manure that is transported off-site must be sampled at least once a year for nitrogen, phosphorus and potassium. The results of these analyses must be provided to the recipient of the manure.

(iv) Manure application equipment must be calibrated prior to land application of manure and/or process wastewaters at a minimum of once per year.

(b) Record keeping requirements:

Each CAFO must maintain on its premises a complete copy of the current PNP and the records specified in paragraphs (b)(1) through (12) of this section. The CAFO must make the PNP available to the permitting authority and the Regional Administrator, or his or her designee, for review upon request. Records must be maintained for 5 years from the date they are created.

(1) Cover Sheet which includes the following information:

(i) the name and location of the CAFO,

(ii) name and title of the owner or operator

(iii) name and title of the person who prepared the plan,

(iv) date the plan was prepared,

(v) date the plan was amended

(2) Executive Summary which includes the following information:

(i) Total average herd or flock size

(ii) Identification of manure collection, handling, storage, and treatment practices

(iii) Amount of manure generated annually

(iv) Identification of planned crops (rotation)

(v) Realistic yield goal as described in § 412.31(b)(1)(iii)

(vi) Field condition as determined by the phosphorus index, soil test phosphorus, or phosphorus threshold (for each field unit that will receive manure)

(vii) number of acres that will receive manure

(viii) amount of manure transported off-site

(ix) animal waste application rate (gallons or tons/acre)

(x) identification of watershed or nearest surface water body

(3) Records documenting the inspections required under paragraph (a)(1) of this section.

(4) Records tracking the repairs performed on drinking water lines, automated feeding equipment, feed storage and silos, manure storage, manure treatment facilities, as well as maintenance of berms and diversions that direct clean stormwater away from any manure and other process wastewater.

(5) Records documenting the following information about manure application and crop production.

(i) Expected crop yield based on historical data for the CAFO for its land application area, or county average yield data when the CAFO does not have a prior history of crop yields

(ii) The date(s) manure is applied,

(iii) Weather conditions at time of application and for 24 hours prior to and following application,

(iv) Results from manure and soil sampling,

(v) Test methods used to sample and analyze manure and soil,

(vi) Whether the manure application rate is limited to nitrogen, phosphorus, or some other parameter,

(vii) The amount of manure and manure nutrients applied,

(viii) The amount of any other nutrients applied to the field reported in terms of nitrogen, phosphorus and potassium (including commercial fertilizer, legume credits, and biosolids),

(ix) Calculations showing the total nutrients applied to land,

(x) Calibration of manure application equipment,

(xi) The rate of application of manure,

(xii) The method used to apply the manure, estimated nitrogen losses based on application method used, and the route of nitrogen loss,

(xiii) The field(s) to which manure was applied and total acreage receiving manure,

(xiv) What crop(s) was planted,

(xv) The date that crops were planted in the field, and

(xvi) The crop yields obtained.

(6) Records of the total volume or amount of manure and process wastewater generated by all animals at the facility during each 12 month period. This must include milk parlor washwater and egg washwater. The volume or amount may be determined through direct measurements or an estimated value provided all factors are documented.

(7) Records of rainfall duration, amount of rainfall, and the estimated volume of any overflow that occurs as the result of any catastrophic or chronic rainfall event.

(8) A copy of the emergency response plan for the CAFO.

(9) Records of how mortalities are handled by the CAFO.

(10) Name of state approved specialist that prepared or approved the PNP, or record and documentation of training and certification for owners or operator writing their own PNP.

Subpart D—Swine, Poultry and Veal

§ 412.40 Applicability.

This subpart applies to operations defined as concentrated animal feeding operations (CAFOs) under 40 CFR 122.23 and includes the following animals: Swine, each weighing 55 lbs. or more; swine, each weighing less than 55 lbs.; veal; cattle; chickens; and turkeys.

§ 412.41 Effluent limitation attainable by the application of the best practicable control technology currently available (BPT).

Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the application of BPT:

(a) For CAFO production areas:

Discharges must achieve the same requirements as specified in § 412.31(a).

(b) For CAFO land application areas:

Discharges resulting from the application of manure or process wastewater to crop or pasture land owned or under the control of the CAFO must achieve the same requirements as specified in § 412.31(b) and § 412.37.

§ 412.42 Effluent limitations attainable by the application of the best control technology for conventional pollutants (BCT).

Except as provided in 40 CFR 125.30 through 125.32 , any existing point source subject to this subpart must achieve the following effluent limitations representing the application of BCT:

(a) For CAFO production areas:

The limitations are the same as specified in § 412.41(a).

(b) For CAFO land application areas:

The limitations are the same as specified in § 412.41(b).

§ 412.43 Effluent limitations attainable by the application of the best available technology economically achievable (BAT).

Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the application of BAT:

(a) For CAFO production areas:

(1) There must be no discharge of process wastewater pollutants into U.S. waters.

(2) Any CAFO subject to this subpart must also comply with the requirements specified in § 412.37(a)(1) through (3).

(b) For CAFO land application areas:

The limitations are the same as specified in § 412.41(b).

§ 412.45 New source performance standards (NSPS).

Any new source subject to this subpart must achieve the following standards:

(a) For CAFO production areas:

(1) There must be no discharge of process wastewater pollutants into U.S. waters, including any pollutants discharged to ground water which have a direct hydrological connection to surface waters.

(2) The ground water beneath the production area must be sampled twice annually to demonstrate compliance with the provisions of paragraph (a)(1) of this section, unless the CAFO has determined to the satisfaction of the permitting authority that the ground water beneath the production area is not connected to surface waters through a direct hydrologic connection. Ground water samples must be collected up-gradient and down-gradient of the production area. and analyzed for:

(i) Total coliforms

(ii) Fecal coliform

(iii) Total dissolved solids

(iv) Nitrates

(v) Ammonia

(vi) Chloride

(3) Any CAFO subject to this subpart must also comply with the requirements specified in § 412.37(a)(1) through (3).

(b) For CAFO land application areas:

Discharges resulting from the application of manure or process wastewater to crop or pasture land

owned or under the control of the CAFO must achieve the same requirements as specified in § 412.31(b) and § 412.37.

(c) Any new source subject to the provisions of this section that commenced discharging after [insert date 10 years prior to the date that is 60 days from the publication date of the final rule] and before [insert date that is 60 days from the publication date of the final rule] must continue to achieve the standards specified in § 412.15, provided that the new source was constructed to meet those standards. For ''toxic'' and nonconventional pollutants, those standards shall not apply after the expiration of the applicable time period specified in 40 CFR § 122.29(d)(1); thereafter, the source must achieve the standards specified in paragraphs (a) and (b) of this section.

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Part III

Department of Health and Human Services

Health Care Financing Administration

42 CFR Part 447

Medicaid Program; Revision to Medicaid Upper Payment Limit Requirements for Hospital Services, Nursing Facility Services, Intermediate Care Facility Services for the Mentally Retarded, and Clinic Services; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Part 447

[HCFA–2071–F]

RIN 0938–AK12

Medicaid Program; Revision to Medicaid Upper Payment Limit Requirements for Hospital Services, Nursing Facility Services, Intermediate Care Facility Services for the Mentally Retarded, and Clinic Services

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final rule.

SUMMARY: This final rule modifies the Medicaid upper payment limits for inpatient hospital services, outpatient hospital services, nursing facility services, intermediate care facility services for the mentally retarded, and clinic services. For each type of Medicaid inpatient service, existing regulations place an upper limit on overall aggregate payments to all facilities and a separate aggregate upper limit on payments made to State-operated facilities. This final rule establishes an aggregate upper limit that applies to payments made to government facilities that are not State government-owned or operated, and a separate aggregate upper limit on payments made to privately-owned and operated facilities. This rule also eliminates the overall aggregate upper limit that had applied to these services.

With respect to outpatient hospital and clinic services, this final rule establishes an aggregate upper limit on payments made to State government-owned or operated facilities, an aggregate upper limit on payments made to government facilities that are not State government-owned or operated, and an aggregate upper limit on payments made to privately-owned and operated facilities.

These separate upper limits are necessary to ensure State Medicaid payment systems promote economy and efficiency. We are allowing a higher upper limit for payment to non-State public hospitals to recognize the higher costs of inpatient and outpatient services in public hospitals. In addition, to ensure continued beneficiary access to care and the ability of States to adjust to the changes in the upper payment limits, the final rule includes a transition period for States with approved rate enhancement State plan amendments.

EFFECTIVE DATE: The provisions of this final rule are effective March 13, 2001.

FOR FURTHER INFORMATION CONTACT: Robert Weaver, (410) 786–5914, Nursing facility services and intermediate care facility services for the mentally retarded.

Larry Reed, (410) 786–3325, Inpatient and outpatient hospital services and clinic services.

SUPPLEMENTARY INFORMATION:

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I. Statutory and Regulatory Framework

Title XIX of the Social Security Act (the Act) authorizes Federal grants to States for Medicaid programs that provide medical assistance to low-income families, elderly individuals, and persons with disabilities. Each State Medicaid program is administered by the State in accordance with an approved State plan. While the State has considerable flexibility in designing its State plan and operating its Medicaid program, it must comply with Federal requirements specified in the Medicaid statute, regulations, and program guidance. Additionally, the plan must be approved by the Secretary, who has delegated this authority to HCFA.

Section 1903(a)(1)(A) of the Act provides for payments to States, through Federal financial participation (FFP), in expenditures for services covered under an approved State plan. Section 1902(a)(30)(A) of the Act requires a State plan to meet certain requirements in setting payment amounts for covered Medicaid care and services. One of these requirements is that payment for care and services under an approved State Medicaid plan be consistent with efficiency, economy, and quality of care. This provision provides authority for specific upper payment limits set forth in Federal regulations in 42 CFR part 447 relating to different types of Medicaid covered services. With respect to inpatient hospital services, nursing facility (NF) services, and intermediate care facility services for the mentally retarded (ICF/MR), upper payment limits are set forth in regulations at § 447.272, ''Application of upper payment limits.'' This provision limits overall aggregate State payments and aggregate payments to State-operated providers. With respect to outpatient hospital services and clinic services, similar upper payment limits on aggregate State payments are set forth in regulations at § 447.321, ''Outpatient hospital services and clinic services: Upper limits of payments.''

Existing regulations stipulate that aggregate State payments for each type of services, that is, inpatient hospital and outpatient hospital services, NF services, ICF/MR services, and clinic services may not exceed a reasonable estimate of the amount the State would have paid under Medicare payment principles. Under §§ 447.257, ''FFP: Conditions relating to institutional reimbursement,'' and 447.304, ''Adherence to upper limits; FFP, paragraph (c),'' FFP is not available for State expenditures that exceed the applicable upper payment limit.

The statute also permits States some flexibility to use local government funds for the non-Federal share of Medicaid expenditures. Under section 1902(a)(2) of the Act, States may fund up to 60 percent of the non-Federal share of Medicaid expenditures with local government funds. Section 1903(w)(6) of the Act specifically limits the Secretary's ability to place restrictions on a State's use of certain funds transferred to it from a local unit of government subject to the requirements in section 1902(a)(2) of the Act.

Before 1981, under section 1902(a)(13) of the Act, States were required to pay rates for hospital and long-term care services that were directly related to cost reimbursement. To obtain approval from HCFA, many States set rates using Medicare reasonable cost payment principles.

In 1980 and 1981, the Congress enacted legislation (section 962 of the Omnibus Reconciliation Act of 1980 (ORA 1980), Public Law 96–499, and section 2173 of the Omnibus Budget Reconciliation Act of 1981 (OBRA 1981), Public Law 97–35, collectively known as the ''Boren Amendment'') that amended section 1902(a)(13) of the Act to give States flexibility to deviate from Medicare's reasonable cost payment principles in setting payment rates for hospital and long-term care services.

The Boren Amendment was primarily considered a floor on State spending because it required States to set rates that would meet the costs incurred by efficiently and economically operated facilities. However, the Boren Amendment also supported upper payment limits on overall rates. In legislative history, the Congress directed the Secretary to maintain ceiling requirements that limited State payments in the aggregate from exceeding Medicare payment levels. The Senate Finance Committee stated that ''the Secretary would be expected to continue to apply current regulations that require that payments made under State plans do not exceed amounts that would be determined under Medicare principles of reimbursement'' (S. Rep. No. 471, 96th Cong., 1st sess. (1979).

In 1986, the Congress implicitly affirmed the use of upper limits on payments for inpatient hospital services, NF services, and intermediate care facility (ICF) (now ICF/MR) services. Section 9433 of the Omnibus Budget Reconciliation Act of 1986, Public Law 99–509, precluded the Secretary from placing limits on State payments to hospitals that serve a disproportionate number of low-income patients with special needs (disproportionate share hospital (DSH) payments) but maintained the application of limits on regular inpatient payment rates.

The existing regulations on upper limits were last changed in a final rule published in the **Federal Register** on July 28, 1987 (52 FR 28141) that addressed the application of the upper payment limit to States that had multiple payment rates for the same class of services. The July 28, 1987 final rule also addressed the differential rate issue in the context of State-operated facilities. Several audits had revealed that the circumstances of State-operated facilities created incentives for States to overpay these facilities. A high volume of uninsured patients had increased the costs of providing services in State government-owned or operated facilities. These costs, in turn, were passed on to the State. To offset those higher costs, States established payment methodologies that paid State government-owned or operated facilities at a higher rate than privately operated facilities. Higher Medicaid payments to State government-owned or operated facilities allowed States to obtain additional Federal Medicaid dollars to cover costs formerly met entirely by State dollars. To ensure payments to State-operated facilities would be consistent with efficiency and economy, the July 28, 1987 final rule applied the Medicare upper limit test to State-operated facilities separate from other facilities. However, it did not create a separate upper payment limit for other government facilities, which allowed their payments to count toward the same aggregate upper payment limit as private facilities.

Section 4711 of the Balanced Budget Act of 1997 (BBA), Public Law 105–33, amended section 1902(a)(13) of the Act to increase State flexibility in rate setting by replacing the substantive requirements of the Boren amendment with a new public process. The new public process requires the State agency to have in place, and use, a public process that determines the rates of payment under the plan for inpatient services furnished by hospitals, nursing facilities, and intermediate care facilities for the mentally retarded. As part of the new public process requirements, States must publish proposed and final rates, the methodologies underlying the establishment of the rates, and the justifications for the rates. The public process must give providers, beneficiaries and their representatives, and other concerned State residents an opportunity to review and comment on the proposed rates, methodologies, and justifications, before they become final. In addition, in the case of hospitals, the rates must take into account (in a manner consistent with section 1923 of the Act) the situation of hospitals that serve a disproportionate number of low-income patients with special needs. Under section 4711 of Public Law 105–33, States have flexibility to target rate increases to particular types of facilities so long as the rates are established in accordance with the new public process requirements.

The Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA) amends titles XVIII, XIX, and XXI of the Social Security Act to provide benefits improvements and beneficiary protections in the Medicare and Medicaid Programs and the State child health insurance program (SCHIP), as revised by the Balanced Budget Act of 1997 and the Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act of 1999, and for other purposes. Section 705 of BIPA imposes additional requirements upon Medicaid UPL.

The BIPA addressed publication of this final rule at Section 705, ''Deadline for Issuance of Final Regulation Relating to Medicaid Upper Payment Limits.'' In section 705(a), it requires that we publish these final regulations not later than December 31, 2000. It further requires that, while this final rule must be based on the proposed rule announced October 5, 2000, that this final regulation shall be published ''* * * notwithstanding any requirement in the Administrative Procedures Act (APA) under chapter 5 of title 5, United States Code, or any other provision of law''* * * Section 705(b) of the BIPA provides for a longer transition period for States that had an approved State plan provision or methodology in effect on October 1, 1992. Section 701 of BIPA also changes a State's DSH allotments and provides for an increase in DSH allotment for extremely low DSH States based on the publication date of this rule.

We further note that waiver of the APA did not require that we review all comments received on the proposed rule and respond to them in the final rule. Under section 705(b), we considered replacing the transition periods in the proposed rule with that provided in this section of the law. Instead, we have decided to add a third transition period for those States with approved State plans or methodologies in effect on or before October 1, 1992.

II. Basis for the Proposed Changes

It had become apparent that the existing regulations created a financial incentive for States to overpay non-State government-owned or operated facilities because, through this practice, States, counties, and cities were able to effectively lower net State or local expenditures for covered services and gain extra Federal matching payments. This practice is not consistent with the Medicaid statute and has contributed to rapidly growing Medicaid spending.

The incentive for, and ability of, States to pay excessive rates to non-State government-owned or operated Medicaid providers can be explained as follows. As stated previously, the existing aggregate upper payment limit is applied to both private and non-State

government-owned or operated facilities. By developing a payment methodology that set rates for proprietary and nonprofit facilities at lower levels, States were able to set rates for county or city facilities at substantially higher levels and still comply with the existing aggregate upper payment limit. The Federal government matched these higher payment rates to public facilities. Because these facilities are public entities, funds to cover the State share were transferred from those facilities (or the local government units that operate them) to the State, thus generating increased Federal funding with no net increase in State expenditures. This is not consistent with the statutory requirements that Medicaid payments be economical and efficient.

On July 26, 2000, the Director of the Center for Medicaid and State Operations sent a letter to all State Medicaid Directors notifying them of the Administration's concern that ''Medicaid payments meet the statutory definition of efficiency and economy'' and that we would be issuing a proposed rule to address this problem. Additionally, States were informed that the Office of the Inspector General (OIG) and the General Accounting Office (GAO) had begun to monitor States with State plans that permitted these types of payments. Both the GAO and OIG have testified before Congress on the scope of these financing practices, their impact on State and Federal spending, and on the resultant uses of increased Federal funds. Preliminary results of OIG's work to date are described below.

As of December 22, 2000, the OIG had completed six substantial reviews in five States. Although the specifics of the enhanced payment programs and associated financing mechanisms differed somewhat in each State reviewed, the OIG found that payment programs share some common characteristics. These similarities are included below.

- In general, enhanced payments to city and county government owned providers were not based on the actual cost of providing services to Medicaid beneficiaries, or directly related to increasing the quality of care provided by the public facilities that received the enhanced payments.
- Enhanced payments to public nursing facilities were not being retained by the facilities to provide services to Medicaid beneficiaries. Instead, the majority of the enhanced payment was returned by the providers to the States through intergovernmental transfers (IGT). The States then used the funds for other purposes, some of which were unrelated to the Medicaid program.
- Unlike the nursing facilities, public hospital providers retained the majority of the Medicaid enhanced payments. However, the portion of the funds that hospitals returned to the States through IGTs resulted in millions of dollars available to the States for other uses.
- While the public hospital providers served a large number of Medicaid beneficiaries and uninsured patients, the hospitals either (1) did not receive Medicaid disproportionate share hospital (DSH) payments from the States, or (2) returned the majority of the Medicaid DSH payments to the States through IGTs. It appears, for these providers, that States used enhanced payments in the place of DSH payments, although Medicaid DSH payments are designed to help hospitals that provide care to a large number of Medicaid beneficiaries and uninsured patients.

Similarly, the GAO testified before the Congress that existing arrangements violate the basic integrity of Medicaid as a joint Federal/State program. GAO asserted that, by taking advantage of a technicality, States had used these financing schemes, in effect, to replace State Medicaid dollars with Federal Medicaid dollars.

III. Summary of the Provisions of the October 10, 2000 Proposed Rule

On October 10, 2000, we published a proposed rule in the **Federal Register** (65 FR 60151) that set forth proposed changes in the Medicaid upper payment limits for hospital services, NF services, ICF/MR services, and clinic services. A detailed description of the specific provisions of the proposed rule can be found beginning at 65 FR 60152. In the October 10, 2000 proposed rule, we proposed to establish:

- An aggregate upper payment limit for inpatient hospital, NF, and ICR/MR services furnished by other government-owned or operated facilities.
- An aggregate upper payment limit for outpatient hospital and clinic services provided by State government-owned or operated facilities and a separate aggregate upper payment limit for outpatient hospital and clinic services provided by all other government-owned or operated facilities.
- Two transition periods for States with approved rate enhancement State plan amendments to comply with the proposed payment limits. (The length of the transition period would depend on the effective date of the State's plan amendment, which is discussed in section III.C. of this preamble.)

IV. Analysis of and Responses to Public Comment

We received approximately 562 timely items of correspondence containing comments on the proposed rule from State Government officials, members of Congress, provider organizations, the Office of the Inspector General, county government officials, individual providers and private citizens. A discussion of the specific provisions of the proposed rule and summaries of the public comments received, and our responses to the comments are set forth below under the appropriate section heading:

Calculation of the UPL

Calculation/Technical Clarifications of UPL (§ 447.272(a) & (b), § 447.321(a) & (b))

We received many comments requesting clarification regarding the calculation of the proposed UPLs. In the proposed rule, we did not propose any changes to the methodology States may use to calculate the UPLs but proposed to redefine the groups of providers that would be subject to the UPLs.

Comment: One commenter noted that § 447.272(a) was introduced with the clause: ''Except as provided in paragraphs (b)(2) and (c) of this section, * * *'' The commenter added, however, that paragraph § 447.272(b), which included (b)(2), began with the language: ''In addition to being subject to the requirements of paragraph (a) of this section, * * *'' The commenter noted that these two clauses can be interpreted to be directly contradictory.

Response: In this final rule, we have eliminated the two clauses that were contradictory in our proposed rule. We revised paragraph (a) of §§ 447.272 and 447.321 to identify the different categories of facilities that furnish inpatient and outpatient services, respectively. Under the proposed rule, these categories included State government'owned or operated and other government-owned or operated. In this final rule, we renamed the ''other government-owned or operated'' category as ''non-State government-owned or operated'' and added a third category for privately-owned and operated facilities.

We revised paragraph (b) of sections §§ 447.272 and 447.321 to provide the general rule for aggregate payment that applies to each category of facilities described in paragraph (a).

Comment: One commenter recommended that we clarify our use of the terms ''facilities'' and ''services'' in §§ 447.272 and 447.321 to consistently use the phrase ''services in a facility''

rather than the term ''services'' by itself. The commenter added that the word ''those'' should also be eliminated when it has no reference.

Response: We have revised §§ 447.272 and 447.321 to clarify the types of services furnished by each group of facilities that are included in the UPLs.

Comment: One commenter recommended that we provide clarification for the term ''outpatient hospital'' in § 447.321(a) because it is not commonly understood and suggested that we instead make a reference to hospital outpatient services.

Response: We removed the term ''outpatient hospitals'' from paragraphs (a) and (b) of § 447.321. In revised § 447.321(a), we use the phrase ''outpatient services furnished by hospitals''. In addition, at § 447.272(a), we use the language ''inpatient services furnished by hospitals'' rather than the term ''inpatient hospitals''.

Comment: One commenter recommended that in paragraph (b) of §§ 447.272 and 447.321 that HCFA find a more neutral word for ''non-compliant'' to describe State plan amendments.

Response: We have revised §§ 447.272 and 447.321 to eliminate the term ''con-compliant.''

Comment: One commenter suggested that we clarify in the regulation that, in determining the UPL, coinsurance and deductible payments paid or payable to hospitals by Medicare beneficiaries must be included in determining what would have been paid under Medicare. The commenter notes that § 447.321(b), which includes this concept, was eliminated without explanation.

Response: Under current UPL regulations at § 447.321, the coinsurance and deductible payments, which a Medicare beneficiary would be liable to pay, are included in the Medicare approved payment amount that can be used in UPL calculations. In this final rule, we will continue to allow States to use the Medicare approved payment amounts as a factor in their UPL computations.

Comment: One commenter recommended that States should be able to calculate the UPL based on date of service rather than date of payment or Federal claiming. The commenter stated that this is consistent with how hospital audits are performed. This eliminates other variances caused by billing patterns or timeliness of State payments.

Response: This final rule continues to permit States to compute the UPL based on date of service.

Comment: We received various comments seeking clarification of the criteria for hospitals to be considered a public facility subject to the new proposed governmental UPL and transition rules. One commenter suggested that hospitals should be classified as public if they exhibit the same characteristics as safety-net hospitals. A commenter recommended that some hospitals should qualify as public even if they are not receiving local tax dollars. Some hospitals are located in counties that have formed a hospital district which permits the levying of special ad valorem taxes to support operation of the hospital.

Response: Within the context of this regulation, we consider a facility to be subject to the new governmental UPL if it can make an IGT payment to the State (either directly or indirectly through a governmental owner or operator, or other arrangement). We have created three aggregate groups based on whether the facility is privately-owned and operated, State government-owned or operated or non-State government-owned or operated. Facilities fall into the categories of non-State government-owned or operated and State government-owned or operated based upon their ability to make intergovernmental transfer payments back to the State and based upon the governance structure of the facility and who retains ultimate liability for the operations of the facility. However, all facilities that are prohibited from transferring funds back to the State will fall into the privately-owned and operated category.

Comment: Several commenters recommended that we continue the current UPL regulations. In addition, commenters suggested that we not establish a third aggregate UPL to apply to non-State government-owned or operated facilities. Another commenter stated that HCFA is already able to ensure economy and efficiency through the State plan approval process, so that no additional safeguards are necessary. A commenter pointed out that the current limits provide the public with assurances that States will not overspend the Medicaid budget.

Response: We disagree with the commenters. We do not believe that the current UPL regulations are sufficient to ensure that State Medicaid payments meet the statutory definition of efficiency and economy. Because the former UPL regulations permit States to pool provider payments, States could set rates to certain providers a multiple above the rate they would pay other providers for the same service. The OIG has completed substantial reviews of the financial mechanisms of five States with approved State plan amendments. As described in the preamble of the proposed and final rule, some general findings showed that enhanced payments to providers were not based on the actual cost of providing services nor were they used to improve the quality of Medicaid services provided by the facilities receiving the enhanced payments. States used this mechanism to shift their share of Medicaid costs and inappropriately increase the Federal Government share. States were also able to recycle Federal funds received from these enhanced payments to generate additional Federal matching funds that may or may not have been used for Medicaid services for Medicaid eligible individuals. In addition, we believe the current UPL regulations are contributing to increases in Medicaid program costs that are out of proportion to the number of services provided and patients served. These findings demonstrate that additional safeguards are needed to ensure economy and efficiency of Medicaid payments.

Comment: One commenter stated that although the proposed rule on its face only adds a new aggregate limit, as it would be implemented, it would effectively modify the current aggregate limits by removing non-State governmental facilities from the calculations of the overall aggregate limit, and results in three different categories of calculation of the aggregate limits (private, State operated and other government operated).

Response: We agree that the practical effect of the proposed UPLs would be to create three classes of providers. In considering this consequence, in this final rule, we have restructured the proposed regulations at §§ 447.272 and 447.321 to separate the providers into three distinct groups that are based on facility ownership and operation. States may aggregate payments up to the UPL that is applicable to each group. Specifically, in paragraph (b) of §§ 447.272 and 447.321, we have eliminated the aggregate group for all providers by facility type and created three separate aggregate groups, which include State government-owned or operated, non-State government-owned or operated, and privately-owned and operated facilities.

Comment: One commenter recommended that we provide clarification on whether the 150 percent aggregate limit for non-State-owned or operated public hospitals is an exception to, and not included in, an aggregate limit for all hospitals of 100 percent of the Medicare payment principles.

Response: In proposed §§ 447.272(b) and 447.321(b), we eliminated the overall aggregate limit that had applied

to all classes of facilities and replaced it with three separate aggregate groups, based on facility ownership and operation, which are independent of each other. Non-State government-owned or operated of hospitals comprise one group, and we permit States to make aggregate payments to this group not to exceed 150 percent of a reasonable estimate of what Medicare would have paid for the same services. Because we have eliminated the overall aggregate group for all providers by facility type, payments to these facilities are not subject to an overall aggregate limit of 100 percent of what Medicare would have paid for services in all hospitals. The final rule clarifies that the limit for non-State-owned or operated public hospitals is an exception to the otherwise applicable limits, and these facilities would not be aggregated with other facilities of different types. We believe our new format presents the aggregate groups in a manner that makes it clear that the UPLs function independent of each other.

Comment: Commenters recommended that HCFA clarify the limits for inpatient and outpatient services for the same non-State government owned hospital. The two limits describe ''payments to hospitals'' not payments for inpatient hospital services and outpatient hospital services.

Response: The limits for inpatient and outpatient services are calculated separately for each service even though they may be provided by the same hospital. The current regulations governing inpatient and outpatient UPLs require that these UPLs be calculated separately and we have not changed these provisions in §§ 447.272 and 447.321. The limits apply to payments for services that in turn would be paid to the provider that furnished them to Medicaid eligible individuals.

Comment: Several commenters recommended that we expand the limits to include different Medicaid services. Some commenters suggested we aggregate inpatient and outpatient hospital services together and others recommended that we also include clinic services with hospital services. One commenter suggested that we include clinics in the calculations of a non-State-government-owned or operated hospital if the clinic refers patients to that hospital or the hospital refers patients to a clinic. Similarly, some commenters believed that we should apply UPLs on a facility-specific basis but also include both inpatient and outpatient services if offered by the facility. These commenters felt that the application of the limit on a service basis could lead to unanticipated funding shifts based solely on the availability of Federal dollars.

Response: We are not accepting these recommendations. Including more than one Medicaid service under the same UPL would create incentives that may lead to abuses similar to those we are now trying to address since the number of providers across which payments may be aggregated would be increased. We considered facility-specific limitations as a possible remedy to the problem of excessive payments, but elected instead to refine our aggregate UPLs. We believe our approach provides an appropriate balance between the needs of States to have flexibility in rate setting and our objective to protect the integrity of the Medicaid program.

Comment: One commenter recommended extremely low DSH States be exempted from the outpatient UPL requirement for State hospitals.

Response: We are not accepting this comment, and have clarified in the final regulations that States must calculate an outpatient UPL separately for State-operated facilities. This will create a uniform procedure for calculating the UPL for inpatient and outpatient services. We believe the commenter's recommendation could result in perpetuating the very abuses this rule is designed to address. As noted in the preamble to the proposed rule, the UPLs were originally modified to include a separate limit for State operated facilities for NF's, ICF/MRs and hospitals for inpatient services so that these facilities were not paid at a higher rate than private facilities. Without creating a similar aggregate group for facilities that furnish outpatient services, States could continue to overpay State facilities while under paying the private facilities.

Comment: One commenter stated that fair and adequate payment for all providers is necessary.

Response: We agree. Under the UPLs, States will be able to set rates that fairly compensate Medicaid providers for Medicaid covered healthcare services.

Comment: One commenter recommended that the UPLs be coordinated such that if a State's payment to a particular group of facilities does not fully use the UPL amount, the ''unused amount'' should be made available to increase other UPLs that may be exceeded in another group. The commenter believes that this method should be allowed because the total limit on a State's claim for Federal financial participation would not be increased.

Response: Allowing States to distribute the any unused amounts under the UPL from one aggregate group to another aggregate group that may be over its UPL would perpetuate the practices that this action is designed to stem and would not be consistent with the statutory requirements that Medicaid payments promote economy and efficiency. States would still have an incentive to under-pay proprietary and nonprofit facilities and over-pay the State operated and non-State government operated facilities. Although the total limit of Federal financial participation would not be increased, States would still be able to obtain extra Federal funds with less of a State match by manipulating which facilities receive extra Medicaid payments.

Comment: Some commenters suggested that small providers, including sole community and critical access hospitals, be given special treatment and not be included in the UPL calculation.

Response: All providers, with the exception of Indian Health Services facilities are subject to the UPLs. We do not believe there is any justification for exempting any group of institutional providers from these regulations. Therefore, we are not removing facilities, such as sole community hospitals and critical access hospitals. These facilities have always been subject UPL regulations and will continue to be.

Comment: One commenter recommended that non-profit nursing homes be included with the county owned or operated nursing homes for determining the UPL for these facilities.

Response: Allowing non-profit nursing homes to be in the same aggregate group as county owned or operated nursing homes would still enable a State to set an excessively high payment rate for the county operated facilities, while paying the nonprofit facilities at a lower rate. This is not consistent with the statutory requirements that Medicaid payments promote economy and efficiency.

Comment: One commenter asked for clarification on whether residential treatment facilities (psychiatric services to those under 21, but not in a hospital) are subject to the UPLs since hospitals, NFs and ICF/MRs are. If residential treatment facilities are not included in these UPLs, the commenter asked us to specify the test for residential treatment centers. The commenter also asked if State and local government-owned residential treatment facilities would be subject to a separate upper limit test as a group.

Response: The UPL regulations at § 447.272 govern payments to inpatient ''hospitals and long term care facilities,'' which includes hospitals, nursing facilities, and intermediate care facilities for the mentally retarded. Residential treatment facilities are a separate type of institutional provider, which may furnish inpatient psychiatric services to individuals under age 21. Therefore, payments to these residential treatment facilities are governed by regulations at § 447.325, ''Other inpatient and outpatient facility services: Upper Limits of Payment.'' This regulation permits a State to pay the customary charge of the provider, but not pay more than the prevailing charges in the locality for comparable services under comparable circumstances.

Comment: One commenter recommended that HCFA provide clarification on the similarity of the terms ''a reasonable estimate of '' and ''amount that can reasonably be estimated.''

Response: These phrases are used interchangeably to describe the States' obligation to make a reasonable estimate under the UPL regulations and require no change in policy.

Comment: Several commenters were concerned about State flexibility in calculating the UPL. Some commenters recommended that States have the ability to determine how UPLs will be applied on a State by State basis to take into account variations in the payment practices among State Medicaid programs. Commenters recommended giving States the flexibility to apply Medicare payment principles to make a reasonable estimate of what Medicare would pay for similar Medicaid services. These commenters believe that States should have the flexibility to consider either Medicare principles of reasonable cost or prospective payment principles in calculating the UPLs or any reasonable methodology for comparing payment under Medicare or Medicaid.

Response: The new UPL regulations afford States some flexibility in calculating a reasonable estimate of what Medicare would have paid for Medicaid services. In formulating their own approach to computing the UPL, States have flexibility to use either Medicare principles of cost reimbursement or prospective payment systems as the foundation of their estimates. In this regulation, we are not changing the standards that we apply to the review of State estimates. While we generally provide guidance to States under the State plan review process, we intend to issue policy that will clarify approaches we have determined to be reasonable, and we will provide additional guidance to States on how to compute the UPLs.

Comment: One commenter notes that the UPL could be calculated based on cost data, if available.

Response: The current regulations at §§ 447.272 and 447.321 allow States to use Medicare payment principles to determine what Medicare would have paid for Medicaid services. States are allowed to continue to use cost data to determine what Medicare would have paid for services.

Comment: Commenters suggested that the same elements of cost for Medicare and Medicaid should be included in both the actual payment and in the calculation of the UPL. States should have the flexibility to determine the content and method of those elements.

Response: The Medicare payment principles used to calculate the UPL are not subject to change through this regulation. We intend to publish subsequent implementing policy documents that will clarify the calculation of the UPL.

Comment: Commenters recommended that States should also have the flexibility to continue to reach a reasonable estimate based on the Medicare payment principles that reasonably relate to similar Medicaid services provided under comparable circumstances.

Response: The UPL requires States to make a reasonable estimate based on Medicare payment principles. There are many factors and elements that States may consider to support their estimates. Using Medicare payment principles for services similar to Medicaid service is a permissible approach.

Comment: One commenter recommended that payment shortfalls to hospitals and nursing facilities should be a factor in setting the UPL.

Response: ''Shortfall'' generally refers to the difference between the cost of a service and the payment for the services. Shortfalls should not be a factor in setting or calculating the UPL because this limit is based on a reasonable estimate of what Medicare would have paid for the same services, and therefore, is unaffected by actual payments for services. However, because the UPL would allow States to set rates that fully cover the cost of Medicaid services, payments to cover Medicaid shortfalls would be allowable under the UPLs.

Comment: One commenter recommended that the UPL should be revised when payments are on average, below reasonable economic and efficient standards. These added payments should then be utilized to underwrite programs that serve low-income individuals.

Response: Section 1902(a)(30)(A) of the Act requires that payments for care and services under an approved State Medicaid plan be consistent with efficiency, economy, and quality of care. The new UPLs permit States to set facility-specific Medicaid rates that are based on costs determined reasonable under Medicare payment principles. Therefore, payments should not be below economic and efficiency standards.

Comment: Several commenters recommended that HCFA clarify the definition of ''other government owned or operated'' facilities. Commenters recommended that the other government-owned or operated group should include hospitals that contract with local governments or have a high level of medical assistance or indigent care but are not owned or operated by the local government. One commenter recommended the following qualifying factors for other government owned or operated facilities: Local government may own assets, control a majority of the hospital's board or must sign off on any major changes in services, including expansions into another county. Another commenter recommended that States should have maximum flexibility in determining the applicability of 150 percent to other government owned or operated hospitals because hospitals may have a relationship with their local government that may fall outside of the current definition of owned or operated. Another commenter questioned if a State can own a facility and have a local government operate it and still receive the enhanced FFP. The commenter continued to question whether a local government can own and have a private contractor operate a facility and still receive the enhanced FFP.

Response: We restructured § 447.272(a) and 447.321(a) and included at paragraph (a)(2) of these sections, the category, ''non-State government owned or operated facilities'' formerly ''other government-owned or operated facilities''. We specify that this category is limited to ''all government facilities that are neither owned nor operated by the State.'' Specifically, for purposes of this regulation, non-State government owned or operated facilities are government facilities, as defined by their ability to make direct or indirect intergovernmental transfer payments to the State, and for which the State does not assume primary ownership or legal liability for the operations of the facilities. Examples of the kinds of

facilities that fall into this category are county or city owned and operated facilities, quasi-independent hospital districts, and hospitals that are owned by local governments but operated by private companies through contractual arrangements with those local governments as long as the hospital retains the ability to make an IGT to the State.

Comment: We received numerous comments on the language used to determine the State-operated facilities. Some commenters recommend that the rule be revised to read ''State owned and operated.'' One commenter wanted this language if the 150 percent limit was not extended to the State operated hospitals. One commenter further explains that if a hospital is State owned and county operated, the State could inflate the other government group by including the hospital in that group, yet not allow the hospital to receive more than 100 percent for the current State-owned or operated group. However, another commenter supported our rationale for keeping the categories of State and non-State owned hospitals separate and distinct. Some commenters recommended that we change the language to State owned, but not State operated because university hospitals that are State owned, but privately operated, may be put into a more restricted group.

Response: We restructured the regulations at §§ 447.272(a) and 447.321(a) and added language to clarify that ''State government-owned or operated facilities'' are all facilities that are either owned or operated by the State. In making this revision, we intend to capture within this group, facilities that are owned by the State, but managed or operated by a local government or private company. We further intend to distinguish between State-owned or operated facilities and those owned or operated by non-State governments. The categories of State government operated and non-State government operated are mutually exclusive, and consequently facilities cannot be considered as part of more than one group when considering the calculation of the UPLs. In addition, as we stated earlier, facilities that qualify for both the State-government and non-State government categories must be put into the State government category.

The 150 Percent Upper Payment Limit for Non-State-Operated Public Hospitals—§§ 447.272(b)(2) and 447.321(b)(2)

In §§ 447.272(b)(2) and 447.321(b)(2) of the proposed rule, we set forth provisions for a UPL of 150 percent of the reasonable estimate of what would have been paid under Medicare payment principles for inpatient and for outpatient hospital services provided in non-State government hospitals. We explained that we were doing this so that the new limits being applied to these providers assured that they would remain in operation and continue to provide services to the Medicaid population. We solicited specific comment on whether the 150 percent limit is appropriate. We received a significant number of comments in response to this proposal.

Support for 150 Percent UPL for Public Hospitals

Comment: One commenter supports the separation of the other government providers from the overall aggregate cap and the 150 percent limit for these facilities. Other commenters indicated that the 150 percent UPL in proposed paragraph (b)(2) of §§ 447.272 and 447.321 (now paragraph (c)(1) of §§ 447.272 and 447.321) generally reflected a reasonable balance and response to the problem identified.

Response: We appreciate the commenters' support for our provisions relating to the 150 percent UPL. Therefore, we will retain the 150 percent provision in paragraph (c)(1) of §§ 447.272 and 447.321.

Comment: Some commenters support the 150 percent limit, but only if it does not cause a decrease in the aggregate limit for private facilities.

Response: It was our intent in the proposed rule that these categories and UPL limits be separate. In this final rule, we have clarified that the 150 percent UPL for non-State government-operated hospitals is separate from the private hospital category and limit. We have restructured paragraph (a) of §§ 447.272 and 447.321 to identify the different categories of facilities that furnish inpatient and outpatient services, respectively. Under the proposed rule, these categories included State government-owned or -operated and non-State government-owned or -operated facilities. In §§ 447.272(a)(3) and 447.321(a)(3) of this final rule, we added a third category for privately-owned and operated facilities.

Support for a Lower UPL Than 150 Percent for Public Hospitals

Comment: Some commenters indicated that the 150 percent limit is not needed and that the limit should remain 100 percent for all groups. These commenters noted that hospitals would receive adequate reimbursement if they (1) retained 100 percent of the State and Federal shares of Medicaid payments up to this UPL and (2) received and retained 100 percent of the State and Federal shares of allowable DSH payments. Other commenters noted that there was no evidence that hospitals or patients benefited from the increased Federal funds that would be obtained from increasing the non-State government-owned or operated limit to 150 percent.

Response: While we agree that there is no clear standard as to what UPL would suffice to assure that hospitals and patients benefit, we believe the 150 percent standard is reasonable. Given the special mission of these public hospitals and their important role in serving the Medicaid population, we think that the 150 percent UPL is justified.

We also agree that hospitals should retain the entire amount of the State and federal payments they receive to cover the cost of providing services to Medicaid and indigent patients. While we have instituted reporting requirements as part of this final rule, it is not our intent to regulate intergovernmental transfers. Likewise, we have not changed the rules related to DSH funds. However, we have made every reasonable effort to assure that we pay these facilities only what is necessary to meet the demand for service for Medicaid individuals. We intend to monitor payments to these providers closely and may propose further refinements as we gain experience with the new UPLs. Should we find that the payments made under the higher limit are not being retained by hospitals to support Medicaid services, we would be open to making further revisions in subsequent rulemaking.

Comment: One commenter noted that DSH funds should be used to fund non-State government-owned or operated hospitals rather than increase their UPL to 150 percent.

Response: One of the primary functions of DSH payments is to help hospitals cover the costs of providing care to indigent patients. In establishing the 150 percent UPL for non-State-owned or operated public hospitals, we were careful to list those reasons that we believe entitled these facilities to receive higher payments than would otherwise be allowed. Although we realize there is an ancillary benefit that may cover the costs of providing uncompensated care in these facilities, that was not the reason for our decision to set a higher UPL for these providers. We were more concerned with assuring the continued existence and stability of these core providers who serve the Medicaid population.

Under current law, States have broad discretion to allocate DSH funds among eligible providers and may redirect DSH funds to these facilities. However, some States that have replaced DSH funds that could have gone to public hospitals with UPL funds may not choose or be able to do so under existing DSH allotments. We have not proposed to change the rules related to DSH funds in this rule. We have made every reasonable effort to assure that we pay only those funds that are necessary to these facilities to meet the demand for service for Medicaid individuals.

Support for a Higher UPL for Public Hospitals

Comment: A number of commenters recommended that the final regulation increase the 150 percent UPL to 175, 200, 250 percent or higher for non-State government-owned or operated facilities. While many of the commenters simply stated that the 150 percent limit is arbitrary and did not provide additional rationale for changing the limit, others did cite various reasons in support of increasing the UPL percentage. The reasons cited included the significant reductions in funding these providers will face as a result of the new limits, the amount of uncompensated care provided by these facilities, and the fact that the 150 percent limit does not adequately account for the amount of funds that these institutions will have to transfer back to State treasuries.

Response: We are not persuaded that a UPL above 150 percent has been justified. We were aware in publishing the proposed rule that proper payment data were difficult to obtain and that those who could provide such data were reluctant to do so because it would disclose the transfer of the excessive payment amounts received by providers back to the State. Given that, our discussion with a wide range of groups led us to believe that the only group of providers that would suffer harm that would hinder their ability to serve the Medicaid population were non-State government-owned or -operated hospitals, even when they retain the full payment. Even then, it was not absolutely clear what level of funding would be needed to both meet these needs and, at the same time, curtail the practice of transferring enhanced payments back to State treasuries. Given limited data, we proposed a UPL for these facilities of 150 percent of a reasonable estimate of Medicare payment principles.

In establishing this 150 percent UPL for non-State-owned or -operated public hospitals, we were careful to list those reasons that we believe entitled these facilities to receive higher payments than would otherwise be allowed. Since public entities may be allowed to transfer payment back to States, we still have concerns as to whether these higher payments would, in fact, be retained by these hospitals to allow them to provide needed services to the Medicaid population. We are instituting reporting requirements in paragraph (d) of §§ 447.272 and 447.321 that will allow us to monitor and track the distribution of these funds.

Comment: Other commenters noted that a limit of 175 percent of the UPL would be consistent with the hospital specific cap of 175 percent of the hospitals uncompensated costs for the disproportionate share hospitals (DSH) limit allowed by the Congress for the State of California and that the Administration has expressed support for applying this DSH limit to other States.

Response: The Administration has separately expressed its support for legislation raising the hospital specific cap to 175 percent of uncompensated costs for public hospitals. The Administration took this position to provide more flexibility in the States administration of DSH payments, but the 175 percent hospital specific cap for uncompensated costs for DSH was not our basis for establishing the 150 percent UPL described in the proposed rule. While uncompensated care costs did not form the basis for establishing the 150 percent limit, we recognize that these UPL payments will offset both the Medicaid payment shortfall and the uninsured costs included in DSH payments. DSH and UPL continue to be separate payment policies. Therefore, in this final rule, we see no basis for applying the same percentages that the Administration supports for a different part of the Medicaid program.

Comment: One commenter noted that the UPL should be set at 175 percent and should not be lowered until a detailed analysis of the consequence of the higher threshold on the availability and access to health care services.

Response: We do not agree. We were aware in publishing the proposed rule that proper payment data were difficult to obtain and that those who could provide such data were reluctant to do so because it would disclose the transfer of the excessive payment amounts received by providers back to the State. It was not clear what level of funding would be needed to both meet these needs and, at the same time, curtail the practice of transferring enhanced payments back to State treasuries. Given limited data, we proposed a UPL for these facilities of 150 percent of a reasonable estimate of Medicare payment principles. We are instituting reporting requirements in paragraph (d) of §§ 447.272 and 447.321 that will allow us to monitor and track the distribution of these funds.

Non-Support: Discriminatory

Comment: Many commenters indicated that application of the 150 percent limit only to non-State government-owned or -operated hospitals is discriminatory. They note that HCFA has no basis for distinguishing between private, State, and non-State government-operated hospitals or between non-State government-owned or -operated hospitals and other non-State government-owned or operated providers such as nursing facilities and clinics or other providers that serve the same safety-net provider role or serve the same patient populations as public hospitals, such as FQHCs and RHCs. Many commenters recommended that the eligibility criteria for the 150 percent limit should be broadened to include facilities that serve the same role or the same populations as public hospitals. Some of these commenters recommended specific criteria such as a Medicaid utilization rate that is equal to that of non-State government-operated hospitals in each State or the 11.75 percent Medicaid utilization rate that is used by the 340B drug discount program of the Public Health Service Act.

Response: We do not agree. Our discussions with a wide range of groups led us to believe that the only group of providers that both retained this money and would suffer harm that would hinder their ability to serve the Medicaid population were non-State government-operated hospitals. In establishing this 150 percent UPL for non-State-operated public hospitals, we were careful to list those reasons that we believe entitled these facilities to receive higher payments than would otherwise be allowed.

Non-State government-operated hospitals serve a unique role that we do not believe would continue to be adequately funded if it were not reflected in Medicaid rates. State-operated hospitals generally have a larger tax base from which to fund uncompensated care and services. Moreover, State operated hospitals that provide inpatient hospital services have been operating under a 100 percent UPL for these services since 1987.

We do not support the inclusion of public clinics, FQHCs or RHCs in the 150 percent category. Since these facilities are or can be paid at full cost,

we see no benefit to further inflating these payments. We believe their inclusion would only compound the problem of drawing down an inflated Federal payment in order to then transfer this overpayment back to the State. Moreover, Medicaid payments to FQHCs and RHCs are established in statute.

While we agree that some private providers may also fulfill a safety-net health care need similar in circumstance to those we described for the non-State government operated hospitals, we do not believe that, as a general class, these private hospitals currently receive Medicaid payments that are at the 100 percent UPL level and see no basis for further raising that level to 150 percent.

We appreciate the role that other non-State government operated facilities such as nursing facilities serve in the provision of health care. However, we do not believe that the circumstances described for NFs justify receiving the 150 percent UPL. Generally, indigent NF patients are Medicaid eligible or become Medicaid eligible and therefore the NF qualifies for Medicaid payment. In addition, NFs do not as a rule provide the kinds of high cost Medicaid support services that non-State government-owned or -operated hospitals provide. Thus, the financial factors affecting non-State government-owned or -operated hospitals do not equally affect NFs.

We do not see the benefit of applying definitions of safety-net hospitals that are used for other purposes. We believe that while there may have been other reasonable alternatives to applying the 150 percent UPL to non-State government-operated hospitals, given the structure of the current regulations, the problem is most directly addressed by the application of the 150 percent UPL to these hospitals.

Comment: Some commenters indicated that it is unfair to narrow the 150 percent UPL to exclude NFs based on the prior performance of other State programs in returning this money to the State to serve other purposes.

Response: As previously indicated, our criteria for excluding NFs from the 150 percent UPL is based on reasons other than the performance of other State programs.

Comment: Some commenters indicated that we should ensure that all hospitals are appropriately compensated to higher payment limits for non-Medicaid, indigent care, regardless of their type.

Response: We appreciate the commenters' concerns. However, as indicated previously, the financial burden of providing uncompensated care did not form the basis for our decision to set a higher UPL for non-State government-operated hospitals. Our discussion with a wide range of groups led us to believe that the only group of providers that both retained this money and would suffer harm that would hinder their ability to serve the Medicaid population were non-State government-operated hospitals. Therefore, we believe that the DSH programs under Medicare and Medicaid, which are intended to help defray the costs of uncompensated care, are better suited to serve this purpose than a higher UPL for Medicaid payments.

Comment: Commenters noted that the proposed rule was drafted so that access to the 150 percent UPL for hospital payments appeared to be tied to the phase out of existing excessive payment State plan amendment for hospitals. They assumed this to be in error noting that 150 percent of the aggregate UPL would be available for non-State government-owned or -operated hospital services on the effective date of the rule.

Response: The 150 percent UPL is not contingent upon the transition period. Given the proper supporting State plan methodologies, States will be able to pay these facilities up to the 150 percent UPL as of the effective date of this final rule.

Comment: Commenters asked for confirmation that the 150 percent UPL would be available to all States upon submission of a State plan amendment (SPA) after the effective date of the final rule.

Response: Federal financial participation will be available for all approved SPAs up to the 150 percent UPL for non-State government-owned or -operated hospital services with the effective date of this final rule.

Comment: Some commenters noted that payment under the 150 percent UPL limit may exceed the provider's customary charges, as provided in § 447.271 and that this was an additional limitation. The commenter proposed that we modify or abolish § 447.271 so that charges do not limit payments under the 150 percent UPL.

Response: Since this final rule would allow charges consistent with payment at the 150 percent UPL standard, we would interpret § 447.271(b) regarding agency payment at a rate greater than its costs to be consistent with these final rules. Therefore, we do not believe that a change to this section of the regulations is necessary.

Comment: One commenter noted that contrary to the statement on pages 60156 and 60157 of the proposed rule that suggested the 150 percent UPL for non-State government-owned or operated facilities would prevent new proposals, in fact it would require a new SPA if the current State plan did not provide for payment up to that level.

Response: To the extent that a State did not have a State plan authority to make payments at this level, a SPA would be needed to claim FFP at this level. However, the State could also continue payment at their current State plan approved rates that were otherwise in conformance with this final rule with no change in its State plan.

Comment: One commenter indicated that States can not continue to fund private safety-net providers such as children's hospitals.

Response: This final regulation does not make any changes that affect payments to children's hospitals or to non-public safety-net providers. States can continue to pay these providers rates necessary to cover the costs of care up to the aggregate limit for privately owned and operated providers. This regulation does assure that the Federal Government and the States each contribute their proper share of funding to these payments.

Comment: One commenter stated that the preamble of the proposed rule does not distinguish between inpatient and outpatient hospital services when noting the role of safety-net hospitals.

Response: Public safety-net hospitals provide both inpatient and outpatient services to large numbers of Medicaid, uninsured and other low-income populations. Additionally, these hospitals provide high cost community support services in both inpatient and outpatient settings. Because these higher cost services, as well as the uncompensated care burden these hospitals bear, are not confined to either inpatient or outpatient services, we believe it is appropriate for the higher rate (of 150 percent of what Medicare would have paid) to be applied to payments in both settings.

Managed Care

The upper payment limits we proposed relate to fee-for-service Medicaid payments. However, we did receive many comments requesting clarification on how they might affect managed care arrangements.

Comment: A number of commenters suggested that HCFA clarify the policy on how the proposed UPL will affect budget neutrality for section 1115 demonstration programs. One commenter recommended we further clarify the preamble language to the proposed rule that indicates that section 1115 expenditure ceilings would be adjusted to account for the effect of the

regulation. Others noted that the final rule should specify that the amount of any increased payments made for hospital services under the rule would be added to section 1115 expenditure ceilings. Another commenter stated that HCFA should reward States that voluntarily reduce their UPL program expenditures below the regulatory limits before the deadline by crediting the Federal savings toward the expenditure ceilings for section 1115 demonstration projects.

Response: As we indicated in the preamble to the proposed rule, we will make adjustments to the budget ceilings for section 1115 demonstration programs. These adjustments will be made in accordance with the terms and conditions governing each program. In general, these terms and conditions provide for adjustments whenever a change in law or regulation would affect State spending in the absence of the demonstration. To the extent that any State with a section 1115 demonstration will experience a change in its spending under this final rule, we will adjust that State's budget ceiling accordingly. According to the terms and conditions governing most demonstrations, the change in the budget ceiling is effective upon the effective date of the new law or regulations. In order to determine whether they will be affected, States should examine their institutional payment provisions to determine how their spending will change under the final rule. If section 1115 States choose to comply with the new UPL before the end of the transition period, the funds that would have otherwise been paid to institutions during the transition period remain as savings under the waiver, and can be used in accordance with the terms and conditions of the waiver. Finally, because each section 1115 program has terms and conditions specifying how adjustments will be made, we do not agree with the commenters that these procedures need to be specified in regulation.

Comment: Several commenters asked us to clarify whether the transition period specified in §§ 447.272(b)(2) and 447.321(b)(1) of the proposed rule applies to States whose UPLs are set via a waiver program instead of a State plan amendment.

Response: As indicated in our previous response, our general policy is to make adjustments whenever a change in law or regulations would affect State spending in the absence of the waiver. To determine when a waiver program would be affected, we would necessarily follow the same rules that apply to provider payments made under an approved State plan. Since those rules provide for a transition period subject to certain conditions, we would apply those same conditions to waiver programs to determine when they would be affected. For example, if excessive payments are currently being made and had been made before October 1, 1999 under a waiver program, then the earliest point the new UPLs would affect State spending would be the beginning of State FY 2002.

Comment: One commenter urged us to allow flexibility in how the UPLs for various types of providers will be calculated under waiver programs. In cases where a waiver changes the distribution of Medicaid payments among different types of facilities, this commenter recommended that the State be allowed to measure compliance with the new UPL according to how the payments would have been made in the absence of the waiver program.

Response: We agree that there may be instances when States have used waiver programs to make system changes that result in shifting payments among different types of facilities, for example, from inpatient settings to ambulatory care settings. However, we do not agree that waiver programs should be exempted from compliance with these UPLs. When States shift patterns of care from inpatient settings to ambulatory care settings, the payment follows the service provision. The UPL for each set of institutions is calculated according to the services provided within those institutions. We believe that the Medicare cost principles allow States sufficient flexibility to pay each set of providers appropriately without a change in the regulation.

Comment: Two commenters suggested that HCFA count managed care payments and services in the UPL. One of these commenters stated that implementation of the regulation should take into consideration the extent to which public hospitals participate in managed care. This commenter noted that public hospitals with a relatively high managed care line of business will receive little relief from this rule if managed care payments are excluded from the higher UPL, since the special rule would then apply to only a small portion of their caseload.

Response: The UPL for institutional payments specified in this rule applies to fee-for-service payments. Managed care payments are subject to separate limits contained in § 447.361. In considering the question of whether a single limit should apply to both fee for service and managed care payments, as the commenter suggests, we had to consider two separate issues. The first issue is whether having two limits inappropriately places providers at a disadvantage. As the commenter correctly points out, some providers have a great deal of managed care business and little or no fee for service business. However, we believe that providers have the ability and the incentive to negotiate appropriate rates with managed care organizations. The limit in § 447.361 provides adequate flexibility for managed care organizations to pay appropriate rates. In addition, in the case of DSH, States will be required as of January 1, 2001 to consider managed care payment shortfalls when making disproportionate share payments. So, to the extent there may be shortfalls, the DSH payments should provide relief.

The second issue we considered is whether having two separate limits may create situations where States may, either inadvertently or by design, make excessive payments to providers, both directly and through managed care organizations. We believe that as long as States cannot make separate or supplemental payments directly to providers for services that are included in managed care contracts, except as provided for in statute for disproportionate share hospitals and federally qualified health centers, this situation cannot occur. The prohibition against making direct payments to providers for services for which a State is already paying a managed care organization is contained in § 434.57.

Comment: Two commenters noted that the notice of proposed rulemaking appears to affect the ability of a State to claim all funds anticipated under Section 1115 Medicaid Demonstration Waiver. These commenters urged that the State be allowed to claim all funds, despite the new UPL regulation.

Response: As noted above, we will make adjustments to the budget ceilings for Section 1115 demonstration programs in cases where State spending will be affected by the new UPLs. We do expect that in some cases, the new limits will prevent States from claiming all funding anticipated under their Section 1115 demonstration program. We encourage all Section 1115 States to review their payment methodologies to determine whether they will be affected. We will make every effort to work with States to ensure that services are not jeopardized as the appropriate adjustments are made.

Comment: A number of commenters encouraged us to exclude payments made under Section 1115 or Section 1915(b) programs from the UPL calculation. One of these commenters noted that the UPL is not necessary as

a cost control measure, because waiver programs already have requirements (budget neutrality for Section 1115 programs and cost effectiveness for section 1915(b) programs designed to limit Federal exposure.

Response: In many cases, waiver programs primarily involve managed care payments. As stated above, these managed care payments are not included in the UPL calculations. However, we realize that in some cases, waiver programs involve other types of payments to institutional providers, and these payments will be affected by this regulation. This regulation is intended to have the same effect whether the payments in question are contained in a State plan amendment or in a waiver. We do not agree with the commenter that payments made under waiver programs, other than managed care payments, should be excluded from the UPL calculation.

Comment: One commenter noted that some States operate under waivers in which they receive lower disproportionate share hospital (DSH) payments in exchange for receiving higher non-DSH Medicaid payments. In these cases, the commenter recommended that the State be allowed to count the payments in question as DSH payments, thus exempting them from the UPL.

Response: Although we are aware that some States have re-directed part of their DSH program to support Medicaid eligibility expansions, we do not believe it is necessary to exempt portions of institutional payments from the UPL to reflect this. To the extent the eligibility expansions increase institutions' medical utilization, the increased utilization should create a higher UPL according to the methodology contained within this rule. Since many eligibility expansions are done in the context of managed care, and managed care payments are exempt from the UPL, we do not believe that States will be disadvantaged in any way by this regulation.

Reporting Requirements

As a condition for establishing a policy of higher UPLs for non-State government-owned or operated hospitals, we announced in the preamble of the proposed rule, our intention to require payments to these hospitals be separately identified and reported to HCFA. The purpose of this requirement was to ensure the higher payments are appropriate and are being fully retained by hospitals. We believe the separate identification of these payments will be a necessary administrative tool to ensure the proper administration of the Medicaid program. We specifically solicited comments on the most suitable methods of reporting and accounting for these payments.

Comment: We received comments suggesting that we expand on the reporting requirements. One commenter recommended that HCFA require the reporting of both intergovernmental transfer revenues (including certified public expenditures if they are used) and supplemental payments. This commenter believes this information is necessary to understand the extent to which funds are actually going to the health care providers or are being retained by health care providers. Other commenters noted that a requirement to report payments alone does not ensure local public hospitals retain Medicaid payments. All or portions of the payments could still be transferred back to the State treasury. Since all the new UPLs still permit pooling, albeit to a smaller degree, the commenters noted that within each class of providers, payments can still be transferred back to the State or diverted directly to non-Medicaid purposes. To remedy the deficiencies they mention, the commenters recommend that the final rule stipulate that payments to public providers, whether State or locally owned or operated, will be considered to breach the applicable UPLs unless they are retained by the public hospitals, or nursing homes to which they are paid and are used by those facilities to meet the costs of delivering services to Medicaid (and uninsured) patients. To implement this approach, one commenter recommended a certification process by which the State Medicaid director or the head of the single State agency certifies that the payments represent an expenditure for the cost of services furnished to Medicaid patients, which could be verified through audits.

Response: We appreciate the input we received on the development of a reporting requirement. Our intent is to develop and enforce a reporting requirement that is not overly administratively burdensome on States or providers, yet sufficient to help us assess what payments are made to facilities in comparison to their UPL and, to the extent possible, ensure Medicaid payments are retained by providers to offset the costs they incur in furnishing covered services to Medicaid patients. After giving consideration to the above comments, we have decided not to require reporting of these data at this time. However, we reserve the right to require reporting of IGT data in the future. However, we do agree that a reporting process to identify facility specific payment as well as that facility's individual UPL would be appropriate. Therefore, we are adding new §§ 447.272(f) and 447.321(f) ''Reporting requirements'' to reflect the addition of a reporting process for Medicaid payments to non-State public providers and providers within the group of providers that exceed the UPL during the transition period on a facility specific basis. We believe this will help improve Federal oversight in this area. We will continue to give further consideration to additional reporting requirements suggestions in further policy guidance and may consult with States, providers, and other interested parties in developing them.

Comment: Several commenters expressed opposition to any additional reporting requirements. While some commenters appreciated the intent behind this requirement, they believed it is neither practical nor appropriate for the Federal government to play such an involved role in determining how the State general revenues are appropriated and spent. These commenters believe that the current reporting requirements are sufficient. Other commenters indicated that this requirement was unnecessary and would be a costly burden on States and providers and asserted States should receive 90 percent enhanced Federal matching for compliance costs.

Response: We disagree with the commenters that current reporting requirements are adequate. The Medicaid program is not a general revenue sharing program, but rather an individual entitlement program under which States make direct payments to health care providers or contracts with prepaid entities. Our interest is not in tracking general revenues, but Medicaid payments paid to Medicaid providers on behalf of Medicaid eligible individuals for Medicaid eligible services. Not only do we feel it is appropriate for us to collect information on provider payments, but we believe that it is necessary to ensure Federal matching dollars are appropriately expended. Further, we do not believe reporting the payments in the manner suggested would be overly burdensome as it will be generated either from claims payment data or UPL calculation data the State would have already performed as the basis of these payments. On the issue of the enhanced 90 percent Federal matching rate, the final rule makes no change to policy in that area. However, we do not believe that this reporting will generally require those activities that qualify for this enhanced match.

Comment: We received several comments relating to the nature and substance of the reporting requirements. One commenter suggested the reporting requirement should be with respect to Medicaid expenditures at the State level. This commenter thought it would be reasonable for States to report expenditures based on the provider categories in the regulation. Another commenter recommended the reporting of enhanced payments to public hospitals on an annual basis similar to the reporting requirements for DSH payments.

Response: We agree. Our intent is to develop and enforce a reporting requirement that is not administratively burdensome on States or providers, yet sufficient to help ensure Medicaid payments are retained by providers to offset the costs they incur in furnishing covered services to Medicaid patients. We believe that information at a provider specific level is needed to ensure the integrity of Medicaid payments. With respect to the timing, we think an annual basis is sufficient.

Comment: Several commenters suggested that HCFA establish some type of monitoring program. Certain commenters wanted to ensure Federal funding is being used for Medicaid purposes and that funds are directed to the maintenance of the nation's safety-net hospitals, including children's hospitals. One commenter recommended setting up a task force to monitor the health care needs of populations in those States that have not used IGT funding to determine if Medicaid and other funding sources are adequate for States to meet the health care needs of their citizens.

Response: We are always interested in developing more efficient and effective ways to administer the Medicaid program. As we indicated in our previous response, we intend to give consideration to any additional steps that may be necessary to ensure the Medicaid program fulfills its statutory purposes and solicit input from States, providers, and Medicaid patients. While we do not intend to go beyond a certification requirement at this time, we may issue additional policy guidance under our general authority to ensure the proper administration of the Medicaid program.

Comment: One commenter stated HCFA must issue proposed rules without any specific reporting requirements and that reporting requirements ultimately adopted must have appropriate additional notice and comment rulemaking as required under the Administrative Procedures Act. The commenter stated that HCFA should issue a separate proposed rule for the reporting requirement.

Response: We believe the commenter is referring to the Paperwork Reduction Act. We will publish a separate notice in the **Federal Register** and provide a 30-day comment period. Further details regarding this process are found in section VI of the preamble, ''Collection of information—reporting requirements'.

Comment: Several commenters felt that the transition period should be more stringent unless the excess payments permitted during the period are linked to the provision of health care service.

Response: We agree that payments above the new UPLs that are permissible during the transition period should be subject to a reporting requirement. We, therefore, will extend the reporting requirements to States as a condition of receiving the transition period.

Indian Health Service

We proposed in § 447.272(b)(2) that Indian Health Service (IHS) and tribal hospitals funded under the Indian Self-Determination and Education Assistance Act (Pub. L. 93–638) would not be subject to the UPLs. We received comments regarding the impact of this regulation on these entities. A number of these commenters recommend that these IHS and tribal hospitals be considered public for the purpose of applying the 150 percent UPL. A few commenters indicated concern regarding how the shift in funding will affect rates paid to these facilities. In response to these comments, we have revised the regulation to clarify that these facilities will not be subject to these aggregated UPLs. Instead, these facilities are subject to payment limits in § 447.325.

Comment: One commenter recommended that non-State owned public nursing facilities located in close proximity to Indian reservations should be included in the 150 percent category.

Response: We do not believe that the circumstances described for NFs justify receiving the 150 percent UPL. Generally, indigent NF patients are Medicaid eligible or become Medicaid eligible and therefore the NF qualifies for Medicaid payment. Thus, the financial factors affecting non-State government-operated hospitals do not equally affect NFs.

Comment: One commenter indicated that it is not clear what, if any, UPL would apply to Pub. L. 93–638 tribal hospitals. Another suggested that we expand the exclusion at § 447.272(b)(2) to include all facilities owned or operated by American Indian tribes.

Response: We generally agree with this comment. We have restructured paragraph (c) of §§ 447.272 and 447.321 to exclude IHS and tribal facilities that are funded under Pub. L. 93–638 from the UPLs. Instead, these facilities will be subject to the payment limits at § 447.325.

Comment: One commenter indicated that Pub. L. 93–638 tribal hospitals should be included as public hospitals.

Response: We disagree with this comment. The Federal Government maintains a government to government relationship with the tribes. Accordingly, we do not believe these hospitals should be included in either the State government or non-State government pools. Including them as public facilities within the UPLs may enable States to set lower payments for the IHS and tribal facilities, and set payments for government operated providers at higher levels and still comply with the aggregate UPLs. Therefore, to avoid these types of incentives, we have excluded IHS facilities from the UPLs.

Comment: One commenter indicated that tribal hospitals serve all residents of their region and, in most regions, are the sole health care providers. The commenter stated that not only are tribal hospitals funded at an amount too low to fulfill their mandate, but the OMB-negotiated rates are less than rates paid to other public hospitals. This commenter also indicated that authorization to make additional payments to Pub. L. 93–638 hospitals as public facilities is in the best interest of improving access to health care for the rural Medicaid population.

Response: We recognize that tribal facilities, especially hospitals, may serve as sole providers in rural communities throughout the country. We do not agree that the inpatient per diem and outpatient per visit rates are necessarily insufficient. These rates are calculated at the full cost of providing Medicaid services under Medicare payment principles. While other public hospitals may be paid more than IHS hospitals in some instances, this issue may be appropriately addressed in public procedures for State ratesetting required by section 1902(a)(13) of the Act.

Also, as noted earlier, it would not be beneficial to the tribal facility to be identified as a public provider (government-operated). Including tribal facilities as a public provider may cause a reduction in payments to the tribal providers so States can shift these amounts to their own government facilities within the aggregate UPL.

Disproportionate Share Hospitals

Section 1902(a)(13)(A) of the Act requires that, in the case of hospitals, payment rates take into account (in a manner consistent with the disproportionate share hospital requirements in section 1923 of the Act), the situation of hospitals which serve a disproportionate number of low-income patients with special needs. We have received comments regarding the disproportionate share hospital (DSH) program and its relationship to the application of the revised UPLs.

Comment: Several commenters recommended that the regulation be delayed, coordinated with, or made contingent upon, the enactment of legislation that will increase the Statewide DSH caps and increase the facility-specific DSH caps. Some commenters suggested that the regulation be made contingent upon enactment of legislation that will increase the facility-specific DSH caps, as long as the legislation requires that DSH payments be used for hospitals and IGTs. Another commenter recommended that the implementation of the regulation be delayed until Congress has the opportunity for careful consideration of modification of the DSH legislation.

Response: The BIPA requires that we publish this final rule by December 31, 2000. This same law provides for increases to the State DSH allotments (including for extremely low DSH States) and an increase in the hospital-specific DSH limits for public hospitals for a 2-year period. The effective date of the increase in DSH allotments coincides with the date that this final regulation is published in the **Federal Register**. The increase in hospital-specific DSH limits for public hospitals for a 2-year period that begins with the State fiscal year beginning after September 30, 2002.

Comment: One commenter suggested that all payments to DSHs be exempt from the UPL regulations.

Response: We disagree with this comment. While Medicaid DSH payments to these hospitals have been and remain exempt from UPLs, Medicaid services payments to these same hospitals have always been subject to the UPLs. Medicaid services payments are made only on behalf of Medicaid eligible individuals, and are subject to the efficiency and economy requirements in section 1902(a)(30) of the Act. Since the upper limits permit States to set reasonable rates for Medicaid services, we do believe it is necessary to exempt payments made to a DSH facility on behalf of a Medicaid eligible individual.

Comment: Two commenters indicated that the rule should be modified to reflect the special needs of low-DSH allotment States.

Response: The UPLs established in this regulation are caps placed on the amount of Medicaid payments States can make to groups of providers for services obtained by Medicaid eligible individuals. The limits do not impact the availability of Federal funds States may use for the payment of Medicaid DSH expenditures.

The BIPA provides extremely low DSH States with increases to their DSH allotments.

Comment: One commenter noted that DSH funding should be increased by statutory revisions instead of by the 150 percent UPL since DSH expenditures are for uncompensated care.

Response: As noted, recently passed legislation increased individual public hospital-specific (uncompensated care cost) limits under the DSH program. However, we realize some States and public hospitals have come to rely on the funds generated through the enhanced program payments. While we agree with this comment to a degree, we believe the 150 percent UPL provides an appropriate balance between our objective to reduce excessive payments and to allow States flexibility to target payments to under-funded hospitals.

Comment: One commenter indicated that we should amend the proposed rule to include an exception to allow ''proportionate share'' payments of FFP up to the DSH cap if funds are dedicated or restricted to medical services coverage for low-income uninsured individuals in those States where the total of all disproportionate share payments does not exceed the State's DSH limit.

Response: A link between the DSH payments and services would require a statutory change that would mandate that DSH payments be paid for specific services. The disproportionate share hospital program was created by Congress to allow States to make provider-specific payments to Medicaid providers that treat a disproportionately high number of Medicaid and low-income patients. DSH payments are not linked to specific patient claims or services. Therefore, we do not have authority to link DSH payments to specific services without a statutory change.

Comment: One commenter indicated that the preamble of the proposed rule fails to explain why the DSH program, which provides funds for hospitals that serve low income patients with special needs, is inadequate to this task, thus justifying the 150 percent limit to make room for an additional funding stream.

Response: Our intent in establishing these new limits is to reduce excessive payments that some States make to certain government operated health care facilities. In light of financial pressures facing government-operated hospitals, we believe a higher limit is appropriate to ensure Medicaid eligible individuals will continue to have adequate access to the health care services they provide.

Transition Periods for States That Have Approved Rate Enhancement State Plan Amendments §§ 447.272(b)(2)(i), (ii) and 447.321(b)(1)(i), (ii)

We recognize that immediate implementation of these new upper payment limits could disrupt State budget arrangements for States that have relied on funding obtained from approved rate enhancement State plan amendments (SPAs). Therefore, in the October 10, 2000 proposed rule, we included a transition policy for States with approved rate enhancement methodologies that would be affected by the proposed upper payment limits (65 FR 60151).

We had proposed two transition periods, which States may qualify for based on the effective date of the State plan amendment that provided for excessive payments. For approved amendments with an effective date on or after October 1, 1999, we proposed a transition period that would end on September 30, 2002. At the end of this period, Medicaid payments to governmental providers would have to stay within the new UPLs. We proposed a longer transition period for States with approved amendments that were effective prior to October 1, 1999. For these States, we proposed a 3-year phase down to the new UPLs beginning in the first full State fiscal year (FY) that begins calendar year 2002. During the 3-year phase down, States would be required to determine the amount of payment in excess of the proposed UPLs and gradually reduce this amount in 25 percent increments. We solicited comments on the material elements of these transition periods, including the starting point for the phase-out, the percentage reduction each year, and the appropriate transition period.

Congress passed the BIPA, which requires that we publish this final rule by December 31, 2000. Section 705(b) of BIPA provides for a transition period for States with a State Medicaid payment provision or methodology that meets both of the following criteria:

1. It was approved, deemed to have been approved, or was in effect on or

before October 1, 1992 (including any subsequent amendments or successor provisions or methodologies and whether or not a State plan amendment was made to carry out such provision or methodology after such date) or under which claims for Federal financial participation were filed and paid on or before such date.

2. It provides for payments that are in excess of the upper payment limit test established under this final rule (or which would be noncompliant with this final rule if the actual dollar payment levels made under the payment provision or methodology in the State fiscal year that begins during 1999 were continued).

Comment: Many commenters expressed support for any transition period to re-adjust State budget plans impacted by the new UPLs. Other commenters indicated that the two tiered approach in §§ 447.272(a) and 447.321(a) seemed reasonable and should allow ample time for non-compliant States to bring their plans into compliance.

Response: We appreciate the commenters' support. We agree that the amount of time permitted under the transition period is sufficient for States to come into compliance with the UPLs.

Comment: Several commenters opposed providing a longer transition period to States that have amendments in effect prior to October 1, 1999. These commenters felt that the 2-year or shorter period was sufficient time for all States to bring their spending into compliance with the proposed regulations. Two commenters argued that avoiding disruption of States budget arrangements is not the purpose of Federal Medicaid matching payments nor the Secretary's duty under Federal Medicaid law. The 5-year transition simply rewards States that drew down more Federal funds than those States that followed statutory rules. These commenters were also critical of the 5-year transition period because it would be granted to every qualifying State regardless of financial circumstances. In support of this position, the commenters cited information indicating the financial health of most States is good and combined State balances totaled $21.2 billion in FY 2000.

Response: While we agree with these comments in principle, we believe it is appropriate to phase-in the new UPLs over the timeframes described in the proposed rule. As addressed elsewhere in the preamble, States, providers, and beneficiaries expressed concern over how the application of the upper limits would impact Medicaid access and quality of care. We believe that the time permitted in the proposed rule is reasonable and balances the need to protect the fiscal integrity of the Medicaid program with State budget issues.

Comment: We received many comments that recommended a longer transition period ranging from 6 to 10 years instead of our proposal for the 2 and 5 year transition period specified in the proposed rule. Some of the comments were State specific and others suggested that the 8-year transition period in HR 2614 (later enacted as BIPA), legislation pending in the House should form the basis for an extended transition period. Others suggested the length of the transition period should be proportional to the length of time the payment arrangement had been in effect or extended if economic conditions worsen.

Response: We believe that the time permitted by our transition periods is sufficient and balances the need to protect the integrity of the Medicaid program and addresses State budget issues. Our paramount interest in issuing these regulations is to preserve the integrity of the Medicaid program. Under section 1903(a) of the Social Security Act, States are required to fund their share (in accordance with a statutory formula) of Medicaid covered health care services furnished to eligible individuals. In recognition that States may have diverted Federal matching funds for other purposes, whether health-related or not, we provided a transition period which would allow all States who qualify for a transition period to have at least one legislative session before SPAs would have to comply with the new upper limits. We also note that in passing section 705 of BIPA, Congress provided a longer transition period for States only with excessive payment methodologies in effect or approved on or before October 1, 1992. We believe that if Congress wanted all States to have an 8-year transition period as provided for in BIPA, they would have done so.

Comment: Many commenters expressed opposition to having different transition periods based on the effective date of an SPA. In addition, commenters recommended that all affected States have the 5-year transition period. One commenter suggested that our basis of ''reasonable reliance'' on the funds is flawed. This commenter indicated that the length of time that these revenues have been available to a State is not an indication of the importance of these dollars. This commenter also did not believe a distinction could be made between affirmatively approved amendments and deemed approved amendments. Other commenters criticized the distinction because in their view the only difference is the timing of when States choose to submit amendments under current regulations.

Response: We do not agree. We note that all amendments with an effective date of October 1, 1999 or later were ''deemed approved'' rather than affirmatively approved. The decision to let these SPAs lapse into approval was intended to avoid any appearance of ratification of these SPAs, and in response to an increase in the number and dollar magnitude of new plan submissions. This decision was consistent with our goal to address the loophole in existing UPL regulations. Depending on State response times to requests for additional information, the time between initial submission and eventual ''approval'' could take as long as 9 months. We made it clear to States whose SPAs were deemed approved after October 1, 1999, that we intended to change the regulation, and therefore, put them on notice that they could not permanently rely on the additional Federal dollars generated through these mechanisms. However, States with SPAs approved prior to October 1, 1999 were not aware of our intention to change the regulations related to UPL. The reliance concept is applicable because these funds have been built into State and provider budgets for longer periods of time. We note also that in enacting a third transition period for States with excessive payment methodologies in place on or before October 1, 1992, the Congress has ratified our approach to establish transition periods based on a ''reliance concept.''

Comment: Some commenters expressed concern that the 2-year phase-in period is too rapid and does not provide adequate time for State legislatures and Medicaid programs to prepare for the immediate and long range budgetary consequences they will confront as a result of the rule. One commenter felt that logistical barriers should compel us to reexamine the reasonableness of the timeframes it has presented for States to come into compliance with the rule. The commenter pointed out that 23 States have biennial budgets that have already been established, 13 States have legislatures that meet for short periods of time, and some States do not have full time legislatures who could timely respond within the proposed transition periods.

Response: We did not find these comments to be persuasive. States with biennial budgets would be able to amend their budgets in the interim

legislative session. We also note that all amendments with an effective date of October 1, 1999 or later were ''deemed approved'' rather than affirmatively approved. The decision to let these SPAs lapse into approval was intentional and in response to an increase in the number and dollar magnitude of new plan submissions. This decision was consistent with our goal to address the loophole in existing UPL regulations. As indicated in the proposed rule, during the review of these amendments, we informed States of our intent to curtail excessive payments and advised the States not to rely on the continuation of this funding. Therefore, these States should have made contingency financing plans for important programs funded with these enhanced payments, knowing that we intended to curtail them as soon as possible. We again note that the Congress recently considered our transition periods in passing section 705 of BIPA. By requiring us to add a third transition period for States with methodologies approved or effective before October 1, 1992, Congress has affirmed our transition periods for other States.

Comment: One commenter suggested it would be more appropriate to change the scope of the 2-year transition period to make it applicable to State plan amendments effective on or after October, 1999, and submitted before the effective date of the final regulation. The commenter indicated that the date of State plan approval by HCFA is not within the control of States and suggests the possibility of two States submitting equally acceptable amendments on the same date and having them approved by HCFA on different dates.

Response: We do not agree with this comment. Once the final regulations are issued, we will rely on them to review State plan amendments and will disapprove amendments that do not comply with them. We also note that we have followed a uniform practice that treats all States equally in reviewing these amendments. Thus, we do not believe there is a possibility of different approval dates for two States with equally acceptable amendments submitted on the same date.

Comment: Several commenters requested that this transition policy be revised to clarify that approved amendments with an effective date prior to October 1, 1999, but later amended or renewed after October 1, 1999, qualify for the extended transition period.

Response: We agree that the transition policy as stated in the proposed rule is unclear with respect to States that annually renew or amend their rate methodologies that direct excessive payments to public non-State government providers. If a State had an approved amendment in effect prior to October 1, 1999 and amended or renewed that authority after October 1, 1999, the State would appear to qualify for two transition periods. In these cases where a State meets the requirements to qualify for more than one transition period, our policy is to give that State flexibility to decide which transition period to select. Because we have clarified this in the preamble, we do not believe we need to amend the regulation text.

Technical Clarifications on Transition and Base Year Issues

Comment: Several commenters felt the base year amount should be adjusted to reflect annual changes in the Nursing Facility Market Basket Inflation Index and to recognize Balanced Budget Act (BBA) ''give back'' dollars currently under consideration by the Congress.

Response: We disagree. These types of adjustments would not impact the base year, but instead would be taken into account when making the UPL calculation in the year it occurs. For instance, if the excessive payment to be phased down is $100 million, that number stays constant, and a different percentage (that is, 75, 50, 25) is applied to it each year. Over this period of time, the cost of services furnished by providers may increase, or the amount Medicare may pay may increase for the reasons cited by the commenter. The effect of these increases would be to raise the UPL for services in the year they are furnished.

Comment: A commenter recommended that each State should be able to properly reflect any increases that occur in Medicare Skilled Nursing Facility Prospective Payment System rates during the course of the State FY 2000 in its UPL base period calculations. The commenter further recommended that States should be given additional time to utilize patient assessments and other data from FY 2000 to more precisely re-estimate their FY 2000 UPL for nursing facility services, even if these data are not available until after State FY 2000.

Response: In computing UPLs, we require State estimates to be reasonable. With respect to the changing nature of Medicare payment systems, in previous refinements to UPL regulations, we issued guidance to States indicating that they must use Medicare payment principles in effect during the same period the services were furnished. We have also advised that States must take into account program differences, such as non-covered services or acuity levels that might overstate the estimate. These policies permit States flexibility to make refinements to Medicare payment systems that were in effect during State FY 2000.

Comment: The same commenter was also concerned that each State's UPL estimate for State FY 2000, which determines the ''excess'' payments that will be phased-out, may not reflect any further change to the SNF PPS methodology that occur after State FY 2000. The commenter asked how a State using SNF PPS to compute its estimate will be able to receive a credit for increases in Medicare rates and a commensurate reduction in the excessive payments. The commenter suggests that an equitable approach would permit the State to factor any change in Medicare rates into the calculation of excess payments on an ongoing basis.

Response: Our current policy permits and, in some cases, requires States to factor Medicare payment changes into their UPL estimates on an ongoing basis. However, these types of changes would not impact the base period ''excessive payment'' computation. Instead, they would affect the UPL calculations in the year services were furnished. If the affect of Medicare payment changes were to increase the UPL for services furnished in State FY 2003, then once the UPL amount was determined for that year, 75 percent of the base period excessive payment would be added to that amount.

Comment: A commenter noted that the proposed rule differentiates between State and non-State government facilities and felt that to be consistent, the calculation of the base period and subsequent transition period payments should also exclude State owned and operated facilities.

Response: The base calculation is derived by comparing actual Medicaid payments paid to all providers to the maximum amount allowed under the applicable new UPL for services furnished during State FY 2000.

Comment: One commenter asked for clarification of ''State fiscal year'' with respect to the base period. The commenter believes the proposed rule is ambiguous because the phase-out period is described to begin in the State FY that begins in calendar year (CY) 2002. The commenter requested that we confirm that the ''State fiscal year 2000'' is the State FY year that begins in CY 2000. Another commenter urged that base year excessive payment computation be based on the State FY between 2000 and 2003 in which the highest amount of payment was made.

Response: We did not intend any ambiguity nor do we believe the proposed rule is ambiguous with respect to the base period. In the discussion of the base period calculation, the proposed rule clearly indicates the services and payments for such services in State FY year 2000 shall be used to compute the excessive payment. In this instance, we are referring to the State FY that ends in calendar year 2000 since this year would commonly be understood and referred to as State FY 2000. We are maintaining State FY 2000 as the base period for the purpose of computing the phase down amount. This year was selected because it represents the last complete State FY prior to this rule change.

Comment: Several commenters indicated that the text of § 447.272(b)(2)(iii) as proposed, limits payments to the lower of the base State FY 2000 payments or the limit based on the reduction schedule. Commenters stated that this restriction could result in a lower transition payment than that which would be available in the absence of the transition provisions. This requirement also appears in § 447.321(b)(1)(iii) and (b)(2)(iii). Commenters recommended that the reference to ''base State FY 2000 payments'' be deleted from each regulation.

Response: While we have included generous transition periods, we do not think it is appropriate to permit States to make payments that would further increase the amount of payment that is in excess of the new UPLs. We have revised the text of the transition provisions in §§ 447.272(e) and 447.321(e) to make this clarification. We have also extended this policy to all transition periods.

Comment: Many commenters suggested alternative starting points for this transition period. Several commenters recommended that the start point of the 3-year ''phase down'' period begin with the start of Federal FY 2003 rather than in the State FY that begins in CY 2002. These commenters pointed out that this change would ensure all States that qualify for this transition period receive the same amount of time to come into full compliance with the new UPLs. They also noted that this change would extend the same ''hold harmless'' protection afforded States in the shorter transition period.

Response: Because the additional time permitted under the longer transition period is based on State fiscal years, we realize that some long transition States may have to begin to comply with the 25 percent reduction schedule before the expiration of the shorter transition period. However, we would not expect this result to create any hardships since the longer transition period will permit, at a minimum, 30 extra months to make payments at higher levels that would have been permitted under the shorter transition period. We note that the use of State fiscal years is consistent with the Congressional implementation of facility specific disproportionate share hospital payment limits, except that we have provided States with considerably more time to come into full compliance.

General Comments

Comment: Several commenters asked that we clarify that payments for clinic services will receive the same transition period as public hospital services.

Response: The same transition periods apply equally to each of the five Medicaid services that are subject to the new UPLs. Should Medicaid payments for nursing facility or clinic services exceed the maximum permitted under the new UPLs, the State would be afforded the applicable ''transition periods'' set forth in §§ 447.272(e) or 447.321(e).

Comment: One commenter indicated that a transition protection should be available in any transition year in which a State would otherwise exceed the applicable limit. While the proposed rule extends the transition periods to States with rate enhancements that would be impacted by the new UPLs, the commenter believed that the proposed rule was ambiguous with respect to when the rate enhancement arrangement is to be determined non-compliant for the purpose of receiving the benefit of a transition period. The commenter asserts that the preamble to the proposed rule suggests that the relevant period for determining non-compliance is State FY 1999–2000. Assuming this is the case, the commenter believes that freezing the determination of non-compliance to a particular year inappropriately denies transition assistance to States that have not taken full advantage of UPL flexibility. The transition rules were apparently designed to phase-down those States that would substantially exceed the new UPL. The commenter feels that the transition provisions fail to provide protection to States that may exceed the new UPL during the transition because of factors beyond their control, even though they were compliant during the base year. Because payment levels in such a State can vary due to a number of factors, such as increase in Medicaid enrollment, the commenter recommends that the determination of eligibility for a transition rule should be made on a current period basis.

Response: A transition period is available to States that have approved methodologies that result in provider payments that exceed the new UPLs at the time of this rule change. If the payments result from an approved State plan methodology that was effective on or after October 1, 1999, the State would be eligible for the abbreviated transition period. If the payments result from an approved State plan methodology that was in effect prior to October 1, 1999, the State would qualify for one of the extended transition periods, depending on when the State plan methodology was effective or approved. The commenter is correct in that State FY 2000 is the relevant period for determining the excessive payment amount that will be factored into a longer transition period.

Comment: In phasing out a payment methodology during a particular transition period, a commenter asked if we will require new State plan amendments to effect reductions in payment, or will we consider compliance with the regulation, such as applying the percentage in the regulation to the last approved State plan amendment sufficient without a new State plan amendment.

Response: Given the diverse nature of UPL State plan amendments, it is difficult to describe a single action that would be appropriate in all cases. States are required under 42 CFR 430.12(c) to reflect changes in Federal law, regulations, policy interpretations or court decisions. We anticipate States, in many cases, will need to change their payment methodologies in order to reduce payments to levels that comply with the new UPLs and ceilings during the transition period. Under § 447.257 and § 447.304, we provide disallowance authority to the extent that States do not submit conforming State plan amendments. We encourage affected States to contact their HCFA Regional Office for guidance specific to their situation.

Comment: The proposed UPL rule suggests that the transition period for States are applicable only to the new category: other government-owned or operated hospitals. The preamble, however, describes these transition periods as applicable to the entire State program. The commenter recommends clarification of the transition periods' applicability consistent with the preamble.

Response: The transition provisions apply to approved amendments and/or waivers that result in rate enhancements that exceed the new UPLs in a particular

State. In addition, in the case of outpatient hospital services and clinic services, a new UPL applies to State government-owned or operated and non-State-government owned or operated facilities. Although States make payments to all provider types such as inpatient hospital, nursing facilities, and clinics, the transition provision would only apply to those payment arrangements that result in payments that exceed the new UPLs. Under a State's Medicaid program, for example, should State payments only to State NFs exceed the new UPLs, the State would be eligible only for the transition period relating to NF services, and not the other service categories that are subject to new UPLs.

Comment: We received numerous comments recommending that we grandfather existing UPL enhanced payment proposals. These comments suggested various bases for selection, for example, on approval as of a specific point in time, length of time a program had been operating, or other qualifying factors such as compliance with a maintenance of effort provision or extremely low DSH spending.

Response: Our intent in issuing these new UPLs is to ensure States set provider payments rates that are consistent with efficiency and economy and made in accordance with section 1903(a) of the Social Security Act. We believe this is necessary to preserve the integrity of the Medicaid program. Any type of grandfather solution would effectively result in the permanent continuation of the payment arrangements that necessitated the issuance of these new payment limits and therefore would not be an effective policy in preserving the integrity of the Medicaid program. We also believe that a grandfather policy would be arbitrary and capricious and would not withstand legal challenge. Such targeted relief to specific States or groups of States would need to be addressed legislatively.

Comment: Some commenters suggested that the final regulation include a list of States affected by the regulation and which transition the State qualifies for.

Response: On an individual basis, we plan to work with those States affected by the new UPLs.

Comment: A few commenters requested clarification of how amendments submitted after the effective date of the regulation would be treated.

Response: An amendment that would result in payments that exceed an applicable UPL would be disapproved.

Comment: A commenter indicated that States wishing to convert to the new UPL should be permitted to do so at any time during the transition period. This would allow States to submit new UPL transactions based upon the final rule.

Response: States that would otherwise qualify for a transition period are free to adjust payments to comply with the new UPLs at any time prior to the expiration of the transition period.

Comment: Many commenters urged us to approve pending applications in their State, or in all States before finalizing the rule.

Response: We have given all States ample notice of our position that these programs are abusive and of our intent to publish this regulation to curtail such programs. To affirmatively approve pending applications would be counterproductive to our purpose of preserving the fiscal integrity of the Medicaid program.

Intergovernmental Transfers

Although the UPLs we proposed do not regulate IGTs, we received many comments related to States' flexibility to use them.

States Ability To Use IGTs

Comment: Several commenters stated that the IGT program is legal and they also pointed out that the abuses cited in the proposed rule were approved by HCFA. They indicated that there is a long history of using such financing mechanisms to offset the increased cost of Federal initiatives and unfunded mandates. They believe we are focusing too narrowly and should be looking at overall Medicaid funding needs.

Response: This regulation does not eliminate the use of IGTs. States and the Federal government share the responsibility of financing the Medicaid program. IGTs are a financing mechanism States can use to help fund their share of allowable program expenditures. Under the Medicaid statute, up to 60 percent of State funding may come from local public resources. States, counties, and cities have developed their own unique arrangements for sharing in Medicaid costs. IGTs have their own statutory basis and those provisions are not being interpreted or modified by this regulation.

We agree with the commenter that the current UPL related funding schemes fit within the structure of our current regulations. As noted earlier in this document, the old regulation was designed to allow flexibility for States to pay providers differently to account for higher costs of some facilities. However, that flexibility has been used in recent years to establish funding arrangements that are excessive and abusive and do not assure that federal Medicaid funding is spent for Medicaid covered services provided to Medicaid eligible individuals. Such funding arrangements represent a direct and immediate threat to the integrity of the Medicaid program and therefore need to be changed.

Comment: Several commenters recommended that we avoid changing the way the Medicaid UPLs are calculated. Another commenter noted that current regulations are adequate to control abuse through the State plan approval process.

Response: Due to excessive payment arrangements resulting from the pooling and aggregation of public and private payment rates in the current UPL regulations, we believe it is necessary to change the current UPL regulations. The UPLs will still be calculated using Medicare payment principles, which is not a change from current regulations. We disagree that current regulations are adequate to control abuses through the State plan approval process because the current rules permit States to pool and aggregate UPLs across like provider types and do not provide sufficient authority to ensure Medicaid payments are consistent with efficiency and economy.

Comment: Several commenters suggested that States should not be allowed to arbitrarily increase their State match rates through the use of IGTs. One commenter stated that the problem of ''recycling'' enhanced funding needs to be addressed since it's being ''marketed'' to additional States and will therefore increase the scope of the problem. The commenter believes that these IGT funds may make it appear that Medicaid expenditures are increasing when the dollars are not related to program costs.

Response: We are not proposing to modify our current requirements relating to IGTs at this time. This regulation addresses excessive payments that result by pooling and aggregation of public and private payment rates. We believe it is necessary to change these pooling arrangements to ensure Medicaid payments to providers are consistent with efficiency and economy.

Uses of IGT Funds

Comment: Commenters recommended that we specify, in this rule, that Federal funds received as a share of Medicaid expenditures financed through IGTs must be used for Medicaid purposes. Specifically, one commenter suggested that UPL funds generated in nursing facilities should be required to pay for services provided by nursing facilities.

Response: We agree that Federal Medicaid matching funds should be used to pay for Medicaid services provided to Medicaid eligible individuals and believe the UPLs will help ensure this result. We do not believe that simply specifying or requiring that Federal funds received as a share of Medicaid expenditures financed through IGTs be used for Medicaid purposes will solve the problem. The Office of the Inspector General's (OIG's) draft audits have shown that once States obtain excess Federal funds through IGTs, they may transfer a portion of those dollars from providers to their General State fund and we lose the ability to track how Medicaid dollars are spent. Therefore, we would have no means of monitoring or enforcing such a provision.

Comment: Many commenters indicated that their individual States are appropriately using funds obtained through IGTs. The commenters believe that these States should not be punished for problems in other States. The commenters also believe that the regulation should distinguish between ''good'' and ''bad'' uses rather than eliminating the program.

Response: This regulation does not modify or change Medicaid IGT requirements. States can continue to use IGTs to finance Medicaid payments. States, counties, and cities have developed their own unique arrangements for sharing in Medicaid costs and this regulation should not disturb such arrangements.

Comment: One commenter indicated that overall States are meeting their responsibilities and cannot offset cuts in IGT funds. Many commenters pointed out that States and providers need this money. The commenters indicated that the State Medicaid rates are already inadequate and will probably be reduced if there is a cut in IGT funds. Several commenters are concerned that eliminating the IGT program will cause a serious disruption to State and county ''safety-net'' providers and other enhanced services that could not otherwise be funded.

Response: This regulation does not attempt to change States' ability to use IGTs. States, counties, and cities have developed their own unique arrangements for sharing in Medicaid costs and these arrangements are protected by statute. Furthermore, this rule will not reduce or limit the amount of Federal funding available to States to pay for Medicaid services to Medicaid eligible individuals. We believe that States were given ample notice of our intent to publish this rule in our letter to State Medicaid Directors on July 26, 2000. In addition, the transition periods in the final rule will provide States with sufficient time to modify their budgetary planning as necessary.

States have the flexibility to set payment rates in accordance with their public process. States will retain the flexibility to pay 100 percent of the costs of serving Medicaid patients, and the Federal government will pay its share of those costs in accordance with each State's Federal medical assistance percentage. In recognition of the unique and important role public safety-net hospitals play in caring for low income, vulnerable populations, we have provided States with flexibility to set higher Medicaid payment rates for these providers. However, we do not intend for these higher Medicaid payments to ultimately replace State dollars for Medicaid or other enhanced services.

Comment: One commenter reasoned that IGT funds should go to children's hospitals even if they are not publicly owned or operated.

Response: Under current rules, States have the discretion to determine how they will use public funds that have been transferred to them from or certified by units of government within the State. In addition, there are no rules that prevent States from paying children's hospitals in accordance with the new UPL regulations for private hospitals. With this group of providers, States still have the flexibility to pay some hospitals more than others to account for differences in cost or caseload.

Comment: One commenter is concerned that reduced funding to county non-acute hospitals will cause patients to be transferred to acute care hospitals, resulting in higher hospital stays and higher costs.

Response: We believe all county hospitals will be able to benefit from higher Medicaid service rates permitted under the UPL for county hospitals.

Comment: One commenter recommended that county facilities have a ''hold harmless provision'' to prevent care decreases. Another commenter recommended children's hospitals have a hold harmless provision.

Response: We do not have the authority to require States to hold any facility harmless in the implementation of the new Medicaid UPLs. If a State is making excessive payments to certain facilities, we anticipate the State will have to adjust payments to those facilities to comply with the new UPLs.

Quality of Care and Access

Comment: Numerous commenters expressed concern regarding the impact that this rule will have on the quality of patient care in a variety of programs and settings due to the potential loss of funding available as a result of the implementation of this rule. Many of these commenters noted that quality health care depends on adequate funding. Commenters expressed concern about the impact of reduced quality of care on the following: nursing facilities, hospitals, federally qualified health centers (FQHCs) county non-profit nursing facilities, public nursing facilities, county facilities, safety-net providers, children's hospitals, local health departments, physicians, the State Children's Health Insurance Program (SCHIP), eligibility expansions, Medicaid and SCHIP outreach, the uninsured population, and rural areas. States appear to be using excess Federal funds obtained through current flexibility in the Medicaid upper payment limits to support a variety of health care services.

Response: We strongly support the provision of quality health care to every Medicaid eligible individual. We also recognize that quality health care depends on adequate funding. We do not believe this final rule will interfere with the provision of quality health care services to Medicaid eligible individuals as it permits States to set payment rates that will sufficiently reimburse providers for Medicaid services.

Comment: Several commenters recommended that we adopt special provisions to protect certain providers and populations including children's hospitals, nursing facilities, Medicaid eligible individuals, children and families, pregnant women, seniors, and people with disabilities. Adopting a special provision would be consistent with section 1902(a)(30) of the Act, which requires Medicaid payments to be consistent with quality of care and sufficient to provide adequate access to care.

Response: In this rule, we are modifying the application of the Medicaid upper payment limits. Although we recognize that the groups mentioned by the commenters have special health care needs, we feel that under the new UPLs, States will clearly be able to set rates that fairly compensate all Medicaid service providers for services furnished to Medicaid eligible individuals. The purpose of our rule is to protect the fiscal integrity of the Medicaid program. We intend to achieve this purpose by curtailing excessive rates that some States have established to pay certain providers.

Comment: Commenters pointed out that cutting the IGT funds will reduce

access to care for the elderly and disabled, particularly individuals with heavy care needs, and the uninsured.

Response: First we note that this rule does not place restrictions on IGTs which have their own statutory authority. This regulation deals with pooling and aggregating Medicaid payments under the current UPL categories. Section 1902(a)(30) of the Act requires States to set payments that are consistent with efficiency, economy, and quality of care. Under this authority, States can establish payment methodologies that take into account differences in costs that providers may incur based on the acuity level of their Medicaid patient population. The UPLs we have established do not interfere with reasonable rates that reflect the volume and costs of Medicaid services furnished by a provider. We also note that under section 1902(a)(30) of the Act, payments must be sufficient to enlist enough providers so that services are available to the Medicaid population to the same extent services are available to the general population.

Comment: Several commenters indicated that they believed the rule will result in less FFP for States and, although many States have flush budgets, they may restrict funds for nursing services and other Medicaid benefits, reduce the number of Medicaid eligible individuals, and cause redirection of State funds. Another commenter indicated that the IGT rule's affect on nursing homes will cause a lack of nursing home placement for patients.

Response: As we stated in the regulatory impact statement of the proposed regulation, the rule will not reduce the overall aggregate amount that a State can pay for Medicaid services. Each State makes its own budgetary and rate setting decisions. Under section 1902(a)(30)(A) of the Act, States are required to provide payment that is sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that the care and services are available to the general population in the geographic area. While States have considerable flexibility in rate setting, should they impose rate reductions as a result of this final rule, they still must assure that Medicaid services are available at least to the degree these services are available to other populations in the same geographic area.

Comment: Commenters are concerned that the new Medicaid UPLs will create financial insecurity for numerous providers and will put the following providers at risk of closing their doors or declaring bankruptcy: sole-community hospitals, county facilities caring for patients who receive specialized services, private safety-net hospitals, inner-city and rural safety-net hospitals providing services to low-income and uninsured people, nursing homes, large county nursing facilities, and skilled for-profit and non-profit nursing homes. In addition, a few commenters expressed concern that the proposed rule will put certain State's Medicaid programs in jeopardy.

Response: We recognize the precarious situation of providers who face low payment rates and are responsible for providing care and services to Medicaid eligible and uninsured individuals. We want to emphasize that this regulation permits States to set reasonable rates for Medicaid services.

Comment: Several commenters expressed the concern that the regulation will jeopardize the ability of States to develop, maintain, and expand home and community-based services, including home and community-based waiver programs, for the elderly, persons with disabilities, or persons with developmental disabilities. Similarly, several other commenters indicated that funds derived from the UPL loophole are used for other laudable causes, such as reduction in the use of restraint and seclusion, taking nursing home beds out of service, providing and enhancing safety-net services to low income populations, and behavioral management training. The commenters stated that these causes would also be jeopardized.

Response: We recognize the concerns of these commenters, but note that this regulation does not directly affect Federal financial participation for these services. States can continue to develop home and community-based waiver programs and provide home and community-based services under their Medicaid programs and the federal government will match State expenditures for these services. While some States may have used the UPL loophole to support home and community-based services or other laudable causes, as described by the commenters, these arrangements are inappropriate as they effectively result in Federal funds being used in place of required State funding.

We also believe States have many important incentives to continue to develop, maintain, and expand home and community-based services. First, home and community-based services, including home and community-based service waivers serve as a cost-effective alternative to institutional care. Second, the provision of home and community-based services under the Medicaid program is an important tool for enabling States to fulfill their responsibilities in serving persons with disabilities ''in the most integrated setting appropriate'' as required by the Americans with Disabilities Act. Lastly, the provision of home and community-based services is crucial if States are to be responsive to the needs and preference of the elderly and persons with disabilities who seek alternatives to institutional care.

Comment: One commenter noted that the proposed rule could result in a reduction of services to Medicaid recipients with disabilities unless we add a State fiscal maintenance of effort (MOE) provision to protect recipients who receive home and community-based services. This commenter recommended that we require that each State spend no less in each future year (adjusted for health care inflation) on home and community-based services provided either under a home and community-based services waiver or under the Medicaid State plan.

Response: We do not have sufficient authority to impose an MOE requirement because HCBW services are an optional program under the Medicaid Statute. We believe States will maintain these programs because of the incentives previously mentioned.

Miscellaneous

We also received a number of comments not directly related to the provisions of the proposed rule, which we summarize here.

Comment: One commenter recommended that we maintain our traditional flexibility in interpreting the UPL regulation and allow State flexibility.

Response: We agree that States should maintain the ability to establish payment rates for their providers. However, with respect to the State's payment rates, section 1902(a)(30) of the Act requires that these rates be consistent with efficiency, economy and quality of care. HCFA has found that the increase in title XIX Federal funding for enhanced payments to nursing homes and hospitals is not consistent with the statutory definition of efficiency and economy. Therefore, we are taking this action to ensure that State Medicaid payments meet the statutory definition of efficiency and economy by issuing this UPL regulation to address the enhanced program payments.

Comment: Several commenters indicated that we do not have the legal authority to set UPLs.

Response: The legal basis for setting the UPL is section 1902(a)(30) of the Act

which provides that the State's payment rates be consistent with efficiency, economy and quality of care. This provision provides us the legal authority, on behalf of the Secretary, to set the UPLs on Medicaid payments as set forth in the Federal regulations at 42 CFR part 447.

Comment: The State of Georgia does not have an UPL SPA pending and wants to be removed from the list.

Response: We disagree. The State has a pending amendment to its State plan which will make payments previously made to DSHs, to hospitals within the State's UPL. To date, the State has not demonstrated that these enhanced payments are tied to the cost of Medicaid services.

Comment: One commenter suggested that we consider approaches to closing the loophole that will not damage safety-net providers.

Response: We do not believe that ''closing the loophole'' or capping the enhanced payments States are making to providers will damage safety-net providers. We have accounted for potential affects of this regulation on public hospitals by setting the UPL cap at 150 percent of what Medicare principles would have paid. We have also granted transition periods to States to allow them to continue the enhanced programs for a prescribed amount of time.

Comment: One commenter indicated that as a major rule, this final rule can not take effect until 60 days after publication.

Response: This rule will be effective 60 days from the date of publication.

Comment: One commenter suggested that we consider allowing all States to apply UPL funds to health services that would result in net savings to Medicaid (for example, training community-care aides). Another commenter indicated the UPL funds should only be permitted to reduce institutional bias and should be based on removing people from nursing homes. One commenter recommended that Medicaid funds should go to nursing homes so there will be adequate operating capital.

Response: The Medicaid statute currently contains several authorities States can use to legitimately redirect Medicaid funding in the manner suggested by the commenters. Under section 1115 of the Act, States can operate programs that expand eligibility and/or include services not otherwise covered by Medicaid, if these programs do not result in increased Federal spending. Under section 1915(c) of the Act, States can establish home and community-based programs as an alternative to institutional care. The main distinction between these programs and similar programs that may be funded under the former UPLs, is that States would be required to fund their share of the costs as required by the Medicaid statute. To operate similar programs under the UPLs, States would have to represent expenditures for the medically necessary provision on institutional care for the purpose of claiming Federal matching funds, and then have those institutions transfer Federal funds to support non-institutional services. The representation is misleading since by definition the funds would not be used by the institution to provide medically necessary care and services to its inpatients, but rather to support some type of alternative program. We believe these types of funding arrangements completely undermine the integrity of the Medicaid program. It is our intent that under the new UPLs, Medicaid payments claimed as a nursing home expenditure, or as an expenditure for some other type of institutional service, will in fact be paid to and retained by those facilities to offset the costs they incurred in furnishing Medicaid services to eligible individuals.

Comment: One commenter indicated that safeguarding the financial integrity of Medicaid is of paramount concern. Another commenter indicated that [Medicaid] program integrity is important.

Response: We agree with this comment and will continue to work with States and provider groups to ensure the integrity of the Medicaid program, while preserving the State's current flexibility to set payment rates in accordance with section 1902(a)(13)(A) of the Act.

Comment: One commenter suggested that we create a separate alternative which specifically focuses on the State's use of an IGT policy rather than an upper payment limit.

Response: Our primary concern is reducing excessive payments and we believe the establishment of upper payment limits is the most direct approach to achieve this objective. As indicated in the proposed rule, we gave consideration to developing an IGT policy. However, had we proposed an IGT policy, our intent would have been to have it supplement our proposed UPL modifications. Because we realize that States, counties, and cities have developed their own unique arrangements for sharing in Medicaid costs, we decided not to pursue this policy at the time we proposed the new UPLs. We remain concerned with the manner in which IGTs are used in particular instances and agree that a policy specific to them may be necessary to ensure that Federal funds are used to match bona fide expenditures.

Comment: Several commenters recommended that we require State maintenance of efforts and reject State plan amendments that would lower payments to nursing homes. Another commenter indicated that we cannot approve State plan amendments that would lower or provide inadequate updating.

Response: The Balanced Budget Act of 1997 repealed certain sections of 1902(a)(13) of the Social Security Act (Boren amendments) which had previously allowed us to disapprove State plans that implemented payment rates that were not ''reasonable and adequate to cover the costs of an efficient and economically operated provider.'' Therefore, the statutory basis for us to disapprove a plan based upon inadequate or unreasonable rates has been repealed. The Boren amendment requirements have been replaced with a requirement that States establish payment rates using a public process that allows for meaningful opportunities for public input. It is during this public process that providers should communicate their concerns regarding the adequacy of the payment rates to maintain Medicaid services at the optimum level required to care for the provider's Medicaid patient population.

While the objective of the new upper limits is to reduce excessive payments, we are concerned by the volume of comments we received relating to the impact these limits will have on Medicaid quality and to services access. Under Section 1902(a)(30) of the Act, States are required to make payments that are consistent with efficiency, economy, and quality of care and that is sufficient to enlist enough providers so that health care services covered by Medicaid are available to the extent such services are available to the general population in the geographic area. Section 1902(a)(30) is a Medicaid State plan requirement, and therefore, we can require States to report how proposed changes in payment rates are anticipated to impact the quality of care and access to Medicaid services.

Comment: One commenter noted that excessive Medicaid funding is necessary because Medicare reimbursement has been tightened.

Response: We disagree with this comment. Medicaid and Medicare are separate and distinct entitlement programs that are geared towards two different populations and administered under the statutory authority of two different titles in the Social Security

Act. A reduction in funds to providers under the Medicare program does not grant States the authority to make payments that do not meet the statutory requirements of Medicaid.

Comment: One commenter indicated that the money is currently being used to provide services to Medicaid eligible individuals .

Response: We realize that in some cases, States may be using enhanced payments to expand Medicaid eligibility or provide additional services. Since Federal-matching payments would necessarily be available for these program expansions, in this context, the States would be using the enhanced payments rather than the required State matching payments. In this case, we believe this practice violates the integrity of the Medicaid program and we intend to curtail it with the application of the new UPLs.

Comment: One commenter indicated that States should not be penalized for actions under plans approved by us in the past.

Response: States are not being penalized for methodologies permitted by us in the past. We recognize that the UPLs may disrupt State budgets. States with these plans have been given a transition period, however, and we have an obligation under 1902(a)(30) to ensure State payments are consistent with efficiency, economy and quality of care.

Comment: One commenter indicated that GAO and OIG have rushed to judgement.

Response: We believe that the OIG and GAO studies on State enhanced payment programs were extremely thorough, and the conclusion drawn from these studies well thought through. The OIG continues to study State programs and any specifics and further conclusions drawn from the study of these programs will be shared with us.

Comment: One commenter indicated that we are too focused on the process States use to meet their Medicaid needs.

Response: It is our responsibility, as the Federal agency that administers the Medicare and Medicaid program, to ensure that the fiscal integrity of the Medicaid program is maintained. If we find that States are making Medicaid payments which are not consistent with efficiency, economy, and quality of care, we, on behalf of the Secretary, must act upon the problem through regulation.

Comment: One commenter suggested that we modify rules to give States extra money for indigent care.

Response: We do not have the regulatory authority, under title XIX, to require States to designate specific funds to indigent care.

Comment: Two commenters recommended three categories of Federal funding for each group of hospitals: private, State, non-State government owned.

Response: We have revised the UPL at paragraph (a) of §§ 447.272 and 447.321 to account for these three separate groups. We have established a separate UPL for each of the following categories: privately-operated facilities, non-State government-operated facilities, and State government-operated facilities.

Comment: One commenter indicated that we should not allow States to use the Medicaid funds to build bridges, but did believe we should not place limits on New Hampshire's Medicaid funding.

Response: The new upper limits are intended to ensure Medicaid payments are consistent with efficiency and economy. Under the former UPLs, States could make excessive payments to certain public providers. Once paid to a provider, the provider had the flexibility to use the funds as it felt appropriate. As illustrated by the initial finding of the Inspector General, the funds may be used in a variety of ways. In cases in which the funds are donated back to the State, it ultimately becomes impossible to track the Medicaid payments due to the fungibility of money. By reducing excessive payments, we believe that the new UPLs preclude States from using Medicaid funds for non-Medicaid purposes. While New Hampshire does have a rate enhancement program, we do not know at this time how the new UPLs will ultimately impact them.

Comment: One commenter inquired about the term of ''fair compensation''. The commenter asked if we had a definition of fair compensation. The commenter asked if fair compensation was equivalent to ''may not exceed a reasonable estimate of what would have been paid for those services under Medicare payment principles.'' The commenter felt that it was inconceivable to believe any State pays compensation rates to its providers that exceed any reasonable definition of fair compensation, which seemed to be our position.

Response: The term ''fair compensation'' is not defined in any Federal Medicaid regulations. In the context used in the proposed rule, we were pointing out that under the new UPLs we are establishing, States will be able to set service rates that fairly compensate individual providers for covered Medicaid services furnished to Medicaid eligible individuals. In other words, the UPL would permit a State to set facility specific rates that are based on the reasonable cost each provider incurs in furnishing Medicaid services to Medicaid eligible individuals. While we can understand the commenter's dismay about States setting excessive rates, our analysis of nursing facility payment programs in several States shows that payments to public providers are often multiples above the price the State would have paid a private facility for the same service. When computed on a per-day basis, we have found payments in some States to be in the $1,000–$1500 range.

Comment Period

Extend Comment Period

The proposed rule allowed a 30-day comment period.

Comment: A number of commenters urged HCFA to extend the comment period. Twelve commenters recommended that the comment period be extended to provide States more time because of the magnitude of the policy change. Fourteen commenters felt that the public was not given sufficient time to understand the implications of this ruling. A few commenters felt that the comment period should be extended to allow time to conduct impact analysis and to evaluate the effect of the rule on long term care. Two commenters stated that the comment period should be extended to allow more time to respond to the possible negative impact on resident care and Medicaid accessibility.

Response: While we appreciate all the comments requesting extension of the comment period, it is our belief that the comment period provided was reasonable and sufficient. We believe the thirty-day period was sufficient particularly in view of the intense national publicity given this issue over the last several months and extensive consultation with various stakeholders before the proposed rule was even published. In recognition that States may have budgetary disruptions resulting from the rule, we began advising States earlier this year that new SPAs may not be in effect for long and that long standing plans would need to come into compliance with a final rule change. On July 26, 2000, we issued a State Medicaid Director's letter formally informing States of our intention to publish a proposed rule to modify the current UPL. In addition, HCFA, the Office of the Inspector General and the General Accounting Office testified in September on the scope of the financing practices, their impact on State and Federal spending, and on the ways that States used the increased Federal funds. At this hearing, we informed the Committee and other stakeholders about

our intent to publish a proposed rule and change the current UPL regulations.

We also believe that the proposed transition period allows sufficient time for State legislatures and Medicaid programs to prepare for any budgetary consequences. As stated in our responses to comments on the transition period, our paramount interest in issuing these regulations is to preserve the integrity of the Medicaid program. Under section 1903(a) of the Social Security Act, States are required to share (in accordance with a statutory formula) in the burden of financing the costs of Medicaid covered health care services furnished to eligible individuals. We recognize that States may have diverted Federal matching funds for other purposes (whether health related or not). We provided a transition period which would allow all States that qualify for a transition period to have at least one legislative session to fully analyze and evaluate the effect of the rule and before SPAs would have to comply with the new upper limits.

Comment: One commenter believes that the comment period should be extended for at least 60 days because of concerns regarding the impact of the regulation on hospitals that serve a disproportionate share of low income and indigent patients.

Response: We do not believe that a longer comment period would address these concerns. First, before the publication of the proposed rule, the Administration conducted extensive consultations with many hospitals and associations serving a disproportionate share of low income and indigent patients. The proposed rule has accounted for potential effects on such hospitals by setting the UPL cap at 150 percent of what Medicare payment principles would have paid. In addition, the proposed rule granted transition periods to States to allow time to adjust State budgets to protect certain programs and providers. This transition was intended to balance the need to protect the fiscal integrity of the Medicaid program while accounting for State budget issues and provider impacts.

Delaying Action or Implementation

Comment: A number of commenters recommended that we not impose this regulation until a long term care policy can be developed with two dedicated sources of funding for nursing facilities. One commenter indicated that the regulation should not take effect until there is legislative change to FMAP formula.

Response: Delay in implementing this regulation would be contrary to Medicaid statute and further contribute to the rapid growth in Federal Medicaid spending. Section 1902(a)(30) of the Act requires a State plan to meet certain requirements in setting payment amounts to obtain Medicaid care and services. One of these requirements is that payment for care and services under an approved State Medicaid plan be consistent with efficiency, economy, and quality of care. The Administration has found that the increase in title XIX Federal funding for enhanced payments to nursing homes and hospitals is not consistent with the statutory definition of efficiency and economy. Therefore, the Administration has charged us with the task of ensuring that State Medicaid payments meet the statutory definition of efficiency and economy by issuing this UPL regulation to address the enhanced program payments.

Comment: Several commenters requested that HCFA not enact the proposed rule.

Several commenters recommended that the implementation date be delayed to permit States to develop legislative and fiscal solutions, while one commenter suggested delaying implementation of the rule for 1 year to allow time to work cooperatively with the States to reach mutually agreeable solutions to HCFA's concerns. One commenter recommended that HCFA should assess the procedural and substantive ramifications on State budgets and Medicaid programs before proceeding with this rule.

Response: As stated in our responses to comments on the transition period, our paramount interest in issuing these regulations is to preserve the integrity of the Medicaid program. Under section 1903(a) of the Social Security Act, States are required to share (in accordance with a statutory formula) in the burden of financing the costs of Medicaid covered health care services furnished to eligible individuals. We recognize that States may have diverted Federal matching funds for other purposes (whether health related or not). We provided a transition period which would allow all States who qualify for a transition period to have at least one legislative session to fully analyze, evaluate and assess the procedural and substantive ramifications the rule and before SPAs would have to comply with the new upper limits.

We believe it is appropriate to phase-in the new UPLs over the timeframes proposed in the proposed rule. As addressed in the preamble, States, providers, and beneficiaries expressed concern over how the application of the upper limits would impact Medicaid access and quality of care. We believe that the time permitted in the proposed rule is reasonable and balances the need to protect the fiscal integrity of the Medicaid program and State budget issues.

We would not want to delay the implementation of the rule for one year because that would allow additional States to submit SPAs to take advantage of the current UPL loophole. This could dramatically increase Medicaid expenditures in the near term.

Comments on Impact Analysis

We received comments on the impact analysis of the proposed rule. We invited comment on alternatives we considered and on other possible approaches for achieving our objective to ensure Medicaid service payments are consistent with efficiency and economy. We specifically solicited comment on alternative means of setting the maximum amount that may be paid to public hospitals that have traditionally provided ''safety-net'' care and services to underserved communities and individuals who are uninsured. In addition, we requested information regarding the mechanisms used to finance these hospitals under the existing regulations, as well as suggestions for a means of curbing excessive payments while allowing States the flexibility to recognize higher costs faced by these hospitals.

Comment: We received several comments that were critical of the impact analysis published in the proposed rule. These commenters asserted that the lack of data or uncertainty over how States may respond to the new UPLs does not excuse HCFA from its obligations under the RFA. Several commenters wanted us to provide a better analysis of the impact on small entities, specifically including children's hospitals, as well as the impact on State Medicaid programs before publication of the final rule.

Response: Due to data limitations and uncertainty with respect to how States may re-adjust payments to maintain the same level of Federal Medicaid dollars, we specifically solicited comments on how the new UPLs in this final rule would impact Medicaid participating health care providers. Unfortunately, we did not receive any information that would help us more accurately quantify the impact at the individual provider level. In the proposed rule as well as in this final rule, we have tried to explain the difficulties and complexities of trying to project the potential impact of the new UPLs. Since State Medicaid programs do not routinely report the type of data that would be necessary to

accurately quantify the impact on affected providers, in our analysis we have tried to explain the factors that would cause the regulation to have an impact.

Comment: One commenter took strong exception with our assessment that non-government owned or operated small entities should not be impacted because the UPLs, as proposed, did not apply to them. The commenter stated that many community-service providers depend on Medicaid for a large part of their revenues, and because they have less political influence than hospitals, nursing homes, or physicians, it is likely these small community providers would bear a disproportionate share of payment reductions resulting from the rules. The commenter stated that the State of Michigan claims that the entire cost of its home and community-based waiver (HCBW) program is funded by UPL revenues and according to one State official, the entire community-based program may be eliminated if the UPL rule is adopted.

Response: The commenter's real concern appears to be with State budget priorities, which are beyond the scope of this rule. This rule will not alter federal funding of HCBW services, and will not preclude States from funding their share of such services. We have acknowledged that, in some States, public institutional providers may return these payments to the State and the State may use the returned payments to fund HCBW services. Since States do not report to us on their internal funding sources, we do not have data that would allow us to quantify the effect of potential State budget reductions on some providers because of internal funding shortfalls. The commenter did not furnish any specific data. Moreover, any comments on the impact internal funding shortfalls may have on providers is necessarily speculative since, ultimately, the allocation of State resources is an issue of State discretion beyond federal purview. We have emphasized that, under the new UPLs, States will be able to set service rates that fairly compensate institutional providers. Such rates must be set using a public process that includes input from providers. Non-institutional HCBW services are not subject to this UPL, and rates for those services will not be affected. Furthermore, there are substantial reasons, including civil rights requirements and net cost savings in comparison to institutional services, why States should continue to fund HCBW services. Thus, we do not believe there will be a substantial impact on HCBW services from this rule.

Comment: One Commenter stated that HCFA should ensure that the final rule does not exacerbate the financial stresses that rural hospitals continue to face in light of the myriad provisions of the Balanced Budget Act of 1997 that have resulted in a budget-crushing domino effect.

Response: We do not believe this rule will have a significant impact on rural hospitals. These regulations do not interfere with States' ability to set adequate payment rates for all providers including rural hospitals. In addition, rural hospital owned or operated by local governments may benefit from the higher UPLs set for hospital providers.

Due to data limitations, mainly because States do not routinely report payment information that would allow us to quantify the impact on providers, we have tried, in the absence of data, to explain what would and would not be permitted under the final UPL rules. We have emphasized that the new UPLs will permit States to set service rates that fairly compensate providers. The rules are intended to preclude States from setting rates that far exceed the amount of costs a provider would be expected to incur relative to the services provided to Medicaid individuals.

Comment: Several commenters indicate that the rule changes will put considerable pressure on State budgets. This in turn will make it exceptionally difficult to administer programs for children, the working poor, and community social service programs, all of which provide health care, food, shelter and child care to those populations most in need. It will weaken the part of the health organization and safety-net providers who run these programs because they will no longer have the ability to negotiate for inflationary updates to State health care budgets and may even jeopardize the small updates they have realized for FY 2001. Without these funds, one commenter noted a deficit will result in fractured financing systems and a rising number of uninsured individuals. These shortfalls would have to be offset through tax increases. The commenters added that HCFA should target abuses of the system and control the use of funds.

Response: The Medicaid program is available to assist States in paying for the costs of needed health care services provided to Medicaid eligible individuals. While we appreciate the concern over State budgets and access to non-Medicaid programs, State funding issues are outside of the scope of the Medicaid program. We believe these rules will help ensure that Medicaid payments are used to pay for Medicaid services provided to Medicaid eligible individuals.

Comment: One commenter notes that this regulation will reduce funding to both public hospitals and private hospitals that have emergency rooms or trauma centers. As this funding is used to support safety-net hospitals with emergency rooms and trauma centers, its loss would force the closure of portions of the trauma network. Another impact identified by the commenter is that affected facilities will not be able to provide care to the indigent and uninsured.

Response: We recognize the important role non-State public hospitals play in providing emergency room and trauma care and in caring for the indigent. For these reasons we have set a higher UPL for these facilities. Ultimately, we believe these higher limits will substantially increase the overall amount of Federal funding that will be available to States for inpatient and outpatient hospital expenditures.

Comment: Several commenters asserted that their State and health care facilities stand to lose substantial funding under the implementation of the UPL.

Response: Because commenters did not support these assertions with Medicaid service utilization and payment information, we were not able to use these comments in trying to quantify the impact of these UPLs in this final rule. Since these rules allow States to set reasonable Medicaid service rates, we do not believe the asserted impact can be fairly attributed to the UPLs.

Comments: Several commenters supported grandfathering in existing arrangements.

Response: As we indicated in the preamble, we do not think this alternative would effectively address the problem of excessive Medicaid payments. This approach would permanently permit the continuation of excessive payments by States that are currently making them and therefore would not achieve our objective to have Medicaid payments be consistent with efficiency and economy. We also believe this approach would not withstand legal challenge if it were to be effected through a regulatory change.

Comment: One commenter urged us to consider additional alternatives which would minimize the impact of the rules on children's hospitals. Noting the purpose of the rule, the commenter asserted it is not within those provisions to adopt a rule which will result in the severe underpayment of children's hospitals and threaten their ability to furnish needed health care services.

Response: Because the UPLs will allow States to set rates that compensate providers fairly for needed health care services they furnish to Medicaid individuals, we do not believe children's hospitals will experience underpayments as a result of this rule. This comment appears to more directly relate to State budget priorities which are outside the scope of this rule.

Comment: One commenter disagreed with our assessment that the proposed UPLs are not subject to unfunded mandate reform act. The commenters stated that the term ''Federal Mandate'' as used in the unfunded mandate reform act means any provision in a regulation that imposes an enforceable duty upon State governments including a condition of federal assistance. (2 U.S.C. section 1555) Under the proposed rule, States have an enforceable duty to amend their State plans and claiming procedures. The commenter added that the regulations shift the costs of existing federal mandates currently being assumed by the Federal government through IGTs to the States. The commenter believed the impact is well in excess of $100 million in any one year and, therefore, believed an unfunded mandate reform act impact analysis is required.

Response: We disagree with the commenter and maintain our position that these new upper limits in this final rule have no unfunded mandate implications.

Comment: One commenter noted that our regulatory approach is distinctly superior to any of the other alternatives considered.

Response: We appreciate the commenter's support of our approach. We did explore alternative approaches but none of the options were suitable measures to solve the current situation within the current laws and regulations without changing the statute or taking away some degree of State flexibility.

V. Summary of Changes to the Proposed Rule

In response to comments on the proposed rule and to provide policy clarification and eliminate redundancy, we made a number of changes in the final rule. A summary of these changes is as follows:

- Restructured §§ 447.272 and 447.321 to more clearly present our policy.
- Restructured §§ 447.272(a) and 447.321(a) to identify the different categories of facilities that furnish inpatient and outpatient services, respectively. Under the proposed rule, these categories included State government-owned or operated and non-State government-owned or operated facilities. In this final rule, we added a third category for privately-owned and operated facilities.
- Restructured the regulations at §§ 447.272(a) and 447.321(a) and added language to clarify that ''State government-owned or operated facilities'' are ''all facilities that are either owned or operated by the State'' to clarify that facilities that qualify for both the State-government and non-State government categories must be put into the State government category.
- Restructured §§ 447.272(a) and 447.321(a) and included at paragraph (a)(2) of these sections, the category, ''non-State government-owned or operated facilities'' formerly ''other government-owned or operated facilities.''
- Clarified our definition of non-State-owned or operated facilities to specify that this category includes ''all facilities that are neither owned nor operated by the State.''
- Removed the term ''outpatient hospitals'' from proposed § 447.321(a) and (b) and replaced it with the phrase ''outpatient services furnished by hospitals.''
- Provided clarification in §§ 447.272 and 447.321 for references to the term ''services'' by replacing it with the phrase ''services furnished by the group of facilities.''
- Added §§ 447.272(e) and 447.321(e) to provide the provisions for our ''Transition periods''.
- Clarified that States with approved payment methodologies before October 1, 1999 and subsequently amended may select either transition option.
- Modified the short transition period in § 447.272(e) and § 447.321(e) so that it does not erroneously does not make reference to States with excessive payment amendments approved after the publication date of the rule.
- Modified the transition period in § 447.272(e) and § 447.321(e) to add a third transition period for State plan amendments effective on or before October 1, 1992 based on section 705 of BIPA.
- Added §§ 447.272(f) and 447.321(f) to include reporting requirements for States that make Medicaid payments to non-State public providers and providers within the groups of providers that exceed the UPL during the transition period on a facility specific basis.
- Specified in the preamble that residential treatment facilities are governed by regulations at § 447.325, ''Other inpatient and outpatient facility services: Upper Limits of Payment.
- Clarified that the institutional UPL specified in the final rule will continue to apply only to fee-for-service payments, and we made it clear that it is not appropriate to include managed care services and payments in the UPL specified in this regulation.
- Specified that changes in the budget neutrality ceilings for section 1115 demonstration programs become effective upon the effective date of the new law or regulation that necessitated the change.
- Clarified in the preamble that these UPLs do not regulate IGTs.
- Revised the regulations to update our references to the Balanced Budget Act of 1997 legislation for DSH requirements. (See § 447.272(c)(3) and § 447.321(c)(3))

VI. Collection of Information Requirements—Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA), agencies are required to solicit public comment when a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. To fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA requires that we solicit comments on the following issues:

- Whether the information collection is necessary and useful to carry out the proper functions of the agency;
- The accuracy of the agency's estimate of the information collection burden;
- The quality, utility, and clarity of the information to be collected; and
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

Therefore, we are soliciting public comment on each of these issues for the information collection requirements discussed below.

Section 447.272 Inpatient Services: Application of Upper Payment Limits

For payments that exceed the 100 percent limit, the agency must annually report to HCFA the total Medicaid payments made to each hospital described under paragraph (c)(1) of this section and the reasonable estimate of the amount that would be paid for the services furnished by each hospital under Medicare payment principles. In addition, States that are eligible for a transition period described in paragraph (e) of this section, and that make payment that exceed the limit under paragraph (b) of this section, must report annually to HCFA the total

Medicaid payments made to each Facility and a reasonable estimate of the amount that would be paid for the services furnished by the facility under Medicare payment principles.

It is estimated that there will be approximately 57 State agency reports submitted on an annual basis and that it will take 8 hours per instance to submit the reporting requirements to HCFA. The total amount burden associated with this requirement is 456 hours.

Section 447.321 Outpatient Hospital Services: Application of Upper Payment Limits.

For payments that exceed the 100 percent limit, the agency must annually report to HCFA the total Medicaid payments made to each hospital described under paragraph (c)(1) of this section and the reasonable estimate of the amount that would be paid for the services furnished by each hospital under Medicare payment principles. In addition, States that are eligible for a transaction period described in paragraph (e) of this section, and that make payment that exceed the limit under paragraph (b) of this section, must report annually to HCFA the total Medicaid payments made to each Facility and a reasonable estimate of the amount that would be paid for the services furnished by the facility under Medicare payment principles.

It is estimated that there will be approximately 31 State agency reports submitted on an annual basis and that it will take 8 hours per instance to submit the reporting requirements to HCFA. The total annual burden associated with this requirement is 248 hours.

We have submitted a copy of this final rule to OMB for its review of the information collection requirements in §§ 447.272 and 447.321. These requirements are not effective until they have been approved by OMB.

If you have any comments on any of these information collection and record keeping requirements, please mail the original and 3 copies within 30 days of this publication date directly to the following:

Health Care Financing Administration, Office of Information Services, Information Technology Investment Management Group, Division of HCFA Enterprise Standards, Room N2–14–26, 7500 Security Boulevard, Baltimore, MD 21244–1850. Attn: John Burke HCFA–2071–F;

Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Brenda Aguilar, HCFA Desk Officer.

VII. Regulatory Impact Analysis

A. Overall Impact

We have examined the impact of this final rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review) and the Regulatory Flexibility Act (RFA) (September 19, 1980, Public Law 96–354). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any one year). We consider this final rule to be a major rule and we have provided an analysis below.

The RFA requires agencies to analyze options for regulatory relief of small businesses, nonprofit organizations and government agencies. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $5 million or less annually. For purposes of the RFA, many hospitals, nursing facilities and intermediate care facilities are considered to be small entities. Individuals and States are not included in the definition of a small entity.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 50 beds.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in expenditure in any one year by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million. We do not believe that this threshold applies for this final rule.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. We do not believe this final rule in any way imposes substantial direct compliance costs on State and local governments or preempts or supersedes State or local law.

As we explained in the proposed rule and reiterate in more detail below, the impact of the new UPLs are highly uncertain. To be impacted by the regulation, a State would have to be making payments to government providers as a class that substantially exceed a reasonable estimate of the costs expected to be incurred based on the volume of services furnished to Medicaid eligible individuals by that class of providers.

A. Anticipated Effects

Effects on States and Medicaid programs

In this final regulation we have attempted to estimate the aggregate impact these new rules will have on Federal reimbursements to States for Medicaid expenditures.

Impact on the Federal Budget Baseline

The estimated impact of this final rule on the President's FY 2001 budget baseline is shown in the table below:

[Dollars in Billions]

	FFY 2001	FFY 2002	FFY 2003	FFY 2004	FFY 2005	FFY 2006	Total
Federal Share of Enhanced payments in Medicaid FY 2001 budget baseline[1]	2.9	3.0	3.2	3.3	3.5	3.6	19.5
Estimated payments in excess of UPL[2]	1.9	2.0	2.1	2.2	2.3	2.5	13.0
Estimated reduction in FFP as a result of phase-down of excess payments[3]	0.0	−0.2	−0.6	−1.1	−1.6	−2.0	−5.4
Estimated increase in FFP from raising UPL for hospitals[4]	0.1	0.4	0.6	0.8	1.0	1.1	4.0
Net change in FFP (sum of previous two lines—may not add due to rounding)	0.1	0.2	0.0	−0.3	−0.5	−0.9	−1.4

[1] Derived from fiscal estimates submitted with State plan amendments approved by HCFA before 10/1/99; projected using President's FY 2001 budget growth rates.

[2] Based on data on government non-State providers from Online Survey and Certification Reporting System (OSCAR) and Medicaid financial management data.
[3] Calculated using transition UPL formula described in this rule (See Table illustrative example.)
[4] FFP on increase in spending anticipated as a result of raising the UPL for hospital services from 100 percent to 150 percent of what would be paid using Medicare payment principles.

As indicated in the table, these estimates have been derived from a number of sources, including the States' own estimates of the fiscal impact of enhanced payment arrangements, data on the number and types of providers of nursing home and inpatient and outpatient hospital services, Medicaid financial management data, and Medicaid budget projections developed for the President's FY 2001 budget. In addition, we also consulted draft reports, prepared by the Inspector General of the Department of Health and Human Services, on the use of intergovernmental transfers to finance enhanced Medicaid payments.

We have identified 29 States with approved and/or pending rate proposals that target enhanced Medicaid payments to hospitals and NF facilities that are owned or operated by county or local governments. There are 18 States with approved State plan amendments or waivers and 5 States with pending plan amendments. In addition, there are 6 States that have both approved and pending plan amendments. We estimate that these proposals currently account for approximately $4.5 billion in Federal spending in FY 2001. This estimate is based on State-reported Federal fiscal information submitted with State plan amendments and State expenditure information where available. It may be understated or overstated to the degree that actual State expenditures would vary from the estimates included with State plan submissions. For example, a State could include a provision in its State Medicaid plan that would enable it to spend up to allowable amounts by making additional payments to designated facilities. Under this scenario, if the upper payment limitation permitted the State to spend an additional $200 million, the actual annual expenditure could vary from zero to $200 million depending upon the State's willingness to finance its share of the payment.

As indicated in the table above, we estimate that about $2.9 billion of this $4.5 billion in FY 2001 is currently reflected in the Medicaid budget baseline, and that about two-thirds of this amount ($1.9 billion in FFY 2001) currently exceeds the upper payment limit imposed by this rule. These excess payments will be phased down beginning in FY 2002 and, as shown in the table, are projected to result in a cumulative FFP reduction of $5.4 billion by FY 2006. (Note: Our estimates do not include excess payment amounts subject to the 2-year transition period for non-compliant plan amendments effective on or after October 1, 1999, since these payment amounts are not included in the President's FY 2001 budget baseline. According to fiscal impact estimates submitted with State plan amendments, these plans entail about $0.9 billion in annual FFP for enhanced payments.) Because some States may be using the Federal share of enhanced payments in a manner that allows some funds to be reinvested in Medicaid (and thereby drawing down additional FFP), the potential impact of this reduction in FFP may extend to other Medicaid services not reflected in the above spending.

It is important to note that, although it will reduce FFP on excess enhanced payments as estimated above, this regulation does not reduce the overall aggregate amount States can spend on Medicaid services or place a fixed ceiling on the amount of State spending that will be eligible for Federal matching dollars. Under the limitations in this final rule, States will be able to set reasonable rates as determined under Medicare payment principles for Medicaid services furnished by public facilities to eligible individuals. The amount of spending permitted under the limits will vary directly with the amount of Medicaid services furnished by public facilities to eligible individuals. While this final rule does not affect the overall aggregate amount States can spend, by setting an upper payment limit for government facilities, it may impact how States distribute available funding to participating health care facilities.

In addition to potential reductions in FFP, this rule will also provide opportunities for increased spending through the provisions which increase the UPL for non-State government-owned or operated hospitals to 150 percent of the amount which would have been paid for inpatient or outpatient services under Medicare payment principles. As shown in the table, based on current projections of Medicaid fee-for-service inpatient and outpatient expenditures, we estimate that increasing payment rates for these services to 150 percent of Medicare-based rates could add $4 billion to federal reimbursements for State Medicaid expenditures over the next six years.

Impact on Medicaid Spending Beyond the Current Budget Baseline

Projections completed since the President's FY 2001 budget now indicate that the Federal share of enhanced payments to government facilities that are not State-owned or operated could reach $10 billion per year by FY 2006 and may account for cumulative spending of more than $90 billion over the next ten years. These projections include States with approved or pending plan amendments and assume that one-half of the remaining States would eventually submit amendments providing for enhanced payments in the absence of these revised rules.

Based on the preceding budget analysis, potentially two-thirds of these enhanced payments could be in excess of the upper payment limits imposed by this final rule and could result in FFP reductions of nearly $55 billion over the next 10 years.

Since our estimates of the potential impact of the policies implemented by this regulation exceed $100 million annually, we consider this final rule to be a major rule.

Audit Results From the Office of the Inspector General (OIG)

Earlier this year, OIG initiated audits on 7 hospital and nursing facility rate enhancement programs in 6 States. The OIG has completed and forwarded draft audit reports to HCFA on 4 nursing facility programs. These audit reports provide considerable detail on each State's enhancement program. The reports also illustrate how each audited program would be impacted if States reduced payments to the new allowable UPL levels and chose not to reinvest the excess payments to support other Medicaid activities that are eligible for Federal matching. In the table below, we have listed the dollar amounts associated with each State's enhancement program. The table shows the base amount, the new UPL at the end of the transition period, and the amount in the base that exceeds the new UPL.

OIG STATE REPORT

[Dollars in millions]

State	Base enhancement	New UPL amount	Excess above UPL
Pennsylvania	$858	$127	$731
Alabama	28.8	1.55	27.25
Nebraska	47.6	11	36.6
Washington State	76.2	2.8	73.4
Total	1005.6	142.35	863.25

C. Effects on Providers

The chart below indicates the types and number of providers potentially affected by this final rule in all 50 States and the District of Columbia. We included facilities in all 50 States because although not every State is currently making enhanced payments to government non-State-owned or -operated facilities, this rule will prevent new proposals from all States in the future. We do not believe any State has payment arrangements with providers of ICF/MR services or clinic services that will be affected by this final rule and, therefore, we did not include those providers in the chart below.

POTENTIALLY AFFECTED PROVIDERS BY NUMBER AND TYPE

Provider type	Government State-owned or operated	Government Non-State-owned or operated	Total
Nursing Facilities	[1] N/A	892	892
Hospitals	[2] 254	1,275	1,529

[1] These facilities are already subject to a separate aggregate upper payment limit and will not be affected by the final rule.
[2] Only hospitals that provide outpatient hospital services may be impacted as inpatient hospital services are already subject to a separate aggregate limit.

As explained earlier in the preamble, it is very difficult to predict how States will respond to this final rule and consequently how State decisions will impact Medicaid providers. Each State makes its own budgetary and rate setting decisions. Since we do not collect information about the specific services that facilities use Medicaid payments to support, we cannot determine how potential payment rate adjustments will affect providers or the patients they serve. Under the upper payment limits in this final rule, States will continue to be able to set rates that provide fair compensation for Medicaid services furnished to Medicaid patients. In addition, hospitals owned or operated by local governments could still receive higher payments than other hospitals since this rule provides for a higher upper payment limit for the facilities. We believe this will ensure Medicaid access to the safety-net providers and minimize the impact on those providers. Additionally, if these hospitals furnish services to indigent patients, they may qualify as a DSH and qualify for funding under a State's program.

With respect to the impact on small rural hospitals, we do not believe the final rule will have a significant overall impact on rural hospitals. With respect to Medicaid services furnished by rural hospitals, the upper payment limits in the final rule do not interfere with States setting rates that result in fair compensation. Additionally, rural hospitals that are owned or operated by local governments should be able to benefit from the higher upper payment limits for inpatient and outpatient hospital services. Finally, if a rural hospital provides services to indigent patients, they may qualify as a DSH and qualify for funding under a State's DSH payment program.

D. Alternatives Considered

Section 1902(a)(30) of the Act requires in part that Medicaid service payments be consistent with efficiency and economy. In addition to the interpretation we are providing in this final rule, we considered several other alternatives to ensure Medicaid service payments are consistent with economy and efficiency. In this section, we will explain these other alternatives and why we did not select them.

1. Facility-Specific Upper Payment Limit

Under this option, Medicaid spending would be limited to a provider-specific application of Medicare payment principles. FFP would not be available on the amount of Medicaid service payment in excess of what a provider would have been paid using Medicare payment principles. These limits would be applied to all institutions, or just to public institutions where the incentives for overpayment are significant. While a facility-specific limitation may be the most effective method to ensure State service payments are consistent with economy and efficiency, when balanced against the additional administrative requirements on States and HCFA, coupled with Congressional intent for States to have flexibility in rate setting, we are not sure that the increased amount of cost efficiency, if any, justifies this approach as a viable option.

2. Government-Owned or Operated Facilities Upper Payment Limit

This option would limit, in the aggregate, the amount of payment States can make to public providers. Under this option, State and local government providers would be grouped together and payments to them as a group could not exceed an aggregate limit. The aggregate limit would continue to be based on Medicare payment principles. This option, relative to upper payment limitations provided in this final rule, would have allowed States to exercise more flexibility granted to them in the rate setting process. While this option permits more flexibility, we believe the

aggregation of Medicaid service payments by all types of government providers would have the unintended consequence of reopening differential rate issues between State facilities and other types of government facilities.

3. Intergovernmental Transfers (IGTs)

Because in many cases we believe there is a connection between excessive payments and IGTs, we gave consideration to formulating policy with respect to them. Generally, States have a genuine incentive to set Medicaid service rates at levels consistent with economy and efficiency since they share the financial responsibility with the Federal Government. However, as explained earlier, the ability of government counties to make IGTs create incentives for States to overpay these government facilities to generate enhanced Federal matching payment. However, we did not pursue this alternative because we recognize that States, counties, and cities have developed their own unique arrangements for sharing in Medicaid costs. Furthermore, there are statutory limitations placed on the Secretary which limit the authority to place restrictions on IGTs.

4. ''Grandfathering'' Existing Arrangements

Under this option, we would not approve any new plan amendments after the effective date of the final rule but would allow those that have been approved to continue operating. This would permit States that are currently making excessive payments to local government facilities to continue making such payments indefinitely. However, allowing some States to permanently continue making excessive payments solely because they were approved before this rule is published and effective appears to be arbitrary, capricious, and inconsistent with our administrative authority.

E. The Unfunded Mandates Act

The Unfunded Mandate Reform Act of 1995 also requires (in section 202) that agencies perform an assessment of anticipated costs and benefits before proposing a rule that may result in a mandated expenditure in any one year by State, local, or Tribal governments, in aggregate, or by the private sector, of $100 million. Absent FFP, we do not believe States will continue to set excessive payment rates for Medicaid services furnished by government providers. Generally, discontinuing an expenditure should not result in new costs, unless the State has to fund the portion of the expenditure that is no longer Federally funded with all State and local dollars. There are no Federal requirements under the Medicaid statute that mandate States to make these types of excessive Medicaid payments to public providers. To the contrary, the Medicaid statute requires that Medicaid plans ensure that payments to providers under the State Medicaid plan are consistent with efficiency and economy. Under the standard set forth in this rule, State Medicaid payments to providers under the State Medicaid plan may be set at levels that are consistent with efficiency and economy, and no additional payments are required. We do not believe the aggregate upper payment limits in this final rule have any unfunded mandate implications because they do not require any additional expenditures by States to providers under their Medicaid program.

F. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct compliance costs on State and local governments, preempts State law, or otherwise has Federalism implications. In developing the interpretative policies set forth in this final rule, we met with interested parties and listened to their ideas and concerns. These discussions were held with members of Congress and their staff and with various associations representing State and local governments, including the National Governors' Association, the National Conference of State Legislatures, and the National Association of State Medicaid Directors. In addition, we met with many hospital associations, advocacy groups, labor organizations, and numerous other interested parties.

G. Conclusion

The financial implications of this final rule are highly uncertain for the reasons we have previously indicated. We anticipate that many State Medicaid programs will be unaffected by the upper payment limits. With respect to affected States, to some degree we will be limiting flexibility in the management of their Medicaid programs. If these States wish to continue to make payments in excess of the aggregate upper payment limits, they will have to fund the excess amount with only State and local resources. In the absence of FFP, we anticipate States will reinvest these resources to support other Medicaid activities to take advantage of and maintain Federal resources. Should States realign their payment systems or divert State matching dollars to support other Medicaid activities, the total amount of available Federal funds should remain unchanged.

Executive Order 12866

In accordance with the provisions of Executive Order 12866, this final rule was reviewed by the Office of Management and Budget.

List of Subjects in 42 CFR Part 447

Accounting, Administrative practice and procedure, Drugs, Grant programs-health, Health facilities, Health professions, Medicaid, Reporting and recordkeeping requirements, Rural areas.

42 CFR part 447 is amended as set forth below:

PART 447—PAYMENTS FOR SERVICES

1. The authority citation for part 447 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. Section § 447.272 is revised to read as follows:

§ 447.272 Inpatient services: Application of upper payment limits.

(a) *Scope.* This section applies to rates set by the agency to pay for inpatient services furnished by hospitals, NFs, and ICFs/MR within one of the following categories:

(1) State government-owned or operated facilities (that is, all facilities that are either owned or operated by the State).

(2) Non-State government-owned or operated facilities (that is, all government facilities that are neither owned nor operated by the State).

(3) Privately-owned and operated facilities.

(b) *General rule.* Except as provided in paragraph (c) of this section, aggregate Medicaid payments to a group of facilities within one of the categories described in paragraph (a) of this section may not exceed a reasonable estimate of the amount that would be paid for the services furnished by the group of facilities under Medicare payment principles in subchapter B of this chapter.

(c) *Exceptions*—(1) *Non-State government-owned or operated hospitals.* The aggregate Medicaid payments may not exceed 150 percent of a reasonable estimate of the amount that would be paid for the services furnished by these hospitals under Medicare payment principles in subchapter B of this chapter.

(2) *Indian Health Services and tribal facilities.* The limitation in paragraph (b) of this section does not apply to Indian Health Services facilities and tribal facilities that are funded through the Indian Self-Determination and Education Assistance Act (Public Law 93–638).

(3) *Disproportionate share hospitals.* The limitation in paragraph (b) of this section does not apply to payment adjustments made under section 1923 of the Act that are made under a State plan to hospitals found to serve a disproportionate number of low-income patients with special needs as provided in section 1902(a)(13)(A)(iv) of the Act. Disproportionate share hospital (DSH) payments are subject to the following limits:

(i) The aggregate DSH limit using the Federal share of the DSH limit under section 1923(f) of the Act.

(ii) The hospital-specific DSH limit in section 1923(g) of the Act.

(iii) The aggregate DSH limit for institutions for mental disease (IMDs) under section 1923(h) of the Act.

(d) *Compliance date.* Except as permitted under paragraph (e) of this section, a State must comply with the upper payment limit described in paragraph (b) of this section by March 13, 2001.

(e) *Transition periods*—(1) *Definitions.* For purposes of this paragraph, the following definitions apply:

(i) *Transition period* refers to the period of time beginning March 13, 2001 through the end of one of the schedules permitted under paragraph (e)(2)(ii) of this section.

(ii) *UPL* stands for the maximum payment level under the upper payment limit described in paragraph (b) of this section for the referenced year.

(iii) *X* stands for the payments to a specific group of providers described in paragraphs (a)(2) and (a)(3) of this section in State FY 2000 that exceeded the amount that would have been under the upper payment limit described in paragraph (b) of this section if that limit had been applied to that year.

(2) *General rules.* (i) The amount that a State's payment exceeded the upper payment limit described in paragraph (b) of this section must not increase.

(ii) A State with an approved State plan amendment payment provision effective on one of the following dates and that makes payments that exceed the upper payment limit described in paragraph (b) of this section to providers described in paragraphs (a)(2) and (a)(3) of this section may follow the respective transition schedule:

(A) For approved plan provisions that are effective on or after October 1, 1999, payments may exceed the limit in paragraph (b) of this section until September 30, 2002.

(B) *For approved plan provisions that are effective after October 1, 1992 and before October 1, 1999, payments during the transition period may not exceed the following*—

(*1*) For State FY 2003: State FY 2003 UPL + .75X.

(*2*) For State FY 2004: State FY 2004 UPL + .50X.

(*3*) For State FY 2005: State FY 2005 UPL + .25X.

(*4*) For State FY 2006; State FY 2006 UPL.

(C) *For approved plan provisions that are effective on or before October 1, 1992, payments during the transition period may not exceed the following:*

(*1*) For State FY 2004: State FY 2004 UPL + .85X.

(*2*) For State FY 2005: State FY 2005 UPL + .70X.

(*3*) For State FY 2006: State FY 2006 UPL + .55X.

(*4*) For State FY 2007: State FY 2007 UPL + .40X.

(*5*) For State FY 2008: State FY 2008 UPL + .25X.

(*6*) For the portion of State FY 2009 before October 1, 2008: State FY 2009 UPL + .10X.

(*7*) Beginning October 1, 2008: UPL described in paragraph (b) of this section.

(*8*) When State FY 2003 begins after September 30, 2002, the reduction schedule in paragraphs (e)(2)(ii)(C)(*1*) through (e)(2)(ii)(C)(*7*) will begin on State FY 2003.

(iii) If a State meets the criteria in paragraph (e)(2)(ii) of this section and its State plan amendment expires before the end of the applicable transition period, the State may continue making payments that exceed the UPL described in paragraph (b) of this section in accordance with the applicable transition schedule described in paragraph (e)(2)(ii) of this section.

(f) *Reporting requirements.* If the reporting requirements in paragraphs (f)(1) and (f)(2) of this section apply, a State must include payments for services furnished during the entire State FY.

(1) *Non-State government-owned or operated hospitals.* If a State makes payments to a group of facilities in this category that exceed the limit under paragraph (b) of this section, the agency must annually report the following information to HCFA:

(i) The total Medicaid payments made to each hospital described under paragraph (c)(1) of this section.

(ii) The reasonable estimate of the amount that would be paid for the services furnished by each hospital under Medicare payment principles.

(2) *Payments during the transition periods.* States that are eligible for a transition period described in paragraph (e) of this section, and that make payments that exceed the limit under paragraph (b) of this section, must report annually the following information to HCFA:

(i) The total Medicaid payments made to each facility.

(ii) A reasonable estimate of the amount that would be paid for the services furnished by the facility under Medicare payment principles.

3. Section 447.304 is amended by revising paragraph (c) and the note that follows paragraph (c) to read as follows:

§ 447.304 Adherence to upper limits; FFP.

* * * * *

(c) FFP is not available for a State's expenditures for services that are in excess of the amounts allowable under this subpart.

Note: The Secretary may waive any limitation on reimbursement imposed by subpart F of this part for experiments conducted under section 402 of Pub. L. 90–428, Incentives for Economy Experimentation, as amended by section 222(b) of Pub. L. 92–603, and under section 222(a) of Pub. L. 92–603.

4. Section 447.321 is revised to read as follows:

§ 447.321 Outpatient hospital and clinic services: Application of upper payment limits.

(a) *Scope.* This section applies to rates set by the agency to pay for outpatient services furnished by hospitals and clinics within one of the following categories:

(1) State government-owned or operated facilities (that is, all facilities that are either owned or operated by the State).

(2) Non-State government-owned or operated facilities (that is, all government facilities that are neither owned nor operated by the State).

(3) Privately-owned and operated facilities.

(b) *General rule.* Except as provided for in paragraph (c) of this section, aggregate Medicaid payments to a group of facilities within one of the categories described in paragraph (a) of this section may not exceed a reasonable estimate of the amount that would be paid for the services furnished by the group of facilities under Medicare payment principles specified in subchapter B of this chapter.

(c) *Exceptions*—(1) *Non-State government-owned or operated*

hospitals. The aggregate Medicaid payments may not exceed 150 percent of a reasonable estimate of the amount that would be paid for the services furnished by these hospitals under Medicare payment principles in subchapter B of this chapter.

(2) *Indian Health Services and tribal facilities.* The limitation in paragraph (b) of this section does not apply to Indian Health Services facilities and tribal facilities that are funded through the Indian Self-Determination and Education Assistance Act (Public Law 93–638).

(d) *Compliance date.* Except as permitted under paragraph (e) of this section, a State must comply with the upper payment limit described in paragraph (b) of this section by March 13, 2001.

(e) *Transition periods*—(1) *Definitions.* For purposes of this paragraph, the following definitions apply:

(i) *Transition period* refers to the period of time beginning March 13, 2001 through the end of one of the schedules permitted under paragraph (e)(2)(ii) of this section.

(ii) *UPL* stands for the maximum payment level under the upper payment limit described in paragraph (b) of this section for the referenced year.

(iii) *X* stands for the payments to a specific group of providers described in paragraph (a) of this section in State FY 2000 that exceeded the amount that would have been under the upper payment limit described in paragraph (b) of this section if that limit had been applied to that year.

(2) *General rules.* (i) The amount that a State's payment exceeded the upper payment limit described in paragraph (b) of this section must not increase.

(ii) A State with an approved State plan amendment payment provision effective on one of the following dates and that makes payments that exceed the upper payment limit described in paragraph (b) of this section to providers described in paragraph (a) of this section may follow the respective transition schedule:

(A) For approved plan provisions that are effective on or after October 1, 1999, payments may exceed the limit in paragraph (b) of this section until September 30, 2002.

(B) *For approved plan provisions that are effective after October 1, 1992 and before October 1, 1999, payments during the transition period may not exceed the following*—

(*1*) For State FY 2003: State FY 2003 UPL + .75X.

(*2*) For State FY 2004: State FY 2004 UPL + .50X.

(*3*) For State FY 2005: State FY 2005 UPL + .25X.

(*4*) For State FY 2006; State FY 2006 UPL.

(C) *For approved plan provisions that are effective on or before October 1, 1992, payments during the transition period may not exceed the following:*

(*1*) For State FY 2004: State FY 2004 UPL + .85X.

(*2*) For State FY 2005: State FY 2005 UPL + .70X.

(*3*) For State FY 2006: State FY 2006 UPL + .55X.

(*4*) For State FY 2007: State FY 2007 UPL + .40X.

(*5*) For State FY 2008: State FY 2008 UPL + .25X.

(*6*) For the portion of State FY 2009 before October 1, 2008: State FY 2009 UPL + .10X.

(*7*) Beginning October 1, 2008: UPL described in paragraph (b) of this section.

(*8*) When State FY 2003 begins after September 30, 2002, the reduction schedule in paragraphs (e)(2)(ii)(C)(1) through (e)(2)(ii)(C)(7) will begin on State FY 2003.

(iii) If a State meets the criteria in paragraph (e)(2)(ii) of this section and its State plan amendment expires before the end of the applicable transition period, the State may continue making payments that exceed the UPL described in paragraph (b) of this section in accordance with the applicable transition schedule described in paragraph (e)(2)(ii) of this section.

(f) *Reporting requirements.* If the reporting requirements in paragraphs (f)(1) and (f)(2) of this section apply, a State must include payments for services furnished during the entire State FY.

(1) *Non-State government-owned or operated hospitals.* If a State makes payments to a group of facilities in this category that exceed the limit under paragraph (b) of this section, the agency must annually report the following information to HCFA:

(i) The total Medicaid payments made to each hospital described under paragraph (c)(1) of this section.

(ii) The reasonable estimate of the amount that would be paid for the services furnished by each hospital under Medicare payment principles.

(2) *Payments during the transition periods.* States that are eligible for a transition period described in paragraph (e) of this section, and that make payment that exceed the limit under paragraph (b) of this section, must report annually the following information to HCFA:

(i) The total Medicaid payments made to each facility.

(ii) A reasonable estimate of the amount that would be paid for the services furnished by the facility under Medicare payment principles.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: December 20, 2000.

Robert A. Berenson,

Acting Deputy Administrator, Health Care Financing Administration.

Dated: December 20, 2000.

Donna E. Shalala,

Secretary.

[FR Doc. 01–635 Filed 1–5–01; 11:30 am]

BILLING CODE 4120–01–P

Federal Register

Friday,
January 12, 2001

Part IV

Environmental Protection Agency

40 CFR Part 63

National Emission Standards for Hazardous Air Pollutants for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[FRL–6919–9]

RIN 2060–AI34

National Emission Standards for Hazardous Air Pollutants for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action promulgates national emission standards for hazardous air pollutants (NESHAP) for new and existing sources used in chemical recovery processes at kraft, soda, sulfite, and stand-alone semichemical pulp mills. Hazardous air pollutants (HAP) that are regulated by this final rule include gaseous organic HAP and HAP metals. The adverse health effects of exposure to these HAP can include cancer, reproductive and developmental effects, gastrointestinal effects, damage to the nervous system, and irritation to the eyes, skin, and respiratory system. Emissions of other pollutants from these sources include particulate matter (PM), volatile organic compounds (VOC), carbon monoxide (CO), sulfur dioxide (SO_2), and nitrogen oxides (NO_X).

This final rule implements section 112(d) of the Clean Air Act (CAA) and is based on the Administrator's determination that chemical recovery combustion sources at kraft, soda, sulfite, and stand-alone semichemical pulp mills are major sources of HAP emissions. The final rule is intended to protect public health by requiring chemical recovery combustion sources to meet standards reflecting the application of the maximum achievable control technology (MACT) to control HAP emissions from these sources. Implementation of this rule will reduce emissions of HAP by approximately 2,500 megagrams per year (Mg/yr) (2,700 tons per year (tpy)) and emissions of other pollutants by approximately 107,900 Mg/yr (118,900 tpy).

EFFECTIVE DATE: March 13, 2001.

ADDRESSES: Docket No. A–94–67, containing information considered by EPA in developing the promulgated standards, is available for public inspection between 8:00 a.m. and 5:30 p.m., Monday through Friday, excluding Federal holidays, at the following address: U.S. EPA, Air and Radiation Docket and Information Center (6102), 401 M Street SW, Washington, DC 20460, telephone (202) 260–7548. The docket is located at the above address in room M–1500, Waterside Mall (ground floor). A reasonable fee may be charged for copying docket materials.

FOR FURTHER INFORMATION CONTACT: For further information concerning applicability and rule determinations, contact the appropriate State or local agency representative. If no State or local representative is available, contact the EPA Regional Office staff listed in the **SUPPLEMENTARY INFORMATION** section of this preamble. For information concerning the analyses performed in developing this rule, contact Mr. Jeff Telander, Minerals and Inorganic Chemicals Group, Emission Standards Division (MD–13), Office of Air Quality Planning and Standards, U.S. EPA, Research Triangle Park, North Carolina 27711, telephone number (919) 541–5427, facsimile number (919) 541–5600, electronic mail address telander.jeff@epa.gov.

SUPPLEMENTARY INFORMATION:

Regulated Entities

Categories and entities potentially regulated by this action are those kraft, soda, sulfite, and stand-alone semichemical pulp mills with chemical recovery processes that involve the combustion of spent pulping liquor. Categories and entities potentially regulated by this action include:

Category	SIC code	NAICS code	Examples of regulated entities
Industry	2611, 2621, 2631	32211, 32212, 32213	Kraft, soda, sulfite, and stand-alone semichemical pulp mills.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. To determine whether your facility is regulated by this action, you should examine the applicability criteria in § 63.860 of the final rule. If you have questions regarding the applicability of this action to a particular entity, consult the appropriate EPA Regional Office representative listed below:

U.S. EPA Region I—Director, Air Compliance Program; 1 Congress Street; Suite 1100 (SEA); Boston, MA 02114–2023; Phone: (617) 918–1650; Fax: (617) 918–1505.

U.S. EPA Region II—Air Compliance Branch; 290 Broadway; New York, NY 10007; Phone: (212) 637–4080; Fax: (212) 637–3998.

U.S. EPA Region III—Chief, Air Enforcement Branch (3AP12); 1650 Arch Street; Philadelphia, PA 19103–2029; Phone: (215) 814–3438; Fax: (215) 814–2134; Region III Office Website: http://www.epa.gov/reg3artd/hazpollut/hazairpol.htm.

U.S. EPA Region IV—Air and Radiation Technology Branch; Atlanta Federal Center; 61 Forsyth Street; Atlanta, Georgia 30303–3104; Phone: (404) 562–9105; Fax: (404) 562–9095.

U.S. EPA Region V—Air Enforcement and Compliance Assurance Branch (AE–17J); 77 West Jackson Boulevard; Chicago, IL 60604–3590; Phone: (312) 353–2088; Fax: (312) 353–8289.

U.S. EPA Region VI—Chief, Toxics Enforcement Section (6EN–AT); 1445 Ross Avenue; Dallas, TX 75202–2733; Phone: (214) 665–7224; Fax: (214) 665–7446; Region VI Office Website: www.epa.gov/region6.

U.S. EPA Region VII—901 N. 5th Street; Kansas City, KS 66101; Phone: (913) 551–7020; Fax: (913) 551–7844; http://www.epa.gov/region07/programs/artd/air/toxics/airtox1.htm.

U.S. EPA Region VIII—Air Enforcement Program (8ENF–T); 999 18th Street Suite 500; Denver, CO 80202; Phone: (303) 312–6312; Fax: (303) 312–6409.

U.S. EPA Region IX—Air Division; 75 Hawthorne Street; San Francisco, CA 94105; Phone: (415) 744–1219; Fax: (415) 744–1076.

U.S. EPA Region X—Office of Air Quality (OAQ–107); 1200 Sixth Avenue; Seattle, WA 98101; Phone: (206) 553–4273; Fax: (206) 553–0110.

Judicial Review

The NESHAP for chemical recovery combustion sources at kraft, soda, sulfite, and semichemical pulp mills was proposed on April 15, 1998 (63 FR 18783). Today's action announces EPA's final decisions on the rule. Under section 307(b)(1) of the CAA, judicial review of the final rule is available by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by March 13, 2001. Only those objections to this rule which were raised with reasonable specificity during the period for public comment may be raised during judicial review. Under section 307(b)(2) of the CAA, the requirements that are the subject of today's final rule may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

World Wide Web (WWW)

In addition to being available in the docket, an electronic copy of today's final rule will also be available on the WWW through the Technology Transfer Network (TTN). Following the Administrator's signature, a copy of the rule will be posted on the TTN's policy and guidance page for newly proposed or final rules at http://www.epa.gov/ttn/oarpg/t3pfpr.html. The TTN provides information and technology exchange in various areas of air pollution control. If more information regarding the TTN is needed, call the TTN HELP line at (919) 541–5384.

Outline

The following outline is provided to aid in reading this preamble to the final rule.

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C. Performance Test Requirements
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E. Unfunded Mandates Reform Act of 1995
F. Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*
G. Paperwork Reduction Act
H. National Technology Transfer and Advancement Act of 1995
I. Congressional Review Act

I. Background and Public Participation

Section 112 of the CAA requires EPA to list categories and subcategories of major sources and area sources of HAP and to establish NESHAP for the listed source categories and subcategories. Major sources of HAP are those that have the potential to emit greater than 9.07 Mg/yr (10 tpy) of any one HAP or 22.68 Mg/yr (25 tpy) of any combination of HAP.

Section 112 of the CAA requires that we establish NESHAP for the control of HAP from both new and existing major sources. The CAA requires the NESHAP to reflect the maximum degree of reduction in emissions of HAP that is achievable. This level of control is commonly referred to as MACT.

The MACT floor is the minimum control level allowed for NESHAP and is defined under section 112(d)(3) of the CAA. In essence, the MACT floor ensures that the standard is set at a level that assures that all major sources achieve the level of control at least as stringent as that already achieved by the better-controlled and lower-emitting sources in each source category or subcategory. For new sources, the MACT floor cannot be less stringent than the emission control that is achieved in practice by the best-controlled similar source. The MACT standards for existing sources can be less stringent than standards for new sources, but they cannot be less stringent than the average emission limitation achieved by the best-performing 12 percent of existing sources in the category or subcategory (or the best-performing 5 sources for categories or subcategories with fewer than 30 sources) (CAA section 112(d)(3)).

In developing MACT, we also consider control options that are more stringent than the floor. We may establish standards more stringent than the floor based on the consideration of the cost of achieving the emissions reductions, any non-air quality health and environmental impacts, and energy requirements (CAA section 112(d)(2)).

On July 16, 1992 (57 FR 31576), we published a list of source categories slated for regulation under section 112(c). That list included the pulp and paper production source category regulated by the standards being promulgated today. We proposed standards for chemical recovery combustion sources at kraft, soda, sulfite, and stand-alone semichemical pulp mills covered by this rule on April 15, 1998 (63 FR 18783).

As in the proposal, the final standards give existing sources 3 years from the date of promulgation to comply. Sources that begin construction or reconstruction after April 15, 1998 must comply with the standards for new sources by March 13, 2001 or upon startup, whichever is later. We believe these standards to be achievable by affected sources within the time provided.

Emissions limits, as well as monitoring, performance testing, recordkeeping, and reporting requirements are included in the final rule. All of these components are necessary to ensure that sources comply with the standards both initially and over time. However, we have made every effort to simplify the requirements in the rule.

The preamble for the proposed standards described the rationale for the proposed standards. Public comments were solicited at the time of proposal. The public comment period lasted from April 15, 1998 to June 15, 1998. Industry representatives, regulatory agencies, environmental groups, and the general public were given the opportunity to comment on the proposed rule and to provide additional information during and after the public comment period. Although we offered at proposal the opportunity for oral presentation of data, views, or arguments concerning the proposed rule, no one requested a hearing, and a hearing was not held.

We received a total of 35 letters containing comments on the proposed rule during and after the public comment period. Commenters included individual pulp and paper companies, an industry trade association, an environmental group, a local regulatory agency, an association of State and local regulatory agencies, and an association of air pollution control vendors. Today's final rule reflects our full consideration of all of the comments received. Major public comments on the proposed rule, along with our responses to those comments, are summarized in this preamble. See the Summary of Public Comments and Responses memorandum for a more detailed discussion of public comments and our responses (docket No. A–94–67).

II. Summary of Final Rule

A. Applicability

The final rule applies to all existing and new kraft, soda, sulfite, and stand-alone semichemical pulp mills with chemical recovery processes that involve the combustion of spent pulping liquor. Specifically, the affected sources that are regulated by today's final rule are each new nondirect contact evaporator (NDCE) recovery furnace and associated smelt dissolving tank (SDT) located at a kraft or soda pulp mill, each new direct contact evaporator (DCE) recovery furnace system and associated SDT located at a kraft or soda pulp mill, each new lime kiln located at a kraft or

soda pulp mill, each new or existing sulfite combustion unit located at a sulfite pulp mill, each new or existing semichemical combustion unit located at a stand-alone semichemical pulp mill, and each existing chemical recovery system located at a kraft or soda pulp mill. The chemical recovery system is defined as all existing DCE and NDCE recovery furnaces, SDT, and lime kilns at a kraft or soda pulp mill.

All existing kraft and soda pulp mills have chemical recovery processes that involve the combustion of spent pulping liquor. However, several existing sulfite and stand-alone semichemical pulp mills do not recover pulping chemicals by combusting spent liquor. Three of the 11 sulfite mills use a calcium-based sulfite process and do not have chemical recovery combustion units and, thus, are not impacted by this final rule. One of the 13 stand-alone semichemical pulp mills burns spent liquor in a power boiler and does not have chemical recovery; therefore, that mill also is not impacted by this final rule.

B. Standards

Today's final rule regulates HAP metals emissions and/or gaseous organic HAP emissions for chemical recovery combustion sources in the pulp and paper production source category. The promulgated standards are summarized in Table 1.

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TABLE 1. SUMMARY OF PROMULGATED STANDARDS[a]

Subcategory	Emission point	HAP metals standard		Alternate HAP metals standard ("bubble")		Gaseous organic HAP standard	
		Existing	New	Existing	New	Existing	New
Kraft and soda	Recovery furnaces (NDCE and DCE)	PM ≤ 0.10 gr/dscm (0.044 gr/dscf) at 8% oxygen	PM ≤0.034 g/dscm (0.015 gr/dscf) at 8% oxygen	Mill-specific PM emission limit (kg/Mg (lb/ton) BLS) based on calculated value of the sum of the individual emissions limits for recovery furnaces, SDT, and lime kilns. See equation 1 in §63.865(a)(1) of the final rule.	No "bubble" alternate standard for new sources	No standard	Gaseous organic HAP ≤ 0.012 kg/Mg (0.025 lb/ton) BLS (as measured by methanol)
	SDT	PM ≤ 0.10 kg/Mg (0.20 lb/ton) BLS	PM ≤ 0.06 kg/Mg (0.12 lb/ton) BLS			No standard[b]	No standard[b]
	Lime kilns	PM ≤ 0.15 g/dscm (0.064 gr/dscf) at 10% oxygen	PM ≤ 0.023 g/dscm (0.01 gr/dscf) at 10% oxygen			No standard[b]	No standard[b]
Sulfite	Sulfite combustion units	PM ≤ 0.092 g/dscm (0.040 gr/dscf) at 8% oxygen	PM ≤ 0.046 g/dscm (0.020 gr/dscf) at 8% oxygen	Not applicable	Not applicable	No standard[b]	No standard[b]
Stand-alone semi-chemical	Semichemical combustion units	No standard	No standard	Not applicable	Not applicable	Gaseous organic HAP ≤ 1.49 kg/Mg (2.97 lb/ton) BLS (as measured by THC) OR 90% reduction	Gaseous organic HAP ≤ 1.49 kg/Mg (2.97 lb/ton) BLS (as measured by THC) OR 90% reduction

[a] g/dscm = grams per dry standard cubic meter, gr/dscf = grains per dry standard cubic foot, kg/Mg = kilograms per megagram, lb/ton = pounds per ton, BLS = black liquor solids, and THC = total hydrocarbons.

[b] Emissions of gaseous organic HAP from these sources are regulated as part of the NESHAP for noncombustion sources at pulp and paper mills.

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The standards for each subcategory are discussed in the following sections by the pollutant regulated.

1. HAP Metals Standards for Kraft and Soda Pulp Mills

Today's rule promulgates PM emissions limits as a surrogate for HAP metals for new and existing recovery furnaces, SDT, and lime kilns at kraft and soda pulp mills. The PM emissions limits are established at the MACT floor level. For existing kraft and soda recovery furnaces and SDT, the MACT floor level corresponds (coincidentally) to the promulgated PM emissions limits in the new source performance standards (NSPS) for kraft pulp mills (43 FR 7568, February 23, 1978). We believe this level best represents the level of performance achievable by the average of the best-performing 12 percent of sources, considering normal process and operating variability. For existing kraft and soda lime kilns, the MACT floor level is more stringent than the NSPS because data indicate that the average of the best-performing 12 percent of sources can achieve a more stringent level.

The final rule also allows the use of a ''bubble compliance alternative'' for determining compliance with the HAP metals standards for existing process units (*i.e.*, recovery furnaces, SDT, and lime kilns) in the chemical recovery system at kraft and soda pulp mills. The bubble compliance alternative allows mills to set PM emissions limits for each existing process unit in the chemical recovery system at the mill such that, if these limits are met, the total emissions from all existing process units are less than or equal to a mill-specific bubble limit. This mill-specific bubble limit is calculated based on the promulgated emissions standards (referred to in the rule as reference concentrations or reference emissions rates) for each process unit and mill-specific gas flow rates and process rates. Equation 1 in § 63.865(a)(1) of the final rule will be used to calculate the bubble limit based on PM emissions.

As in the proposed rule, the bubble compliance alternative is not applicable to new affected sources under this rulemaking. Thus, all new affected sources at kraft and soda pulp mills are required to meet the individual emissions limitations set for those sources. Also, owners or operators of existing process units subject to the NSPS for kraft pulp mills are required to continue to meet the PM emissions standards of that rule, regardless of which option they choose for complying with today's HAP metals standards (because that standard is a separate regulatory requirement which remains in place).

Owners or operators that choose to comply with the HAP metals standards using the bubble compliance alternative are required to submit PM emissions limits to the Administrator for approval for each existing kraft or soda recovery furnace, SDT, and lime kiln at the mill. Before the PM emissions limits are approved, the owner or operator must submit documentation demonstrating that if the PM emissions limits for each emission source are met, the entire group of process units in the chemical recovery system are in compliance with the millwide allowable PM emission level. The allowable PM emission level is determined from the applicable bubble equation using the reference PM concentrations and reference PM emissions rates for each process unit and source-specific factors for exhaust gas flow rates and process rates. Once approved by the Administrator, the PM emissions limits are incorporated in the operating permit for the mill. Thereafter, the owner or operator of the kraft or soda pulp mill demonstrates compliance with the standards by demonstrating that each recovery furnace, SDT, and lime kiln emits less than or equal to the approved PM emission limit for that process unit. In addition, the PM emissions limits for any existing recovery furnace, SDT, or lime kiln subject to the 1978 NSPS for kraft pulp mills must be at least as stringent as the PM emissions limits established in the NSPS. An example of how the bubble compliance alternative can be used to establish PM emissions limits for process units in a chemical recovery system at an example mill is provided in the administrative record (Docket No. A–94–67).

With one exception, owners or operators that choose to comply with the HAP metals standards using the bubble compliance alternative must include all existing process units in a chemical recovery system in the bubble. Any existing process unit that can be classified as a stand-by unit (*i.e.*, a process unit that operates for less than 6,300 hours during any calendar year) cannot be included as part of a bubble. Owners or operators of stand-by units must accept the promulgated PM emissions limits shown in Table 1 for those units.

2. Gaseous Organic HAP Standards for Kraft and Soda Pulp Mills

Today's rule promulgates a gaseous organic HAP standard for new recovery furnaces using methanol as a surrogate for gaseous organic HAP. All new recovery furnaces at kraft and soda pulp mills must meet a gaseous organic HAP limit, as measured by methanol, of 0.012 kilogram per megagram (kg/Mg) (0.025 pound per ton (lb/ton)) of black liquor solids (BLS) fired. There are no gaseous organic HAP standards under today's rule for existing NDCE recovery furnaces or DCE recovery furnace systems.

3. HAP Metals Standards for Sulfite Pulp Mills

Today's rule promulgates PM emissions limits as a surrogate for HAP metals for new and existing sulfite combustion units. Existing sulfite combustion units must meet a PM emission limit of 0.092 gram per dry standard cubic meter (g/dscm) (0.040 grain per dry standard cubic foot (gr/dscf)) corrected to 8 percent oxygen. New sulfite combustion units must meet a PM emission limit of 0.046 g/dscm (0.020 gr/dscf) corrected to 8 percent oxygen.

4. Gaseous Organic HAP Standards for Stand-Alone Semichemical Pulp Mills

Today's rule promulgates gaseous organic HAP standards for existing and new semichemical combustion units using total hydrocarbon (THC) as a surrogate for gaseous organic HAP. All stand-alone semichemical pulp mills with existing or new chemical recovery combustion units must reduce gaseous organic HAP emissions (as measured by THC reported as carbon) from these units by 90 percent, or meet a gaseous organic HAP emission limit (as measured by THC reported as carbon) of 1.49 kg/Mg (2.97 lb/ton) of BLS fired.

C. Performance Test Requirements

The following discussion identifies the test methods to be used for compliance determinations.

Test Method 5, ''Determination of Particulate Emissions from Stationary Sources'' (40 CFR part 60, appendix A)—in conjunction with a measurement of oxygen concentration in the stack gas using either Test Method 3A, ''Determination of Oxygen and Carbon Dioxide Concentrations in Emissions from Stationary Sources (Instrumental Analyzer Procedure)'' (40 CFR part 60, appendix A) or Test Method 3B, ''Gas Analysis for the Determination of Emission Rate Correction Factor or Excess Air'' (40 CFR part 60, appendix A)—is the test method for determining compliance with the PM emissions limits for new and existing kraft and soda recovery furnaces, SDT, and lime kilns and for new and existing sulfite combustion units. Test Method 29, ''Determination of Metals Emissions from Stationary Sources'' (40 CFR part

60, appendix A) may be used as an alternative to Test Method 5 for measuring PM emissions. Test Method 17, ''Determination of Particulate Emissions from Stationary Sources (In-Stack Filtration Method)'' (40 CFR part 60, appendix A) may also be used as an alternative to Test Method 5 if a constant value of 0.009 g/dscm (0.004 gr/dscf) is added to the results of Test Method 17, and the stack temperature is no greater than 205 degrees Centigrade (°C) (400 degrees Fahrenheit (°F)).

Test Method 308, ''Procedure for Determination of Methanol Emissions from Stationary Sources'' (40 CFR part 63, appendix A) is the test method for determining compliance with the gaseous organic HAP emission limit for new kraft and soda NDCE recovery furnaces that are not equipped with dry electrostatic precipitator (ESP) systems and for DCE recovery furnace systems.

Test Method 25A, ''Determination of Total Gaseous Organic Concentration using a Flame Ionization Analyzer'' (40 CFR part 60, appendix A) is the test method for determining compliance with the gaseous organic HAP emission limit for new and existing combustion units at stand-alone semichemical pulp mills.

D. Monitoring Requirements

Each owner or operator of an affected source or process unit must install, operate, calibrate, and maintain a continuous monitoring system for each affected source or process unit. The owner or operator also must establish a range of values for each operating parameter (associated with a process operation or with an emission control device) to be monitored based upon values recorded during the initial performance test or during qualifying previous performance tests using the required test methods. If values from previous performance tests are used to establish the operating parameter range, the owner or operator must certify that the control devices and processes had not been modified subsequent to the testing upon which the data used to establish the operating ranges were obtained. The owner or operator may conduct multiple performance tests to establish ranges of operating parameters. The owner or operator also may establish expanded or replacement ranges during subsequent performance tests. An exceedance of the operating parameters occurs when the measured operating parameter levels, averaged over a specified time period, are outside the established range for a predetermined duration. However, with the exception of opacity exceedances, no more than one exceedance would be attributed to an affected source or process unit during any given 24-hour period. The following paragraphs describe the operating parameters to be monitored, the averaging periods and frequency with which these parameters should be monitored, when corrective action is required to return operating parameters to levels that are within the established range, and when operating parameter exceedances constitute a violation of the emissions standards.

Owners or operators of existing kraft or soda recovery furnaces that are equipped with an ESP for PM control must install, calibrate, maintain, and operate continuous opacity monitoring systems (COMS). The COMS must perform at least one cycle of sampling and analysis for each successive 10-second period and one cycle of data recording for each successive 6-minute period. If the average of ten consecutive 6-minute average values of opacity exceeds 20 percent, the owner or operator must initiate the corrective actions contained in the mill's startup, shutdown, and malfunction (SSM) plan. A violation of the applicable emissions standards would occur when opacity is greater than 35 percent for 6 percent or more of the operating time during any quarterly period.

Owners or operators of new kraft or soda recovery furnaces and new or existing kraft or soda lime kilns that are equipped with ESP for PM control must also install, calibrate, maintain, and operate COMS. The COMS must perform at least one cycle of sampling and analysis for each successive 10-second period and one cycle of data recording for each successive 6-minute period. If the average of ten consecutive 6-minute average values of opacity exceeds 20 percent, the owner or operator must initiate the corrective actions contained in the facility's SSM plan. A violation of the applicable emissions standards would occur when opacity is greater than 20 percent for 6 percent or more of the operating time during any quarterly period.

Owners or operators using wet scrubbers to meet the PM emissions limits for any kraft or soda recovery furnace, SDT, or lime kiln or any sulfite combustion unit must install, calibrate, maintain, and operate a continuous monitoring system capable of determining and recording the pressure drop and scrubbing liquid flow rate at least once for each successive 15-minute period. If any 3-hour average of the pressure drop or scrubbing liquid flow rate falls outside the established range, the owner or operator must initiate the corrective actions included in the facility's SSM plan. A violation of the applicable emissions standards occurs when six or more 3-hour average values of either parameter are outside the established range during any 6-month reporting period.

Owners or operators using regenerative thermal oxidizers (RTO) to comply with the gaseous organic HAP emission standard for chemical recovery combustion units at stand-alone semichemical mills must establish a minimum RTO operating temperature that indicates at least a 90 percent reduction in HAP emissions (as measured by THC reported as carbon), or outlet HAP emissions (as measured by THC reported as carbon) of less than or equal to 1.49 kg/Mg (2.97 lb/ton) of BLS fired. To ensure ongoing compliance, the owner or operator must install, calibrate, maintain, and operate a monitoring system to measure and record the RTO operating temperature for each successive 15-minute period. If any 1-hour average of the operating temperature falls below the minimum established temperature, the owner or operator must initiate the corrective actions contained in the facility's SSM plan. A violation of the applicable emissions standards occurs when any 3-hour average of the RTO operating temperature falls below the minimum established temperature.

The owner or operator of an affected source or process unit that uses a wet scrubber, ESP, or RTO to comply with today's standards may monitor alternative operating parameters subject to prior written approval by the Administrator, as specified in § 63.8(f).

The owner or operator of an affected source or process unit that is complying with today's standards through operational changes or by a control device other than those described above must submit a plan proposing parameters to be monitored, parameter ranges, and monitoring frequencies to be used to determine ongoing compliance, subject to approval by the Administrator. If any 3-hour average value of a monitored parameter falls outside the established range, the owner or operator must initiate the corrective actions included in the facility's SSM plan. A violation of the emissions standards occurs when six or more 3-hour average values of a monitored parameter are outside the established range during any 6-month reporting period.

Owners or operators complying with the gaseous organic HAP standard for new kraft and soda recovery furnaces through the use of an NDCE recovery furnace equipped with a dry ESP system are not required to perform any continuous parameter monitoring for

gaseous organic HAP. However, each owner or operator must maintain onsite a certification statement signed by a responsible mill official that an NDCE recovery furnace equipped with a dry ESP system is in use.

E. Recordkeeping and Reporting Requirements

In addition to all of the recordkeeping and reporting requirements outlined in § 63.10, owners or operators of kraft, soda, sulfite, and stand-alone semichemical pulp mills must maintain the following records for each affected source or process unit: Records of the BLS firing rates for all recovery furnaces at kraft and soda pulp mills and spent liquor solids firing rates for all chemical recovery combustion units at sulfite and stand-alone semichemical pulp mills, records of the lime production rates (calculated as calcium oxide) for all kraft and soda lime kilns, records of all parameter monitoring data, records and documentation of supporting calculations for compliance determinations, records of the established monitoring parameter ranges for each affected source or process unit, and records of all certifications made in order to determine compliance with the gaseous organic HAP standards. Consistent with requirements in the NESHAP General Provisions in subpart A of 40 CFR part 63 and the operating permit program in 40 CFR part 70, all records must be maintained for a minimum of 5 years.

III. Summary of Changes Since Proposal

A. Applicability

At proposal, we defined affected source as each kraft and soda NDCE recovery furnace and associated SDT, each kraft and soda DCE recovery furnace and associated SDT, each kraft and soda lime kiln, each sulfite combustion unit, and each semichemical combustion unit. However, this definition would have prevented mills from averaging emissions of HAP metals or the PM surrogate for HAP metals across their existing recovery furnaces, SDT, and lime kilns (a bubble compliance alternative which we proposed). To allow averaging across these existing emission points, we have revised the definition of affected source to include existing NDCE recovery furnaces, DCE recovery furnaces, SDT, and lime kilns as process units within a chemical recovery system affected source.

As in the proposed rule, new sources are not eligible for the bubble compliance alternative under this rulemaking, given that state-of-the-art equipment design and add-on controls can be integrated and installed most cost-effectively during construction of new sources. New sources can be designed and constructed with maximized compliance in mind. Also, sources classified as new by virtue of being reconstructed can be reconstructed with maximized compliance in mind. Therefore, we have not revised the definition of affected source for new sources. Each new kraft and soda recovery furnace and associated SDT, and each new kraft and soda lime kiln will continue to be defined as an affected source by itself.

B. Definitions

Because of the changes in definition of affected source in the final rule, we have added definitions for ''chemical recovery system'' and ''process unit'' to § 63.861 in the final rule. Chemical recovery system is defined as all existing DCE and NDCE recovery furnaces, SDT, and lime kilns at a kraft or soda pulp mill. Process unit is defined as an existing DCE or NDCE recovery furnace, SDT, or lime kiln in a chemical recovery system at a kraft or soda pulp mill.

To take into account the development of gasification technology as a replacement for conventional recovery furnace systems, we have added a definition for ''black liquor gasification'' to § 63.861 in the final rule. Black liquor gasification is defined as the thermochemical conversion of black liquor into a combustible gaseous product. For the same reason, we also have revised the definitions for ''recovery furnace,'' ''kraft recovery furnace,'' ''semichemical combustion unit,'' and ''soda recovery furnace'' to include black liquor gasification.

In order to eliminate any confusion with the term ''PM,'' we have replaced the term ''PM HAP'' with ''HAP metals'' throughout the final rule. Therefore, the definition for ''HAP metals'' in § 63.861 of today's rule replaces the definition for ''PM HAP.''

C. Standards

In the proposed rule, we included a standard whereby existing kraft and soda lime kilns must ensure that the concentration of PM in the exhaust gases discharged to the atmosphere is less than or equal to 0.15 g/dscm (0.067 gr/dscf) corrected to 10 percent oxygen. We have decided not to promulgate this PM standard because this proposed standard does not reflect the performance of MACT (*i.e.,* the surrogate PM emissions levels achievable by the best-performing lime kilns, which are controlled by ESP). We have revised the PM standard for existing lime kilns in the final rule to be equivalent to the revised HAP metals MACT floor PM level of 0.15 g/dscm (0.064 gr/dscf) corrected to 10 percent oxygen. (There is also a bubble compliance alternative, whereby, as explained earlier, PM emissions from the recovery furnace, SDT, and lime kiln could in essence be summed so long as the summed emissions are no greater than the sum of the otherwise-applicable MACT emission standard for each unit.)

The proposed rule included a compliance option whereby existing kraft and soda recovery furnaces, SDT, and lime kilns could meet a standard for individual HAP metals, rather than for the PM surrogate for HAP metals (63 FR 18758, 18765, and 18769, April 15, 1998; proposed § 63.862). We have decided not to promulgate this alternative HAP metals standard because this proposed standard does not reflect the performance of MACT (*i.e.,* the HAP metals emissions levels achievable by the best-performing sources) and also because it would have other significant technical deficiencies. (See docket No. A–94–67.) (Necessarily, we also are not promulgating the bubble compliance alternative associated with this HAP metals option.)

D. Performance Test Requirements

To correct an oversight in the proposed rule, we have added an oxygen correction equation for volumetric gas flow rates to the final rule under new § 63.865(b)(4). The equation will be used to correct gas streams to the same oxygen content as the associated emission limit (*e.g.,* 8 percent oxygen for recovery furnaces, 10 percent oxygen for lime kilns). For the same reason, we also revised the PM emission limit equations for the bubble compliance alternative in paragraphs (a)(1), (2)(i), and (2)(iii) of § 63.865 for the final rule to reflect the oxygen correction for volumetric gas flow rates. Because SDT exhaust conditions already approximate ambient air conditions, we have removed the oxygen correction in the PM emission limit equation for SDT in § 63.865(a)(2)(ii) from the final rule. We have also clarified the oxygen correction equation in § 63.865(b)(2), which is used to correct PM concentrations, for the final rule.

E. Monitoring Requirements

In order to account for any recovery furnaces that might use a wet scrubber, we have revised the wet scrubber monitoring provisions in § 63.864(a)(2), (c)(1)(ii), and (c)(2)(ii) for the final rule

to include kraft or soda recovery furnaces. We have clarified the opacity corrective action provisions in § 63.864(c)(1)(i) of the final rule to state that affected sources or process units are required to implement corrective action when the average of ten consecutive 6-minute averages results in a measurement greater than 20 percent opacity. We also have revised the opacity violation provisions in § 63.864(c)(2)(i) and (ii) to clarify in the final rule that a violation of the applicable emission standard would occur when the opacity is greater than the specified level for 6 percent or more of the operating time in any quarterly period.

F. Reporting Requirements

We have revised the excess emissions reporting provisions of § 63.867(c) for the final rule to clarify that reporting excess emissions below the violation thresholds of § 63.864(c) does not constitute a violation of the applicable standard.

G. Delegation of Authority

We have revised the delegation of authority provisions in § 63.868 for the final rule to include the following authorities which will be retained by the Administrator and not transferred to a State: Approval of alternatives to standards in § 63.862 under § 63.6(g), approval of major alternatives to test methods under § 63.7(e)(2)(ii) and (f) and as defined in § 63.90, approval of major alternatives to monitoring under § 63.8(f) and as defined in § 63.90, and approval of major alternatives to recordkeeping and reporting under § 63.10(f) and as defined in § 63.90. These authorities are retained because any requests by sources for alternative standards must be considered by EPA and acted upon in a notice and comment rulemaking. We cannot delegate authorities that may alter the stringency of the standard, that require Federal oversight for national consistency, or that may require Federal rulemaking. Requests to revise standards for the source category (or portions thereof) must be addressed through the subpart E rulemaking process for alternative standards.

IV. Summary of Responses to Major Comments

This section summarizes the major comments we received on the proposed rule and our responses to those comments. A more comprehensive summary of comments and responses can be found in docket No. A–94–67.

Comment: Commenters questioned the proposed MACT floor of ''no control'' for gaseous organic HAP emissions from existing NDCE recovery furnaces and stated that the performance of dry ESP systems should be the basis of the MACT floor for gaseous organic HAP emissions from existing NDCE recovery furnaces. One commenter provided a list of 13 NDCE recovery furnaces equipped with dry ESP systems, which is a sufficient number of recovery furnaces to define the MACT floor. A commenter also noted that wet to dry ESP system conversion is a cost-effective control option.

Response: We are not basing the MACT floor for existing NDCE recovery furnaces on this technology for the following reasons. We have concluded that existing NDCE recovery furnaces do not represent the ''best'' or ''maximum achievable'' technology. It is possible that black liquor gasification is a means of reducing gaseous organic HAP emissions from chemical recovery operations that provides environmental benefits (notably energy savings) which are superior to those provided by NDCE recovery furnaces (whether equipped with wet or dry ESP systems). Compared with NDCE recovery furnace performance, development of the proposed gasification technology promises reduced consumption of fossil fuel, increased efficiency in energy conversion and chemical recovery, elimination of the smelt-water explosion hazard (inherent to the operation of conventional recovery furnaces), reduced maintenance costs, and significantly lower environmental emissions of criteria pollutants (PM, SO_2, NO_X, VOC precursors to ozone, and CO) and greenhouse gases (63 FR 26607, May 8, 2000, Proposed Final Project Agreement for Georgia-Pacific XL Project).

Because gasification systems do not require the use of an ESP, the costs that would be incurred by converting a wet ESP system to a dry ESP system are not recoverable if the NDCE recovery furnace is replaced with a gasification system. Therefore, if we require existing NDCE recovery furnaces with wet ESP systems by virtue of a MACT floor to retrofit to dry ESP systems, we would tend to eliminate the incentive for the industry to replace the NDCE recovery furnaces with gasification systems before the end of the useful life of the dry ESP systems. Thus, it is our view that a MACT floor requirement which results in retrofitting to dry ESP systems would create disincentives that would discourage possible conversion to the even more promising gasification technology, so that such a requirement need not be considered to be ''MACT.'' See *Portland Cement Ass'n* v. *EPA,* 486 F.2d 375, 385 (D.C. Cir. 1973); *Essex Chemical Corp.* v. *Ruckelshaus,* 486 F.2d 427, 439 (D.C. Cir. 1973) (in establishing technology-based standards, EPA must consider counter-productive effects of a control technology in determining whether it is a ''best'' technology).

In a related matter, there is a further question as to whether existing DCE recovery furnaces should be subject to MACT floor or beyond-the-floor standards for gaseous organic HAP. We considered whether to require conversion of DCE recovery furnace systems to NDCE recovery furnaces with dry ESP systems as a beyond-the-floor standard. The capital costs of this retrofitting would be in the billions of dollars and would not be justified by the amount of HAP removed. Moreover, we do not view NDCE recovery furnaces with dry ESP systems as MACT for existing DCE recovery furnaces because it would create the same disincentives for conversion to gasification just discussed, including potentially foregoing significant energy-saving opportunities. (See CAA section 112(d)(2), which includes energy impacts as a relevant consideration in beyond-the-floor determinations.) Consequently, we are not adopting a beyond-the-floor standard for DCE recovery furnaces.

It would also be highly anomalous to adopt a MACT floor based on the performance of NDCE recovery furnaces with dry ESP systems, for the following reason. As explained above, we are not adopting a beyond-the-floor standard for existing DCE recovery furnaces, and the MACT floor for existing DCE recovery furnaces is ''no control.'' This would yield the result that a MACT floor determination would apply only to NDCE recovery furnaces—the better-performing furnace type. Hence the anomaly—the only type of existing recovery furnace to incur regulatory costs would be the better-performing NDCE recovery furnaces. Although, as also explained above, we currently do not view gaseous organic HAP control of existing NDCE or DCE recovery furnaces as MACT in order to preserve incentives for conversion of the furnaces to gasification systems, in determining that there should be no further control of these units under CAA section 112(d) at the present time, we are also swayed by avoiding the anomaly of controlling only NDCE recovery furnaces.

We also note that the new source standard for recovery furnaces reflects the performance of NDCE recovery furnaces equipped with dry ESP systems. We could not base the standard

on the performance of gasification at this time because accurate data documenting performance on pulp and paper combustion sources do not yet exist. Obtaining accurate performance data on gasification systems is one of the purposes of the proposed Final Project Agreement for the Georgia-Pacific XL Project (63 FR 26607, May 8, 2000). In any case, we also do not believe that this standard poses the same potential to discourage use of gasification. First, we expect that sources using gasification technology will be able to meet the standard. Second, we are prepared to exercise flexibility as to compliance dates for any new source basing its compliance on use of gasification technology, consistent with the statute (63 FR 26607, May 8, 2000).

Comment: Several commenters objected to the proposed beyond-the-floor MACT standard for gaseous organic HAP emissions from existing semichemical combustion units that are not fluidized-bed reactors. Commenters also claimed that the proposed emission limit is not supportable for some types of chemical recovery combustion units, such as recovery furnaces.

Response: We disagree with the commenters. Based on available emissions data and our RTO cost estimates, RTO represent a cost-effective control strategy for meeting the proposed gaseous organic HAP emissions limits. (See docket No. A–94–67.)

Comment: A commenter provided data for kraft and soda recovery furnaces, SDT, and lime kilns which the commenter believes show a lack of correlation between outlet emissions of PM and outlet emissions of HAP metals. According to the commenter, variations in raw materials and processes have a greater effect on uncontrolled HAP metals emissions, and, therefore, controlled emissions, than the type of control device used. According to the commenter, there is not a straight correlation between reducing PM and reducing HAP metals.

Response: Regarding the commenter's suggestion that there is a lack of statistical correlation between HAP metals emissions and PM emissions, we agree that the ratio of the mass of HAP metals to the total mass of PM emitted varies from source to source. Additionally, the amount of HAP metals in PM at each source varies. We do not agree with the commenters' assertion that PM is an inappropriate surrogate for particulate HAP metals emissions. Hazardous air pollutant metals are a component of PM, and control devices designed for PM removal also remove particulate HAP metals at a similar rate. Therefore, emission control efficiencies, determined by measuring emissions at both the inlet and the outlet of the control device, are similar for both PM and particulate HAP metals. Outlet PM emissions are a good indicator of the performance of the control device, and there is no doubt that PM is an appropriate surrogate for particulate HAP metals.

Also, after reviewing available HAP metals emissions data, we conclude that there are insufficient data to establish numerical HAP metals emissions limits that reflect MACT. Consequently, we have chosen not to promulgate the proposed numerical HAP metals emissions limits and the associated HAP metals bubble compliance alternative.

Comment: A number of commenters objected to the proposed emissions limits for PM (as a surrogate for HAP metals) for existing sources. Commenters suggested that the PM emissions limits be recalculated using additional PM emissions data because they believe that many units operate well below the emissions levels selected for the proposed MACT floors. Commenters also took issue with our using the PM standards in the NSPS for Kraft Pulp Mills as the basis for the HAP metals MACT floors for existing kraft and soda combustion sources and noted that we failed to account for the fact that the technology reflected in the NSPS for Kraft Pulp Mills is an old technology and that numerous sources are achieving emissions reductions well beyond the NSPS.

Response: We disagree with the commenters regarding their objections to the proposed PM emissions limits for existing kraft and soda recovery furnaces and SDT. We believe that the MACT floor PM emissions limits for recovery furnaces and SDT are justified due to the variability in PM emissions from these sources and the uncertainties about why the same types of control equipment perform at different levels under comparable circumstances. Therefore, we believe that the standards in the final rule reasonably reflect the level of performance achievable in practice by the average of the best-performing 12 percent of sources.

For existing lime kilns, the control devices that we thought were representative of the HAP metals MACT floor were ESP, high-efficiency venturi scrubbers, and ESP and scrubbers in combination. However, lime kilns equipped with ESP consistently show lower PM emissions than lime kilns equipped with scrubbers, and it is apparent that there are a sufficient number of lime kilns equipped with ESP to be representative of the HAP metals MACT floor. (That is, sufficient numbers of sources are equipped with ESP such that the level of performance of a lime kiln equipped with an ESP represents the level of performance achievable by the average of the best-performing 12 percent of existing kraft and soda lime kilns.) Therefore, today's action corrects that error and recalculates the PM emission limitation achievable by the technology that represents the MACT floor for existing lime kilns based on the performance of a lime kiln equipped with a properly designed and operated ESP.

Based on available data from monthly and annual compliance tests, lime kilns equipped with ESP can achieve PM emissions as low as 0.0023 g/dscm (0.001 gr/dscf) and as high as 0.15 g/dscm (0.064 gr/dscf) at 10 percent oxygen. To account for this variability in PM emissions from lime kiln ESP, we are setting the HAP metals MACT floor for existing lime kilns at 0.15 g/dscm (0.064 gr/dscf) at 10 percent oxygen, which is slightly less than the proposed HAP metals MACT floor of 0.15 g/dscm (0.067 gr/dscf) at 10 percent oxygen.

The best-performing lime kiln ESP (which represents MACT for HAP metals for new lime kilns) is more than twice the size (*i.e.,* has twice the specific collecting area) of typical lime kiln ESP, and its performance remains the basis for the new source MACT standard. Therefore, today's action does not differ from the proposed standard for HAP metals for new lime kilns.

V. Summary of Impacts

A. Air Quality Impacts

At the current level of control, emissions of HAP (HAP metals and gaseous organic HAP) are approximately 20,400 Mg/yr (22,500 tpy), and emissions of other pollutants (PM, VOC, CO, SO_2, NO_X) are approximately 507,100 Mg/yr (559,000 tpy). Implementation of today's final rule is expected to reduce emissions of HAP, PM, VOC, CO, and SO_2, and slightly increase emissions of NO_X. The EPA estimates that emissions of HAP will be reduced by approximately 2,500 Mg/yr (2,700 tpy) and emissions of other pollutants by approximately 107,900 Mg/yr (118,900 tpy).

B. Cost Impacts

The estimated capital cost of control for today's final rule is $241 million (1997$) and includes the cost to purchase and install both the control equipment and monitoring equipment. Most (89 percent) of the capital cost can be attributed to the PM controls for

kraft, soda, and sulfite combustion units.

The estimated annual cost of the rule is $32.2 million/yr (1997$) and accounts for the year-to-year operating expenses associated with the control equipment and the monitoring equipment, in addition to the capital recovery expense associated with the equipment purchases. Most (79 percent) of the annual cost can be attributed to the PM controls for kraft, soda, and sulfite combustion units.

The total average costs for annual recordkeeping and reporting activities required by the final rule are estimated to be $962,600/yr (1997$) through the third year after the effective date and $5.4 million/yr (1997$) through the third year after the compliance date.

These capital and annualized cost estimates are intended to represent the maximum expected costs of the NESHAP and do not account for the potential cost savings achieved by mills that will successfully use the bubble compliance alternative.

C. Economic Impacts

This section presents a summary of EPA's evaluation of the economic impacts of today's final rule. A more detailed analysis of the economic impacts of this rule, as well as the recently promulgated NESHAP for noncombustion pulp and paper sources (*i.e.,* MACT I and MACT III) and promulgated effluent limitation guidelines, is discussed in the Economic Analysis for the National Emission Standards for Hazardous Air Pollutants for Source Category: Pulp and Paper Production; Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards: Pulp, Paper, and Paperboard Category—Phase 1 (DCN 14649; hereafter, the Economic Analysis, or EA). The EPA estimates that the pulp and paper industry will incur total capital costs of $240 million (1997$) under the final rule. Overall, EPA projects total annualized compliance expenditures of $30 million (1997$).

Price increases of less than 0.5 percent are anticipated for bleached papergrade kraft and soda, dissolving kraft, dissolving sulfite, papergrade sulfite, and semichemical pulps and products. A price increase of 1.4 percent is expected for unbleached kraft pulps. Based on our economic modeling of the impacts of such changes, we do not anticipate any facility closures nor firm failures as a result of compliance with this final rule. In addition, we expect that production decreases, employment changes, and impacts on international trade will be minimal.

D. Benefits Analysis

Implementation of today's final rule is expected to reduce emissions of HAP, PM, VOC, CO, and SO_2, while it is expected to slightly increase emissions of NO_X. Such pollutants can potentially cause adverse health effects and can have welfare effects, such as impaired visibility and reduced crop yields. In the benefits analysis, we have not conducted detailed air quality modeling to evaluate the magnitude and extent of the potential impacts from individual pulp and paper facilities. Nevertheless, to the extent that emissions from these facilities cause adverse effects, this final rule would mitigate such impacts.

1. Qualitative Description of Pollutant Effects

This final rule is designed to reduce the emissions of HAP, as defined in section 112 of the CAA. Several of these HAP are classified as known, probable, or possible human carcinogens. They have also been shown to cause other adverse health effects, such as damage to the eye, central nervous system, liver, kidney, and respiratory system depending upon the exposures to these emissions. The types of studies in which these various effects have been reported include: (1) Epidemiological studies of health effects occurring in human populations (*e.g.*, the general population, or workers exposed in the workplace), (2) case reports that document human exposure incidents (*e.g.*, accidental releases or poisonings), (3) carefully controlled laboratory exposures of volunteer human subjects, and (4) laboratory studies on animals.

Emissions of VOC and NO_X interact in the presence of sunlight to create ground-level ozone. Recent scientific evidence shows an association between elevated ozone concentrations and increases in hospital admissions for a variety of respiratory illnesses and indicates that ground-level ozone not only affects people with impaired respiratory systems (such as asthmatics), but healthy adults and children as well. Adverse welfare effects of ozone exposure include damage to crops, tree seedlings, ornamentals (shrubs, grass, *etc.*), and forested ecosystems.

The reactions between VOC and NO_X to form ozone depend on the balance in concentrations of each pollutant found in the ambient air. For example, when the concentration of NO_X is high relative to the concentration of VOC, VOC reductions are effective in limiting ozone formation, while NO_X reductions in that situation are ineffective. This rule is expected to increase NO_X emissions slightly, but also decrease VOC emissions. The increase in NO_X under this rule is not expected to cause significant adverse health or welfare impacts because the magnitude of the NO_X increase (less than 500 Mg/yr) is very small relative to the total NO_X inventory.

The VOC emission reductions from this rule occur primarily in rural attainment areas. These areas tend to be NO_X limited; therefore, VOC reductions are not expected to affect ozone concentrations. The low-end estimate of VOC benefits relates to emissions reductions (3,400 Mg/yr) occurring in ozone nonattainment areas. Since ozone nonattainment areas are typically urban areas that are VOC limited, these emissions reductions are likely to be effective in limiting ozone formation. The high-end of the range of VOC benefits includes all VOC emissions reductions (31,000 Mg/yr) expected to occur for this rule. This estimate is included to account for the uncertainty as to whether specific rural areas are NO_X limited.

Exposure to PM has been associated with the following adverse human health effects: Premature mortality, aggravation of respiratory and cardiovascular disease, changes in lung function and increased respiratory symptoms, alterations in lung tissue and structure, and altered respiratory tract defense mechanisms. In general, exposed populations at greater risk from these effects are the following: individuals with respiratory disease and cardiovascular disease, individuals with infectious disease, elderly individuals, asthmatic individuals, and children. Reduced welfare is associated with elevated concentrations of fine particles, which reduce visibility, damage materials, and cause soiling. The reductions in PM emissions under this rule (approximately 21,000 Mg/yr) are intended to decrease the adverse effects of PM, to the extent that populations or scenic destinations are located within pollutant transport distance of pulp and paper facilities.

Carbon monoxide is a colorless, odorless gas that is toxic to mammals. When inhaled, it combines with hemoglobin, which reduces the oxygen-carrying capacity of blood and results in less oxygen being transported to vital organs of the body. This can have detrimental effects on the cardiovascular and central nervous systems. There are numerous studies that support the association between ambient CO levels and adverse health effects which have been cited in the Air Quality Criteria Document for Carbon Monoxide (EPA Document No. 600/P–99/001F, June 2000). The reduction of

CO emissions under this rule is intended to diminish these potential effects.

Sulfur dioxide oxidizes in water to form both sulfurous and sulfuric acids. When SO_2 dissolves in the atmosphere in rain, fog, or snow, the acidity of the deposition can corrode various materials and cause damage to both aquatic and terrestrial ecosystems. Sulfur dioxide can also transform into $PM_{2.5}$, (*i.e.*, particulate matter with an aerodynamic diameter less than or equal to 2.5 micrometers). Emissions of SO_2 are reduced slightly (20 Mg/yr) under this rule.

2. Monetized Air Quality Benefits

We used a benefit transfer method to value a subset of the emissions reductions for the MACT II rule. Monetized benefit values are estimated for only VOC, SO_2, and PM emissions reductions expected to result from this rule. This method relies on a benefits analysis conducted for the Ozone and PM national ambient air quality standards (NAAQS). The benefits analysis conducted for the NAAQS involves the same pollutants that are impacted by this pulp and paper rulemaking, and we assume the values from the NAAQS analysis are applicable to this final rule. The NAAQS analysis valued the national-level benefits achieved from a single, ''representative'' year under a new set of standards. The benefits (in dollars) per ton of reduction of each pollutant were then applied to the projected reductions of the same pollutants under this final rule.

We assume that the relationship of emission changes with the health and welfare effects associated with the NAAQS-estimated ozone and PM concentrations correspond to the projected changes in emissions from pulp and paper mills. No air quality modeling was conducted to evaluate potential changes in human exposure under the rule, so the actual magnitude and timing of human health benefits are unknown.

In some cases, we did consider the location of mills when applying the NAAQS benefits per ton figures. For VOC monetized benefits, a low-end estimate included emissions only in ozone nonattainment areas, which was compared to a high-end estimate that used all VOC emissions. For SO_2, the benefit transfer values differed between mills located in the eastern and western portions of the United States. Some benefit categories were not monetized at all, due to a lack of sufficient data. Nevertheless, the largest monetized benefits are derived from PM reductions, for which we used nationwide emission estimates and assume that the distributions of exposed populations from the ozone and PM studies are similar to those exposed to pulp and paper mill emissions.

The EPA estimates that the rule would reduce HAP emissions by approximately 2,500 Mg/yr; VOC emissions by approximately 31,000 Mg/yr (3,400 Mg/yr in ozone nonattainment areas); CO emissions by 56,000 Mg/yr; PM emissions by approximately 21,000 Mg/yr; and SO_2 emissions by 20 Mg/yr; and increase NO_X emissions by approximately 500 Mg/yr. Based upon the previously discussed emissions reductions, we estimate that the monetary benefits of the rule range between $280 million and $370 million (1997$) for a representative year.

This rule is expected to result in reductions in PM emissions for particles of varying sizes. We expect most PM reductions to be in the size range of PM_{10} and below. This assumption is based upon the fact that existing chemical recovery process sources typically have PM controls in place which have removed most of the large particles associated with uncontrolled emissions. However, it is likely that a small fraction of emissions reductions will be for particles above PM_{10}. Reductions in emissions of particle sizes greater than 10 micrometers may not result in the same benefits as particles of sizes less than 10 micrometers. As such, PM-related benefits reported for this rule represent an upper-bound estimate on the applicable PM emissions reductions.

These figures suggest that the benefits of today's final rule may be significantly greater than the projected costs. Chapter 4 of the EA presents a detailed description of the methodology used to monetize the benefits of the rule.

E. Non-Air Environmental Impacts

The quantity of PM collected will increase when recovery furnace PM control devices are upgraded or replaced to comply with today's final HAP metals standards. However, no increases in solid waste disposal are expected because existing mills have sufficient capacity within the chemical recovery process to recycle the additional PM collected.

If owners or operators choose to replace wet scrubbers with ESP to comply with the HAP metals standard for lime kilns, the generation of wastewater will be reduced. The significance of the reduction in wastewater will depend on whether the scrubber discharge had previously been recycled and reused. If wet scrubbers are replaced by ESP (and there was no prior recycle or reuse of scrubber discharge), EPA estimates that wastewater discharge will decrease nationwide by about 35 billion liters per year (9.3 billion gallons per year) following implementation of the rule.

F. Energy Impacts

The overall energy demand (*i.e.*, electricity plus natural gas) is expected to decrease by about 13,700 megawatt-hours per year (MWh/yr) nationwide under today's final rule. Electricity requirements are expected to decrease by about 17,800 MWh/yr under the final rule. This net decrease in electricity requirements includes an expected increase of about 39,600 MWh/yr when PM control devices on kraft and soda recovery furnaces and SDT and sulfite combustion units are upgraded or replaced, an expected increase of 18,400 MWh/yr when gaseous organic HAP controls (*i.e.*, RTO) are added to semichemical combustion units, and an expected decrease of about 75,900 MWh/yr if wet scrubbers are replaced by ESP to provide increased control of PM emissions from kraft and soda lime kilns. Natural gas requirements are expected to increase by about 4,100 MWh/yr when gaseous organic HAP controls are added to semichemical combustion units. This estimate is based on an increase of 0.4 million cubic meters per year (14 million cubic feet per year) of natural gas, assuming 1,024 British thermal units per cubic foot of natural gas.

VI. Administrative Requirements

A. Executive Order 12866, Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51736, October 4, 1993), EPA must determine whether the regulatory action is ''significant'' and, therefore, subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Executive Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, OMB has notified EPA that this action is a ''significant regulatory action'' because it will have an annual effect on the economy of $100 million or more. Consequently, this action was submitted to OMB for review under Executive Order 12866. Any written comments from OMB and written EPA responses are available in the docket (see **ADDRESSES** section of this preamble).

B. Executive Order 13132, Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the regulation. The EPA also may not issue a regulation that has federalism implications and that preempts State law unless EPA consults with State and local officials early in the process of developing the regulation.

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

C. Executive Order 13084, Consultation and Coordination With Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to 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 final rule does not significantly or uniquely affect the communities of Indian tribal governments. No tribal governments own or operate kraft, soda, sulfite, or stand-alone semichemical pulp mills. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

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

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 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, EPA must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned rule is preferable to other potentially effective and reasonably feasible alternatives that EPA considered.

The EPA interprets Executive Order 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 Executive Order has the potential to influence the rule. This final rule is not subject to Executive Order 13045 because it is based on technology performance and not on health or safety risks.

E. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, 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 by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost effective, or least-burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that this rule (in conjunction with the MACT I and MACT III rules and the effluent guidelines recently promulgated for the pulp and paper industry) contains a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments, in the aggregate, or to the private sector in any 1 year. According, EPA has prepared under section 202 of the UMRA a written statement, which is summarized below.

1. Statutory Authority

The statutory authority for this rulemaking is section 112 of the CAA.

Title III of the CAA Amendments was enacted to reduce the amount of nationwide air toxic emissions. Section 112(b) lists the 189 chemicals, compounds, or groups of chemicals deemed by Congress to be HAP. These toxic air pollutants are to be regulated by NESHAP. Hazardous air pollutant emissions from the pulp and paper production source category are being regulated under section 112(d) of the CAA. The NESHAP requires existing and new major sources to control emissions of HAP using MACT.

The pulp and paper production source category includes all mills that produce pulp and/or paper. The NESHAP for the source category are being developed in phases. This final NESHAP, referred to as MACT II, regulates chemical recovery combustion sources at kraft, soda, sulfite, and stand-alone semichemical pulp mills. The final NESHAP for noncombustion sources (*i.e.,* MACT I and MACT III) regulates noncombustion processes at mills that (1) chemically pulp wood fiber (using kraft, sulfite, soda, and semi-chemical methods) (MACT I), and (2) mechanically pulp wood fiber (*e.g.,* groundwood, thermomechanical, pressurized), pulp secondary fibers (deinked and nondeinked), and pulp nonwood (MACT III).

Regarding EPA's compliance with section 205(a), EPA did identify and consider a reasonable number of alternatives. A summary of these alternatives and their costs and environmental impacts is provided in the preamble to the proposed rule (63 FR 18773, April 15, 1998). Additional information on the costs and environmental impacts of the regulatory alternatives is presented in the Revised Nationwide Costs, Environmental Impacts, and Cost Effectiveness of Regulatory Alternatives for Kraft, Soda, Sulfite, and Semichemical Combustion Sources Memo (docket No. A–94–67).

The chosen alternative represents the MACT floor for chemical recovery combustion sources at kraft, soda, and sulfite pulp mills and is the least costly and least burdensome alternative for those sources. The chosen alternative also includes an option more stringent than the MACT floor for chemical recovery combustion sources at stand-alone semichemical pulp mills. However, EPA considers the cost effectiveness of the more stringent option for semichemical chemical recovery combustion sources (less than $2,900/Mg of HAP reduced) acceptable, especially when measured against the environmental benefits of reducing emissions of both HAP and non-HAP. Therefore, EPA concludes that the chosen alternative is the least costly and least burdensome alternative that achieves the objectives of section 112, as called for in section 205(a).

2. Social Costs and Benefits

The regulatory impact analysis prepared for MACT I, including the EPA's assessment of costs and environmental benefits, is detailed in the ''Regulatory Impacts Assessment of Proposed Effluent Guidelines and NESHAP for the Pulp, Paper, and Paperboard Industry,'' (EPA–821/R–93–020). The regulatory impacts assessment document was updated for the final rule for MACT I and III and the proposed rule for MACT II and is referred to as the Economic Analysis Document (docket No. A–94–67).

3. Future and Disproportionate Costs

The EPA does not believe that there will be any disproportionate budgetary effects of the rule on any particular areas of the country, particular governments or types of communities (*e.g.,* urban, rural), or particular industry segments.

4. Effects on the National Economy

The estimated direct cost to the pulp and paper industry of compliance with this rule is approximately $30 million (1997$) annually. Indirect costs of the rule to industries other than the pulp and paper industry, governments, tribes, and other affected entities are expected to be minor. The estimated annual cost of this rule is minimal when compared to the nominal gross domestic product of $8,318.4 billion reported for the Nation in 1997. This rule is expected to have little impact on domestic productivity, economic growth, full employment, creation of productive jobs, and on the international competitiveness of the U.S. goods and services.

5. Consultation With Government Officials

Although this rule does not affect any State, local, or tribal governments, EPA has consulted with State and local air pollution control officials. The EPA also has held numerous meetings on the proposed integrated rules with many of the stakeholders from the pulp and paper industry, including the AF&PA, the National Council of the Paper Industry for Air and Stream Improvement, numerous individual companies, vendors, and other interested parties. The EPA has added materials to the docket to document these meetings.

F. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

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

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business that has fewer than 750 employees for NAICS codes 32211, 32212, and 32213 (pulp, paper, and paperboard mills), (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000, and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, it has been determined that this action will not have a significant economic impact on a substantial number of small entities. The EPA has determined that three companies met the definition of small entity at the time of proposal. These three companies own only three of the 136 mills subject to today's final rule. The small business analysis reported in the EA shows that the affected mills have costs as a percentage of sales ratios of less than 1 percent, that these mills are not expected to close, nor are the owning companies expected to encounter financial distress as a result of this rule. An analysis of mergers and acquisitions subsequent to the baseline year of the analysis indicates that these three companies no longer meet the definition of small business.

G. Paperwork Reduction Act

The information collection requirements in this final rule will be submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The EPA has prepared an Information Collection Request (ICR) document (ICR No. 1805.01), and a copy may be obtained from Sandy Farmer by mail at Office of Environmental Information, Collection Strategies Division (2822), U.S. EPA, 1200 Pennsylvania Avenue NW, Washington, DC 20460, by electronic mail at

farmer.sandy@epa.gov, or by calling (202) 260–2740. A copy may also be downloaded off the Internet at http://www.epa.gov/icr. The information requirements are not effective until OMB approves them.

The information requirements in the final rule include mandatory notifications, records, and reports required by the NESHAP General Provisions. These information requirements are needed to confirm the compliance status of major sources, to identify any non-major sources not subject to the standard and any new or reconstructed sources subject to the standards, to confirm that emission control devices are being properly operated and maintained, and to ensure that the standards are being achieved. Based on the recorded and reported information, EPA can decide which facilities, records, or processes should be inspected. These recordkeeping and reporting requirements are specifically authorized under section 114 of the CAA. All information submitted to EPA for which a claim of confidentiality is made is safeguarded according to EPA's policies in 40 CFR part 2, subpart B.

The annual public recordkeeping and reporting burden for this collection of information (averaged over the first 3 years after the effective date of this rule) is estimated to total 21,500 labor hours per year, at a total annual cost of $958,300 (1997$). This estimate includes initial notifications, one-time performance test and report (with repeat tests where needed), one-time purchase and installation of monitoring system, one-time preparation of a startup, shutdown, and malfunction plan with immediate reports for any event when the procedures in the plan were not followed, compliance reports, and recordkeeping. Total capital costs associated with these requirements over the 3-year period of the ICR are estimated at $14,700, with annualized capital costs of $1,600 (1997$). Total operation and maintenance costs associated with these requirements are estimated at $2,700 (1997$).

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

H. National Technology Transfer and Advancement Act of 1995

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

This rulemaking involves the following technical standards: EPA Methods 1, 2, 3, 3A, 3B, 4, 5, 17, 25A, 29, and 308 (40 CFR part 60, appendix A; 40 CFR part 61, appendix B; 40 CFR part 63, appendix A). Consistent with the NTTAA, EPA conducted searches to identify voluntary consensus standards in addition to these EPA methods. For EPA Methods 3B and 308, no applicable voluntary consensus standards have been found at this time. The search and review results have been documented and are placed in the docket for this rule (Docket No. A–94–67).

The search for emissions testing procedures identified 19 voluntary consensus standards. The EPA determined that 15 of these 19 standards identified for measuring emissions of the HAP or surrogates subject to emissions limits in the rule would not be practical due to lack of equivalency, detail, and/or quality assurance/quality control requirements. Therefore, we did not use these voluntary consensus standards in this rulemaking. Four of the 19 consensus standards identified are under development or under EPA review. Therefore, we did not use these voluntary consensus standards in this rulemaking.

Section 63.865 of the rule lists the EPA test methods included in the rule. Most of these methods have been used by States and industry for more than 10 years. Nevertheless, under § 63.7(e)(2)(ii) and (f), the rule also allows any State or source to apply to EPA for permission to use an alternative method in place of any of the EPA test methods listed in § 63.865.

I. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective March 13, 2001.

List of Subjects in 40 CFR Part 63

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations, Pulp and paper mills, Reporting and recordkeeping requirements.

Dated: December 15, 2000.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, title 40, chapter I, part 63 of the Code of Federal Regulations is amended as follows:

PART 63—[AMENDED]

1. The authority citation for part 63 continues to read as follows:

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

2. Part 63 is amended by adding subpart MM to read as follows:

Subpart MM—National Emission Standards for Hazardous Air Pollutants for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills

Sec.

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§ 63.860 Applicability and designation of affected source.

(a) The requirements of this subpart apply to the owner or operator of each kraft, soda, sulfite, or stand-alone semichemical pulp mill that is a major source of hazardous air pollutants (HAP) emissions as defined in § 63.2.

(b) *Affected sources.* The requirements of this subpart apply to each new or existing affected source listed in paragraphs (b)(1) through (6) of this section:

(1) Each existing chemical recovery system (as defined in § 63.861) located at a kraft or soda pulp mill.

(2) Each new nondirect contact evaporator (NDCE) recovery furnace and associated smelt dissolving tank(s) located at a kraft or soda pulp mill.

(3) Each new direct contact evaporator (DCE) recovery furnace system (as defined in § 63.861) and associated smelt dissolving tank(s) located at a kraft or soda pulp mill.

(4) Each new lime kiln located at a kraft or soda pulp mill.

(5) Each new or existing sulfite combustion unit located at a sulfite pulp mill.

(6) Each new or existing semichemical combustion unit located at a stand-alone semichemical pulp mill.

(c) The requirements of the General Provisions in subpart A of this part that apply to the owner or operator subject to the requirements of this subpart are identified in Table 1 to this subpart.

§ 63.861 Definitions.

All terms used in this subpart are defined in the Clean Air Act, in subpart A of this part, or in this section. For the purposes of this subpart, if the same term is defined in subpart A or any other subpart of this part and in this section, it must have the meaning given in this section.

Black liquor means spent cooking liquor that has been separated from the pulp produced by the kraft, soda, or semichemical pulping process.

Black liquor gasification means the thermochemical conversion of black liquor into a combustible gaseous product.

Black liquor oxidation (BLO) system means the vessels used to oxidize the black liquor, with air or oxygen, and the associated storage tank(s).

Black liquor solids (BLS) means the dry weight of the solids in the black liquor that enters the recovery furnace or semichemical combustion unit.

Black liquor solids firing rate means the rate at which black liquor solids are fed to the recovery furnace or the semichemical combustion unit.

Chemical recovery combustion source means any source in the chemical recovery area of a kraft, soda, sulfite or stand-alone semichemical pulp mill that is an NDCE recovery furnace, a DCE recovery furnace system, a smelt dissolving tank, a lime kiln, a sulfite combustion unit, or a semichemical combustion unit.

Chemical recovery system means all existing DCE and NDCE recovery furnaces, smelt dissolving tanks, and lime kilns at a kraft or soda pulp mill. Each existing recovery furnace, smelt dissolving tank, or lime kiln is considered a process unit within a chemical recovery system.

Direct contact evaporator (DCE) recovery furnace means a kraft or soda recovery furnace equipped with a direct contact evaporator that concentrates strong black liquor by direct contact between the hot recovery furnace exhaust gases and the strong black liquor.

Direct contact evaporator (DCE) recovery furnace system means a direct contact evaporator recovery furnace and any black liquor oxidation system, if present, at the pulp mill.

Dry electrostatic precipitator (ESP) system means an electrostatic precipitator with a dry bottom (*i.e.,* no black liquor, water, or other fluid is used in the ESP bottom) and a dry particulate matter return system (*i.e.,* no black liquor, water, or other fluid is used to transport the collected PM to the mix tank).

Hazardous air pollutants (HAP) metals means the sum of all emissions of antimony, arsenic, beryllium, cadmium, chromium, cobalt, lead, manganese, mercury, nickel, and selenium as measured by EPA Method 29 (40 CFR part 60, appendix A) and with all nondetect data treated as one-half of the method detection limit.

Kraft pulp mill means any stationary source that produces pulp from wood by cooking (digesting) wood chips in a solution of sodium hydroxide and sodium sulfide. The recovery process used to regenerate cooking chemicals is also considered part of the kraft pulp mill.

Kraft recovery furnace means a recovery furnace that is used to burn black liquor produced by the kraft pulping process, as well as any recovery furnace that burns black liquor produced from both the kraft and semichemical pulping processes, and includes the direct contact evaporator, if applicable. Includes black liquor gasification.

Lime kiln means the combustion unit (*e.g.,* rotary lime kiln or fluidized-bed calciner) used at a kraft or soda pulp mill to calcine lime mud, which consists primarily of calcium carbonate, into quicklime, which is calcium oxide (CaO).

Lime production rate means the rate at which dry lime, measured as CaO, is produced in the lime kiln.

Method detection limit means the minimum concentration of an analyte that can be determined with 99 percent confidence that the true value is greater than zero.

Modification means, for the purposes of § 63.862(a)(1)(ii)(E)(*1*), any physical change (excluding any routine part replacement or maintenance) or operational change (excluding any operational change that occurs during a start-up, shutdown, or malfunction) that is made to the air pollution control device that could result in an increase in PM emissions.

Nondetect data means, for the purposes of this subpart, any value that is below the method detection limit.

Nondirect contact evaporator (NDCE) recovery furnace means a kraft or soda recovery furnace that burns black liquor that has been concentrated by indirect contact with steam.

Particulate matter (PM) means total particulate matter as measured by EPA Method 5, EPA Method 17 (§ 63.865(b)(1)), or EPA Method 29 (40 CFR part 60, appendix A).

Process unit means an existing DCE or NDCE recovery furnace, smelt dissolving tank, or lime kiln in a chemical recovery system at a kraft or soda mill.

Recovery furnace means an enclosed combustion device where concentrated black liquor produced by the kraft or soda pulping process is burned to recover pulping chemicals and produce steam. Includes black liquor gasification.

Regenerative thermal oxidizer (RTO) means a thermal oxidizer that transfers heat from the exhaust gas stream to the inlet gas stream by passing the exhaust stream through a bed of ceramic stoneware or other heat-absorbing medium before releasing it to the atmosphere, then reversing the gas flow so the inlet gas stream passes through the heated bed, raising the temperature of the inlet stream close to or at its ignition temperature.

Semichemical combustion unit means any equipment used to combust or pyrolyze black liquor at stand-alone semichemical pulp mills for the purpose

of chemical recovery. Includes black liquor gasification.

Similar process units means all existing DCE and NDCE recovery furnaces, smelt dissolving tanks, or lime kilns at a kraft or soda pulp mill.

Smelt dissolving tanks (SDT) means vessels used for dissolving the smelt collected from a kraft or soda recovery furnace.

Soda pulp mill means any stationary source that produces pulp from wood by cooking (digesting) wood chips in a sodium hydroxide solution. The recovery process used to regenerate cooking chemicals is also considered part of the soda pulp mill.

Soda recovery furnace means a recovery furnace used to burn black liquor produced by the soda pulping process and includes the direct contact evaporator, if applicable. Includes black liquor gasification.

Stand-alone semichemical pulp mill means any stationary source that produces pulp from wood by partially digesting wood chips in a chemical solution followed by mechanical defibrating (grinding), and has an onsite chemical recovery process that is not integrated with a kraft pulp mill.

Sulfite combustion unit means a combustion device, such as a recovery furnace or fluidized-bed reactor, where spent liquor from the sulfite pulping process (i.e., red liquor) is burned to recover pulping chemicals.

Sulfite pulp mill means any stationary source that produces pulp from wood by cooking (digesting) wood chips in a solution of sulfurous acid and bisulfite ions. The recovery process used to regenerate cooking chemicals is also considered part of the sulfite pulp mill.

Total hydrocarbons (THC) means the sum of organic compounds measured as carbon using EPA Method 25A (40 CFR part 60, appendix A).

§ 63.862 Standards.

(a) *Standards for HAP metals: existing sources.* (1) Each owner or operator of an existing kraft or soda pulp mill must comply with the requirements of either paragraph (a)(1)(i) or (ii) of this section.

(i) Each owner or operator of a kraft or soda pulp mill must comply with the PM emissions limits in paragraphs (a)(1)(i)(A) through (C) of this section.

(A) The owner or operator of each existing kraft or soda recovery furnace must ensure that the concentration of PM in the exhaust gases discharged to the atmosphere is less than or equal to 0.10 gram per dry standard cubic meter (g/dscm) (0.044 grain per dry standard cubic foot (gr/dscf)) corrected to 8 percent oxygen.

(B) The owner or operator of each existing kraft or soda smelt dissolving tank must ensure that the concentration of PM in the exhaust gases discharged to the atmosphere is less than or equal to 0.10 kg/Mg (0.20 lb/ton) of black liquor solids fired.

(C) The owner or operator of each existing kraft or soda lime kiln must ensure that the concentration of PM in the exhaust gases discharged to the atmosphere is less than or equal to 0.15 g/dscm (0.064 gr/dscf) corrected to 10 percent oxygen.

(ii) As an alternative to meeting the requirements of § 63.862(a)(1)(i), each owner or operator of a kraft or soda pulp mill may establish PM emissions limits for each existing kraft or soda recovery furnace, smelt dissolving tank, and lime kiln that operates 6,300 hours per year or more by:

(A) Establishing an overall PM emission limit for each existing process unit in the chemical recovery system at the kraft or soda pulp mill using the methods in § 63.865(a)(1) and (2).

(B) The emissions limits for each kraft recovery furnace, smelt dissolving tank, and lime kiln that are used to establish the overall PM limit in paragraph (a)(1)(ii)(A) of this section must not be less stringent than the emissions limitations required by § 60.282 of part 60 of this chapter for any kraft recovery furnace, smelt dissolving tank, or lime kiln that is subject to the requirements of § 60.282.

(C) Each owner or operator of an existing kraft or soda recovery furnace, smelt dissolving tank, or lime kiln must ensure that the PM emissions discharged to the atmosphere from each of these sources are less than or equal to the applicable PM emissions limits, established using the methods in § 63.865(a)(1), that are used to establish the overall PM emissions limits in paragraph (a)(1)(ii)(A) of this section.

(D) Each owner or operator of an existing kraft or soda recovery furnace, smelt dissolving tank, or lime kiln must reestablish the emissions limits determined in paragraph (a)(1)(ii)(A) of this section if either of the actions in paragraphs (a)(1)(ii)(D)(*1*) and (*2*) of this section are taken:

(*1*) The air pollution control system for any existing kraft or soda recovery furnace, smelt dissolving tank, or lime kiln for which an emission limit was established in paragraph (a)(1)(ii)(A) of this section is modified (as defined in § 63.861) or replaced; or

(*2*) Any kraft or soda recovery furnace, smelt dissolving tank, or lime kiln for which an emission limit was established in paragraph (a)(1)(ii)(A) of this section is shut down for more than 60 consecutive days.

(iii) Each owner or operator of an existing kraft or soda recovery furnace, smelt dissolving tank, or lime kiln that operates less than 6,300 hours per year must comply with the applicable PM emissions limits for that process unit provided in paragraph (a)(1)(i) of this section.

(2) The owner or operator of each existing sulfite combustion unit must ensure that the concentration of PM in the exhaust gases discharged to the atmosphere is less than or equal to 0.092 g/dscm (0.040 gr/dscf) corrected to 8 percent oxygen.

(b) *Standards for HAP metals: new sources.* (1) The owner or operator of any new kraft or soda recovery furnace must ensure that the concentration of PM in the exhaust gases discharged to the atmosphere is less than or equal to 0.034 g/dscm gr/dscf) corrected to 8 percent oxygen.

(2) The owner or operator of any new kraft or soda smelt dissolving tank must ensure that the the concentration of PM in the exhaust gases discharged to the atmosphere is less than or equal to 0.06 kg/Mg (0.12 lb/ton) of black liquor solids fired.

(3) The owner or operator of any new kraft or soda lime kiln must ensure that the concentration of PM in the exhaust gases discharged to the atmosphere is less than or equal to 0.023 g/dscm (0.010 gr/dscf) corrected to 10 percent oxygen.

(4) The owner or operator of any new sulfite combustion unit must ensure that the concentration of PM in the exhaust gases discharged to the atmosphere is less than or equal to 0.046 g/dscm (O.020 gr/dscf) corrected to 8 percent oxygen.

(c) *Standards for gaseous organic HAP.* (1) The owner or operator of any new recovery furnace at a kraft or soda pulp mill must ensure that the concentration or gaseous organic HAP, as meauared by methanol, discharged to the atmosphere is no greater than 0.012 kg/Mg (0.025 lb/ton) of black liquor solids fired.

(2) The owner or operator of each existing or new semichemical combustion unit must ensure that:

(i) The concentration of gaseous organic HAP, as measured by total hydrocarbons reported as carbon, discharged to the atmosphere is less than or equal to 1.49 kg/Mg (2.97 lb/ton) of black liquor solids fired; or

(ii) The gaseous organic HAP emissions, as measured by total hydrocarbons reported as carbon, are reduced by at least 90 percent prior to

discharge of the gases to the atmosphere.

§ 63.863 Compliance dates.

(a) The owner or operator of an existing affected source or process unit must comply with the requirements in this subpart no later than January 12, 2004.

(b) The owner or operator of a new affected source that has an initial startup date after January 12, 2001, must comply with the requirements in this subpart immediately upon startup of the affected source, expect as specified in § 63.6(b).

§ 63.864 Monitoring requirements.

(a) *General.* (1) The owner or operator of each affected kraft or soda recovery furnace or lime kiln equipped with as ESP must install, calibrate, maintain, and operate a continuous opacity monitoring system that can be used to determine opacity at least once every successive 10-second period and calculate and record each successive 6-minute average opacity using the procedures in §§ 63.6(h) and 63.8.

(2) The owner or operator of each affected kraft or soda recovery furnace, kraft or soda lime kiln, sulfite combustion unit, or kraft or soda smelt dissolving tank equipped with a wet scrubber must install, calibrate, maintain, and operate a continuous monitoring system that can be used to determine and record the pressure drop across the scrubber and the scrubbing liquid flow rate at least once every successive 15-minute period using the procedures in §63.8(c), as well as the procedures in paragraphs (a)(2)(i) and (ii) of this section:

(i) The monitoring device used for the continuous measurement of the pressure drop of the gas stream across the scrubber must be certified by the manufacturer to the accurate to within a gage pressure of ±500 pascals (±2 inches of water gage pressure); and

(ii) The monitoring device used for continuous measurement of the scrubbing liquid flow rate must be certified by the manufacturer to be accurate within ±5 percent of the design scrubbing liquid flow rate.

(3) The owner or operator of each affected semichemical combustion unit equipped with an RTO must install, calibrate, maintain, and operate a continuous monitoring system that can be used to determine and record the operating temperature of the RTO at least once every successive 15-minute period using the procedures in § 63.8(c). The monitor must compute and record the operating temperature at the point of incineration of effluent gases that are emitted using a temperature monitor accurate to within ±1 percent of the temperature being measured.

(4) The owner or operator of each affected source or process unit that uses a control device listed in paragraphs (a)(1) through (3) of this section may monitor alternative control device operating parameters subject to prior written approval by the Administrator.

(5) The owner or operator of each affected source or process unit that uses an air pollution control system other than those listed in paragraphs (a)(1) through (3) of this section must monitor the parameters as approved by the Administrator using the methods and procedures in § 63.865(f).

(6) The owner or operator of each affected source or process unit complying with the gaseous organic HAP emissions limitations of § 63.862(c)(1) through the use of an NDCE recovery furnace equipped with a dry ESP system is not required to conduct any performance testing or any continuous monitoring to demonstrate compliance with the gaseous organic HAP emission limitation.

(b) *Initial compliance determination.* (1) The owner or operator of each affected source or process unit subject to the requirements of this subpart is required to conduct an initial performance test using the test methods and procedures listed in §§ 63.7 and 63.865, except as provided in paragraph (b)(3) of this section.

(2) *Determination of operating ranges.* (i) During the initial performance test required in paragraph (b)(1) of this section, the owner or operator of any affected source or process unit must establish operating ranges for the monitoring parameters in paragraphs (a)(2) through (5) of this section, as appropriate; or

(ii) The owner or operator may base operating ranges on values recorded during previous performance tests or conduct additional performance tests for the specific purpose of establishing operating ranges, provided that test data used to establish the operating ranges are or have been obtained using the test methods required in this subpart. The owner or operator of the affected source or process unit must certify that all control techniques and processes have not been modified subsequent to the testing upon which the data used to establish the operating parameter ranges were obtained.

(iii) The owner or operator of an affected source or process unit may establish expanded or replacement operating ranges for the monitoring parameter values listed in paragraphs (a)(2) through (5) of this section and established in paragraph (b)(2)(i) or (ii) of this section during subsequent performance tests using the test methods in § 63.865.

(3) An initial performance test is not required to be conducted in order to determine compliance with the emissions limitations of § 63.862(c)(1) if the affected source or process unit includes an NDCE recovery furnace equipped with a dry ESP system.

(4) After the Administrator has approved the PM emissions limits for each kraft or soda recovery furnace, smelt dissolving tank, and lime kiln, the owner or operator complying with an overall PM emission limit established in § 63.862(a)(1)(ii) must demonstrate compliance with the HAP metals standard by demonstrating compliance with the approved PM emissions limits for each affected kraft or soda recovery furnace, smelt dissolving tank, and lime kiln, using the test methods and procedures in § 63.865(b).

(c) *On-going compliance provisions.* (1) Following the compliance date, owners or operators of all affected sources or process units are required to implement corrective action, as specified in the startup, shutdown, and malfunction plan prepared under § 63.866(a) if the monitoring exceedances in paragraphs (c)(1)(i) through (v) of this section occur:

(i) For a new or existing kraft or soda recovery furnace or lime kiln equipped with an ESP, when the average of ten consecutive 6-minute averages result in a measurement greater than 20 percent opacity;

(ii) For a new or existing kraft or soda recovery furnace, kraft or soda smelt dissolving tank, kraft or soda lime kiln, or sulfite combustion unit equipped with a wet scrubber, when any 3-hour average parameter value is outside the range of values established in paragraph (b)(2) of this section.

(iii) For a new or existing semichemical combustion unit equipped with an RTO, when any 1-hour average temperature falls below the temperature established in paragraph (b)(2) of this section;

(iv) For an affected source or process unit equipped with an alternative emission control system approved by the Administrator, when any 3-hour average value is outside the range of parameter values established in paragraph (b)(2) of this section; and

(v) For an affected source or process unit that is monitoring alternative operating parameters established in paragraph (a)(4) of this section, when any 3-hour average value is outside the range of parameter values established in paragraph (b)(2) of this section.

(2) Following the compliance date, owners or operators of all affected sources or process units are in violation of the standards of § 63.862 if the monitoring exceedances in paragraphs (c)(2)(i) through (vi) of this section occur:

(i) For an existing kraft or soda recovery furnace equipped with an ESP, when opacity is greater than 35 percent for 6 percent or more of the operating time within any quarterly period;

(ii) For a new kraft or soda recovery furnace or a new or existing lime kiln equipped with an ESP, when opacity is greater than 20 percent for 6 percent or more of the operating time within any quarterly period;

(iii) For a new or existing kraft or soda recovery furnace, kraft or soda smelt dissolving tank, kraft or soda lime kiln, or sulfite combustion unit equipped with a wet scrubber, when six or more 3-hour average parameter values within any 6-month reporting period are outside the range of values established in paragraph (b)(2) of this section;

(iv) For a new or existing semichemical combustion unit equipped with an RTO, when any 3-hour average temperature falls below the temperature established in paragraph (b)(2) of this section;

(v) For an affected source or process unit equipped with an alternative air pollution control system approved by the Administrator, when six or more 3-hour average values within any 6-month reporting period are outside the range of parameter values established in paragraph (b)(2) of this section; and

(vi) For an affected source or process unit that is monitoring alternative operating parameters established in paragraph (a)(4) of this section, when six or more 3-hour average values within any 6-month reporting period are outside the range of parameter values established in paragraph (b)(2) of this section.

(3) For purposes of determining the number of nonopacity monitoring exceedances, no more than one exceedance will be attributed in any given 24-hour period.

§ 63.865 Performance test requirements and test methods.

(a) The owner or operator of a process unit seeking to comply with a PM emission limit under § 63.862(a)(1)(ii)(A) must use the procedures in paragraphs (a)(1) through (4) of this section:

(1) Determine the overall PM emission limit for the chemical recovery system at the mill using Equation 1 of this section as follows:

$$EL_{PM} = \left[\left(C_{ref,\,RF}\right)\left(Q_{RFtot}\right) + \left(C_{ref,\,LK}\right)\left(Q_{LKtot}\right)\right](F1)/\left(BLS_{tot}\right) + ER1_{ref,\,SDT} \qquad \text{(Eq. 1)}$$

Where:

EL_{PM}=overall PM emission limit for all existing process units in the chemical recovery system at the kraft or soda pulp mill, kg/Mg (lb/ton) of black liquor solids fired.

$C_{ref,\,RF}$=reference concentration of 0.10 g/dscm (0.044 gr/dscf) corrected to 8 percent oxygen for existing kraft or soda recovery furnaces.

QRF_{tot}=sum of the average volumetric gas flow rates measured during the performance test and corrected to 8 percent oxygen for all existing recovery furnaces in the chemical recovery system at the kraft or soda pulp mill, dry standard cubic meters per minute (dscm/min) (dry standard cubic feet per minute [dscf/min]).

$C_{ref,\,LK}$=reference concentration of 0.15 g/dscm (0.064 gr/dscf) corrected to 10 percent oxygen for existing kraft or soda lime kilns.

Q_{LKtot}=sum of the average volumetric gas flow rates measured during the performance test and corrected to 10 percent oxygen for all existing lime kilns in the chemical recovery system at the kraft or soda pulp mill, dscm/min (dscf/min).

F1=conversion factor, 1.44 minutes•;kilogram/day•gram (min•kg/d•g) (0.206 minutes•pound/day•grain [min•lb/d•gr]).

BLS_{tot}=sum of the average black liquor solids firing rates of all existing recovery furnaces in the chemical recovery system at the kraft or soda pulp mill measured during the performance test, megagrams per day (Mg/d) (tons per day [tons/d]) of black liquor solids fired.

$ER1_{ref,\,SDT}$=reference emission rate of 0.10 kg/Mg (0.20 lb/ton) of black liquor solids fired for existing kraft or soda smelt dissolving tanks.

(2) Establish an emission limit for each kraft or soda recovery furnace, smelt dissolving tank, and lime kiln; and, using these emissions limits, determine the overall PM emission rate for the chemical recovery system at the mill using the procedures in paragraphs (a)(2)(i) through (v) of this section, such that the overall PM emission rate calculated in paragraph (a)(2)(v) of this section is less than or equal to the overall PM emission limit determined in paragraph (a)(1) of this section, as appropriate.

(i) The PM emission rate from each affected recovery furnace must be determined using Equation 2 of this section as follows:

$$ER_{RF} = (F1)\left(C_{EL,\,RF}\right)\left(Q_{RF}\right)/(BLS) \qquad \text{(Eq. 2)}$$

Where:

ER_{RF}=emission rate from each recovery furnace, kg/Mg (lb/ton) of black liquor solids.

F1=conversion factor, 1.44 min•kg/d•g (0.206 min•/d•gr).

$C_{EL,\,RF}$=PM emission limit proposed by owner or operator for the recovery furnace, g/dscm (gr/dscf) corrected to 8 percent oxygen.

Q_{RF}=average volumetric gas flow rate from the recovery furnace measured during the performance test and corrected to 8 percent oxygen, dscm/min (dscf/min).

BLS=average black liquor solids firing rate of the recovery furnace measured during the performance test, Mg/d (ton/d) of black liquor solids.

(ii) The PM emission rate from each affected smelt dissolving tank must be determined using Equation 3 of this section as follows:

$$ER_{SDT} = (F1)\left(C_{EL,\,SDT}\right)\left(Q_{SDT}\right)/(BLS) \qquad \text{(Eq. 3)}$$

Where:

ER_{SDT}=emission rate from each SDT, kg/Mg (lb/ton) of black liquor solids fired.

F1=conversion factor, 1.44 min•kg/d•g (0.206 min•lb/d•gr).

$C_{EL,\ SDT}$=PM emission limit proposed by owner or operator for the smelt dissolving tank, g/dscm (gr/dscf).

Q_{SDT}=average volumetric gas flow rate from the smelt dissolving tank measured during the performance test, dscm/min (dscf/min).

BLS=average black liquor solids firing rate of the associated recovery furnace measured during the performance test, Mg/d (ton/d) of black liquorsolids fired. If more than one SDT is used to dissolve the smelt from a given recovery furnace, then the black liquor solids firing rate of the furnace must be proportioned according to the size of the SDT.

(iii) The PM emission rate from each affected lime kiln must be determined using Equation 4 of this section as follows:

$$ER_{LK} = (F1)(C_{EL,\ LK})(Q_{LK})(CaO_{tot}/BLS_{tot})/(CaO_{LK}) \qquad \text{(Eq. 4)}$$

Where:

ER_{LK}=emission rate from each lime kiln, kg/Mg (lb/ton) of black liquor solids.

F1=conversion factor, 1.44 min•kg/d•g (0.206 min•lb/d•gr).

$C_{EL,LK}$=PM emission limit proposed by owner or operator for the lime kiln, g/dscm (gr/dscf) corrected to 10 percent oxygen.

Q_{LK}=average volumetric gas flow rate from the lime kiln measured during the performance test and corrected to 10 percent oxygen, dscm/min (dscf/min).

CaO_{LK}=lime production rate of the lime kiln, measured as CaO during the performance test, Mg/d (ton/d) of CaO.

CaO_{tot}=sum of the average lime production rates for all existing lime kilns in the chemical recovery system at the mill measured as CaO during the performance test, Mg/d (ton/d).

BLS_{tot}=sum of the average black liquor solids firing rates of all recovery furnaces in the chemical recovery system at the mill measured during the performance test, Mg/d (ton/d) of black liquor solids.

(iv) If more than one similar process unit is operated in the chemical recovery system at the kraft or soda pulp mill, Equation 5 of this section must be used to calculate the overall PM emission rate from all similar process units in the chemical recovery system at the mill and must be used in determining the overall PM emission rate for the chemical recovery system at the mill:

$$ER_{PUtot} = ER_{PU1}(PR_{PU1}/PR_{tot}) + \ . \ . \ . \ + (ER_{PUi})(PR_{PUi}/PR_{tot}) \qquad \text{(Eq. 5)}$$

Where:

ER_{PUtot}=overall PM emission rate from all similar process units, kg/Mg (lb/ton) of black liquor solids fired.

ER_{PU1}=PM emission rate from process unit No. 1, kg/Mg (lb/ton) of black liquor solids fired, calculated using Equation 2, 3, or 4 in paragraphs (a)(2)(i) through (iii) of this section.

PR_{PU1}=black liquor solids firing rate in Mg/d (ton/d) for process unit No. 1, if process unit is a recovery furnace or SDT. The CaO production rate in Mg/d (ton/d) for process unit No. 1, if process unit is a lime kiln.

PR_{tot}=total black liquor solids firing rate in Mg/d (ton/d) for all recovery furnaces in the chemical recovery system at the kraft or soda pulp mill if the similar process units are recovery furnaces or SDT, or the total CaO production rate in Mg/d (ton/d) for all lime kilns in the chemical recovery system at the mill if the similar process units are lime kilns.

ER_{PUi}=PM emission rate from process unit No. i, kg/Mg (lb/ton) of black liquor solids fired.

PR_{PUi}=black liquor solids firing rate in Mg/d (ton/d) for process unit No. i, if process unit is a recovery furnace or SDT. The CaO production rate in Mg/d (ton/d) for process unit No. i, if process unit is a lime kiln.

i=number of similar process units located in the chemical recovery system at the kraft or soda pulp mill.

(v) The overall PM emission rate for the chemical recovery system at the mill must be determined using Equation 6 of this section as follows:

$$ER_{tot} = ER_{RFtot} + ER_{SDTtot} + ER_{LKtot} \qquad \text{(Eq. 6)}$$

Where:

ER_{tot}=overall PM emission rate for the chemical recovery system at the mill, kg/Mg (lb/ton) of black liquor solids fired.

ER_{RFtot}=PM emission rate from all kraft or soda recovery furnaces, calculated using Equation 2 or 5 in paragraphs (a)(2)(i) and (iv) of this section, where applicable, kg/Mg (lb/ton) of black liquor solids fired.

ER_{SDTtot}=PM emission rate from all smelt dissolving tanks, calculated using Equation 3 or 5 in paragraphs (a)(2)(ii) and (iv) of this section, where applicable, kg/Mg (lb/ton) of black liquor solids fired.

ER_{LKtot}=PM emission rate from all lime kilns, calculated using Equation 4 or 5 in paragraphs (a)(2)(iii) and (iv) of this section, where applicable, kg/Mg (lb/ton) of black liquor solids fired.

(3) For purposes of determining the volumetric gas flow rate used in this section for each kraft or soda recovery furnace, smelt dissolving tank, and lime kiln, Methods 1 through 4 in appendix A of 40 CFR part 60 must be used.

(4) Process data measured during the performance test must be used to determine the black liquor solids firing rate on a dry basis and the CaO production rate.

(b) The owner or operator seeking to determine compliance with § 63.862(a) must use the procedures in paragraphs (b)(1) through (4) of this section.

(1) For purposes of determining the concentration of PM emitted from each kraft or soda recovery furnace, sulfite combustion unit, smelt dissolving tank or lime kiln, Method 5 or 29 in appendix A of 40 CFR part 60 must be used, except that Method 17 in appendix A of 40 CFR part 60 may be used in lieu of Method 5 or Method 29 if a constant value of 0.009 g/dscm (0.004 gr/dscf) is added to the results of Method 17, and the stack temperature is no greater than 205°C (400°F). The sampling time and sample volume for each run must be at least 60 minutes and 0.90 dscm (31.8 dscf). Water must be used as the cleanup solvent instead of acetone in the sample recovery procedure.

(2) For sources complying with paragraph (a)(1) or (2) of § 63.862, the PM concentration must be corrected to the appropriate oxygen concentration using Equation 7 of this section as follows:

$$C_{corr} = C_{meas} \times (21 - X)/(21 - Y) \qquad \text{(Eq. 7)}$$

Where:
C_{corr}=the measured concentration corrected for oxygen, g/dscm (gr/dscf).
C_{meas}=the measured concentration uncorrected for oxygen, g/dscm (gr/dscf).
X=the corrected volumetric oxygen concentration (8 percent for kraft or soda recovery furnaces and sulfite combustion units and 10 percent for kraft or soda lime kilns).
Y=the measured average volumetric oxygen concentration.

(3) Method 3A or 3B in appendix A of 40 CFR part 60 must be used to determine the oxygen concentration. The gas sample must be taken at the same time and at the same traverse points as the particulate sample.

(4) For purposes of complying with paragraph (a)(1) or (2) of § 63.862, the volumetric gas flow rate must be corrected to the appropriate oxygen concentration using Equation 8 of this section as follows:

$$Q_{corr} = Q_{meas} \times (21 - X)/(21 - Y) \qquad \text{(Eq. 8)}$$

Where:
Q_{corr} = the measured volumetric gas flow rate corrected for oxygen, dscm/min (dscf/min).
Q_{meas} = the measured volumetric gas flow rate uncorrected for oxygen, dscm/min (dscf/min).
X = the corrected volumetric oxygen concentration (8 percent for kraft or soda recovery furnaces and sulfite combustion units and 10 percent for kraft or soda lime kilns).
Y = the measured average volumetric oxygen concentration.

(c) The owner or operator seeking to determine compliance with the gaseous organic HAP standard in § 63.862(c)(1) without using an NDCE recovery furnace equipped with a dry ESP system must use Method 308 in appendix A of this part. The sampling time and sample volume for each run must be at least 60 minutes and 0.014 dscm (0.50 dscf), respectively.

(1) The emission rate from any new NDCE recovery furnace must be determined using Equation 9 of this section as follows:

$$ER_{NDCE} = (MR_{meas})/(BLS) \qquad \text{(Eq. 9)}$$

Where:
ER_{NDCE} = methanol emission rate from the NDCE recovery furnace, kg/Mg (lb/ton) of black liquor solids fired.
MR_{meas} = measured methanol mass emission rate from the NDCE recovery furnace, kg/hr (lb/hr).
BLS = average black liquor solids firing rate of the NDCE recovery furnace, Mg/hr (ton/hr); determined using process data measured during the performance test.

(2) The emission rate from any new DCE recovery furnace system must be determined using Equation 10 of this section as follows:

$$ER_{DCE} = \left[(MR_{meas,\,RF})/BLS_{RF}\right] + \left[(MR_{meas,\,BLO})/BLS_{BLO}\right] \qquad \text{(Eq. 10)}$$

Where:
ER_{DCE} = methanol emission rate from each DCE recovery furnace system, kg/Mg (lb/ton) of black liquor solids fired.
$MR_{meas,RF}$ = average measured methanol mass emission rate from each DCE recovery furnace, kg/hr (lb/hr).
$MR_{meas,BLO}$ = average measured methanol mass emission rate from the black liquor oxidation system, kg/hr (lb/hr).
BLS_{RF} = average black liquor solids firing rate for each DCE recovery furnace, Mg/hr (ton/hr); determined using process data measured during the performance test.
BLS_{BLO} = the average mass rate of black liquor solids treated in the black liquor oxidation system, Mg/hr (ton/hr); determined using process data measured during the performance test.

(d) The owner or operator seeking to determine compliance with the gaseous organic HAP standards in § 63.862(c)(2) for semichemical combustion units must use Method 25A in appendix A of 40 CFR part 60. The sampling time must be at least 60 minutes.

(1) The emission rate from any new or existing semichemical combustion unit must be determined using Equation 11 of this section as follows:

$$ER_{SCCU} = (THC_{meas})/(BLS) \qquad \text{(Eq. 11)}$$

Where:
ER_{SCCU} = THC emission rate from each semichemical combustion unit, kg/Mg (lb/ton) of black liquor solids fired.
THC_{meas} = measured THC mass emission rate, kg/hr (lb/hr).
BLS = average black liquor solids firing rate, Mg/hr (ton/hr); determined using process data measured during the performance test.

(2) If the owner or operator of the semichemical combustion unit has selected the percentage reduction standards for THC, under § 63.862(c)(2)(ii), the percentage reduction in THC emissions is computed using Equation 12 of this section as follows, provided that Ei and Eo are measured simultaneously:

$$(\%R_{THC}) = \left(\frac{E_i - E_o}{E_i}\right) \times 100 \qquad \text{(Eq. 12)}$$

Where:
$\%R_{THC}$ = percentage reduction of total hydrocarbons emissions achieved.
E_i = measured THC mass emission rate at the THC control device inlet, kg/hr (lb/hr).
E_o = measured THC mass emission rate at the THC control device outlet, kg/hr (lb/hr).

(e) The owner or operator seeking to comply with the continuous parameter monitoring requirements of § 63.864(b)(2) must continuously monitor each parameter and determine the arithmetic average value of each parameter during each 3-run performance test. Multiple 3-run performance tests may be conducted to establish a range of parameter values.

(f) The owner or operator of an affected source or process unit seeking to demonstrate compliance with the standards in § 63.862 using a control technique other than those listed in § 63.864(a)(1) through (3) must provide to the Administrator a monitoring plan that includes a description of the control device, test results verifying the performance of the control device, the appropriate operating parameters that will be monitored, and the frequency of measuring and recording to establish continuous compliance with the standards. The monitoring plan is subject to the Administrator's approval. The owner or operator of the affected source or process unit must install, calibrate, operate, and maintain the monitor(s) in accordance with the monitoring plan approved by the Administrator. The owner or operator must include in the information submitted to the Administrator proposed performance specifications and quality assurance procedures for the monitors. The Administrator may request further information and will approve acceptable test methods and procedures.

§ 63.866 Recordkeeping requirements.

(a) *Startup, shutdown, and malfunction plan.* The owner or operator must develop and implement a written plan as described in § 63.6(e)(3) that contains specific procedures to be followed for operating the source and maintaining the source during periods of startup, shutdown, and malfunction, and a program of corrective action for malfunctioning process and control systems used to comply with the standards. In addition to the information required in § 63.6(e), the plan must include the requirements in paragraphs (a)(1) and (2) of this section.

(1) Procedures for responding to any process parameter level that is inconsistent with the level(s) established under § 63.864(b)(2), including the procedures in paragraphs (a)(1)(i) and (ii) of this section:

(i) Procedures to determine and record the cause of an operating parameter exceedance and the time the exceedance began and ended; and

(ii) Corrective actions to be taken in the event of an operating parameter exceedance, including procedures for recording the actions taken to correct the exceedance.

(2) The startup, shutdown, and malfunction plan also must include the schedules listed in paragraphs (a)(2)(i) and (ii) of this section:

(i) A maintenance schedule for each control technique that is consistent with, but not limited to, the manufacturer's instructions and recommendations for routine and long-term maintenance; and

(ii) An inspection schedule for each continuous monitoring system required under § 63.864 to ensure, at least once in each 24-hour period, that each continuous monitoring system is properly functioning.

(b) The owner or operator of an affected source or process unit must maintain records of any occurrence when corrective action is required under § 63.864(c)(1), and when a violation is noted under § 63.864(c)(2).

(c) In addition to the general records required by § 63.10(b)(2), the owner or operator must maintain records of the information in paragraphs (c)(1) through (6) of this section:

(1) Records of black liquor solids firing rates in units of megagrams/day or tons/day for all recovery furnaces and semichemical combustion units;

(2) Records of CaO production rates in units of megagrams/day or tons/day for all lime kilns;

(3) Records of parameter monitoring data required under § 63.864, including any period when the operating parameter levels were inconsistent with the levels established during the initial performance test, with a brief explanation of the cause of the deviation, the time the deviation occurred, the time corrective action was initiated and completed, and the corrective action taken;

(4) Records and documentation of supporting calculations for compliance determinations made under §§ 63.865(a) through (e);

(5) Records of monitoring parameter ranges established for each affected source or process unit;

(6) Records certifying that an NDCE recovery furnace equipped with a dry ESP system is used to comply with the gaseous organic HAP standard in § 63.862(c)(1).

§ 63.867 Reporting requirements.

(a) *Notifications.* The owner or operator of any affected source or process unit must submit the applicable notifications from subpart A of this part, as specified in Table 1 of this subpart.

(b) *Additional reporting requirements for HAP metals standards.* (1) Any owner or operator of a group of process units in a chemical recovery system at a mill complying with the PM emissions limits in § 63.862(a)(1)(ii) must submit the PM emissions limits determined in § 63.865(a) for each affected kraft or soda recovery furnace, smelt dissolving tank, and lime kiln to the Administrator for approval. The emissions limits must be submitted as part of the notification of compliance status required under subpart A of this part.

(2) Any owner or operator of a group of process units in a chemical recovery system at a mill complying with the PM emissions limits in § 63.862(a)(1)(ii) must submit the calculations and supporting documentation used in § 63.865(a)(1) and (2) to the Administrator as part of the notification of compliance status required under subpart A of this part.

(3) After the Administrator has approved the emissions limits for any process unit, the owner or operator of a process unit must notify the Administrator before any of the actions in paragraphs (b)(3)(i) through (iv) of this section are taken:

(i) The air pollution control system for any process unit is modified or replaced;

(ii) Any kraft or soda recovery furnace, smelt dissolving tank, or lime kiln in a chemical recovery system at a kraft or soda pulp mill complying with the PM emissions limits in § 63.862(a)(1)(ii) is shut down for more than 60 consecutive days;

(iii) A continuous monitoring parameter or the value or range of values of a continuous monitoring parameter for any process unit is changed; or

(iv) The black liquor solids firing rate for any kraft or soda recovery furnace during any 24-hour averaging period is

increased by more than 10 percent above the level measured during the most recent performance test.

(4) An owner or operator of a group of process units in a chemical recovery system at a mill complying with the PM emissions limits in § 63.862(a)(1)(ii) and seeking to perform the actions in paragraph (b)(3)(i) or (ii) of this section must recalculate the overall PM emissions limit for the group of process units and resubmit the documentation required in paragraph (b)(2) of this section to the Administrator. All modified PM emissions limits are subject to approval by the Administrator.

(c) *Excess emissions report.* The owner or operator must report quarterly if measured parameters meet any of the conditions specified in paragraph (c)(1) or (2) of § 63.864. This report must contain the information specified in § 63.10(c) of this part as well as the number and duration of occurrences when the source met or exceeded the conditions in § 63.864(c)(1), and the number and duration of occurrences when the source met or exceeded the conditions in § 63.864(c)(2). Reporting excess emissions below the violation thresholds of § 63.864(c) does not constitute a violation of the applicable standard.

(1) When no exceedances of parameters have occurred, the owner or operator must submit a semiannual report stating that no excess emissions occurred during the reporting period.

(2) The owner or operator of an affected source or process unit subject to the requirements of this subpart and subpart S of this part may combine excess emissions and/or summary reports for the mill.

§ 63.868 Delegation of authority.

(a) In delegating implementation and enforcement authority to a State under section 112(d) of the Clean Air Act, the authorities contained in paragraph (b) of this section must be retained by the Administrator and not transferred to a State.

(b) The authorities which will not be delegated to States are listed in paragraphs (b)(1) through (4) of this section:

(1) Approval of alternatives to standards in § 63.862 under § 63.6(g).

(2) Approval of major alternatives to test methods under § 63.7(e)(2)(ii) and (f) and as defined in § 63.90.

(3) Approval of major alternatives to monitoring under § 63.8(f) and as defined in § 63.90.

(4) Approval of major alternatives to recordkeeping and reporting under § 63.10(f) and as defined in § 63.90.

TABLE 1 TO SUBPART MM—GENERAL PROVISIONS APPLICABILITY TO SUBPART MM

General provisions reference	Summary of requirements	Applies to supbart MM	Explanation
63.1(a)(1)	General applicability of the General Provisions	Yes	Additional terms defined in § 63.861; when overlap between subparts A and MM of this part, subpart MM takes precedence.
63.1(a)(2)–(14)	General applicability of the General Provisions	Yes.	
63.1(b)(1)	Initial applicability determination.	No.	Subpart MM specifies the applicability in § 63.860.
63.1(b)(2)	Title V operating permit—see 40 CFR part 70	Yes	All major affected sources are required to obtain a title V permit.
63.1(b)(3)	Record of the applicability determination	No	All affected sources are subject to subpart MM according to the applicability definition of subpart MM.
63.1(c)(1)	Applicability of subpart A of this part after a relevant standard has been set.	Yes	Subpart MM clarifies the applicability of each paragraph of subpart A of this part to sources subject to subpart MM.
63.1(c)(2)	Title V permit requirement	Yes	All major affected sources are required to obtain a title V permit. There are no area sources in the pulp and paper mill source category.
63.1(c)(3)	[Reserved]	NA..	
63.1(c)(4)	Requirements for existing source that obtains an extension of compliance.	Yes.	
63.1(c)(5)	Notification requirements for an area source that increases HAP emissions to major source levels.	Yes.	
63.1(d)	[Reserved]	NA.	
63.1(e)	Applicability of permit program before a relevant standard has been set.	Yes.	
63.2	Definitions	Yes	Additional terms defined in § 63.861; when overlap between subparts A and MM of this part occurs, subpart MM takes precedence.
63.3	Units and abbreviations	Yes.	
63.4	Prohibited activities and circumvention	Yes.	
63.5(a)	Construction and reconstruction—applicability	Yes.	
63.5(b)(1)	Upon construction, relevant standards for new sources.	Yes.	
63.5(b)(2)	[Reserved]	NA.	
63.5(b)(3)	New construction/reconstruction	Yes.	
63.5(b)(4)	Construction/reconstruction notification	Yes.	
63.5(b)(5)	Construction/reconstruction compliance	Yes.	
63.5(b)(6)	Equipment addition or process change	Yes.	
63.5(c)	[Reserved]	NA.	
63.5(d)	Application for approval of construction/reconstruction.	Yes.	
63.5(e)	Construction/reconstruction approval	Yes.	

TABLE 1 TO SUBPART MM—GENERAL PROVISIONS APPLICABILITY TO SUBPART MM—Continued

General provisions reference	Summary of requirements	Applies to supbart MM	Explanation
63.5(f)	Construction/reconstruction approval based on prior State preconstruction review.	Yes.	
63.6(a)(1)	Compliance with standards and maintenance requirements—applicability.	Yes.	
63.6(a)(2)	Requirements for area source that increases emissions to become major.	Yes.	
63.6(b)	Compliance dates for new and reconstructed sources.	Yes.	
63.6(c)	Compliance dates for existing sources	Yes	Subpart MM specifically stipulates the compliance schedule for existing sources.
63.6(d)	[Reserved]	NA.	
63.6(e)	Operation and maintenance requirements	Yes.	
63.6(f)	Compliance with nonopacity emissions standards.	Yes.	
63.6(g)	Compliance with alternative nonopacity emissions standards.	Yes.	
63.6(h)	Compliance with opacity and visible emissions (VE) standards.	Yes	Subpart MM does not contain any opacity or VE standards; however, § 63.864 specifies opacity monitoring requirements.
63.6(i)	Extension of compliance with emissions standards.	Yes.	
63.6(j)	Exemption from compliance with emissions standards.	Yes.	
63.7(a)(1)	Performance testing requirements—applicability.	Yes	§ 63.864(a)(6) specifies the only exemption from performance testing allowed under subpart MM.
63.7(a)(2)	Performance test dates	Yes.	
63.7(a)(3)	Performance test requests by Administrator under CAA section 114.	Yes.	
63.7(b)(1)	Notification of performance test	Yes.	
63.7(b)(2)	Notification of delay in conducting a scheduled performance test.	Yes.	
63.7(c)	Quality assurance program	Yes.	
63.7(d)	Performance testing facilities	Yes.	
63.7(e)	Conduct of performance tests	Yes.	
63.7(f)	Use of an alternative test method	Yes.	
63.7(g)	Data analysis, recordkeeping, and reporting	Yes.	
63.7(h)	Waiver of performance tests	Yes	§ 63.864(a)(6) specifies the only exemption from performance testing allowed under subpart MM.
63.8(a)	Monitoring requirements—applicability	Yes	See § 63.864.
63.8(b)	Conduct of monitoring	Yes	See § 63.864.
63.8(c)	Operation and maintenance of CMS	Yes	See § 63.864.
63.8(d)	Quality control program	Yes	See § 63.864.
63.8(e)(1)	Performance evaluation of CMS	Yes.	
63.8(e)(2)	Notification of performance evaluation	Yes.	
63.8(e)(3)	Submission of site-specific performance evaluation test plan.	Yes.	
63.8(e)(4)	Conduct of performance evaluation and performance evaluation dates.	Yes.	
63.8(e)(5)	Reporting performance evaluation results	Yes.	
63.8(f)	Use of an alternative monitoring method	Yes.	
63.8(g)	Reduction of monitoring data	Yes.	
63.9(a)	Notification requirements—applicability and general information.	Yes.	
63.9(b)	Initial notifications	Yes.	
63.9(c)	Request for extension of compliance	Yes.	
63.9(d)	Notification that source subject to special compliance requirements.	Yes.	
63.9(e)	Notification of performance test	Yes.	
63.9(f)	Notification of opacity and VE observations	Yes	Subpart MM does not contain any opacity or VE standards; however, § 63.864 specifies opacity monitoring requirements.
63.9(g)(1)	Additional notification requirements for sources with CMS.	Yes.	
63.9(g)(2)	Notification of compliance with opacity emissions standard.	Yes	Subpart MM does not contain any opacity or VE emissions standards; however, § 63.864 specifies opacity monitoring requirements.
63.9(g)(3)	Notification that criterion to continue use of alternative to relative accuracy testing has been exceeded.	Yes.	

TABLE 1 TO SUBPART MM—GENERAL PROVISIONS APPLICABILITY TO SUBPART MM—Continued

General provisions reference	Summary of requirements	Applies to supbart MM	Explanation
63.9(h)	Notification of compliance status	Yes.	
63.9(i)	Adjustment to time periods or postmark deadlines for submittal and review of required communications.	Yes.	
63.9(j)	Change in information already provided	Yes.	
63.10(a)	Recordkeeping requirements—applicability and general information.	Yes	See § 63.866.
63.10(b)(1)	Records retention	Yes.	
63.10(b)(2)	Information and documentation to support notifications and demonstrate compliance.	Yes.	
63.10(b)(3)	Records retention for sources not subject to relevant standard.	Yes	Applicability requirements are given in § 63.860.
63.10(c)	Additional recordkeeping requirements for sources with CMS..	Yes.	
63.10(d)(1)	General reporting requirements	Yes.	
63.10(d)(2)	Reporting results of performance tests	Yes.	
63.10(d)(3)	Reporting results of opacity or VE observations.	Yes	Subpart MM does not include any opacity or VE standards; however, § 63.864 specifies opacity monitoring requirements.
63.10(d)(4)	Progress reports	Yes.	
63.10(d)(5)	Periodic and immediate startup, shutdown, and malfunction reports.	Yes.	
63.10(e)	Additional reporting requirements for sources with CMS.	Yes.	
63.10(f)	Waiver of recordkeeping and reporting requirements.	Yes.	
63.11	Control device requirements for flares	No	The use of flares to meet the standards in subpart MM is not anticipated.
63.12	State authority and delegations	Yes.	
63.13	Addresses of State air pollution control agencies and EPA Regional Offices.	Yes.	
63.14	Incorporations by reference	Yes.	
63.15	Availability of information and confidentiality	Yes.	

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Federal Register

Friday,
January 12, 2001

Part V

Department of Agriculture

Forest Service

36 CFR Part 212, et al.

Administration of the Forest Development Transportation System; Prohibitions; Use of Motor Vehicles Off Forest Service Roads; Final Rule

Forest Service Transportation; Final Administrative Policy; Notice

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Parts 212, 261, and 295

RIN 0596–AB67

Administration of the Forest Development Transportation System; Prohibitions; Use of Motor Vehicles Off Forest Service Roads

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: This final National Forest System Road Management rule revises regulations concerning the management, use, and maintenance of the National Forest Transportation System. Consistent with changes in public demand and use of National Forest System resources and the need to better manage funds available for road construction, reconstruction, maintenance, and decommissioning, the final rule removes the emphasis on transportation development and adds a requirement for science-based transportation analysis. In concert with the revision of National Forest System roads administrative direction published elsewhere in today's **Federal Register**, the intended effect of this final rule is to help ensure that additions to the National Forest System network of roads are those deemed essential for resource management and use; that, construction, reconstruction, and maintenance of roads minimize adverse environmental impacts; and, finally, that unneeded roads are decommissioned and restoration of ecological processes are initiated.

EFFECTIVE DATE: This rule is effective January 12, 2001.

FOR FURTHER INFORMATION CONTACT: Mike Ash, Deputy Director of Engineering, Engineering Staff, Forest Service, 202–205–1400.

SUPPLEMENTARY INFORMATION: The following outline displays the contents of the **SUPPLEMENTARY INFORMATION** section of this rule.

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General Comments

Natural Resource Agenda
Comments concerning the Natural Resource Agenda
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Comments concerning the need for access
Comments concerning access rights
Cooperating Agencies
Comment concerning cooperating agencies
Forest Trails
Comments concerning the rule's impact on trails
Amount of Road To Be Decommissioned
Comments concerning road decommissioning
Relationship of the Roads Rule, the Roadless Area Conservation Rule, and the Planning Rule.
Comments concerning the relationship among the three rules.
Levels of Road Management Decisions
Comments concerning the levels at which road management decisions will be made
Compliance with Existing Laws, Regulations, and Congressional Intent
Comments concerning the rule's compliance with various land management acts
Comments concerning compliance with environmental laws and regulations
Comments concerning the Transportation Efficiency Act for the Twenty-First Century
Comments concerning the Multiple-Use Sustained-Yield Act of 1960
Comments concerning the Administrative Procedures Act and the Federal Advisory Committee Act
Comments concerning the Rehabilitation Act of 1973 and the Americans with Disabilities Act
Comments regarding the rule-making process and the National Environmental Policy Act
Comments concerning the environmental assessment
Comments concerning the rule's requirement for National Environmental Policy Act analyses
Comments concerning No Takings implications and the Civil Justice Reform Act [1]
Funding for Implementation of the Final Roads Rule
Comments concerning funding
Specific Comments on Proposed Revisions to 36 CFR Part 212
Comments concerning removing the term ''development''
Comments concerning changes to those sections of 36 CFR Part 212 not mentioned in the proposed rule
Comments regarding proposed § 212.1 Definitions
Overall comment
Comments concerning the term ''Forest transportation atlas''
Comments concerning the term ''Forest transportation facility''
Addition of the term ''new road construction''
Comments concerning the term ''Road''
Modification of the definition for ''classified roads''
Modification of the definition for ''unclassified roads''
Other changes
Comments regarding proposed § 212.2 Forest Transportation Program
Comments concerning which lands are affected by the rule
Comments concerning the contents of the forest transportation atlas
Comments concerning use of science-based transportation analysis
Comments concerning emergency activities
Comments regarding the proposed § 212.5 Road System Management
Comments concerning the references to officials
Comments concerning the order of road management options
Comments concerning the use of science-based roads analysis
Comments concerning the identification of minimum road systems
Comments concerning coordination with tribal governments
Comments concerning road management and uses
Comments concerning road decommissioning
Proposed changes to § 212.6, § 212.7, § 212.10
Proposed § 212.13 Temporary suspension of road construction in unroaded areas
Proposed § 212.20 National Forest trail system operation
Overall comment on the trail system
Conforming Amendments to 36 CFR Parts 261 and 295
Regulatory Impact
Unfunded Mandates Reform
Environmental Impact
No Takings Implications
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Federalism
Conclusion

Background

On January 28, 1998, in an Advance Notice of Proposed Rulemaking (ANPR) (63 FR 4350), the Forest Service announced its intent to revise regulations concerning management of the National Forest Transportation System. Simultaneously, the Forest Service published a proposed interim rule (63 FR 4351) to suspend temporarily road construction and reconstruction in certain unroaded areas of National Forest System lands. The purpose of the interim rule was to take a ''timeout'' for 18 months while the Forest Service developed a new, long-term road management final rule and the new analytical tools needed to provide a more ecological approach to analyzing existing and future road needs.

On March 3, 2000, in Part III of the **Federal Register**, the Forest Service issued an overview notice to provide background information on the need for changes in the agency's national forest development transportation system. That notice outlined the three primary actions in a proposed new road management strategy that would help the Forest Service find an appropriate balance between safe and efficient access for all forest road users and the protection of healthy ecosystems. The three primary actions proposed were the following: (1) Develop new analytical tools to decide if, and when, new and existing roads are needed to meet resource management objectives; (2)

aggressively decommission roads that are determined, through forest planning, implementation of the National Environmental Policy Act, and other analyses, to be damaging to the environment or to be no longer necessary for achieving resource management objectives; and (3) maintain and improve those important roads that do not compromise healthy lands and waters and are needed for recreation, rural access, and the sustainable flow of goods and services. The overview notice made clear that both a proposed revision of Forest Service regulations on Administration of the Forest Development Transportation System and a proposed revision of administrative directives are necessary to achieve these three actions.

Published, also, in Part III of the **Federal Register** for March 3, 2000, the proposed rule clarified the transportation system information to be gathered and to be displayed in a new forest transportation atlas (formerly plan). The rule also proposed: (1) to remove the emphasis on ''road development'' that is in the current rules; (2) to set a standard that each forest identify the minimum road system required to balance access objectives with ecosystem health goals; and (3) to use a science-based roads analysis to identify the road network needed to serve the public and land administrators.

Comments were invited on the overview notice, the proposed rule, and the corollary administrative directive, all published in Part III of the March 3, 2000, **Federal Register**. Comments were due May 2, 2000. The comment period was then extended to May 17, 2000, resulting in a 77 day comment period. The Forest Service invited written comments and considered those comments in preparing this final rule.

The adoption of the final rule modifies 36 CFR part 212 to require the development of a transportation atlas for each National Forest System administrative unit, which displays the minimum system of roads, trails, and airfields needed for the management of National Forest System lands and for public access. The adoption of the final rule removes the term ''forest development road'' to signal the shift away from development and construction of new roads to maintaining needed roads and decommissioning unneeded roads. The adoption of the final rule also requires the use of a science-based analysis process to analyze the National Forest road system. The adoption of the final rule establishes a standard for the road system, requiring it to be in compliance with resource objectives, to reflect likely funding, and to minimize adverse environmental effects associated with road construction, reconstruction, and maintenance. Equally important is the rule's requirement to identify unneeded roads that should be decommissioned, giving priority to decommissioning those roads that pose the greatest risk to public safety or environmental degradation. Revisions to 36 CFR parts 261 and 295 are those needed solely to conform terminology revisions being adopted in 36 CFR part 212.

Analysis and Response to Public Comments

During the comment period, the Forest Service received approximately 5,900 letters, e-mails, faxes, petitions, postcards, and other responses to the proposed National Forest System Road Management rule and policy. The geographic distribution of responses received was as follows: Western States —2,105; Mountain States —1,607; Central (Midwestern) States —733; Southeastern States —279; Northeastern States —541; and Unknown—581. Of the nearly 5900 total responses, 5505 were received from individuals. Groups and organizations representing forest resource users (grazing, timber, oil/gas/mining, and recreation) accounted for 134 responses and conservation and preservation groups submitted another 97. Government agencies and elected officials accounted for 98 responses and are divided between: Tribal (6), Federal (16), State (28), county (37), and local (11). There were an additional 34 responses received from groups or organizations that do not fit into one of the previous categories.

A number of comments received were outside the scope of this rulemaking effort. These included matters such as comments on the Forest Service roadless initiative, that was also underway; suggestions to seek funding from Congress for recreation trails; suggestions to transfer all public land to the States; suggestions to designate more Wilderness areas; suggestions to solve jurisdictional disputes in Nye County, Nevada; suggestions that the agency emphasize public education to gain support for road needs; suggestions to protect the environment by land allocation; and a suggestion to conduct an environmental impact analysis on each road every 10 years. While these comments emerged as a result of respondents' reviews of the proposal, they are generally not germane to this regulation. A number of other comments received were not specific to a particular section, but to the overall proposed rule and administrative policy. A summary of those comments and the agency's response to them follows.

General Comments

Natural Resource Agenda

In the overview notice that preceded the proposed road management rule and proposed administrative policy (65 FR 11676), the Forest Service explained that the road management initiative was a key element of the Forest Service Natural Resource Agenda.

Comments concerning the Natural Resource Agenda: Some respondents were concerned that implementation of the Natural Resource Agenda would circumvent legal processes, Congressional intent, and public involvement processes. Others expressed concern that the Natural Resource Agenda would change the natural resource mission of the Forest Service and encourage off-budget trust funds.

Agency response: The Natural Resource Agenda identifies long-term program emphasis areas for the Forest Service. Specifically, it calls for the agency to emphasize watershed health and restoration, sustainable forest management, recreation, and roads. The Agenda is the cornerstone of the agency's Strategic Plan prepared pursuant to the Forest and Rangeland Renewable Resources Planning Act and the Government Performance Results Act. The actions and goals articulated in the Natural Resource Agenda all fall within the mission assigned to the Forest Service through the Multiple-Use Sustained-Yield Act, the National Forest Management Act, and the other laws that establish the agency's mission and activities. While the Natural Resource Agenda does place new emphasis on some resources and uses, it does not fundamentally alter the Forest Service's mission nor does it encourage off-budget trust funds.

Need for Public Access and Forest Management Access

In the preamble of the notice of proposed rulemaking (65 FR 11680), the Forest Service noted that the proposal gives emphasis to providing safe administrative and public access within the context of maintaining healthy ecosystems.

Comments concerning the need for access: The Forest Service received numerous comments questioning the agency's ability to effectively manage forest resources for long-term forest health and wildfire suppression, while reducing road access. Others were concerned about the potential reduction

in the number of roads open to the public and the effect fewer roads would have on public access and recreation use on national forests and grasslands. A few expressed concern that the agency would use road maintenance costs or a lack of funding to justify road closures. A few identified human and natural resource-related emergency access concerns. Still others were concerned with the concept of road decommissioning. Specifically, some expressed concern that roads analysis would delay road decommissioning, while others were concerned that the agency would not thoroughly analyze options for keeping roads open before deciding to decommission them.

Agency response: Scientific evidence compiled to date suggests that roads are a significant source of erosion and sedimentation and are, in part, responsible for a decline in the quality of fish and wildlife habitat. The agency recognizes that the National Forest Transportation System is vitally important for responsible management of the National Forest System lands and is essential to many rural communities and recreational users. The agency is responsible for finding a balance between the need for public and administrative access and the environmental costs associated with providing that access. The final rule and administrative policy require the use of a science-based roads analysis process to identify road needs, issues, and opportunities. The roads analysis process encourages the agency to actively engage the public and other state, federal, local and tribal partners in those discussions. The final rule at 36 CFR Part 212.5(b)(1) requires the identification of the minimum road system needed for safe and efficient travel and for administration, utilization, and protection of National Forest System lands. The identification of the minimum road system needed includes considerations for forest health, emergency access, and public access needs. The final road management policy will improve access by allowing the agency to focus its limited resources on the roads people need and use.

Comments concerning access rights: Several individuals expressed concern over the effect of the proposed rule and policy on access rights, on roads managed by other agencies, and on roads under permit or other agreements, such as cost-share agreements and special use permits. Some States, such as North Dakota, were concerned the rule and policy could circumvent state laws and policies.

Agency response: The final rule and policy do not affect existing access rights provided by statute, treaty, or pursuant to reserved or outstanding rights. Moreover, the final rule and policy do not impose additional requirements on entities that possess access rights on roads owned privately or by state, county, tribal, or local jurisdictions. The final rule and policy provide direction regarding how the Forest Service intends to make road management decisions, not what those decisions must be. Road management activities on public roads with easements through the National Forest System, such as state and county roads, are not affected by this final rule. However, roadwork (such as realignment or widening) on National Forest System lands outside granted easements may require some level of roads analysis. The final rule and policy emphasize involvement with public, federal, state, local and tribal entities and in no way conflict with state laws.

Cooperating Agencies

Other federal agencies, States, tribal governments, and local governments are encouraged to participate with the Forest Service in implementing these regulations.

Comment concerning cooperating agencies: A respondent stated that the Forest Service continually denies requests for cooperating agency status for various States and counties.

Agency response: The agency is interested in maximizing cooperation with all agencies and interests and has established, within the policy, mechanisms with which to accomplish this objective. Both local agency and public involvement are key features of the roads analysis methodology and the National Environmental Policy Act (NEPA) environmental analysis process. These two public involvement mechanisms will ensure that local public issues and concerns are fully disclosed and addressed. The agency believes that participation by state, tribal, and local governments, as well as by individual citizens, will be critical to the long-term success in the implementation of this final rule and related administrative directive.

Forest Trails

The proposed rule did not propose many substantive changes to the agency's rules on the management of trails. As with the term ''forest development road,'' the term ''forest development trail'' would be revised by removing the term ''development.'' Otherwise, all references to trails were retained as adopted in the July 1, 1999, edition of Title 36, parts 200–299 of the Code of Federal Regulations.

Comments concerning the rule's impact on trails: Several respondents requested that the Forest Service explain the relationship between the proposed road management rule and the management of the National Forest Trail System. Others wanted to know the distinction between motorized roads and motorized trails.

Agency response: The road management rule and associated administrative policy provide direction for the management of the forest transportation facilities. While forest transportation facilities include roads, trails, and airfields, this final rule and administrative policy are specific to road management, not trails. Roads are managed for use by highway vehicles in compliance with state laws. Motorized trails are managed for off-highway vehicles not specifically excluded by local authority. Generaly these trails are used by motor bikes or all-wheel drive vehicles. The final rule defines a road as a motor vehicle travel-way more than 50 inches wide, unless designated and managed as a trail. A trail, therefore, may be more than 50 inches wide and motorized or non-motorized. The roads analysis process provides the means for the public and managers to address road and trail access relationships and opportunities.

Amount of Road To Be Decommissioned

The focus of the rule and policy is on determining the need for proper restoration, maintenance, and decommissioning of roads. The issue of decommissioning roads received substantial comment from the public.

Comments concerning road decommissioning: Respondents expressed a wide range of opinions on the amount of road decommissioning that should occur. Some stated strong feelings that all unauthorized and environmentally damaging roads should be decommissioned immediately. Others expressed strong concerns that if too many roads were decommissioned, public access needs and demands would not be met.

Agency Response: At about 380,000 miles of classified roads (plus an estimated additional 60,000 miles of unclassified roads), the forest transportation system is considered to be largely complete. National Forest System management's focus, therefore, through implementation of the roads rule and administrative policy, is shifting from developing new roads to managing access within the capability of the land. Through the rule's roads analysis process, responsible officials

can use local public involvement to identify roads that are needed for access and those roads that are no longer needed. These unneeded roads will be prioritized for decommissioning, either to return to a more natural state or to become a designated trail.

Relationship of the Roads Rule, the Roadless Area Conservation Rule, and the Planning Rule

In addition to the Road Management Rule, the Forest Service has two other ongoing and related rulemaking efforts: the Land and Resource Management Planning Rule and the Roadless Area Conservation Rule.

Comments concerning the relationship among the three rules: Many respondents expressed concern about the relationships among the proposed road management policy, the roadless area conservation rule, and the planning rule and questioned their cumulative effects. Others complained about the impacts of having to respond to these and other national policy efforts simultaneously.

Agency response: The proposed planning rule, road management policy, and roadless area conservation rule are three separate and distinct Forest Service initiatives that together form a coherent strategy for dealing with vital conservation issues. The Forest Service teams writing the rules have coordinated with each other to ensure that definitions and requirements are consistent across the policies. The proposed planning rule revisions will incorporate the principles of ecological, economic, and social sustainability into forest planning. The proposed roadless area conservation rule addresses how to protect inventoried roadless areas within National Forest System lands in the context of multiple-use management.

The planning rule provides the overall framework for planning and management of the National Forest System. The road management rule and policy which are implemented through the planning process must adhere to the sustainability, collaboration, and science provisions of the planning rule. For example, under the road management policy, national forests and grasslands must complete an analysis of their existing road system and then incorporate the analysis into their land management planning process. The analysis is accomplished by using a science-based analysis procedure and by working cooperatively with other agency partners and the public, as required by the planning rule. The road management rule and policy are intended to ensure that the National Forest Road System: (1) Meets current and future land and resource management objectives; (2) provides for public uses of National Forest System lands; (3) allows for economical and efficient management; and, (4) minimizes and begins to reverse adverse ecological impacts associated with the current transportation system.

The planning rule, road management rule and policy, and roadless area conservation rule all seek to provide for long-term sustainability, to promote collaboration, and to integrate science into National Forest System land management decisions. The agency has provided various public involvement and information meetings, public hearings, use of draft documents for public, and other opportunities to engage the public in these rulemaking efforts.

Levels of Road Management Decisions

The Forest Service proposal to revise its national road management policy continues the practice of making decisions about road management activities at the local level.

Comments concerning the levels at which road management decisions will be made: Several individuals indicated a preference for road decisions to be made at the National level, in the belief that decisions at the national level would better ensure broad representation for all Americans. Others suggested that road decisions are best made at the local level by those most knowledgeable about resource issues, and these respondents objected to the proposed service-wide policy. Some were confused by the terms ''line officers,'' ''Forest officers,'' ''responsible officials,'' and other terms for those who would make agency decisions.

Agency response: The road management rule is an appropriate decision to be made at the national level. Also appropriate for issuance at the national level are policies that address national issues or service-wide directives, which establish standards that guide Forest Service field officials, who administer the funds and resources. Regional Foresters, Forest Supervisors, and District Rangers are responsible for implementation of this rule and policy. Within the national framework, the majority of road decisions, such as whether to build, close, or decommision a particular road, would likely be made at the Forest Supervisor level or lower. However, road decisions would be made using local public involvement to identify needed and uneeded roads. To help avoid confusion, the final rule uses the term ''Responsible Official.'' (See the subsequent preamble discussion of 36 CFR 212.5.)

Compliance With Applicable Laws and Regulations

Forest Service rules must be in compliance with applicable laws and regulations. The following comments and agency responses relate to those requirements.

Comments concerning the rule's compliance with various land management acts: Many respondents expressed concern that the roads rule, if implemented, would be contrary to the statutory requirements set forth in the Forest and Rangeland Renewable Resources Planning Act (16 U.S.C. 1601–1613), National Forest Management Act, the Organic Administration Act, National Forest Roads and Trails Act, and the Federal Land Policy and Management Act. These writers stated that the violations would be a result of the agency's shift away from the ''continued flow of products'' emphasized in the various land management acts. They also stated that the shift away from the term ''development,'' as used in regard to forest roads and trails, would conflict with § 10(b) of the Forest and Rangeland Renewable Resources Planning Act. In addition, some of these writers believed that the process being used to initiate the road management rule is outside the land management planning process and, therefore illegal.

Agency response: Generally, the respondents did not specify what aspects of the final rule would violate existing laws, nor did they provide suggestions for modifying or improving the regulations. Therefore, the agency is unable to address the respondents' concerns directly. However, the agency is confident that the proposed rule and policy are compliant with applicable laws. The final rule sets the guidelines for management of the forest transportation system, but does not make site-specific decisions or allocate resources. Rather, the final rule sets in place a process by which decisions about National Forest System roads are to be informed through a roads analysis approach that will include active public involvement. Allocation of forest-land resources will continue to be made through forest planning. The Forest and Rangeland Renewable Resources Planning Act, § 10(a) directs the ''installation of a proper system of transportation to service the National Forest System . . . to meet anticipated needs on an economical and environmentally sound basis.'' Section 10 (b) of the act addresses re-vegetation requirements for roads that are not a

part of the forest development road system. This final rule changes nomenclature by shifting from a ''forest development road system plan'' to a ''forest transportation atlas,'' but the agency must still comply with relevant statutes. The final rule and policy are in compliance with sections 10(a) and 10(b) of the Forest and Rangeland Renewable Resources Planning Act. This final rule, in fact, was developed in response to strong public concern about National Forest System road management issues.

Comments concerning compliance with environmental laws and regulations: The Forest Service also received several comments suggesting that if the agency were fully compliant with existing environmental laws and regulations, such as the Clean Water Act and the Endangered Species Act, the need to promulgate these regulations would be negated.

Agency response: As stated previously, the agency must comply with all applicable laws. The agency believes this final rule balances the need for public use and safe public access with the protection of healthy ecosystems.

Comments concerning the Transportation Efficiency Act for the Twenty-First Century: A few respondents suggested that any major shift in the road policy should include a reference to the Transportation Efficiency Act for the Twenty-First Century (TEA–21).

Agency response: The final rule and policy do not materially change the manner in which the Forest Service cooperates and participates in highway management programs of the Federal Highway Administration or the various State Departments of Transportation for highway development and management as envisioned under TEA–21.

Comments concerning the Multiple-Use Sustained-Yield Act of 1960: Some respondents felt that the proposed rule and administrative policy would result in restricting motorized access so broadly as to prevent sustained yields of forest products and would reduce other multiple uses and, thus, violate the Multiple-Use Sustained-Yield Act of 1960.

Agency response: The final rule does not alter the statutory multiple-use mandate or the agency's compliance with that mandate. Lands administered by the Forest Service must continue to be managed in consideration of the relative values of the various resource uses in accordance with land and resource management plans (forest plans), which are prepared in compliance with the Multiple-Use Sustained-Yield Act of 1960 (16 U.S.C. 528), the Forest and Rangeland Renewable Resources Planning Act, as amended by the National Forest Management Act of 1976 (16 U.S.C. et seq), and the National Environmental Policy Act.

Comments concerning the Administrative Procedures Act and the Federal Advisory Committee Act: A few respondents alleged that the agency had apparently colluded with environmental groups in drafting the notice of proposed rulemaking, and, if so, this collusion was a violation of the Administrative Procedures Act and the Federal Advisory Committee Act. Some felt a statement from the Chief's speech made at the Commonwealth Club of California and reported in the January 26, 2000, issue of a California newspaper— ''In the end there will be fewer roads''— was a clear indication that the agency had already made a decision without the opportunity for the public to provide comment.

Agency response: Section 553(c) of the Administrative Procedures Act directs agencies to give prior notice of proposed rules and to give an opportunity for the public to comment. The Act requires consideration of those comments in adoption of a final rule. In order to obtain that public comment, the agency identifies a proposed action. There is no prohibition on listening to citizens or groups and discussing issues or approaches prior to formulating a draft or final rule. In fact, the Forest Service continually receives correspondence from, or is asked to meet with, citizens, members of Congress, other public officials, and interest groups who are asking the agency to take action on many policy fronts. Letters from, and meetings with, interest groups can sometimes result in discussions of potential policy changes and help the agency formulate proposed policies. Moreover, the public has full opportunity to comment on proposed rules.

The Federal Advisory Committee Act (FACA) is not a bar to all formal and informal consultations between federal agencies and groups rendering advice. Recently, the Federal District Court for the District of Idaho rejected claims alleging violations of FACA regarding development of its roadless rulemaking and related actions (*Boise County, Idaho* v. *Glickman,* CV–OO–141–S–EJL (D.Id. decided Sept 8, 2000)). The requirements of FACA have not been violated.

Comments concerning the Rehabilitation Act of 1973 and the Americans with Disabilities Act: Many respondents expressed concern that eliminating roads would limit access for those not physically capable of hiking and that this would result in discriminatory action on the part of the Federal Government.

Agency response: Title V of the Rehabilitation Act of 1973 and the Americans with Disabilities Act both cover executive branch actions of the Federal Government. Title V prohibits discrimination in services and employment on the basis of handicap and has no bearing on this final rule, which would not affect employment of persons with disabilities nor the delivery of federal services to persons with disabilities. As to compliance with the Americans with Disabilities Act, it is likely that accessibility to some areas of National Forest System lands may change in the future, but any such change would follow an indepth public involvement process during which the concerns of the disabled wishing access to such areas would be taken into account. Moreover, a reduction in roads would result in a more focused use of Forest Service resources for reconstruction that could actually improve access for the disabled on those roads most suitable to their needs and desires.

Comments regarding the rule-making process and the National Environmental Policy Act: Many respondents expressed the belief that the National Environmental Policy Act mandates preparation of an environmental impact statement rather than an environmental assessment prior to this rule's promulgation.

Agency response: In this case, the National Environmental Policy Act does not require an environmental impact statement or an environmental assessment. Under the Council on Environmental Quality regulations at 40 CFR 1501.3(b), agencies may adopt regulations which establish categories of actions, known as categorical exclusions, which do not require the preparation of an environmental assessment or impact statement. Forest Service categorical exclusions are established in Forest Service Handbook 1909.15, chapter 30. As noted in the proposed rule, the Forest Service has established a categorical exclusion for documentation in an environmental assessment or impact statement for ''rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions.'' Although the agency determined that the rule could be categorically excluded, to further the goals of the National Environmental Policy Act, the Forest Service has elected to prepare an environmental

assessment. The agency has updated the environmental assessment addressing the reasonably foreseeable environmental impacts of this final rule and associated policy in response to comments and new information, and has concluded that an environmental impact statement is not required.

Comments concerning the environmental assessment: The agency received numerous comments regarding the National Forest Service Road Management Strategy Environmental Assessment. Comments included: requests for clarification of terms, assertions that the environmental assessment violated the National Environmental Policy Act because a full range of alternatives was not analyzed, statements that the assumptions used in the analysis were biased in favor of closing roads, requests to consider the environmental effects of moving timber harvests to private lands and other countries, concern that the agency balance the social, economic, and environmental elements, and many others.

Agency response: Comments related to the content of the environmental assessment have been reviewed and addressed. Agency responses may be found in Appendix G of the National Forest System Road Management Strategy Environmental Assessment. Comments in that Appendix are categorized as follows: range of alternatives, adequacy of analysis, compliance with existing laws, need for environmental impact statement, and various editorial comments or suggestions.

Comments concerning the rule's requirement for National Environmental Policy Act analyses: A small number of respondents expressed the concern that the cost associated with an environmental impact statement during the transition period for the road policy, required prior to any road construction or reconstruction in roadless or specific unroaded areas, could exceed the total value of one's property or the cost of the road and, thus, constitute a taking of private land without just compensation.

Agency response: The Forest Service is obliged to comply with all environmental and administrative laws, including the National Environmental Policy Act (NEPA). The Council on Environmental Quality implementing regulations requires the Forest Service to promulgate procedures for compliance with NEPA, including instructions on the preparation of environmental impact statements and environmental assessments. Compliance with applicable laws and regulations in the review and approval of particular road construction decisions does not constitute a taking of private property.

Comments concerning No Takings implications and the Civil Justice Reform Act: Some respondents believe the No Takings implications and Civil Justice Reform Act statements are incorrect because of inaccurate RARE II inventories and resultant designations. They also believe the road management rule will result in taking of private property rights by restricting access to mining claims, private and native in-holdings, and other rights of ingress and egress by closing county and permitted roads through and within National Forest System lands. Others were concerned that access for other federal, state, and local agencies would be restricted by decommissioning roads.

Agency response: The agency recognizes that changes have occurred since the RARE II inventories were completed and that on some forests portions of inventoried roadless areas have been roaded. This final rule requires a science-based roads analysis that will identify needed and unneeded roads, road maintenance priorities, and other road related resource concerns. Updating existing road inventories will occur as part of the roads analysis process. The final road management rule and the accompanying final administrative policy honors access to private property pursuant to statute, treaty, and outstanding or reserved rights, including reasonable access to private land inholdings. Also, the final rule does not retroactively affect existing permits, contracts, or other instruments authorizing the occupancy and use of National Forest System lands. Forest Service officials must conduct a roads analysis to determine the minimum road system needed to achieve management goals and objectives. As part of that analysis, the agency requires the responsible official to seek to involve interested and affected citizens and organizations, including businesses, in the roads analysis and subsequent National Environmental Policy Act processes. Road decommissioning decisions will be made on a local basis, with public involvement, and will take into account access needs of state, county, and tribal governments.

Funding for Implementation of the Final Roads Rule

In the discussion of the regulatory impact of the proposed rule (65 FR 11691), the agency stated that management costs are not expected to change significantly as a result of these proposals.

Comments concerning funding: Several respondents were concerned that the proposed roads analysis requirements would add to the cost of managing the National Forest Road system and that this would reduce available road maintenance funding. Others expressed concern that the agency does not consider roads as assets; and, therefore, the agency would not consider and compare the cost of maintenance to the cost of road decommissioning. Still others recognized that the Forest Service's reduced budgets do not allow for adequate road maintenance and suggested that avenues to enhance revenue for road maintenance, such as user fees, be considered. Still others suggested using volunteers or entering into cooperating maintenance agreements with user groups to accomplish the needed road maintenance. Some questioned why the agency requested less funding than what is needed for maintenance in Fiscal Year 2001.

Agency response: Roads are an integral part of the Forest Service Natural Resource Agenda and Strategic Plan. The final rule reflects the agency's realistic capability to manage the operation, use, and maintenance of the forest transportation system over the long term. The overview notice (65 FR 11676) acknowledged that the agency has a continuing problem adequately funding road maintenance. The agency is exploring the potential benefits of converting selected high use roads to public roads to qualify more roads for funding from the Federal Highway Trust Fund. Inventories of forest transportation system maintenance and restoration needs, which are to be conducted under the rule and administrative policy, are intended to provide a basis for future funding requests for road management activities. The Forest Service is proud of the volunteer relationships that have been developed and strengthened over time and will continue to use volunteers as appropriate. Issues of revenue enhancement are beyond the scope of this final rule.

Specific Comments on Proposed Revisions to 36 CFR Part 212

On March 3, 2000, the Forest Service proposed to revise 36 CFR Part 212 to shift emphasis from transportation development to managing administrative and public access within the capability of the land. The proposal would shift the focus of National Forest System road management from development and construction of new roads to maintaining and restoring

needed roads and decommissioning unneeded roads within the context of maintaining, managing, and restoring healthy ecosystems.

The following is a summary of substantive comments received pertaining to the proposed rule and the agency's response, including any changes made in the final rule.

Comments concerning removing the term ''development'': Consistent with the intent to shift emphasis from road development to managing access, the proposed rule removed the words ''forest development roads'' and replaced them with the words ''National Forest System roads.''

Several respondents objected to the removal of the word ''development'' from the rule as they felt this change indicated a shift from sustainable forest management and public access. Others agreed that the change was in alignment with the proposed direction of the road management policy. Others objected to the use of the terms ''Forest Service'' roads since the respondents felt that roads on National Forest System lands were not owned by the Forest Service, but rather are managed by the Forest Service and ''owned'' by the public.

Agency response: The agency believes that this shift from ''development'' to improved stewardship of the transportation system is both realistic and appropriate. Therefore, as proposed, the term ''development'' is removed in the final rule. In considering comments on this issue, the agency discovered two other places where the term ''development'' needed to be removed: in the heading of § 212.1(c) and in the heading and text of § 212.1(d). Also, with regard to the proposed rule's reference to ''Forest Service'' roads, the agency agrees with the comments and has changed the terminology in the final rule from ''Forest Service roads'' to ''National Forest System roads.'' Forest roads are administrative roads, authorized by the National Forest Road and Trail Act. Many of these roads are open to public travel. However, they are not public roads as defined in 23 U.S.C. 101. National Forest System roads is a more accurate term since it covers national grasslands as well as other lands that are part of the National Forest System.

Comments concerning changes to those sections of 36 CFR Part 212 not mentioned in the proposed rule: Some respondents wanted to know whether other sections of 36 CFR Part 212 not specifically mentioned in the proposed rule (such as § 212.3, § 212.8, § 212.9 and § 212.21) would be adopted as unchanged.

Agency response: Those sections of 36 CFR Part 212 not specifically mentioned in the proposed rule and this final rule, remain unchanged.

Comments Regarding Proposed § 212.1 Definitions

The proposed rule added new definitions and updated and revised existing definitions. The agency proposed to remove the term ''forest transportation plan'' and instead, add the term ''forest transportation atlas'' to more clearly reflect the nature and intent of the transportation information being collected. Definitions also were proposed for ''road,'' ''classified road,'' and ''unclassified road.'' These terms are necessary to understand and implement the requirements of § 212.5 that provide direction for the identification of needed and unneeded National Forest System roads.

Overall comment: Several respondents requested that the definitions be simplified for clarity and understanding. Others were concerned with apparent conflicts among the definitions of federal, state, and local jurisdictions. The area of most concern was the definition of a ''road.'' Many people stated that the Forest Service should clarify its definition of a road and offered suggestions as to what the definition should be.

Agency response: In the final rule at § 212.1, the definitions for ''forest transportation atlas,'' ''forest transportation facility,'' and ''road'' have been revised in response to comments. The term ''temporary roads and other temporary facilities'' has been defined and added to the definition of a road. The previous definition of ''construction'' was replaced with a definition for ''new road construction'' to be consistent with the revised administrative policy.

Comments concerning the term ''Forest transportation atlas'': Some respondents expressed the concern that the *agency* was violating the Forest and Rangeland Renewable Resources Planning Act by replacing the term ''forest development transportation plan'' with ''forest transportation atlas.'' Others wanted to know what the difference was between a forest transportation atlas and a forest transportation plan.

Agency response: The Agency has not only changed the name from ''forest transportation development plan'' to ''forest transportation atlas'' but also has more clearly identified the requirements of the atlas. The forest transportation atlas serves as the repository of road related information. As part of this final rule, each administrative unit must prepare and maintain a forest transportation atlas, which must contain information about the transporation system, such as inventories, descriptions, and geo-spatial displays of the forest roads, trails, and airfields. The forest transportation atlas will be updated, as needed, through ongoing inventories or via project planning and must be available to the public.

Comments concerning the term ''Forest transportation facility'': Many respondents felt the proposed revisions in terminology and definitions were consistent with the change in proposed philosophy. Other respondents wanted to know how the definition for forest transportation facility would apply to particular roads, trails, and airfields.

Agency response: The definition of ''forest transportation facility'' has been modified to add the word ''designated'' to describe trails and airfields. The change was necessary because ''classified'' is a term used to describe needed roads and does not apply to trails and airfields. The description of facility types has been revised by adding ''devices and other transportation network'' before the word ''appurtenances.'' The description of the lands affected was modified to include those facilities that are ''wholly or partially within or adjacent to National Forest System lands'' for consistency with the administrative policy.

Addition of the term ''new road construction'': No comments were received regarding the specific definition of construction; however, for clarity, the definition for ''construction'' has been replaced in the final rule with the term ''new road construction'' and minor changes were made to the definition.

Comments concerning the term ''Road'': There were many comments requesting clarification of the terms ''road,'' ''classified road,'' and ''unclassified road,'' as well as questions about where temporary roads should be categorized. Others offered suggestions as to what the definition of ''road'' should be.

Agency response: The agency has revised terms related to roads to more clearly delineate various categories of roads. The definition for road has been modified to replace the word ''classified'' with the word ''designated'' when referring to trails. The term ''classified'' describes a needed road and does not apply to trails or airfields. In addition, the term ''temporary roads'' was added to identify temporary roads as a subcategory of a road.

Modification of the definition for ''classified roads'': The definition for classified roads has been modified to

better describe which roads are classified roads and to fully conform to the definition of ''Forest Road'' (23 U.S.C. 101) of which classified roads are a subset.

Modification of the definition for ''unclassified roads'': The definition for unclassified roads has been modified in the final rule to clarify that these roads are not managed as part of the forest transportation system. In addition, the term ''temporary roads'' has been removed from the definition of unclassified road and has been set out as a separate subcategory of road to acknowledge that temporary roads are managed differently than unclassified roads. An example of a temporary road would be those needed for short-term access to forest areas for restorative efforts after fires.

Other Changes

In addition to changes made in response to comments, the agency discovered that it had failed to include a definition for the term ''road decommissioning'' in the proposed rule. A definition had been included in the final rule and administrative policy at FSM 7705.

Concerns Regarding Proposed § 212.2—Forest Transportation Program

The proposed rule recommended revising § 212.2 to require a transportation atlas for each National Forest System administrative unit in lieu of the current ''forest transportation plan.''

Comments concerning which lands are affected by the rule: Some respondents did not understand what constituted the ''National Forest System'' and wanted the Forest Service to clarify the lands to which the rule applied. Others wanted the Forest Service to clarify whether the proposal applied to National Grasslands as well as National Forests.

Agency response: Paragraph (a) of proposed § 212.2 identifies the lands for which transportation atlas must be prepared. Grasslands are specified when describing the administrative units to which the final rule applies. However, to ensure that readers understand what constitutes the ''National Forest System,'' that term has been added at § 212.1 in the final rule including the definition set out in the Forest Rangeland Renewable Resources Planning Act. Additionally, for clarity, the term ''national grassland'' rather than ''grassland,'' is used in § 212.2(a) of the final rule.

Comments concerning use of science-based transportation analysis: Paragraph (a) of proposed § 212.2 indicated that the identification of transportation facilities was required by science-based analysis. There were many comments in support of the requirement of a science-based transportation analysis. One organization submitted a ''best science'' document and requested that this document be given consideration in the final rule. Other respondents were concerned that the requirement to carry out a science-based analysis prior to any new road construction would hamper the ability of the agency to respond quickly to conditions requiring immediate action, such as fire emergencies.

Agency response: The *agency is pleased with the support for science-based* roads analysis. The requirement to use science-based analyses has been moved to paragraph § 212.5(b)(1) Identification of road system to clarify how the analysis would be used.

Comments concerning emergency activities: A number of respondents wrote to state that emergency activities should be exempt from roads analysis.

Agency response: The agency has provided for exemptions from roads analysis for emergency activities in Forest Service Manual 7712.16 [Interim Requirements for road construction/reconstruction in inventoried roadless and contiguous unroaded areas].

Concerns Regarding the Proposed § 212.5—Road System Management

Paragraph (b) (1) of this section of the proposed rule directed responsible officials to identify the minimum transportation system needed to administer, protect, and utilize National Forest System lands. This section also established a standard that the road system on each unit must be commensurate with the resource objectives adopted in forest plans, must reflect likely funding, and, to the extent practicable, must minimize the adverse environmental impacts associated with road construction, reconstruction, and maintenance. Finally, to provide the information necessary to meet these requirements, the proposed rule required Forest Service officers to conduct a roads analysis at appropriate scales with opportunities for public involvement and consultation with state, local, and tribal governments.

Proposed paragraph (b) (2) addressed identification and decommissioning of roads not needed to meet forest plan resource objectives. The proposed paragraph also gave direction on scheduling of decommissioning, giving priority to decommissioning those roads posing the greatest risk to public safety or to environmental quality.

Comments concerning the references to officials: Several reviewers found the various references to decision makers, such as ''line officers,'' ''forest officers,'' and ''responsible official'' confusing.

Agency response: The agency understands how these terms, which are well understood by Forest Service employees, can be confusing to others. As a result, in the final rule only the term ''responsible official'' is used to indicate the decisionmaker.

Comments concerning the order of road management options: A respondent noted that the order of possible road management options varied: from construction, reconstruction, decommissioning, and maintenance in the Roads Analysis document to decommissioning, reconstructing, maintaining, and then constructing in the proposed policy and rule. The respondent stated that though a subtle change, such a change might be significant.

Agency response: The ordering of road management activities in the various documents was random and does not signify any importance or priority of one type of activity over another.

Comments concerning use of science-based roads analysis: There were many comments in support of the requirement to use a science-based roads analysis process to identify needed and unneeded roads. One environmental organization submitted a document that identified the ''latest'' science-based research on roads and related environmental effects and requested the document be given consideration in the final rule.

Agency response: This final rule does not establish any specific science-based roads analysis process as the standard to be used; rather, it preserves Forest Service flexibility to further describe science-based roads analysis in conjunction with other ecosystem analyses and to adjust the process in response to new scientific information about road and resource management interactions. Appropriate portions of § 212.5 have been revised to provide clarifying direction for using a science-based analysis to identify those transportation facilities needed for the management and access of National Forest System lands. Science-based roads analysis is discussed further in the final administrative policy published elsewhere in today's **Federal Register**.

Comments concerning the identification of minimum road systems: Concerned about the proposed direction to identify the minimum road system needed, many respondents questioned

the ability of the agency to effectively manage forest resources long-term while reducing road access. Others objected strongly to the reduction in roads open to public use because of the effect on public access and recreation opportunities on National Forest System lands. Still, others favored and expected to see a reduction in roads on National Forest System lands as a result of the final rule and administrative policy. Most of these concerns were linked to opinions about negative environmental impacts of road construction and to concerns that roads may not be maintained to safe standards.

Agency response: In the final rule, the agency has clarified the phrase ''minimum road system'' to mean the road system necessary to meet resource and other management objectives adopted in the land and resource management plan, to meet applicable statutory and regulatory requirements, and, to the extent practicable, to minimize the adverse environmental impacts associated with road construction, reconstruction, decommissioning, and maintenance. When identifying the minimum road system, responsible officials also must consider and be responsive to expected long-term road funding.

Comments Concerning Coordination With Tribal Governments

Some respondents expressed concern that the proposed rule did not sufficiently emphasize the importance of communication between agency and tribal governments.

Agency response: The agency agrees, and in the final rule, the agency has added ''tribal governments'' § 212.5(b)(1) to the list of other government entities with whom the responsible official must consult when conducting a roads analysis.

Comments concerning road management and uses: Some respondents questioned the need for a process to identify whether new roads are needed, or to identify which existing roads should be reconstructed, maintained, or decommissioned. Other respondents questioned whether and how the road management policy and use of the roads analysis would allow for the consideration of other motorized and non-motorized uses.

Agency response: The final rule directs the agency to use a roads analysis to determine the minimum road system needed to meet resource and other management objectives adopted in forest plans. The roads analysis is a critical component of the overall road strategy that will help to ensure that road issues and concerns are fully disclosed and analyzed. In response to the query about how the roads analysis would allow for consideration of other travel means, text has been added to paragraph § 212.5(b)(2) to recognize that roads may be converted to other uses.

Comments concerning road decommissioning: Some respondents felt that the term needed to be clarified or better defined. A few respondents requested more specific information about the end objectives of decommissioning a road. Others equated decommissioning to road closure and restricted access to public lands and restricted use of forest resources.

Agency response: In the final rule, § 212.5(b)(2) has been expanded to more accurately describe the activities and treatments encompassed within the term ''decommissioning''. Decommissioning is described as an activity that restores roads to a more natural state. Activities used to decommission a road include the following: (1) reestablishing former drainage patterns, stabilizing slopes, and restoring vegetation; (2) blocking the entrance to the road, installing water bars, removing culverts, reestablishing drainage-ways, and removing unstable fills; (3) pulling back road shoulders; (4) scattering slash on the roadbed; (5) complete elimination of the roadbed by restoring natural contours and slopes; and (6) other methods designed to meet the specific conditions associated with the land around the unneeded road. Therefore, the agency has adopted § 212.5 as proposed except for the changes noted. It should be noted that in addition to decommissioning roads, the responsible official may also convert roads to other uses such as trails.

Proposed Changes to § 212.6, § 212.7, § 212.10

The final rule removes the words ''forest development roads'' from part 212 and replaces them with the words ''Forest Service roads.''

Proposed § 212.13—Temporary Suspension of Road Construction in Unroaded Areas

Section 212.13 is the requirement set out in the interim rule (63 FR 4351) that adopted a temporary road building suspension on certain unroaded lands. The interim rule was designed to expire after 18 months or upon the publication of a final road management rule, whichever occured first. Therefore, this section is removed by this final rule.

Proposed § 212.20—National Forest Trail System Operation

The agency proposed a revision to the rule on National Forest development trail system to remove the reference to development.

Overall comment on the trail system: Some respondents wanted the Forest Service to clarify the relationship between the road management rule and management of the National Forest trail system.

Agency response: The Forest Transportation System is composed of forest roads, trails, airfields, and related facilities. The final roads management rule and administrative policy focuses on the road management system because of the intense public controversy surrounding forest road management and because of the environmental impacts associated with roads. In addition, there is a critical need to address the road maintenance backlog on many National Forests. The National Forest trail system, while an important component of the overall Forest Transportation System, is not nearly as controversial, nor as environmentally impacting. Moreover, this rule was designed specifically to address road management issues. However, the final rule modifies § 212.20 to require that Forest Service trails be identified in the forest transportation atlas in recognition of the importance of displaying the overall forest transportation network. In the final rule, this section was revised to change the heading from ''National Forest development trail system operation'' to ''National Forest trail system operation'' to conform to the language in the remaining sections of part 212.

Conforming Amendments to 36 CFR Parts 261 and 295

The rules at 36 CFR part 261 list prohibited acts on National Forest System lands. Violations of these acts may lead to a citation or an arrest, depending on the case and its severity. There were numerous references in these regulations to ''forest development roads.'' This final rule replaces ''forest development road(s)'' with ''National Forest System road(s)'' to conform to the terminology in part 212. The final rule also replaces ''Forest Development Road System Plan'' at § 261.2 with ''Forest Transportation Atlas'' to conform with the terminology in part 212.

The rules at 36 CFR part 295 govern use of motor vehicles off forest development roads. This final rule replaces the term ''National Forest development roads'' with ''National Forest System roads'' in the heading and

sections of part 295 to conform with the terminology in part 212. No substantive revisions are proposed to these parts.

No comments were received on 36 CFR part 261 or 295, and, consequently, the final rule adopts the text of these sections as proposed.

Conclusion

The Forest Service is adopting this final rule and corresponding changes in administrative policy to help govern National Forest Transportation System planning and management. This action is necessary for the following reasons: (1) to ensure that the National Forest Transportation System meets current and future land and resource management objectives and provides for attendant public uses of National Forest System lands; (2) to provide for safe public access and travel; (3) to allow for economical and efficient management; and (4) to the extent practicable, to minimize and begin to reverse adverse ecological impacts from roads. This revision reflects shifts in public opinion and changes in demand and use of the National Forest System, considers possible economic and social benefits associated with road construction and uses, and utilizes scientific information about the environmental impacts of road construction. Also, all of the action items called for in the report to the President on wildlandfires of 2000 are compatible with the final road management policy. The final road management policy provides local decisionmakers adequate discretion to authorize needed access to meet resource management objectives and, is therefore, consistent with the agency's cohesive fire strategy; ''Protecting People and Sustaining Resources in Fire Adapted Ecosystems, a Cohesive Strategy.''

Regulatory Impact

This final rule was reviewed under USDA procedures and Executive Order (E.O.) 12866 on Regulatory Planning and Review. The Office of Management and Budget (OMB) determined that this is a significant rule as defined by E.O. 12866 because of the importance of the Forest Service road system and the level of public interest expressed in the promulgation of the interim and final rules. A cost-benefit analysis has been prepared as part of the environmental assessment of this rule.

Issuing new regulations consistent with emerging road management policy will provide a transportation system that best serves current and anticipated management objectives and public uses, including access, of National Forest System lands. This final rule emphasizes investing in the reconstruction and maintenance of the most heavily used roads and establishing priorities for decommissioning unneeded roads. This final rule requires that the agency use a roads analysis prior to making decisions about road construction, reconstruction, and decommissioning. The agency currently conducts transportation analysis in association with forest planning, ecosystem assessments, and other analyses. Thus, the agency does not expect an incremental increase of administrative costs due to new administrative requirements under this final rule.

The costs and benefits associated with this final rule were described primarily in qualitative terms. Since the rule does not result in any land management decisions, the effect of the rule on the flow of goods and services will be further evaluated in the roads analysis and other planning analyses. Implementation of the final rule is expected to improve water quality, air quality, and wildlife and fish habitat. The spread of noxious weeds and invasive plants should be reduced. Increased emphasis on road decommissioning may reduce recreation access in some situations. However, this reduction in access would likely be offset by increased emphasis on maintaining existing roads and improving access in other areas. Remote recreation settings found in contiguous unroaded areas will be protected during the interim requirement period.

During the interim requirement period, access that requires roads will be limited in contiguous unroaded areas. Timber harvest and exploration and development of minerals are likely to be impacted in this interim period. If all planned timber harvest in contiguous unroaded areas was foregone, approximately 65 million board feet of timber per year could be affected. Up to 433 direct and 797 total jobs could be affected. These effects would expect to be of short duration, since the interim requirements period ends once comprehensive road inventory and forest-scale roads analysis is completed and incorporated as appropriate into the forest plan.

The cost-benefit analysis can be found in: National Forest System Road Management Strategy Environmental Assessment. This document can be obtained from the Internet at *www.fs.fed.us/news/roads* for 1 year following publication of the final rule or by writing to the Director of Ecosystem Management Coordination, P.O. Box 96090, Washington, D.C. 20090.

In summary, this final rule provides direction that emphasizes a science-based approach to addressing road management activities. While the agency cannot quantify many of the impacts of this final rule, the agency thoroughly considered both the potential and qualitative costs and benefits. Pursuant to requirements of Executive Order 12866, the agency carefully assessed alternative regulatory approaches and made a reasoned determination that the benefits justify the costs.

This final rule also has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This final rule primarily involves revising agency terminology and broad principles to guide the planning and management of the Forest Service road system and has no significant direct or indirect financial or other impact on small businesses. Therefore, it is hereby certified that this action does not have a significant economic impact on a substantial number of small entities as defined by the Act.

Unfunded Mandates Reform

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), the agency has assessed the effects of this final rule on State, local, and tribal governments, and on the private sector. This final rule does not compel the expenditure of $100 million or more by any State, local, or tribal government, or anyone in the private sector. Therefore, a statment under § 202 of the Act is not required.

Environmental Impact

Section 31.1b of Forest Service Handbook 1909.15 (57 FR 43180; September 18, 1992) excludes from documentation in an environmental assessment or environmental impact statement ''rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions.'' The Forest Service's assessment is that this final rule falls within this category of exclusion. Nevertheless, the agency has prepared an environmental assessment. The agency received numerous comments regarding the National Forest Service Road Management Strategy Environmental Assessment. Comments included: requests for clarification of terms, assertions that the environmental assessment violated the National Environmental Policy Act because a full range of alternatives was not analyzed, statements that the assumptions used in the analysis were biased in favor of closing roads, requests to consider the environmental effects of moving timber

harvests to private lands and other countries, concern that the agency balance the social, economic, and environmental elements, and many others.

Comments related to the content of the environmental assessment have been reviewed and addressed. Agency responses may be found in Appendix G of the National Forest System Road Management Strategy Environmental Assessment. The agency has updated the environmental assessment addressing the environmental effects of this rule and associated policy in response to the comments and new information, and has concluded that an environmental impact statement is not required.

The environmental assessment can be obtained from the Internet at *www.fs.fed.us/news/roads* for 1 year following publication of the final rule or by writing to the Director of Ecosystem Management Coordination, P.O. Box 96090, Washington, D.C. 20090.

No Takings Implications

This final rule has been reviewed for its impact on private property rights under Executive Order 12630. It has been determined that this final rule does not pose a risk of taking Constitutionally-protected private property; in fact, the final rule honors access to private property pursuant to statute, treaty, and to outstanding or reserved rights.

Civil Justice Reform Act

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. The revision would (1) preempt all state and local laws and regulations that are found to be in conflict with or that would impede its full implementation; (2) would not retroactively affect existing permits, contracts, or other instruments authorizing the occupancy and use of National Forest System lands; and (3) does not require administrative proceedings before parties may file suit in court challenging these provisions.

Controlling Paperwork Burdens on the Public

This final rule does not contain any record keeping or reporting requirements or other information collection requirements as defined in 5 CFR Part 1320 and, therefore, imposes no paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 USC 3501, *et seq.*) and implementing regulations at 5 CFR Part 1320 do not apply.

Federalism and Consultation with Tribal Governments

The agency has considered this final rule under the requirements of Executive Order 12612 and concluded that the final rule does 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, the agency has determined that no further assessment of federalism implications is necessary at this time.

In addition, the agency has reviewed the consultation requirements under Executive Order 13132, effective November 2, 1999. This order calls for enhanced consultation with federal, state and local governmental officials and emphasizes increased sensitivity to their concerns. In the spirit of these requirements, the agency has carefully considered, in the development of this final rule, the comments received from States, federal agencies, tribal governments, and local governments in response to the Advanced Notice of Proposed Rulemaking published January 28, 1998 (63 FR 4350) and National Forest System Road Management and Transportation System; Proposed Rule and Notices published March 3, 2000 (65 FR 11680). In § 212.2, the definition of ''forest transportation atlas'' recognizes the need to consider forest resources upon which communities depend. Section 212.5 of the final rule requires agency officials to use a science-based roads analysis process and actively engage the public in identifying the Forest Service road system. The final rule at § 212.5(b)(1) calls for consultation with affected federal agencies, State, tribal, and local governments in identifying transportation needs. In addition to public comments on the proposed rule and policy, the agency also contacted many federal, state, tribal, and local government officials to clarify provisions of the proposed rule and to understand their concerns.

Although the Forest Service did not mandate that evey field unit had to consult with other government agencies and tribes, many Regional Foresters and Forest Supervisors met with representatives of these governmental entities to discuss their ideas and concerns about the proposals. Some 98 governmental entities submitted formal comments on the road management proposals. In the final rule, the agency has added ''tribal governments'' § 212.5(b)(1) to the list of other governmental entities with whom the responsible official must consult when conducting a roads analysis.

This final rule provides the broad framework for managing National Forest System roads. Instructions for complying with these revisions are set out in a final revision of the Forest Service Manual Title 7700 that appears elsewhere in this part of today's **Federal Register**. The final revisions to 36 CFR parts 212, 261, and 295, in conjunction with final administrative direction published elsewhere in this notice today, provide the framework for achieving this new emphasis.

List of Subjects

36 CFR Part 212

Highways and roads, National forests, Public lands—rights-of-way, and Transportation.

36 CFR Part 261

Law enforcement, Investigations, National forests, and Seizures and forfeitures.

36 CFR Part 295

National forests and Traffic regulations.

For the reasons set forth in the preamble, the Forest Service amends Chapter II of Title 36 of the Code of Federal Regulations to read as follows:

PART 212—ADMINISTRATION OF THE FOREST TRANSPORTATION SYSTEM

1. The authority citation for Part 212 continues to read as follows:

Authority: 16 U.S.C. 551, 23 U.S.C. 205.

2. Revise the heading for Part 212 as set out above.

3. Remove the words ''forest development'' and, in their place, add the word ''forest'' in the following places:

a. § 212.1 (c) heading
b. § 212.1 (d) heading, text
c. § 212.1(e) heading;
d. § 212.1(i) text;
e. § 212.1(j) text;
f. § 212.1(k) text;
g. § 212.2 heading;
h. § 212.2(a) text;
i. § 212.2(b) text;
j. § 212.2(c) text;
k. § 212.4(a) text;
l. § 212.4(b) text.

4. Amend § 212.1 as follows:

a. Remove the paragraph designations (a)–(k) and arrange the terms in alphabetical order.

b. Remove the definition for ''forest transportation plan'', add the definition for ''forest transportation atlas'' and revise the definition for ''forest transportation facility.''

c. Remove the term and definition for ''construction'' and add definitions in alphabetical order, for ''new road construction,'' ''National Forest System,'' ''road decommissioning'', ''road reconstruction,'' and ''road'' to read as follows:

§ 212.1 Definitions.

* * * * *

Forest Transportation Atlas. An inventory, description, display, and other associated information for those roads, trails, and airfields that are important to the management and use of National Forest System lands or to the development and use of resources upon which communities within or adjacent to the National Forests depend.

Forest Transportation Facility. A classified road, designated trail, or designated airfield, including bridges, culverts, parking lots, log transfer facilities, safety devices and other transportation network appurtenances under Forest Service jurisdiction that is wholly or partially within or adjacent to National Forest System lands.

National Forest System. As defined in the Forest Rangeland Renewable Resouces Planning Act, the ''National Forest System'' includes all National Forest lands reserved or withdrawn from the public domain of the United States, all National Forest lands acquired through purchase, exchange, donation, or other means, the National Grasslands and land utilization projects administered under title III of the Bankhead-Jones Farm Tennant Act (50 Stat. 525, 7 U.S.C. 1010–1012), and other lands, waters or interests therein which are administered by the Forest Service or are designated for administration through the Forest Service as a part of the system.

New Road Construction. Activity that results in the addition of forest classified or temporary road miles.

Road. A motor vehicle travelway over 50 inches wide, unless designated and managed as a trail. A road may be classified, unclassified, or temporary.

(1) *Classified Roads.* Roads wholly or partially within or adjacent to National Forest System lands that are determined to be needed for long-term motor vehicle access, including State roads, county roads, privately owned roads, National Forest System roads, and other roads authorized by the Forest Service.

(2) *Temporary Roads.* Roads authorized by contract, permit, lease, other written authorization, or emergency operation not intended to be part of the forest transportation system and not necessary for long-term resource management.

(3) *Unclassified Roads.* Roads on National Forest System lands that are not managed as part of the forest transportation system, such as unplanned roads, abandoned travelways, and off-road vehicle tracks that have not been designated and managed as a trail; and those roads that were once under permit or other authorization and were not decommissioned upon the termination of the authorization.

Road Decommissioning. Activities that result in the stabilization and restoration of unneeded roads to a more natural state.

Road Reconstruction. Activity that results in improvement or realignment of an existing classified road as defined below:

(1) *Road Improvement:* Activity that results in an increase of an existing road's traffic service level, expands its capacity, or changes its original design function.

(2) *Road Realignment:* Activity that results in a new location of an existing road or portions of an existing road and treatment of the old roadway.

* * * * *

5. Amend § 212.2 by removing paragraph (c) and revising paragraph (a) to read as follows:

§ 212.2 Forest transportation system.

(a) For each national forest, national grassland, experimental forest, and any other unit of the National Forest System as defined in § 212.1 and listed in 36 CFR part 200, subpart A, the Forest Supervisor or other responsible official must develop and maintain a forest transportation atlas, which is to be available to the public at administrative headquarters units. The purpose of the atlas is to display the system of roads, trails, and airfields of the unit. The atlas consists of the geo-spatial, tabular, and other data to support analysis needs and resource management objectives identified in land management plans. The atlas is a dynamic document that changes in response to new information on the existence and condition of roads, trails, and airfields of the unit. The atlas does not contain inventories of temporary roads, which are tracked by the project or activity authorizing the temporary road. The content and maintenance requirements for the atlas are identified in the Forest Service directive system (36 CFR 200.1).

* * * * *

§ 212.5, 212.6, 212.7, 212.10 [Amended]

6. Remove the words ''forest development roads'' and, in their place, add the words ''National Forest System roads'' in the following places:

(a) § 212.5(a) text;
(b) § 212.6(b) text;
(c) § 212.6(c) text;
(d) § 212.7(a) text; and
(e) § 212.10 heading and text.

7. Amend § 212.5 by adding paragraph (b) to read as follows:

§ 212.5 Road system management.

(a) * * *

(b) Road system—(1) *Identification of road system.* For each national forest, national grassland, experimental forest, and any other units of the National Forest System (§ 212.1), the responsible official must identify the minimum road system needed for safe and efficient travel and for administration, utilization, and protection of National Forest System lands. In determining the minimum road system, the responsible official must incorporate a science-based roads analysis at the appropriate scale and, to the degree practicable, involve a broad spectrum of interested and affected citizens, other state and federal agencies, and tribal governments. The minimum system is the road system determined to be needed to meet resource and other management objectives adopted in the relevant land and resource management plan (36 CFR part 219), to meet applicable statutory and regulatory requirements, to reflect long-term funding expectations, to ensure that the identified system minimizes adverse environmental impacts associated with road construction, reconstruction, decommissioning, and maintenance.

(2) *Identification of unneeded roads.* Responsible officials must review the road system on each National Forest and Grassland and identify the roads on lands under Forest Service jurisdiction that are no longer needed to meet forest resource management objectives and that, therefore, should be decommissioned or considered for other uses, such as for trails. Decommissioning roads involves restoring roads to a more natural state. Activities used to decommission a road include, but are not limited to, the following: reestablishing former drainage patterns, stabilizing slopes, restoring vegetation, blocking the entrance to the road, installing water bars, removing culverts, reestablishing drainage-ways, removing unstable fills, pulling back road shoulders, scattering slash on the roadbed, completely eliminating the roadbed by restoring natural contours and slopes, or other methods designed to meet the specific conditions associated with the unneeded road. Forest officials should

give priority to decommissioning those unneeded roads that pose the greatest risk to public safety or to environmental degradation.

* * * * *

§ 212.13 [Removed]

8. Remove entire § 212.13.

9. Amend § 212.20 by revising the heading and paragraph (a) to read as follows:

§ 212.20 National Forest trail system operation.

(a) *National Forest System trails.* National Forest System trails must be identified in the forest trail atlas and on maps, which are to be available to the public at Forest Supervisor and District Ranger offices. Trails must be clearly marked on the ground.

* * * * *

PART 261—PROHIBITIONS

10. The authority citation for Part 261 continues to read as follows:

Authority: 16 U.S.C. 551, 16 U.S.C. 472.

11a. Remove the words ''forest development'' and in their place add the words ''National Forest System'' in the following:

Subpart A—General Prohibitions

a. 261.1(a)(1) text;
b. 261.1(a)(3) text;
c. 261.10(d)(2) text;
d. 261.12 heading;
e. 261.13 introductory text;

Subpart B—Prohibitions in Areas Designated by Order

f. 261.50(b) text;
g. 261.50(f) text;
h. 261.54 heading;
i. 261.56 heading and text.

11b. In § 261.2, remove the definitions for ''forest development road'' and ''forest development trail,'' and add the following definitions in correct alphabetical order:

§ 261.2 Definitions.

* * * * *

National Forest System road means a road wholly or partly within or adjacent to and serving a part of the National Forest System and which has been included in a forest transportation atlas.

National Forest System trail means a trail wholly or partly within or adjacent to and serving a part of the National Forest System and which has been included in a forest transportation atlas.

* * * * *

PART 295—USE OF MOTOR VEHICLES OFF FOREST SERVICE ROADS

12. Revise the heading for Part 295 as set out above.

13. The authority citation for Part 295 continues to read as follows:

Authority: 30 Stat. 35, as amended (16 U.S.C. 551): 50 Stat. 525, as amended (7 U.S.C. 1011) E.O. 11644, 11989 (42 FR 26959).

§ 295.1 [Amended]

14. In § 295.1, replace the words ''National Forest development roads'' with ''National Forest System roads.''

15. Replace the words ''forest development roads'' with ''National Forest System roads'' in the following places:

§ 295.2 [Amended]

(a) § 295.2 heading, and

§ 295.5 [Amended]

(a) § 295.5 heading.

Dated: January 4, 2001.

Mike Dombeck,

Chief, Forest Services.

[FR Doc. 01–552 Filed 1–5–01; 4:30 pm]

BILLING CODE 3410–11–U

DEPARTMENT OF AGRICULTURE

Forest Service

RIN 0596–AB67

Forest Transportation System

AGENCY: Forest Service, USDA.

ACTION: Notice of final administrative policy.

SUMMARY: In conjunction with the final rule published elsewhere in this part of today's **Federal Register**, the Forest Service is adopting a final policy governing the national forest transportation system. This action is necessary to ensure that National Forest System roads provide for public uses of National Forest System lands; provide for safe public access and travel; allow for economical and efficient management; to the extent practicable, begin to reverse adverse ecological impacts associated with roads; and meet all other current and future land and resource management objectives. The intended effects of this final policy are to ensure that decisions to construct, reconstruct, or decommission roads will be better informed by using a science-based roads analysis; that the availability of road maintenance funding will be considered when assessing the need for new road construction; and that, instead of focusing on constructing new roads, emphasis will be given to reconstructing and maintaining classified roads while decommissioning unnecessary classified and unclassified roads. The direction is being issued as amendments to Forest Service Manual Title 7700—Engineering, in Chapter 7700—Zero Code and in Chapter 7710—Transportation Atlas, Records, and Analysis.

EFFECTIVE DATE: The directives are effective January 12, 2001.

FOR FURTHER INFORMATION CONTACT: Mike Ash, Deputy Director, Engineering Staff, Forest Service, 202–205–1400.

SUPPLEMENTARY INFORMATION: The following outline displays the contents of the Supplementary Information section of this policy document.

Background

Analysis and Response to Public Comments

Response to General Comments

Road management rule and policy
Adequacy of public involvement on the road management rule and policy
Public and technical review
The roads analysis process
Accountability for managing forest transportation facilities
Validity of the data used to indicate the need to revise the policy
Demand for and supply of roads
Effectiveness of road restrictions and closures
Social and economic considerations
Motorized access
Effects of roads policy on the environment
Creation/expansion of roadless or unroaded areas
Recognition of improved road construction and maintenance techniques

Response to Specific Comments

Amendments to Forest Service Manual Chapter 1920—Land and Resource Management Planning
Proposed Section 1920.5—Definitions
Proposed Section 1922.15—Resource Integration Requirements, paragraph 20
Proposed Section 1922.15—Resource Integration Requirements, paragraph 28
Amendments to Forest Service Manual Title 7700—Forest Transportation System
Proposed FSM Title 7700—Chapter Zero Code
Proposed Section 7701.1—Coordination with Forest Planning
Proposed Section 7701.2—Revegetation
Proposed Section 7701.3—Transportation System Management
Proposed Section 7702—Objectives
Proposed Section 7703—Policy
Proposed Section 7703.1—Road Management
Proposed Section 7705—Definitions
Proposed Section 7709—Handbooks
Proposed Chapter 7710—Transportation Atlas, Records, and Analysis
Chapter title
Forest Road Atlas
Forest Transportation Atlas and records
Transportation analysis
The roads analysis process
Responsibilities for agency Responsible Officials
Roads analysis transition procedures
Specific comments on the regulatory certifications of proposed policy
Cost-benefit analysis
Civil Justice Reform Act
No Takings Implications and Civil Justice Reform Act

Regulatory Certifications

Regulatory Impact
Unfunded Mandates Reform
Environmental Impact
Civil Justice Reform Act
Controlling Paperwork Burdens on the Public

Conclusion

Background

On March 3, 2000, the Forest Service published in Part III of the **Federal Register** (65 FR 11676–11693) a proposed rule and proposed administrative policy, which together were designed to improve the management of National Forest System roads. Under the proposed rule, the rules governing transportation planning and management (36 CFR Part 212) would have been modified as follows:

1. A transportation atlas would be required for each National Forest System administrative unit to display the system of roads, trails, and airfields needed for public access and agency resource management.

2. The word ''development'' would be removed from the description of roads and trails under Forest Service jurisdiction, to signal the shift away from developing new roads to better managing existing roads and access.

3. A science-based analysis process would be required to identify the transportation facilities.

4. As part of road system management planning, agency officials would be required to identify the minimum road system that is commensurate with resource objectives, reflects likely funding, and, to the extent practicable, minimizes adverse environmental effects associated with road construction, reconstruction, and maintenance.

5. Equally important was the proposed rule's requirement to identify unneeded roads that should be decommissioned and to give priority to decommissioning those roads that pose the greatest risk to public safety or environmental quality.

Simultaneously with the proposed rule, the agency published a proposed administrative policy (65 FR 11684). That policy proposed to integrate the process for determining transportation needs into the forest land and resource management planning process (Forest

Service Manual Chapter 1920). The other changes would be issued as amendments to Forest Service Manual Title 7700, entitled ''Forest Transportation System,'' specifically to the Chapter Zero Code, and Chapter 7710, which would be renamed ''Transportation Atlas, Records, and Analysis.''

The focus of the proposed revisions to agency administrative directives was to provide National Forest System road access in a manner that can be efficiently managed within the capabilities of the land. Coordination of transportation analysis and planning with State, county, local, Tribal, and other Federal agency officials was an important component of the proposed policy. Another key feature was that the policy prescribes interim requirements for new road construction in sensitive unroaded and roadless areas until the findings of a comprehensive forest-scale, science-based analysis of the road system is incorporated into forest plans.

Analysis and Response to Public Comments

Public comment on the proposed policy and rule was invited for a 60-day period ending May 2, 2000, and was extended an additional 15 days to May 17, 2000 (65 FR 24910). The Forest Service received approximately 5,900 responses, consisting of letters from individuals, postcards, form letters, petitions, e-mail messages, and resolutions. The geographic distribution of responses received was as follows: Western States—2,105; Mountain States—1,607; Central (Midwestern) States—733; Southeastern States—279; Northeastern States—541; and Unknown—581. Of the nearly 5900 total responses, 5505 were received from individuals. Groups and organizations representing forest resource users (grazing, timber, oil/gas/mining, and recreation) accounted for 134 responses and conservation and preservation groups submitted another 97. Government agencies and elected officials accounted for 98 responses and are divided between: Tribal (6), Federal (16), State (28), county (37), and local (11). There were an additional 34 responses received from groups or organizations that do not fit into one of the previous categories.

Comments on the proposed administrative policy focused on both broad topics reflecting the reviewers' forest management philosophies and environmental values as well as on specific provisions of the policy. Issues raised included such topics as: use of science-based analysis, public involvement, definitions, local decisions, social and economic impacts, and physical and biotic environmental effects of access. Summaries of the significant general comments received and the agency responses follow.

Response to General Comments

Use of Public Comments on the Proposed Rule and Policy

Several respondents wanted to know how public comments would be used to develop the final rule and policy. Others asked specifically whether the agency would use public input when finalizing the rule and administrative policy.

Agency response: Each letter was read; coded by subject, content, and demographics; and entered into a database. Comments were then compiled in the database by subject and content and summarized as ''public concerns.''

These ''public concerns'' were reviewed and grouped into the following categories: purpose and need, processes, relationships, planning and implementation, forest management, social and economic considerations, and environmental effects. The concerns were then analyzed to identify whether they pertained to the proposed rule, proposed policy, and/or the environmental assessment. The comprehensive list of comments was further reviewed to ensure that all concerns were considered. Changes made in the policy are based primarily on the comments received in response to the proposals. While the agency does not necessarily agree with all the comments, it did carefully consider whether changes were needed and arrived at a rationale for its responses. The Supplementary Information section of this final policy summarizes comments and sets out the agency's response, including whether or not and how the policy has been revised. Also, Appendix G of the environmental assessment addresses comments received specific to the environmental assessment.

The Adequacy of Public Involvement on the Proposed Road Rule and Policy

Some respondents thought the agency should have conducted more public involvement with local residents and groups, provided better public access to information, and conducted more outreach to rural populations. Others requested more time to respond or even asked that the final decision be delayed to permit additional public involvement.

Agency response: The final rule and administrative policy incorporate the results of extensive public involvement both before and after publication of the proposals. The agency used a variety of methods to make information available to the public, including public meetings, news releases, public mailings, and internet websites. Public involvement efforts began in January 1998 with the announcement of the intent to revise regulations concerning the management of the National Forest Transportation System. Over 80,000 letters, postcards, and e-mail messages were received in response to the January 1998 announcement. These public comments were used to assist the agency in the development of the proposed rulemaking and the proposed administrative policy published in the **Federal Register** (65 FR 11684) on March 3, 2000. As previously noted, the initial 60-day public comment period was extended for an additional 15 days at the request of potential respondents (65 FR 24910). Therefore, the agency does not believe additional public outreach or involvement is necessary.

Consistency and Technical Quality of Roads Analyses

Some respondents expressed concern that Forest Service roads analyses would vary in quality and rigor and would lack credibility, unless reviewed by outside scientists and other interested individuals or entities. These respondents felt that the findings of roads analyses would always be questioned and lack credibility because the process provided the line officer considerable discretion in affecting the outcome. These respondents proposed that the Forest Service form technical review teams composed of a roads interdisciplinary team, a roads analysis support team, external partners, and non-agency scientists to review the roads analysis for scientific consistency and quality and thus ensure that sound science is being applied. Others wanted to know if the results of the roads analyses would be available for public review.

Agency response: The roads analysis process is designed to provide decisionmakers a sound, science-based procedure for analyzing road management issues and concerns and for identifying road management opportunities. The process is intentionally designed with enough discretion to allow for adjustments in the scope and intensity of the analysis for addressing individual resource situations and varying issues. The agency's emphasis is not on whether all road analyses pass the same ''quality or scientific rigor test,'' but rather that the analyses effectively identify and address relevant road issues and concerns

specific to the area being analyzed. An interdisciplinary team, composed of appropriate subject matter specialists, will conduct each roads analysis. In addition, participation by interested individuals, groups, and governments in the analysis process is not only encouraged but also will be a critical component of the success of the analysis. The findings of the roads analysis will be integrated into other ecological assessments either at the watershed scale, area, or higher scale. Road-related issues, concerns, opportunities, and needs generated as a result of the roads analysis will be disclosed and, when appropriate, analyzed in an appropriate National Environmental Policy Act (NEPA) decision process.

Roads Analysis Process

Some reviewers said that the roads analysis process would result in duplicative work as well as yield inconsistent results.

Agency response: The roads analysis process integrates ecological, social, and economic factors in addressing current and future road needs. The roads analysis process provides a systematic, multiple-scale, agency-wide approach to ensure that important road issues are examined at the appropriate scale. The process is not intended to be applied in a rigid fashion; in fact, given the diversity of the landscape, resource conditions, and the social and economic conditions, rigid application of a roads analysis process would surely fail; rather, the process is intended to be tailored to fit real-life local situations and analysis needs. Therefore, the results of an analysis for one situation is not expected to be identical to an analysis for a different situation. The process also should not be duplicative of other data or work. To the extent possible, existing data are used in the process but, depending on the scope of the issues and concerns, additional information may be collected.

Accountability for Managing Forest Transportation Facilities

Many reviewers expressed resentment about how the Forest Service is making access management decisions. These respondents claimed that the public is being stripped of the right of access to National Forests and Grasslands due to the Forest Service's inability to properly maintain the road system. At least one respondent said that the Forest Service should develop guidelines to assist local districts in the implementation of the final policy. Several writers, while in full support of the transportation policy, did not believe it would be implemented effectively or completely. These respondents suggested that a quota system be initiated that would require a net reduction in total road mileage, schedule road decommissioning, prohibit new road construction, set road density limits, and designate all lands closed to motorized use unless specifically designated open.

Agency response: The agency believes the final Forest Service Manual revisions provide clear guidance to field units. Forest Service Manual Chapter 7710 establishes objectives and responsibilities for analyzing transportation needs and issues. It also provides for significant public involvement for identification of opportunities and concerns, all of which strengthen the agency's and the public's ability to hold Responsible Officials accountable for implementation. The direction in the Forest Service Manual is the foundation for internal reviews of policy and program implementation by field units. Therefore, the mechanisms to provide oversight and ensure compliance are already in place. The agency does not agree that a general prohibition on new road construction or that a quota system for road decommissioning is appropriate. Local, forest-level access and resource management needs, identified within a forest planning framework, should direct road management network decisions. As opposed to specific prohibitions on road construction in inventoried roadless areas, which are under consideration, a general, agency-wide ban on any new roads in the National Forest System is excessive and unduly rigid.

Validity of Agency Statements About the Need To Revise the Policy

Some respondents expressed concern about the validity of the data used to determine the need to revise the transportation policy. Specifically, these respondents challenged the basis for the statements related to demand and use of National Forest System lands, and the assumption that roads have caused environmental damage. Others challenged the degree to which roads are needed for ongoing management of National Forest System land, such as for forest health, fire management, or resource uses.

Agency response: The information and data used to identify the need to revise this administrative policy were collected from several sources. Forest Service researchers and resource specialists reviewed scientific literature to identify the latest research involving the environmental, social, and economic effects of existing roads and road construction, reconstruction, decommissioning, and maintenance. This literature review helped identify the latest recreational demand and supply trends and attitudes about roads on National Forest System lands. Analytical tools for assessing road-related effects on physical and biological resources were also explored. These efforts, in conjunction with other known information (including road-related resource problems, budget limitations and trends, and associated maintenance backlogs) all indicated that the agency needed to change how it manages the transportation system. It should be noted that respondents challenging data and assumptions provided no data or data sources to support their assertions.

The Demand for and Supply of Roads

Many respondents were concerned with the juxtaposition of the agency's projected increase in public demand for roaded and unroaded recreational use on National Forest System lands with the projection of fewer open road miles to accommodate that demand. Some questioned whether the agency was intentionally reducing the supply of roads to reduce demand. Others were concerned with potential adverse environmental effects of confining more users to a smaller available land base and urged that the agency preserve access options in order to provide a variety of travel-ways on National Forest System lands and to diffuse access impacts over a broader land base.

Agency response: The National Forest Transportation System is vitally important to the management of National Forest System lands and is essential to many rural communities and land owners as well as to recreationists and other resource users. The agency seeks to find a balance between the need for public and administrative access to these lands and the environmental costs and benefits associated with providing that access to these lands. The final policy retains the requirement to use a roads analysis process in conjunction with ecosystem assessments that support project activities or forest planning. The roads analysis process encourages the active engagement of local citizens, interested organizations, and other Federal, State, Tribal and local governments to identify and assess both short- and long-term road needs. This collaborative effort will help to ensure that important environmental issues and concerns, as well as road supply issues and concerns, are addressed in a reasonably balanced way. An emphasis on

maintaining the existing road system will better enable the Forest Service to focus its resources on maintaining and reconstructing those roads most important to the public.

The Effectiveness of Road Restrictions and Closures

In response to the proposal to ''aggressively'' decommission roads, many respondents believe that a lack of enforcement of previous road decisions is a major factor behind the agency's inability to effectively manage its current road system. Many others noted that by closing access to more areas, fewer members of the public would use National Forest System lands. Others stated that, despite the potential for increased fines, many forest users would ignore road closures due to lack of enforcement of those closure orders. Others indicated that the law-abiding majority of forest users are ''bearing the punishment'' of road closures, when roads are closed to deter the reckless, illegal behavior of a few.

Agency response: The roads analysis process adopted for use in the final policy is designed to help forest officials better address issues associated with road and access management. Conducting the process with local public and governmental involvement should help officials more clearly define road issues, including restriction or closure alternatives, how the restrictions would be implemented, and the relative effectiveness of road restrictions, closures, and decommissioning.

Motorized Access

Motorized recreationists felt that they were being singled out and forced to bear the majority of the access restrictions on public lands, when their impacts are relatively small compared with other activities. They stated that the analysis should consider the full breadth of motorized and non-motorized recreational needs.

Agency response: Motorized and non-motorized allocation issues, needs, and concerns are appropriately addressed at the local level during the forest or project planning process. The roads analysis process, which is intended to be an open process involving all who are interested in, or affected by, road decisions will be used to inform forest planning road management decisions.

Environmental Effects of Roads Policy

Many respondents wanted the Forest Service to analyze the effects of roads and road management actions on the environment, including on watersheds, riparian areas, fisheries, soils, wildlife, recreational opportunities, and threatened and endangered species. Some reviewers indicated that more environmental damage might be caused by decommissioning roads than by leaving them alone.

Agency response: Roads analysis allows objective evaluation of the physical and biotic environmental effects, as well as of the social and economic effects, of potential road construction, reconstruction, decommissioning, and maintenance actions. The roads analysis process incorporates early identification of potential effects in the site-specific, project-level, decisionmaking and forest planning processes. Therefore, it will help planners recognize those situations where the adverse effects (costs) would outweigh the benefit. This analysis process allows the agency to identify potential issues and opportunities and the options for addressing them.

The Creation/Expansion of Roadless or Unroaded Areas

Many reviewers concluded that road decommissioning could lead to the creation or expansion of inventoried roadless or unroaded areas. These reviewers felt that future entry into these areas could be precluded and that the area could then be considered roadless or unroaded depending on the size of the area and proximity to existing roadless or unroaded areas. These respondents said that in cases where roads pose an environmental risk because of location or initial construction standards, the risks might force road closures. They said that relocation of the road might be impossible because of newly created unroaded areas.

Agency response: Decommissioning roads may result in an increase in the amount of land that is unroaded. Decommissioning does not, however, change the underlying allocation or assigned use for that land. Currently approved activities in areas where roads are decommissioned would continue until, and unless, forest plan direction is amended to preclude these activities. Environmentally damaging roads may be relocated if such an action was consistent with the current forest plan direction. It is possible that some unroaded lands could, at some point, be designated Wilderness areas by Congress, but such a designation is not a foregone conclusion. The majority of decisions related to areas that have decommissioned roads would be made at the local forest planning level and, therefore, conflicting viewpoints would be addressed.

Recognition of Improved Road Construction and Maintenance Techniques

Some respondents said the Forest Service should acknowledge that improved techniques for road layout, design, construction, and maintenance have been used on national forests in recent years and that these improved techniques have resulted in fewer road-related environmental impacts.

Agency response: The agency agrees that road construction techniques used today result in fewer and less intensive adverse environmental impacts than did earlier construction techniques. However, this new technology does not address the problem that the national forests contain over 380,000 miles of classified roads, one-quarter to two-thirds of which are more than 25 years old. It is highly likely that many of these existing roads do not meet current standards for safety or environmental protection. It is critical, therefore, that the agency focus its resources more on maintenance and reconstruction of needed roads and less on new construction.

Specific Comments

In addition to the preceding general comments, the agency received specific substantive comments by code and caption of the proposed policy. Summaries of those comments and the agency's responses follow. The discussion of comments and agency responses is organized according to the coding of the proposed policy.

Amendments to FSM Chapter 1920—Land and Resource Management Planning

This chapter of the Forest Service Manual provides definitions and implementing policy for National Forest System lands and resource management planning processes. Implementation of the road management strategy as described in this final administrative policy will occur chiefly through forest plan amendment or revision. Therefore, direction is needed on how forest planning teams integrate consideration of the forest transportation system into the planning process.

Proposed Section 1920.5—Definitions

The terms ''unroaded areas'' and ''inventoried roadless areas'' were proposed to be added. The terms were essentially the same as used in the agency's proposed forest planning rule (64 FR 54073). No comments were received on the definition section of the proposed policy. However, the agency has revised both definitions to be identical to the definitions used in both

the Land and Resource Management Planning and Roadless Area Conservation Final Rules.

Proposed Section 1922.15—Resource Integration Requirements

The proposed policy added a new paragraph 20 for planners to identify the access requirements and travel management options available to meet resource management objectives for each management area prescription within the forest plan and to identify road management opportunities to be considered. No comments were received on this paragraph; therefore, this paragraph is adopted without change.

Proposed paragraph 28 required that management prescriptions protect values associated with unroaded conditions. Examples of those values included such actions as providing barriers to invasive species and ensuring biological diversity. No comments were received on this paragraph; however, the agency has dropped this paragraph from the final policy in deference to the final Land and Resources Management Planning Final Rule, which addresses protection of roadless values.

Amendments to Forest Service Manual Title 7700—Forest Transportation System

Proposed FSM Title 7700—Chapter Zero Code

This chapter of the Forest Service Manual establishes the overarching, broad authorities, objectives, policy, responsibilities, and definitions for planning, operating, maintaining, and decommissioning forest transportation system facilities. Throughout this chapter, references to ''development'' were proposed to be removed to reflect a shift in administrative policy from ''road development'' to ''managing access within the capability of the land.''

Comment: Several respondents objected to the removal of the word ''development'' from the rule and administrative policy, claiming that the removal was an agency tactic to deceive the public merely by using new terms. Others agreed that the change was in alignment with the proposed change in management emphasis.

Agency response: Removing the word ''development'' to reflect a shift in policy from ''road development'' to ''managing access within the capability of the land'' is a fundamental element of this administrative policy and the accompanying final rule. There is no attempt to deceive the public. To the contrary, we are displaying our intention publicly and subjecting it to comment. Therefore, no change has been made in the final policy, except to add a reference to the Manual section guiding road analysis

Proposed Section 7701–7701.3—Coordination With Forest Planning

This section cites the legal authorities that apply to Transportation Planning Management. No comments were received on section 7701.1 and no changes have been made to this section of the final policy.

Proposed Section 7701.2—Revegetation

This section addresses statutory requirements for revegetating non-permanent roads when activities are completed. In the draft policy, the agency used the term ''prescribes the revegetation of unnecessary roads.''

Comment: Several respondents noted that the Forest and Rangeland Renewable Resources Planning Act section 10(b) requires ''revegetation'' of ''non-permanent'' roads.

Agency response: The agency agrees with the comment. To more accurately reflect the intent of the law, the final policy is revised to read ''The Forest and Rangeland Renewable Resources Planning Act directs that roads be designed to standards appropriate for intended uses and requires the revegetation of roads within 10 years of the termination of temporary and undeveloped roads created under contract, permit, or lease.''

Proposed Section 7701.3—Transportation System Management

This section identifies the statutory and regulatory authorities for transportation system management. The second authority cited in this section is the Highway Safety Act of 1966.

Comment: Respondents wanted the word ''directs'' changed to ''authorizes'' in paragraph 2 of this section. They indicated that the Highway Safety Act authorizes, instead of directs, federal agencies to do certain activities.

Agency response: The agency agrees that the use of the word ''directs'' was inaccurate and has revised the text of the final policy to this effect.

Proposed Section 7702—Objectives

This section identifies the management results to be achieved through transportation system management. The proposed policy sought to refine the management objectives to emphasize environmental protection and to consider ecosystem values in forest transportation system management.

Comment: Some respondents stated the objectives were too narrow and should include specific resources or uses to be served by the transportation system (timber, utility corridors, developed and dispersed recreation, cross-country ski corridors, wildlife corridors, etc.). Other comments indicated the need to clarify text or reorder the list of objectives.

Agency response: The agency disagrees with the need to list specific resources or uses. However, consistency with Forest Plans has been added to better reflect the agency's intent to consider all pertinent uses and resources in the planning process. The coding hierarchy and content standards applicable to FSM Title 7700 is intended to list the basic transportation management outcomes. The order of the objectives was not changed in the final policy because, taken together, they accurately represent agency objectives.

Proposed Section 7703—Policy

This section sets forth the broad policies that are intended to guide decisions about road activities. These policies overlay all of the subsequent directives in Title 7700, not just Chapter 7710, which is being revised. Section 7703 implements the requirements of 36 CFR 212.5(b)(1) by specifying that the minimum transportation system is the system that best serves current and anticipated land and resource management objectives and public uses considering current and future funding levels.

Comment: Many respondents were deeply concerned about the proposed policy direction to ''provide the minimum forest transportation system.'' They questioned the ability of the agency to effectively manage forest resources long-term while reducing road access. Others objected to a reduction in roads that are open to public use, predicting an adverse effect on public access and recreational use on National Forest System lands. Some respondents emphasized the need for coordination and requested that addition to the policy.

Agency response: By ''minimum system,'' the agency did not mean no new roads or other new transportation facilities or that a majority of roads would be decommissioned or converted to other uses. Rather, the agency intends the minimum system of roads is one that meets needed access needs while protecting healthy ecosystems. Furthermore, the text defines ''minimum transportation'' as the system needed to *best serve* (emphasis added) current and anticipated management objectives and public uses as identified in forest plans. Any amendment or revision of forest plans

will involve NEPA compliance and full public involvement. Therefore, in response to concerns about coordination, the agency has retained this text in the final policy, has replaced the term ''forest officers'' with ''Responsible Officials,'' and has added language to demonstrate the expected coordination with other transportation agencies.

Proposed Section 7703.1—Road Management

This proposed section provided direction to conduct a roads analysis when considering proposals to construct new roads, to reconstruct or decommission existing roads, or to change road classifications. The proposed policy also would require use of a roads analysis to identify priorities for reconstructing and maintaining needed roads and decommissioning unneeded roads.

Comment: Some respondents stated that new road construction should be very limited or not allowed at all, while others felt there should be few restrictions on building new roads. By contrast, a number of other respondents felt that the $8.4 billion of road maintenance backlog and decommissioning of all unneeded roads should be completed before any new roads are constructed. Others wanted to have these road management options addressed more thoroughly, in order to delay the closing of roads to the public. A few respondents said that an objective process has not been established for identifying (1) whether new roads are needed, (2) which existing roads should be reconstructed, maintained, or decommissioned, and (3) how priorities should be established. Other respondents had questions about how the road management policy and the use of a roads analysis would consider other motorized and non-motorized uses.

Agency response: The agency notes the disagreement over how decisions about new roads should be made and recognizes that the process for making these decisions needs to be clarified. New language has been added to the final policy to direct the use of a roads analysis to address both access benefits and related ecological costs, giving priority to reconstructing and maintaining needed roads while decommissioning unneeded roads. This section now clarifies when a roads analysis must be conducted and provides a requirement to include an economic analysis that addresses both initial and long-term costs.

The bulk of direction that was in FSM 7703.1 of the proposed policy, has been placed under section FSM 7703.2 entitled ''Management Opportunities.'' This section gives more specific direction for maintaining and constructing needed roads, decommissioning unneeded roads, and adding new roads. New language has been added to paragraph 1 to explain how temporary and unclassified roads are to be considered when making decisions about road maintenance. A discussion relating to those roads follows under ''Proposed Section 7705—Definitions.''

In the final policy, paragraph 3 of FSM 7703.2 entitled ''Adding New Roads'' has been revised to make clear where decisions to add new roads to the transportation system are appropriate. Language has been added to clarify that new roads newly acquired through land acquisition transactions are subject to the same analysis and justification if they are to be placed in the Forest Transportation System only where resource management objectives, environmental impacts, and benefits associated with a new road have been carefully considered and documented. A requirement to consider motorized and non-motorized uses during the transportation system analysis has also been added in response to comments received.

Proposed Section 7705—Definitions

The proposed policy added new definitions pertaining to road management, updated and revised existing definitions, and removed the word ''development.''

Comment: Many respondents were concerned about the definitions of key terms used in the proposed administrative policy. Several respondents requested that the road definition be clarified before finalizing the rule and policy. Others offered suggestions as to what that definition should be. A number of respondents were confused over the terms ''classified'' and ''unclassified'' roads and asked which of these categories included temporary roads. Respondents recommended that the agency use the term ''National Forest System Road'' in place of the term ''Forest Road.'' Additionally, some respondents wondered if a road could be redesignated as a trail if it was no longer needed as a road.

Agency response: The agency agrees that clarification of some of the terms and definitions is needed. Definitions of ''roads,'' ''classified roads,'' ''unclassified roads,'' ''transportation atlas,'' ''new road construction,'' ''temporary road,'' and ''forest transportation facility'' were revised in the final rule at 36 CFR 212.1 published elsewhere in this part of today's **Federal Register**. The administrative policy includes revised definitions for ''forest transportation system management,'' ''new road construction,'' ''road reconstruction,'' ''road improvement,'' ''road realignment,'' ''road maintenance,'' ''roads subject to the Highway Safety Act,'' and ''transportation facility decommissioning''. The proposed definitions for ''public roads,'' ''Forest Road'' ''Forest Service Trail,'' and ''transportation facility jurisdiction'' have not changed. FSM 7705 Exhibit-01, entitled Road Terminology Relationships, which appears at the end of this document, has been retained and updated to clarify road terminology relationships. The following terms have changed between the draft and final policy in response to concerns expressed in public comment and to clarify agency intent. The new terms in the final policy and how the proposed terms were modified are as follows:

National Forest System Road—This was entitled ''Forest Service Road'' in the proposed policy. The new term reflects that National Forest System roads serve National Forest System lands.

Forest Transportation Facility—This term was named Forest Transportation System in the proposed policy. Instead, the final policy refers to ''facility'' instead of system and includes other necessary transportation facilities, such as bridges, parking lots, and other appurtenances.

Forest Transportation System Management—This definition has been revised slightly to reflect changes in other definitions.

New Road Construction—The text has been revised to remove the reference to investment, which was confusing and not relevant in defining the term. Additionally, the definition has been modified to clarify that classified and temporary roads are included in this category.

Road Reconstruction—This term has been simplified by removal of the subcategory definition for rebuilding.

Road Improvement—The text has been changed to remove the reference to investment and clarify that improvement includes expanding the road's capacity or changing the original design function.

Road Realignment—The definition has been streamlined.

Road Maintenance—The definition has been simplified to remove any ambiguity as to the meaning of this term.

Roads Subject to Highway Safety Act—This definition has been modified

to reflect the change from ''Forest Service roads'' to ''National Forest System roads.''

Road Decommissioning—This term was ''Transportation Facility Decommissioning'' in the proposed policy. The terminology has been revised to clarify that the objective of decommissioning is to remove unneeded roads and begin restoration.

The definition in the proposed policy for the term ''Rebuilding'' has been removed from the final administrative policy because it is a component of reconstruction or maintenance and is no longer needed as a separate definition.

During the last year, the Forest Service has adopted new common terms and definitions for maintenance and construction based on standards developed by the Federal Accounting Standards Advisory Board. These generic terms are now being applied in inventorying, budgeting, and accounting for all fixed assets under Forest Service jurisdiction, including the National Forest transportation system. The terms and definitions used in FSM 7705, though slightly different, are not inconsistent with the new common financial management terms and their definitions. The agency is assessing all its transportation directives to determine what changes in Forest Service Manual and Handbook terminology are needed. However, this effort exceeds the scope of these revisions to road management directives.

Proposed Section 7709—Handbooks

The proposed policy lists Forest Service Handbook Section 7709.56 as a reference. The only change to this section was to remove the term ''development'' to be consistent with the change in focus in the agency's transportation system and redefining Forest Service road as National Forest System road. No substantive comments were received on this proposed change, and this section is adopted as proposed.

Proposed FSM Chapter 7710—Transportation Atlas Records and Analysis

Based on comment and further review of this policy, the agency has decided to restructure this chapter, revising some of the captions and expanding and clarifying the direction. The substantive changes to the direction are based on public comment received or on the need to be consistent with other current regulatory initiatives. The significant changes are as follows: (1) A clarification that temporary roads are considered necessary for management of National Forest System resources; (2) an emergency exemption from the interim requirements (transition) for catastrophic events and responses or restoration under the Comprehensive Environmental Responsibility, Compensation, and Liability Act; and (3) the requirement that each national forest and grassland complete the forest-scale road analysis process in 2 years. The comments and agency responses on the proposed direction at FSM 7710 are arranged according to the issues raised by the respondents.

Change in the Chapter 7710 Title

Some respondents questioned the need to change the title of the chapter, while others wondered if transportation planning was being replaced by the roads analysis process.

Agency response: The title of Chapter 7710—Transportation Atlas, Records, and Analysis has been retained in the final policy as it was proposed in the administrative policy. This chapter contains objectives, policies, responsibilities, and requirements for analyzing and documenting the transportation system. The agency feels that the title better reflects the overall transportation management program since transportation planning is only one aspect of the program.

Forest Road Atlas and Records

Similar to comments on Section 7705 noted above, respondents were concerned primarily with which roads would be tracked in the atlas: classified, unclassified, or both. Others were unclear how and where temporary roads would be tracked. Some respondents suggested periodic updates to the road atlas be required, such as annually or every 5 years.

Agency response: All classified and unclassified roads are required to be included in the road atlas. Including unclassified roads in the atlas will provide the mechanism needed to track the prioritization, scheduling, and decommissioning of unclassified roads. The inclusion of unclassified roads in the road atlas is necessary for roads analysis and identification of road management opportunities and priorities. Their inclusion in the atlas does not mean that they are part of the official forest transportation system. The agency recognizes that temporary roads are usually short-term in duration (often less than 1 year) and are required to be managed and tracked with the project or activity in which they are authorized. Therefore, temporary roads will not be required to be included in the forest road atlas unless the agency decides to retain a temporary road as a classified road after the permitted use ceases. The National Forest Management Act (NFMA) requires that these roads be designed to reestablish vegetative cover within 10 years of the termination of the authorization unless converted to other uses.

The agency does not agree that the atlas should be updated at set periods. Atlas updates are intended to be an ongoing activity as road inventories, analyses, and road-related decisions are implemented.

Comments: Some respondents wanted to have accurate maps available that would show the current status of the road system. Others wanted to have the tabulated road inventory accurately reflect the existing road system. Some wanted to know the difference between the transportation atlas and road atlas.

Agency response: As noted in the final rule which appears elsewhere in this part of today's **Federal Register**, each administrative unit will be required to prepare and maintain a transportation atlas which consists of geo-spatial, tabular data, and other associated information for National Forest System roads, trails, and airfields. This final policy further defines the transportation atlas to include separate road atlas, trails atlas, and airfield atlas. In the road atlas, the travel status of each road (whether it is managed as open, restricted, or closed) must be identified. The atlas will be updated through ongoing inventories or project and land management planning, and it will be the source for updating maps prepared for public use, such as the Forest Visitor Map. Information in the atlas will be available to the public.

Comment: Respondents emphasized the need to standardize information on roads and bridges, including physical, operational, usage, performance, and safety characteristics.

Agency response: The agency agrees and believes that Section 7712.5—Road Management Objectives, as written in the final policy, establishes the standards for road information.

Transportation Analysis Process

Some respondents wanted the transportation analysis process clarified, while others expressed concerns about coordination and review of the transportation analysis process and results. Still others expressed the need for planning and analysis process accountability.

Agency response: The agency agrees with the need for clarity and accountability of the planning and analysis process. Therefore, Section 7712—Transportation Analysis has been rearranged with minor text changes and additions.

Comment: Respondents said the road management policy needs to address social, economic, and environmental values in transportation planning and analysis and needs to use the findings from transportation planning to update forest plans.

Agency response: The final administrative policy includes objectives, which specify that social, economic, and environmental values must be considered as part of the roads analysis. Section 7712.12 of the final policy clarifies how transportation analysis, which includes road analysis, contributes to the planning process. Also, in recognition of the importance of roads analysis, a requirement has been added in section 7712.15 for each National Forest System administrative unit to complete a forest-scale roads analysis within 2 years.

Roads Analysis Process

Some respondents expressed confusion about the various scales and scopes of roads analysis.

Agency response: In response to these concerns, the Forest Service took a fresh look at the proposal and concluded that the proposal scattered direction about scale and scope of roads analyses in a number of sections and that reorganizing to consolidate this direction into fewer sections would improve the utility of the directives. An outline of the reorganized chapter 7710 showing sections that address scope and scale of roads analysis is set out in the conclusion of this preamble.

Comment: Most respondents supported the concept of using the roads analysis process. Respondents wanted the process to be either more prescriptive or less prescriptive, depending on their views of how National Forest System lands should be managed. Some respondents were confused about how the analysis process would be used.

Agency response: Roads analysis initiates a process that leads to the identification of road-related issues and relevant analysis questions. These issues and questions, when analyzed and answered, will help to ensure that Responsible Officials are well informed when making road construction, reconstruction, decommissioning, and road priority decisions. Roads analysis is issue-driven and capable of examining issues at various scales. Issues may be identified by the public, local, and Tribal governments, State officials, other Federal agencies, or the Responsible Officials.

In considering, these comments on the roads analysis process, the Forest Service has given considerable attention to revising descriptions of the various levels of analyses and the compliance requirements. These are set out at FSM 7712. FSM 7712.1 cites the *Roads Analysis: Informing Decisions about Managing the National Forest Transportation System (USDA Forest Service, 1999, Misc. Rep. FS–643)* as a current standard for the roads analysis process. The final policy requires the use of this analytical process unless an alternative process is approved by the Deputy Chief for the National Forest System.

In response to confusion about the use of the roads analysis process, a new paragraph has been added at FSM 7712.11 to better describe the expectations and outcomes of a roads analysis. This new text specifies that the product of a roads analysis is a report that documents the information and analysis methods used to identify road opportunities, needs, and recommended priorities for National Forest System roads.

Responsibilities for Agency Officials

Some respondents asked why alternatives to conducting a roads analysis must be approved at the Deputy Chief level.

Agency response: The final policy (FSM 7712.1) adopts the report *Roads Analysis: Informing Decisions About Managing the National Forest Transportation System (USDA Forest Service, 1999, Misc. Rep. FS–643)* as a current standard for conducting roads analysis, just as proposed. The agency expects that engineering and environmental science and our understanding of these sciences will continue to grow; therefore, it is important to preserve the flexibility to incorporate new information into the roads analysis process as it is developed or to adopt new analytical processes. Placing responsibility for approving alternative roads analyses at the Deputy Chief level ensures that any new processes will meet the high standard for science-based analysis established by the current standard. Consequently, no changes have been made to the final policy regarding approval for using an alternative analytical process.

Comment: A number of respondents emphasized the importance of public involvement as a Forest Supervisor's responsibility. They also requested a timeline for completion of road inventories in preparation for forest plan revisions. Other comments indicated the need to clarify text regarding the Forest Supervisor's responsibilities.

Agency response: The final policy adds public involvement as a component of a Forest Supervisor's responsibility. Also, this section has been reorganized to reflect the normal sequence of transportation planning and analysis requirements.

Roads Analysis Transition Procedures Comments

Most of the comments received concerning the transition language related to the sensitive roadless and unroaded areas included in the proposed policy. Some respondents were confused as to how specific projects and forest plans would be affected by the transition language. Some respondents urged the agency not to exclude or exempt any forests or combinations of forests, such as the Tongass National Forest or forests within the Northwest Plan area, while others wanted more exemptions. Many respondents questioned including the roadless-related direction in the policy when the agency already had an ongoing rulemaking specifically for roadless areas.

Agency response: For clarity, the term ''Transition Procedures,'' as used in the draft policy, has been changed to ''Interim Requirements'' in the final policy. The agency carefully considered whether or not to remove the ''transition procedures'' for road construction and reconstruction in roadless and unroaded areas and this direction has been retained in the final policy at FSM 7712.16 to ensure that the values associated with these sensitive areas are fully considered within the context of forest planning. Without the interim requirements, these areas could be subject to an incremental project-by-project risk of degradation. Also, the final policy adds a new section (FSM 7712.15) to address compliance deadlines for completing forest-scale roads analyses and clarifies at FSM 7712.13–13d how the analyses are to be used to inform forest planning and project decisions.

Finally, pursuant to Section 7712.16b of this final road management policy, the Alaska Regional Forester has the discretion to determine whether a compelling need exists, as defined by this section, for a specific road construction project in the Tongass National Forest. The exercise of that discretion may result in a finding that no compelling need exists, in which case the proposed road would not be built, or in a determination that a compelling need does exist for construction of the road. In either case, the determination will be made based upon consideration of the provisions of the Tongass Land Management Plan, including the goal of seeking to meet the

market demand for timber from the Tongass National Forest.

Specific Comments on the Regulatory Certifications of the Proposed Policy

Comments Concerning Social and Economic Considerations

Some respondents felt that the final policy did not adequately address the social and economic effects of decommissioning and closing roads. They believed the Forest Service should reconsider the economic effects of the road policy. Other respondents felt forest roads should be kept open for the economic viability of the surrounding communities and some expressed fears of losing resource-related jobs. Others expressed the need to protect the non-commodity values of National Forest System lands. Respondents said the Forest Service should consider the social ramifications of the transportation policy and how its implementation would affect the quality of life for those who favored more roads as well as for those who favored fewer roads.

Agency response: To the extent practicable, the agency has considered the social and economic effects of adopting this final policy. The final rule and policy provide guidance for transportation planning, but do not dictate local land management decisions. Therefore, the costs and benefits associated with the final rule and policy are described qualitatively in most cases and are limited to predicting the direction of change due to their implementation. The only exception to this limitation was the potential effects on timber harvesting, in which case, the maximum potential effects were estimated. A detailed cost/benefit analysis for the final rule and policy may be found in Appendix E of the National Forest System Road Management Strategy Environmental Assessment available as indicated under the **ADDRESSES** section of this rule.

Comments Concerning Takings Implications and Civil Justice Reform Act

Some respondents said that the No Takings Implications and Civil Justice Reform Act statements are incorrect because inaccurate Roadless Area Review and Evaluation (RARE II) inventories have resulted in inaccurate roadless delineations. They also believe the road management rule will result in the taking of private property rights by restricting access to mining claims, private and native in-holdings, and other rights of ingress and egress by closing county and permitted roads through and within National Forest System lands. Others were concerned that access for other Federal, State and local agencies would be restricted by decommissioning roads.

Agency response: The agency recognizes that changes have occurred since the RARE II inventories were completed and that, on some forests, portions of inventoried roadless areas have been roaded as a result of forest plan decisions. The final rule requires a roads analysis that will identify needed and unneeded roads, road maintenance priorities, and other road-related resource concerns. Updating existing road inventories must be conducted as part of the roads analysis process. The final roads rule and the accompanying final administrative policy honor access to private property pursuant to statute and to outstanding or reserved rights and do not retroactively affect existing permits, contracts, or other instruments authorizing the occupancy and use of National Forest System lands. This includes reasonable access to private land in-holdings. Forest Service officials must conduct a roads analysis to determine the minimum road system needed to achieve management goals and objectives. As part of that analysis, the agency requires the Responsible Official to seek to involve interested and affected citizens and organizations, including businesses, in the roads analysis and subsequent NEPA processes. Road decommissioning decisions will be made on a local basis, with public involvement, and will take into account access needs of State, county, and Tribal governments.

Comment: Some respondents stated that statements contained in the Civil Justice Reform Act (CJRA) section of the proposed rule raised the question of how much weight public involvement would be given in the process. One respondent said that the ability to ignore other governmental requirements seems to grant unwarranted authority to follow a predetermined course of action without heeding local concerns.

Agency response: The agency has already responded to the use of public comments earlier in the **SUPPLEMENTARY INFORMATION** section. Additionally, the language of the CJRA certification was drafted as a model for use by all USDA agencies. However, the public has understandably found the language confusing because it is drafted in the negative. While this language is appropriate for a codified rule, it is of questionable relevance to the adoption of administrative directive. As a matter of agency policy, Forest Service Manual direction is issued for Forest Service employees only. It doesn't regulate the actions of others, and therefore, would never preempt state law in and of itself. Accordingly, this paragraph has been substantially revised in this final rule.

Regulatory Certifications

Regulatory Impact

The final administrative policy has been reviewed under USDA procedures and Executive Order (E.O.) 12866 on Regulatory Planning and Review. The Office of Management and Budget (OMB) reviewed the final policy and has determined that the final policy, in concert with a final rule published separately in today's **Federal Register**, are a significant action as defined by E.O. 12866 because of the importance of the National Forest road system and the strong public interest expressed. A cost-benefit analysis was prepared as part of the environmental assessment on the proposed rule and policy revisions. The environmental assessment, including the cost-benefit analysis, has been updated in response to public comment and to conform to the final rule and policy revisions. A summary of the cost-benefit analysis follows.

The final policy revisions encourage the investment of scarce road management funds in a National Forest road system that best provides access for the current and anticipated management objectives and public uses of National Forest System lands. The final policy emphasizes investing in reconstructing and maintaining needed roads while decommissioning unneeded roads. New road construction must be supported by a roads analysis. Although this final policy requires that the agency use a new roads analysis when making decisions about road construction, reconstruction, and decommissioning, the agency currently conducts various types of transportation analyses in the context of NEPA requirements or other forest planning assessments. Thus, the agency does not expect a significant increase of administrative costs due to new administrative requirements under this final policy. The costs and benefits associated with this final rule were described primarily in qualitative terms. Since the rule does not result in any land management decisions, the effect of the rule on the flow of goods and services will be further evaluated in the roads analysis and other planning analyses. Implementation of the final rule is expected to improve water quality, air quality, and wildlife and fish habitat. The spread of noxious weeds and invasive plants should be reduced. Increased emphasis on road decommissioning may reduce recreation access in some situations. However, this reduction in access would likely be

offset by increased emphasis on maintaining existing roads and improving access in other areas. Remote recreation settings found in contiguous unroaded areas will be protected during the interim requirement period.

The agency anticipates that the final roadless area conservation rule will supercede the interim requirements of section 7712.16b of this final policy for inventoried roadless areas, except for the Tongass National Forest. Therefore, during the interim requirements period, decisions regarding access that would require roads will be limited to contiguous unroaded areas on all National Forests except for the Tongass National Forest. In contiguous unroaded areas, timber harvest and exploration and development of minerals could be impacted in this interim period. If all planned timber harvest in these contiguous unroaded areas were forgone during the interim period, approximately 65 million board feet of timber per year could be affected. This figure covers all National Forests, because for the Tongass National Forest timber harvest effects occur were found only in the inventoried roadless areas, not in contiguous unroaded areas. Under this scenario, up to 433 direct and 797 total jobs could be affected. These effects would be expected to be of short duration, since the interim requirements period ends once a comprehensive road inventory and forest-scale roads analysis are completed and incorporated as appropriate into the forest plan.

Decisions on whether or not to harvest timber and build roads in contiguous unroaded areas will be made in the interim period on a case-by-case basis. Therefore, it is impossible to reliably predict potential effects, since to do so would be to prejudge the outcome of decisions not yet made. Nevertheless, during the interim requirement period, the worst case potential effects arising from timber harvest forgone in contiguous unroaded areas could be an annual loss of income of up to $32 million. In order for these maximum potential effects to be realized, absolutely no road construction or reconstruction would occur in these areas during the interim requirements period. We know that this is not likely to be the case, as there will likely be road activities that are found to meet the compelling need requirement of FSM 7712.16b and, therefore, may proceed.

The interim requirements of the road management policy will apply to planned timber sales on the Tongass for which no final decision has been made. The planned offer volume that could be affected is 102 million board feet that would be offered over a period of 3 to 5 years. Of that total volume, about 72.5 million board feet would likely be harvested over a period of 3 to 5 years, with a resulting annual impact of 15 to 25 million board feet foregone per year, unless the Regional Forester determines that a compelling need within the meaning of FSM 7712.16b exists for harvesting that volume. The potential annual economic effects associated with that volume would be a maximum of 75–125 direct jobs and 120–200 total jobs, with direct income effects of $8.6 million to $14.4 million direct and total income effects of $13.8 million to $23 million. The combined economic impact of foregoing all harvest in all contiguous unroaded areas of the National Forest System and some harvest from inventoried roadless areas on the Tongass would be up to a maximum of $55 million.

The cost-benefit analysis can be found in: *National Forest System Road Management Strategy Environmental Assessment,* page 65, Social and Economic Effects, and in Appendix E, Cost/Benefit Analysis. This document may be obtained from the internet at *www.fs.fed.us/news/roads* for one year following publication of the final policy or by writing to the Director of Ecosystem Management Coordination, P.O. Box 96090, Washington, DC 20090.

In summary, the final policy emphasizes a shift from road development to managing the existing road system within the capability of the land. While the agency could not quantify or establish a monetary value for many of the impacts of this proposed policy, the agency thoroughly considered both the potential quantified and qualitatively-discussed costs and benefits. Pursuant to the requirements of E.O. 12866, the agency carefully assessed alternative regulatory approaches and finalized this rule only after making a reasoned determination that the benefits justify the costs.

The final policy revisions of administrative directives have been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The final policy provides agency-wide direction to forest and regional personnel about planning and managing the forest transportation system. No direct or indirect financial or access impacts on small businesses have been identified. Therefore, it is hereby certified that this action will not have a significant economic impact on a substantial number of small entities as defined by that Act.

Unfunded Mandates Reform

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), the Department has assessed the effects of these administrative policy revisions on State, local, and Tribal governments, and on the private sector. These administrative policy revisions do not compel the expenditure of $100 million or more by any State, local, or Tribal government, or anyone in the private sector. Therefore, a statement under Section 202 of the Act is not required.

Environmental Impact

Section 31.1(b) of Forest Service Handbook 1909.15 (57 FR 43180, September 18, 1992) excludes from documentation in an environmental impact statement ''rules, regulations, or policies to establish service-wide administrative procedures, program processes, or instructions.'' The Forest Service's assessment is that these administrative policy revisions fall within this category of exclusion. Nevertheless, to further the intent of NEPA, the agency has prepared an environmental assessment. This document may be obtained from the Internet at *www.fs.fed.us/news/roads* for 1 year following publication of the final policy or by writing to the Director of Ecosystem Management Coordination, P.O. Box 96090, Washington, DC 20090.

No Takings Implication

These administrative policy revisions were reviewed for their impact on private property rights under E.O. 12630. It has been determined that they do not pose a risk of the taking of Constitutionally protected private property because the proposed administrative policy revisions honor access to private property pursuant to statute or to outstanding or reserved rights.

Civil Justice Reform Act

These administrative policy revisions were reviewed under E.O. 12988, Civil Justice Reform. These revisions solely direct the work of Forest Service employees and are not intended to preempt any state and local laws or regulations that might be in conflict or that would impede full implementation of this policy. These revisions would not retroactively affect existing permits, contracts, or other instruments authorizing the occupancy and use of National Forest System lands and would not require the institution of administrative proceedings before parties may file suit in court challenging these provisions.

Controlling Paperwork Burdens on the Public

These administrative policy revisions do not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR Part 1320 and, therefore, impose no paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) and implementing regulations at 5 CFR Part 1320 do not apply.

Conclusion

Having considered the comments received, the Forest Service hereby adopts final amendments to its forest planning and transportation directives. In addition to the changes already noted in the responses to comments, the agency reconsidered the organization of proposed changes to Chapter 7710 and concluded that the directive was redundant in places and inconsistent in others. Therefore, the Forest Service has reorganized Chapter 7710. The outline of this chapter as adopted is as follows:

7710.2 Objectives
7710.3 Policy
7710.4 Responsibility
7710.41 Deputy Chief, National Forest System
7710.42 Regional Forester
7710.43 Forest Supervisor
7710.44 District Rangers
7711 Forest Transportation Atlas & Records
7711.01 Authority
7711.03 Policy
7711.1 Forest Road Atlas
7712 Transportation Analysis
7712.02 Objectives
7712.03 Policy
7712.1 Roads Analysis
7712.11 Outcomes
7712.12 Integration with existing Land and Resource Management Plans
7712.12a Roads analysis as part of forest plan revision or amendment
7712.12b Road management project planning
7712.13 Scope and Scale of Roads Analysis
7712.13a Roads analysis for large-scale assessments
7712.13b Roads analysis at the forest or area scale
7712.13c Informing Decisions at the watershed and project scale
7712.13d Special Implementation Considerations
7712.14 Road Inventory
7712.15 Compliance Deadlines for Completing Roads Analyses
7712.16 Interim Requirements for road construction/reconstruction in inventoried roadless and contiguous unroaded areas
7712.16a Areas Subject to Interim Requirements
7712.16b Interim Requirements
7712.16c Duration of the interim requirements
7712.16d Emergency Exemptions from Interim Requirements
7712.3 Network Analysis
7712.4 Economic Analysis [Reserved].
7712.6 Scheduling Projects

This final administrative policy implements the revisions to the National Forest Transportation System planning and management adopted in a final rule elsewhere in this part of today's **Federal Register**. This action is necessary: (1) To ensure that the National Forest Transportation System meets current and future land and resource management objectives and provides for attendant public uses of National Forest System lands; (2) to provide for safe public access and travel; (3) to allow for economical and efficient management; and (4) to the extent practicable, to minimize and begin to reverse adverse ecological impacts from roads. This revision reflects shifts in public opinion and changes in demand and use of the National Forest System, considers possible economic and social benefits associated with road construction and uses, and utilizes scientific information about the environmental impacts of road construction. Also, all of the action items called for in the report to the President on the wildland fires of 2000 are compatible with the final road management policy. The final road management policy provides local decisionmakers adequate discretion to authorize needed access to meet resource management objectives and is, therefore, consistent with the agency's cohesive fire strategy; ''Protecting People and Sustaining Resources in Fire Adapted Ecosystems, a Cohesive Strategy.'' This policy is being issued to the Forest Service Manual. Minor, non-substantive, editorial changes have been made to the proposed policy and many sections have been reorganized for efficiency and clarity.

(See Appendix A for a table displaying an Overview of Overall Road Management Policy.)

Dated: January 4, 2001.

Mike Dombeck,

Chief, Forest Service.

National Forest Transportation Forest Service Manual Amendments

Note: The Forest Service organizes its directive system by alphanumeric codes and subject headings. Only those sections of the FSM that are the subject of this notice are set forth here. Those who wish to see the entire document in which the changes are being incorporated may do so at *www.fs.fed.us/news/roads.* In the directives that follow, Forest Service employees charged with decisionmaking responsibilities concerning the National Forest Transportation System are referred to as Responsible Officials and are the intended audience of these administrative directives.

FSM 1920—Land and Resource Management Planning

Chapter 1920—Land and Resource Management Planning

Note: For ease of issuance, this direction to FSM 1920 will be initially issued as an Interim Directive and later integrated into the Chapter as an Amendment.

1920.5—Definitions [the following terms will be added to this section]

Inventoried roadless areas. Areas identified in a set of inventoried roadless area maps, contained in *Forest Service Roadless Area Conservation, Draft Environmental Impact Statement, Volume 2,* dated May 2000, which are held at the National headquarters office of the Forest Service, or any update or revision of those maps.

Unroaded areas. Any area without the presence of a classified road, that is of a size and configuration sufficient to protect the inherent characteristics associated with its roadless condition. Unroaded areas are distinct from and do not overlap with inventoried roadless areas.

1922.15—Resource Integration Requirements

Requirements for integrating individual forest resources, including wilderness and other special areas, into the forest planning process are in 36 CFR Part 219. Refer to the Forest Service Handbook 1909.12 for details on how to incorporate resources into the planning process. In addition, the forest planning process must:

* * * * *

20. Identify the specific access requirements and travel management options available to meet the objectives for each management prescription. Describe how access will be provided and how travel will be managed. Include the Forest Service road system, off-road travel, and air and water access. Integrate considerations of biological, physical, social, and economic factors and environmental design criteria. Link access and travel requirements and opportunities to the full spectrum of resource objectives for each management area and alternative.

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FSM 7700—Forest Transportation System

Chapter 7700 Zero Code

7701 **AUTHORITY**
7701.1 Coordination with Forest Planning
7701.2 Revegetation

7701.3 Transportation System Management
7702 **OBJECTIVES**
7703 **POLICY**
7703.1 Road Management
7703.2 Management Opportunities
7705 **DEFINITIONS**
7709 **HANDBOOKS**

Chapter—Zero Code

This title prescribes the authority, objectives, policy, responsibility, and definitions for planning, construction, reconstruction, operation, and maintenance of forest transportation system facilities.

7701—Authority

7701.1—Coordination With Forest Planning

Title 36, Code of Federal Regulations, Section 219.27 (36 CFR 219.27). Requires transportation access to be addressed in the land and resource management planning process.

7701.2—Revegetation

Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1601, Pub. L. 93–378) as amended by the *National Forest Management Act of 1976* (16 U.S.C. 1608, Pub. L. 94–588). Directs that roads be designed to standards appropriate for intended uses and requires the revegetation of roads within 10 years of the termination of temporary and undeveloped roads created under contract, permit, or lease.

7701.3—Transportation System Management

1. *National Forest Roads and Trails Act of October 13, 1964 as amended (16 U.S.C. 532–538, Pub. L. 88–657).* Authorizes the road and trail systems for the National Forests. Authorizes the granting of easements across Forest Service administered lands, the construction of maximum economy roads (FSM 7705) and methods for financing them, and the imposing of requirements on road users for maintaining and reconstructing roads, including cooperative deposits for such work.

2. *Highway Safety Act of 1966 (23 U.S.C. 402, Pub. L. 89–564).* Authorizes State and local governments and participating Federal agencies to identify and survey accident locations; to design, construct, and maintain roads in accordance with safety standards; to apply sound traffic control principles and standards; and to promote pedestrian safety.

3. *National Trails System Act of October 2, 1968 (16 U.S.C. 1241–1249, Pub. L. 90–543).* Establishes the National Trail System and includes planning, right-of-way acquisition, and construction of trails designated by Congress or the Secretary of Agriculture as part of the system.

4. *Title 36, Code of Federal Regulations, Part 212 (36 CFR Part 212).* Establishes requirements for the administration of the forest transportation system, including roads, trails, and airfields, and provisions for acquisition of rights-of-way. Describes a minimum road system and requires a science-based roads analysis to plan the road system and to set funding priorities.

5. *Title 36, Code of Federal Regulations, Sections 261.12 and 261.54 (36 CFR 261.12 and 261.54).* Establishes prohibitions on National Forest System roads that are enforceable by the Forest Service.

* * * * *

7702—Objectives

The results to be achieved by managing the forest transportation system are as follows:

1. To provide sustainable access in a fiscally responsible manner to National Forest System lands for administration, protection, and utilization of these lands and resources consistent with Forest Plan guidance.

2. To manage a forest transportation system within the environmental capabilities of the land.

3. To manage forest transportation system facilities to provide user safety, convenience, and efficiency of operations in an environmentally responsible manner and to achieve road related ecosystem restoration within the limits of current and likely funding levels.

4. To coordinate access to National Forest System lands with national, regional, statewide, local, and Tribal government transportation needs.

7703—Policy

Determine and provide for the minimum forest transportation system that best serves current and anticipated management objectives and public uses of National Forest System (NFS) lands, as identified in the appropriate land and resource management plans (FSM 1920). In managing the forest transportation system for access, Responsible Officials must coordinate with other public and private transportation system agencies to integrate transportation information and to balance transportation facility investments and maintenance costs against the need to maintain land health and water quality.

7703.1—Road Management

In accordance with 36 CFR § 212.5(b)(1), when managing NFS roads, responsible officials are to:

1. Address both the access benefits and ecological costs of road-associated effects.

2. Give priority to reconstructing and maintaining needed roads and decommissioning unneeded roads, or, where appropriate, converting them to less costly and more environmentally beneficial other uses.

3. Use a roads analysis process (FSM 7712.1) to ensure that road management decisions are based on identification and consideration of social and ecological effects. See FSM 7712.13 for guidance on the scope and scale of roads analysis required.

4. Add new roads only where resource management objectives and benefits are clearly demonstrated and where long-term funding obligations have been carefully considered (FSM 7703.2, para. 3).

7703.2—Management Opportunities

Management opportunities for meeting access needs and utilization of forest resources may include roads managed for safe passenger car use, high-clearance vehicle use, or for roads that restrict highway vehicles but are available for other motorized or non-motorized trail uses (such as hiking and administrative access), or trails managed for a variety of uses (such as hiking, horseback riding, and snowmobiling). In addition to the direction in paragraphs 1–3 of this section, Exhibit 01 in section 7712.1 displays the various road management opportunities available to meet access and program needs.

1. *Maintaining and reconstructing needed roads.* Emphasize maintenance and reconstruction of classified roads to meet road management objectives (FSM 7712.5). Give priority to upgrading the most heavily used roads to provide safe and efficient travel and to reduce adverse environmental impacts. If necessary for environmental protection and due to lack of funding, travel on classified roads may need to be restricted or closed. Such decisions should be undertaken only after careful analysis and consideration. Do not maintain unclassified roads except under emergency resource protection circumstances. Unclassified roads will be closed and made inaccessible where funding permits unless they are made part of the authorized forest road system as provided for in this policy. Temporary roads are maintained as authorized in the contract, permit, lease, or other authorizing document and must

be decommissioned at the conclusion of the authorized activity.

2. *Decommissioning unneeded roads.* Many unplanned, unauthorized, unclassified travelways exist within National Forest System lands and are high priority candidates for decommissioning. Other priorities for decommissioning include temporary roads and roads previously classified as part of the forest transportation system based on anticipated management needs where use and needs have not materialized, or where funding or environmental issues merit consideration of decommissioning or conversion to other uses. Use an open and public roads analysis process (FSM 7712.1) to help identify roads that should be decommissioned, to identify restoration needs, and to establish decommissioning priorities. It may be necessary to regulate use on some unneeded roads until decommissioning or other approved uses, such as conversion to trails, can be achieved.

Once a decision is made and action is taken to decommission a road, re-establish vegetation (FSM 7701.2) and, as necessary, initiate restoration of ecological processes interrupted or adversely impacted by the unneeded roads. Decommissioning includes applying various treatments, which may include one or more of the following:

a. Reestablishing former drainage patterns, stabilizing slopes, and restoring vegetation;

b. Blocking the entrance to a road; installing water bars;

c. Removing culverts, reestablishing drainage-ways, removing unstable fills, pulling back road shoulders, and scattering slash on the roadbed;

d. Completely eliminating the roadbed by restoring natural contours and slopes; or

e. Other methods designed to meet the specific conditions associated with the unneeded roads.

3. *Adding new roads.* Consistent with FSM 7703.1, para. 4, decisions to add new roads to the transportation system are appropriate only where the resource management objectives, environmental impacts, and benefits have been carefully considered and documented.

Additionally, decisions to add new roads to the forest transportation system must be informed by a roads analysis process (FSM 7712.1) conducted at an appropriate scale. Resource management objectives are established in the relevant land and resource management plans (FSM 1920). Identify and consider values associated with or impacted by new roads which include utilization, protection, and administration of National Forest System lands; public health and safety; or private rights. Consideration must be given to long-term road funding opportunities and obligations. In examining the environmental impacts of potential new roads, consider (1) Maintenance of ecological processes; (2) introduction of exotic species; and (3) effects on threatened and endangered species or areas of high unique biodiversity, cultural uses or historical sites, fish and wildlife habitat, water quality, and visual quality. Adding new roads to the transportation system includes both new road construction and newly acquired roads through land purchases, exchanges, or interchanges.

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7705—Definitions

Exhibit FSM 7705–Exhibit 01, Road Terminology Relationships, illustrates the relationships among various road terms.

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Forest Roads. As defined in Title 23, Section 101 of the United States Code (23 U.S.C. 101), any road wholly or partly within, or adjacent to, and serving the National Forest System and which is necessary for the protection, administration, and utilization of the National Forest System and the use and development of its resources.

Forest Transportation Facility. A classified road, designated trail, designated airfield, including bridges, culverts, parking lots, log transfer facilities, safety devices and other transportation network appurtenances, under Forest Service jurisdiction that is wholly or partially within or adjacent to National Forest System lands.

Forest Transportation System Management. The planning, inventory, analysis, classification, recordkeeping, scheduling, construction, reconstruction, maintenance, decommissioning, and other operations undertaken to achieve environmentally sound, safe, cost-effective, access for use, protection, administration, and management of National Forest System lands.

* * * * *

National Forest System Road. A classified forest road under the jurisdiction of the Forest Service. The term ''National Forest System roads'' is synonymous with the term ''forest development roads'' as used in 23 U.S.C. 205.

New Road Construction. Activity that results in the addition of forest classified or temporary road miles (36 CFR 212.1).

Public Roads. Any road or street under the jurisdiction of and maintained by a public authority and open to public travel (23 U.S.C. 101(a)).

Road. A motor vehicle travelway over 50 inches wide, unless designated and managed as a trail. A road may be classified, unclassified, or temporary (36 CFR 212.1).

a. *Classified Roads.* Roads wholly or partially within or adjacent to National Forest System lands that are determined to be needed for long-term motor vehicle access, including State roads, county roads, privately owned roads, National Forest System roads, and other roads authorized by the Forest Service (36 CFR 212.1).

b. *Temporary Roads.* Roads authorized by contract, permit, lease, other written authorization, or emergency operation, not intended to be a part of the forest transportation system and not necessary for long-term resource management (36 CFR 212.1).

c. *Unclassified Roads.* Roads on National Forest System lands that are not managed as part of the forest transportation system, such as unplanned roads, abandoned travelways, and off-road vehicle tracks that have not been designated and managed as a trail; and those roads that were once under permit or other authorization and were not decommissioned upon the termination of the authorization (36 CFR 212.1).

Road Decommissioning. Activities that result in the stabilization and restoration of unneeded roads to a more natural state (36 CFR 212.1), (FSM 7703).

Road Maintenance. The ongoing upkeep of a road necessary to retain or restore the road to the approved road management objective (FSM 7712.3).

Road Reconstruction. Activity that results in improvement or realignment of an existing classified road as defined below:

a. *Road Improvement.* Activity that results in an increase of an existing road's traffic service level, expansion of its capacity, or a change in its original design function.

b. *Road Realignment.* Activity that results in a new location of an existing road or portions of an existing road and treatment of the old roadway (36 CFR 212.1).

Roads Subject to the Highway Safety Act. National Forest System roads that are open to use by the public for standard passenger cars. This includes roads with access restricted on a seasonal basis and roads closed during extreme weather conditions or for emergencies, but which are otherwise open for general public use.

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Transportation Facility Jurisdiction. The legal right to control or regulate use of a transportation facility derived from fee title, an easement, an agreement, or other similar method. While jurisdiction requires authority, it does not necessarily reflect ownership.

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7709—Handbooks

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7709.56—Road Preconstruction Handbook

This handbook establishes procedures and guides for the location, survey, design, and preparation of cost estimates for National Forest System roads.

Chapter 7710—Transportation Atlas, Records, and Analysis

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7710—Transportation Atlas, Records, and Analysis

This chapter contains objectives, policies, responsibilities, and requirements for analyzing transportation needs and issues and for documenting the transportation system. Direction for forest trails is in FSM 2350 and FSH 2309.18, Trails Management Handbook.

7710.2—Objectives

The objectives of transportation analysis are:

1. To determine, within the context of current and likely funding levels, the minimum transportation facilities needed for public and agency access to achieve forest land and resource management goals and to safeguard ecosystem health within the context of current and likely funding levels.
2. To incorporate transportation system needs into the forest land and resource management planning process.
3. To direct the orderly improvement and management of the transportation system and to ensure the documentation of decisions affecting the system.
4. To interact with and involve the public, State, local, and Tribal governments, and other Federal agencies in transportation analysis.

7710.3—Policy

1. Conduct transportation system planning and analysis using the best available science at the appropriate scale and in conjunction with other analyses to inform transportation management decisions. Specifically, transportation analysis can assist transportation planners in:

a. Determining the need for access to National Forest System lands;

b. Identifying the infrastructure required to provide that access; and

c. Considering and minimizing effects of transportation facility construction, reconstruction, maintenance, and decommissioning on ecological processes and ecosystem health, diversity, and productivity.

2. Involve, interact, and coordinate with adjacent landowners, citizens groups, State, local, and Tribal governments, and other Federal agencies. This collaboration is fundamental to effective transportation analysis and planning.
3. Identify and determine the priority areas where detailed transportation analysis, including roads analysis (FSM 7712.1), is essential for achieving land and resource management direction.
4. Ensure that road construction, reconstruction, and maintenance standards or criteria are guided by roads analysis (FSM 7712.1) and documented through the use of road management objectives (FSM 7712.5).

7710.4—Responsibility

7710.41—Deputy Chief, National Forest System

The Deputy Chief, National Forest System, has the authority to approve or rescind roads analysis processes for field use.

7710.42—Regional Forester

It is the responsibility of the Regional Forester to:

1. Ensure that roads analysis is a component of sub-basin, multi-Forest, and sub-regional scale assessments.
2. Develop multi-year regional schedules of proposed transportation facility projects (FSM 1920)
3. Serve as the Responsible Official on any environmental impact statement on road construction or reconstruction in inventoried roadless and certain unroaded areas as identified in FSM 7712.16.

7710.43—Forest Supervisor

The Forest Supervisor is delegated the authority and assigned the responsibility to:

1. Consult and involve Federal, State, local, and Tribal transportation agencies in land and resource management planning to ensure coordination of the overall transportation system.
2. Develop and maintain a forest transportation atlas in compliance with FSM 7711 and 36 CFR Part 212.
3. Complete and maintain an inventory of classified and unclassified roads.
4. Assign transportation analysis to personnel with skills in engineering, hydrology, biology, and other related knowledge and skills.
5. Accomplish roads analysis at the appropriate scale and as directed in FSM 7712.1 and FSM 7712.15, and document the results.
6. Develop and recommend to the Regional Forester annual and multi-year schedules of proposed road construction, reconstruction, and decommissioning projects.

7710.44—District Rangers

Unless reserved by the Forest Supervisor, the District Ranger has authority to approve road management objectives (FSM 7712.5).

7711—Forest Transportation Atlas & Records

7711.01—Authority

The regulations at Part 212 of Title 36 of the Code of Federal Regulations (36

CFR, Part 212) address how the Forest Service is to administer the Forest Transportation System. Section 212.2 requires an atlas as a component of the forest transportation program, as follows:

Section 212.2—Forest Transportation System

(a) For each national forest, national grassland, experimental forest, and any other unit of the National Forest System as defined in § 212.1 and listed in 36 CFR Part 200, Subpart A, the Forest Supervisor or other responsible official must develop and maintain a forest transportation atlas which is to be available to the public at administrative headquarters units. The purpose of the atlas is to display the system of roads, trails, and airfields of the unit. The atlas consists of the geo-spatial, tabular, and other data to support analysis needs and resource management objectives identified in land management plans. The atlas is a dynamic document that changes in response to new information on the existence and condition of roads, trails, and airfields of the unit. The atlas does not contain inventories of temporary roads, which are tracked by the project or activity authorizing the temporary road. The content and maintenance requirements for the atlas are identified in the Forest Service directive system (36 CFR 200).

7711.03—Policy

The transportation atlas is the official repository of transportation facility decisions for each National Forest and National Grassland.

1. *Building the Forest Transportation Atlas.* The initial transportation atlas for each national forest and grassland consists of those maps, inventories, plans, and associated information available as of [January 12, 2001]. Units are to add to this initial information in accordance with direction in this chapter and other chapters of Title 7700.

2. *Maintaining the Transportation Atlas.* Maintain a current record of forest transportation facilities in the atlas. Use the ongoing real property and condition survey updates (FSM 6446) as appropriate. Use the Forest Service Infrastructure database (INFRA) for the storage and analysis of information in the transportation atlas.

7711.1—Forest Road Atlas

1. The forest road atlas is a key component of the forest transportation atlas and, consistent with the road inventory, includes all classified and unclassified roads on National Forest System lands.

2. The road atlas includes, at a minimum, the location, jurisdiction, and road management objectives for classified roads and bridges and the location of unclassified roads and any management actions taken to change the status of unclassified roads.

3. Data and other information contained in the road atlas should be used to support roads analysis.

4. Unit transportation managers shall document changes in road management status, including changes such as accomplishment of decommissioning objectives or the addition of an unclassified road to the forest road system.

5. Temporary roads are not intended to be included as part of the forest road atlas, as they are managed by the projects or activities under which they are authorized and decommissioned at the conclusion of the authorized activity.

7712—Transportation Analysis

Conduct transportation analysis at appropriate scales using the best available science that considers access needs and concerns. Coordinate the analysis with other ecosystem assessments and analyses.

7712.01—Authority

The regulations at Title 36 of the Code of Federal regulations § 212.5 establish the minimum requirements for the road system, using a science-based roads analysis, and identifying unneeded roads as follows:

(b) *Road System*—(1) *Identification of road system.* For each national forest, national grassland, experimental forest, and any other units of the National Forest System (§ 212.1), the responsible official must identify the minimum road system needed for safe and efficient travel and for administration, utilization, and protection of National Forest System lands. In determining the minimum road system, the responsible official must incorporate a science-based roads analysis at the appropriate scale and, to the degree practicable, involve a broad spectrum of interested and affected citizens, other state and federal agencies, and tribal governments. The minimum system is the road system determined to be needed to meet resource and other management objectives adopted in the relevant land and resource management plan (36 CFR 219), to meet applicable statutory and regulatory requirements, to reflect long-term funding expectations, to ensure that the identified system minimizes adverse environmental impacts associated with road construction, reconstruction, decommissioning, and maintenance.

(2) *Identification of unneeded roads.* Responsible officials must review the road system on each National Forest and Grassland and identify the roads on lands under Forest Service jurisdiction that are no longer needed to meet forest resource management objectives and that, therefore, should be decommissioned or considered for other uses, such as for trails. Decommissioning roads involves restoring roads to a more natural state. Activities used to decommission a road include, but are not limited to, the following: reestablishing former drainage patterns, stabilizing slopes, restoring vegetation, blocking the entrance to the road, installing water bars, removing culverts, reestablishing drainage-ways, removing unstable fills, pulling back road shoulders, scattering slash on the roadbed, completely eliminating the roadbed by restoring natural contours and slopes, or other methods designed to meet the specific conditions associated with the unneeded road. Forest officials should give priority to decommissioning those unneeded roads that pose the greatest risk to public safety or to environmental degradation.

7712.02—Objectives

The objectives of transportation analysis are as follows:

1. To identify transportation management opportunities and priorities.

2. To assess transportation management needs, long-term funding, and expected ecosystem, social, and economic effects, including effects on the values of roadless and unroaded areas.

3. To establish transportation management objectives and priorities.

7712.03—Policy

Forest Service regulations implementing the Forest and Rangeland Renewable Resources Planning Act, as amended by the National Forest Management Act, require integration of transportation planning into an interdisciplinary effort that produces Regional, forest, and site-specific project plans. In planning for and analyzing the transportation system, perform the following:

1. Assess economic costs and benefits along with social, physical, and biological factors when identifying transportation facility options.

2. Assess effects of transportation facility options on ecological processes and ecosystem health, diversity, and productivity.

3. Consider the needs of all parties when developing transportation system opportunities in areas of intermingled ownership.

4. Consider long-and short-term uses, including possible mechanized, non-mechanized, and off-highway vehicle uses, when analyzing transportation facilities.

5. Actively engage the public in transportation analysis.

6. Use the forest transportation atlas as a record of transportation facility decisions, including:

a. Documenting road management objectives

b. Identifying all classified and unclassifed roads,

c. Documenting the results of transportation analysis, and

d. Documenting road management project priorities.

7712.1—Roads Analysis

The Responsible Official shall incorporate an interdisciplinary science-based roads analysis into multi-forest, forest-scale, and watershed or area-scale analyses and assessments to inform planners and decisionmakers of road system opportunities, needs, and priorities that support land and resource management objectives. Conducted by an interdisciplinary team, the science-based roads analysis process provides Responsible Officials with critical information needed to identify and manage a minimum road system that is safe and responsive to public needs and desires, is affordable and efficient, has minimal adverse effects on ecological processes and ecosystem health, diversity, and productivity of the land, and is in balance with available funding for needed management actions.

Units are to use an authorized science-based roads analysis process, such as that described in the report *Roads Analysis: Informing Decisions About Managing the National Forest Transportation System (USDA Forest Service, 1999, Misc. Report FS–643).* Pursuant to FSM 7710.41, the Deputy Chief, National Forest Systems, may approve other science-based analysis methods for field use through amendments to this chapter. Although concluding an initial roads analysis is important, conduct additional iterations of analysis as needed to address changes in conditions, such as available funding, inventory and monitoring results, severe disturbance events, or new regulatory requirements.

7712.11—Outcomes

The roads analysis results in a report and accompanying maps that document the information and analysis methods used to identify social and environmental opportunities, problems, risks, and priorities for future road management. The report documents the key findings of the analysis and contains graphical, tabular, and geo-spatial displays of the transportation system options, including a minimum road system. It is important that the roads analysis identify access needs and opportunities that are based on current budget levels and realistic projections of future funding. Analysts should locate, interpret, and use relevant scientific literature in the analysis and disclose assumptions on which the analysis is based. See section 7712.12 for detailed guidance on the various scales of analyses and their findings.

While the report contains factual information concerning the transportation system, road management decisions are not a product of roads analysis. Rather, road management decisions must be informed by roads analysis and disclosed in an appropriate NEPA document (FSM 1950 and FSH 1909.15). FSM 7712.1 '' Exhibit 01 illustrates road management options. Update the transportation atlas (FSM 7711.03), as appropriate, based upon decisions reached after the environmental analysis process (NEPA). Also, update the atlas if a decision changes road management objectives (FSM 7712.5).

7712.12—Integration With Land and Resource Management Plans

The roads analysis evaluates road system opportunities and needs within the context of land and resource management direction. Roads analysis includes opportunities for public participation and emphasizes interdisciplinary team identification and evaluation of road issues and opportunities.

7712.12a—Roads Analysis as Part of Forest Plan Revision or Amendment

The Responsible Official must use the results and findings of the roads analysis process with other ecological assessments when addressing issues raised in forest planning. Conducting a forest-scale analysis does not compel a forest plan amendment or revision.

7712.12b—Road Management Project Planning

1. *New Road Construction.* Consistent with the direction in FSM 7703.1, ensure that the addition of new roads serves a documented need and that the decision is informed by a roads analysis (FSM 7712.1).

2. *Maintenance, Reconstruction, and Decommissioning.* Use roads analysis (FSM 7712.1) to evaluate opportunities and priorities for reconstruction and decommissioning of roads and to provide the context at a scale and intensity commensurate with the scope of the road management issue or concern. Implementation of road maintenance activities does not require a roads analysis before proceeding; however, roads analysis is a useful management tool to help set maintenance priorities.

7712.13—Scope and Scale of Roads Analysis

When proposed road management activities would result in changes in access, such as changes in current use, traffic patterns, and road standards, or where there may be adverse effects on soil and water resources, ecological processes, or biological communities (road construction, reconstruction, and decommissioning), those decisions must be informed by roads analysis (FSM 7712.1) except as provided in section 7712.13c. Generally, road management decisions should be informed by roads analysis at a broad scale. Responsible Officials must choose the appropriate scale for such an analysis and the degree of detail that is appropriate and practical. Site-specific projects may be informed by a watershed roads analysis, if the Responsible Official determines the scope and scale of issues under consideration warrant its use. FSM 7712.13—Exhibit 01 provides a snapshot of the scope and scale of roads analysis and its integration into planning and decisionmaking.

7712.13a—Roads Analysis for Large-Scale Assessments

1. Roads analysis is an integral part of multi-forest or eco-region assessments. At this scale, consider the following:

a. Broad scale issues, such as habitat connectivity, strongholds for aquatic and terrestrial species, sources of clean water, cumulative effects, and other ecosystem values.

b. Integration of other Federal agency, State, county, local, and Tribal transportation systems, and their multi-year transportation plans with the forest transportation system.

c. Potential program opportunities for new or revised forest highways, public lands highways, and public Forest Service roads.

d. Current and likely funding levels available to support road construction, reconstruction, maintenance, and decommissioning.

7712.13b—Roads Analysis at the Forest or Area Scale

Roads analysis at the forest scale is critically important, as it provides a context for road management in the broader framework of managing all forest resources. Close coordination with broader scale ecosystem assessments and analyses is essential. Area-scale assessments may be appropriate on forests with assessment areas composed of islands or groups of islands, on forests with widely separated units, or in areas where watershed boundaries do not make logical or effective assessment boundaries. Examples include forests with large physically or ecologically discrete subdivisions such as the large islands in southeast Alaska, or widely

separated units of National Forests such as: National Forests in Texas, Mississippi, Florida, Missouri, and Louisiana, or on forests where watershed boundaries do not make logical or effective assessment boundaries, such as the coastal plains of the eastern United States.

1. Consider the following at this scale:

a. Environmental issues potentially affected by road management proposals, such as soil and water resources, ecological processes, invasive species spread, and biological communities.

b. Social issues potentially affected by road management proposals such as socio-economic impacts, public access, and accessibility for handicapped persons.

c. An evaluation of the transportation rights-of-way acquisition needs.

d. The interrelationship of State, county, Tribal, and other Federal agency transportation facility effects on land and resource management plans and resource management programs.

e. Transportation investments necessary for meeting resource management plans and programs.

f. Current and likely funding levels available to support road construction, reconstruction, maintenance, and decommissioning.

2. Prepare a report with accompanying map(s) that documents the information and analysis methods used to identify access and environmental priorities, issues, and guidelines for future road management and the key findings. At a minimum, the report will:

a. Inventory and map all classified roads, and display how these roads are intended to be managed.

b. Provide guidelines for addressing road management issues and priorities related to construction, reconstruction, maintenance, and decommissioning.

c. Identify significant social and environmental issues, concerns, and opportunities to be addressed in project level decisions.

d. Document coordination efforts with other government agencies and jurisdictions.

7712.13c—Informing Decisions at the Watershed and Project Scale

Roads analysis at the forest scale will generally provide the context for informing road management decisions and activities at the watershed, area, and project level. Where a forest-scale roads analysis has been conducted, the Responsible Official must consider the decision(s) to be made and determine how to apply the results of the forest-scale roads analysis to best inform management decisions. However, it is generally expected that road inventories and road condition assessments as identified in FSM 7712.14 would be completed at the watershed or project scale.

When higher scale analyses are not available to inform a project decision, the Responsible Official must consider the decisions to be made (FSM 7712.13) and the potential environmental and access effects and determine whether or not additional analysis is needed at the watershed or project scale. Roads analysis below the forest scale is not automatically required, but may be undertaken at the discretion of the Responsible Official. When the Responsible Official determines that additional analysis is not needed for a project, the Responsible Official must document the basis for that conclusion.

When needed, the outcomes of roads analysis at the watershed and area-scale would result, at a minimum in the following:

1. Identification of needed and unneeded roads.

2. Identification of road associated environmental and public safety risks.

3. Identification of site-specific priorities and opportunities for road improvements and decommissioning.

4. Identification of areas of special sensitivity, unique resource values, or both.

5. Any other specific information that may be needed to support project-level decisions.

7712.13d—Special Implementation Considerations

Ongoing, large-scale ecosystem planning efforts of the Columbia River Basin and the Sierra Nevada Framework assessment are exempt from the requirements of FSM 7712.1 to conduct a roads analysis.

7712.14—Road Inventory

Road inventories support roads analysis and road decisions at various scales and consist of geo-spatial data (maps, aerial photos, etc), physical attribute data, and an assessment of road condition to determine if a road is meeting resource management objectives and access needs. The inventory information to be gathered varies by the scale of assessment.

1. *Inventories at Multi-forest and Forest Scale.* Inventories at these scales provide information needed to conduct broader assessments of road management needs and, therefore, require less site-specific information.

a. *Classified Road Inventory.* Geo-spatial and physical attribute information is needed for all classified roads, whereas the assessment of individual road condition would be most important for the major transportation routes (arterials and collectors) or those determined to be of key importance by the forest.

b. *Unclassified Road Inventory.* Information needed for unclassified roads is usually that obtained from existing data and other readily available sources of information, such as aerial photographs.

2. *Inventories at Watershed and Area Scale.* At these scales a comprehensive and complete inventory of all classified, unclassified, and temporary roads is required in order to conduct analyses that inform site-specific decisions, to set priorities for road management actions, and to identify special situations.

Use the INFRA database to store the physical attributes on all classified and unclassified roads. FSM 7712.14 Exhibit-01, entitled Road Inventory Necessary at Various Scales of Road Analysis and located in Appendix B of this document, illustrates the roads analysis objectives and the inventory data to be collected at various scales.

7712.15—Deadlines for Completing Roads Analyses

(Note: The dates in this section will be calculated by the Forest Service Directive Manager when this amendment is issued to field employees.)

1. *Analysis Needed to inform Road Management Decisions.* Section 7712.13 identifies proposed road management decisions other than forest plan revisions or amendments that require roads analysis and provides guidance on the scope and scale of various levels of analysis that might inform those decisions. The following deadlines govern the application of roads analysis to the proposed road management decisions identified in section 7712.13:

a. Decisions made before July 12, 2001 do not require a roads analysis.

b. Decisions made after July 12, 2001 must be informed by a roads analysis.

2. *Forest-Scale Road Analyses.* Every National Forest System administrative unit must have a forest-scale roads analysis completed by January 13, 2003 except as follows:

a. Those units that will complete a forest plan revision or amendment by July 12, 2001 do not need to complete a forest-scale roads analysis (sec. 7712.1) prior to adopting the plan revision or amendment. However, these units are still required to complete a forest-scale roads analysis by January 13, 2003. Those units that have begun revision or amendment of their forest plans but will not adopt a final revision or final amendment by July 12, 2001 must complete a roads analysis prior to

adoption of the final plan revision or amendment.

b. In specific cases where forests are undergoing forest plan revision or amendment, and circumstances are such that additional time for completion of forest-scale roads analysis would be desirable for integration into the forest plan revision or amendment, the Regional Forester may request approval from the Chief for an extension.

7712.16—Interim Requirements for Road Construction/Reconstruction in Inventoried Roadless and Contiguous Unroaded areas

The requirements of section 7712.16a—7712.16d do not revoke, suspend, or modify any project or activity decision, or permit, contract or other legal instrument authorizing occupancy and use of National Forest System land issued prior to January 12, 2001.

7712.16a—Areas Subject to Interim Requirements

Until a comprehensive road inventory and forest-scale roads analysis have been completed and incorporated into the applicable forest plan, the direction in FSM 7712.16a through 7712.16c applies to the following areas:

1. *Inventoried roadless areas,* as defined in FSM 7705, are identified in a set of inventoried roadless area maps, contained in Forest Service Roadless Area Conservation, Draft Environmental Impact Statement, Volume 2, dated May 2000, which are held at the National headquarters office of the Forest Service, or any update or revision of those maps.

2. *Contiguous unroaded areas* of more than 1,000 acres that are contiguous to RARE II inventoried roadless areas or contiguous to areas inventoried in land and resource management plans, contiguous to Congressionally designated wilderness areas or Federally administered components of National Wild and Scenic River Systems classified as Wild, or contiguous to unroaded areas of 5,000 acres or more on other Federal lands. These areas of 1,000 acres or more must have a common boundary of considerable length, be at least one-quarter mile in width, and provide important corridors for wildlife movement or extend a unique ecological value of the established inventoried area.

7712.16b—Interim Requirements

1. Except as provided for in FSM 7712.16c, road construction or reconstruction in inventoried roadless and contiguous unroaded areas (FSM 7716) may be authorized only if:

a. The Regional Forester determines, for the purposes of this section, a compelling need for a road;

b. A science-based roads analysis is conducted pursuant to FSM 7712.1; and

c. An environmental impact statement for the proposed action is prepared and approved by the Regional Forester. Road construction and reconstruction in inventoried roadless and contiguous unroaded areas constitute a significant environmental effect, as defined in the Council on Environmental Quality regulations (40 CFR Part 1508) and the Forest Service Environmental Procedures Handbook (FSH1909.15, Section 05) and, therefore, requires the preparation of an environmental impact statement (FSH1909.15, Section 20.6). The environmental impact analysis provides the basis for the Regional Forester decision on whether to construct or reconstruct a road in inventoried roadless or contiguous unroaded areas.

2. Examples of compelling need, for the purposes of this section, may include, but are not limited to:

a. Roads needed for critical resource restoration and protection.

b. Road realignment needed to prevent resource damage by an existing road that is deemed essential for public or private access, management, or public health or safety, and where such damage cannot be corrected by maintenance.

c. Road access is needed pursuant to reserved or outstanding rights or as provided by statute or treaty.

d. Roads needed to restore wildlife habitat.

To the extent consistent with the Tongass National Forest Land and Resource Management Plan and all applicable laws, the Regional Forester for Region 10, for the purposes of this section, has specific authority to determine that a compelling need exists to provide for the multiple-use and sustained-yield of all renewable resources of the Tongass National Forest, including seeking to meet market demand for timber.

3. Environmental mitigation and environmental restoration of unclassified roads are appropriate in inventoried roadless and contiguous unroaded areas and must follow NEPA-based decisionmaking processes. However, reconstruction or maintenance of unclassified roads in inventoried roadless and contiguous unroaded areas is inappropriate, other than to prevent or correct resource damage, as such activity would lead to de facto road development.

7712.16c—Duration of the Interim Requirements

The interim requirements set forth in FSM 7712.16 through 7712.16b remain in effect until the forest-scale roads analysis has been completed, and either (1) the forest plan has been amended or revised or (2) the Forest Supervisor makes a written determination that the forest plan does not require amendment or revision to reflect the findings of the roads analysis.

While the intent of the forest-scale roads analysis is to ensure an integrated consideration of access needs and opportunities as well as the effects of transportation management on the resources of the forest, there may be situations where an intensive area-scale roads analysis is appropriate (FSM 7712.13b). These specific areas may be relieved from the interim requirements upon completion of an intensive area-scale roads analysis and amendment or revision of the forest plan, or once the Forest Supervisor makes a written determination that the forest plan does not require amendment or revision as a result of the area-scale analysis.

7712.16d—Exemptions From Interim Requirements

The procedures established in sections 7712.16a and 7712.16b apply to a proposal to construct or reconstruct a road in an inventoried roadless or in contiguous unroaded areas unless the Responsible Official determines that one of the following circumstances exists:

1. A road is needed to protect public health and safety in cases of an imminent threat of flood, fire, or other catastrophic event that, without intervention, would cause the loss of life or property.

2. A road is needed to conduct a response action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or to conduct a natural resource restoration action under CERCLA, section 311 of the Clean Water Act, or Oil Pollution Act.

3. Road construction is needed in conjunction with the continuation extension, or renewal of a mineral lease on lands that are under lease by the Secretary of the Interior as of the January 12, 2001 or for a new lease issued immediately upon expiration of an existing lease.

7712.3—Network Analysis

Network analysis may be conducted as part of roads analysis to identify access alternatives. The network analysis shall establish four important types of transportation cost data:

1. Environmental effects and possible ecosystem restoration opportunities.

2. Construction, reconstruction, decommissioning, and maintenance costs of a road system to a specific area.

3. Variable user- and travel-related costs over a road system for a resource activity on a unit or output basis.

4. Life-cycle costs of operating and maintaining the road network.

Reanalyze networks and cost estimates when management practices or management area direction change.

7712.4—Economic Analysis [Reserved]

7712.5—Road Management Objectives

Validate, revise, or establish road management objectives for all classified National Forest System roads to be consistent with land management plan direction, project decisions, and the results and findings of roads analysis. Road management objectives establish the design criteria (FSM 7720) and operation and maintenance criteria (FSM 7730.3) for each road. The road management objectives require approval by the Responsible Official (usually the District Ranger) and are included in the forest road atlas (FSM 7710.44).

7712.6—Scheduling Projects

Integrate the scheduling of decommissioning, reconstruction, and construction project activities with other resource activities in a timely manner (FSM 1920).

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APPENDIX A
OVERVIEW OF OVERALL ROAD MANAGEMENT POLICY

	Maintenance of Existing Roads	Decommissioning Existing Roads	Reconstructing Existing Roads	Constructing New Roads
Inventoried Roadless Area	**Long Term** •Science-based analysis* not required for maintenance **Interim Requirements** Do not apply	**Long Term** •If no longer needed •Use science-based roads analysis to help establish priorities and schedule decommissioning to meet resource objectives. **Interim Requirements** Do not apply	**Long Term** •Decision informed by science-based road analysis* **Interim Requirements** Apply	**Long Term** •Decision informed by science-based road analysis* **Interim Requirements** Apply
	Is maintenance allowed?	**Is decommissioning allowed?**	**Is reconstruction allowed?**	**Is construction allowed?**
Temporary Roads	Yes[4]	Yes[4]	No	Yes
Classified Roads	Yes	Yes	Yes	Yes
Unclassified Roads	No[1]	Yes	No[2]	No[2]
Identified Unroaded Areas	**Long Term** •Science-based analysis* not required for routine & emergency maintenance **Interim Requirements** Do not apply	**Long Term** •If no longer needed •Use science-based roads analysis to help establish priorities and schedule decommissioning to meet resource objectives. **Interim Requirements** Do not apply	**Long Term** •Decision informed by science-based road analysis* **Interim Requirements** Apply	**Long Term and Transfer** •Decision informed by science-based road analysis* **Interim Requirements** Apply
	Is maintenance allowed?	**Is decommissioning allowed?**	**Is reconstruction allowed?**	**Is construction allowed?**
Temporary Roads	Yes[4]	Yes[4]	No	Yes
Classified Roads	No[3]	No[3]	No[3]	Yes
Unclassified Roads	No[1]	Yes	No[2]	No[2]
Roaded Areas and other Unroaded Areas	**Long Term** •Science-based analysis* not required for routine & emergency maintenance **Interim Requirements** Do not apply	**Long Term** •If no longer needed •Use science-based roads analysis to help establish priorities and schedule decommissioning. **Interim Requirements** Do not apply	**Long Term** •As identified through science-based road analysis* and as funding allows **Interim Requirements** Do not apply	**Long Term** •Decision based on NFS resource management objectives and use of science-based road analysis* **Interim Requirements** Do not apply
	Is maintenance allowed?	**Is decommissioning allowed?**	**Is reconstruction allowed?**	**Is construction allowed?**
Temporary Roads	Yes[4]	Yes[4]	No	Yes
Classified Roads	Yes	Yes	Yes	Yes
Unclassified Roads	No[1]	Yes	No[2]	No[2]

***Note:** The Roads Analysis Process does not make decisions! It does collect and identify sets of opportunities that are available to land managers for issues related to roads and access that will
be needed to meet resource objectives.

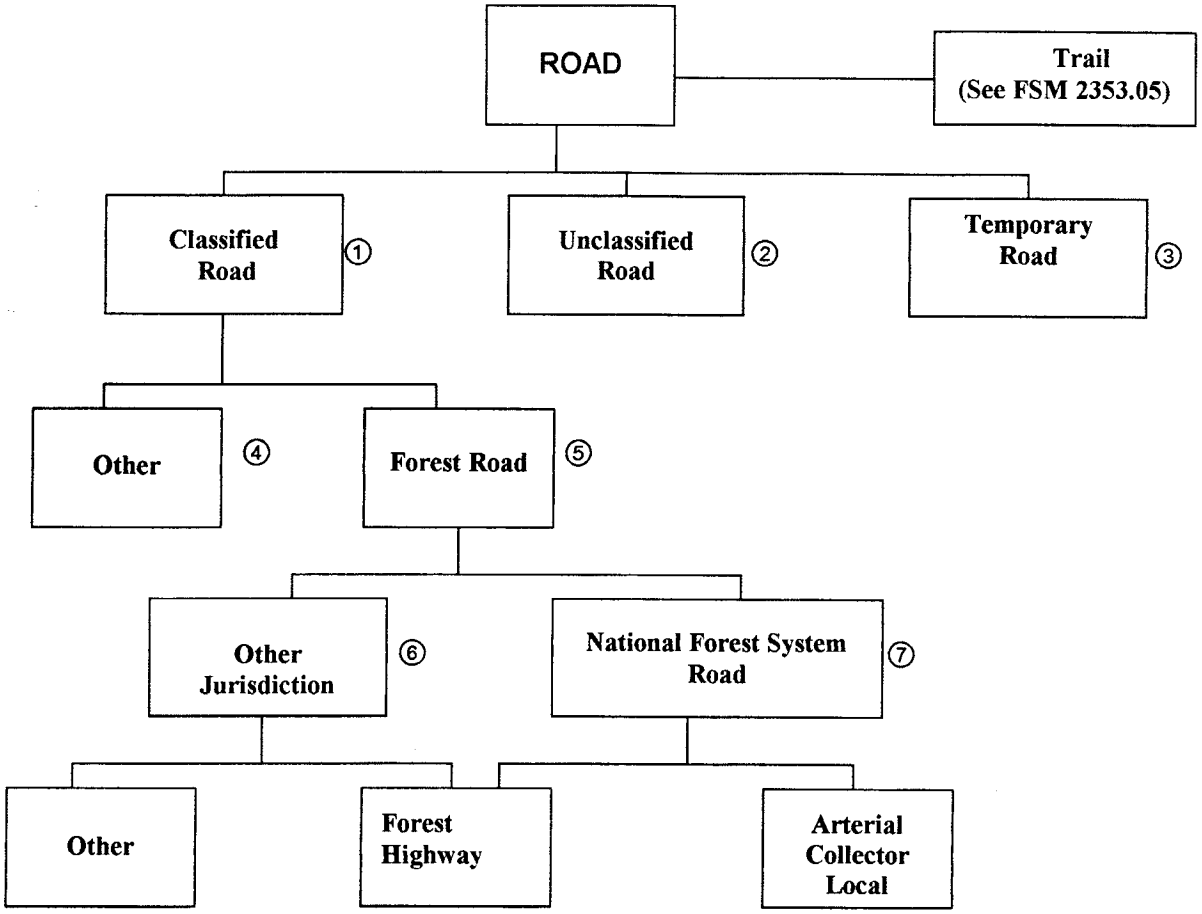
a. Sets of actions already part of site-specific NEPA decisions.
b. Sets of actions that may be undertaken if so concluded by site-specific NEPA decisions.
c. Sets of actions which are inconsistent with Forest plans and would require Forest Plan revisions **and** site-specific NEPA decisions.

Road Maintenance is the ongoing upkeep of a road necessary to retain or restore the road to the approved road management objective. It is independent of road analysis. However, road
analysis may inform decisions about which roads should be classified and therefore, maintained, and can help establish maintenance priorities.

[1] Unclassified roads would not be maintained, except under emergency resource protection circumstances.
[2] Through road analysis, it could be determined that some unclassified roads are necessary to support resource objectives and would become classified.
[3] By definition, unroaded areas do not contain classified roads.
[4] Responsibility of contract, or lease holder.

FSM 7705 – Exhibit 01

Road Terminology Relationships



①Federal, State, Tribal, County, local, private

②Not managed or intended as part of the transportation system

③Authorized by permit, lease, contract, etc. and not necessary for long-term resource management

④Not important to Forest Service administration

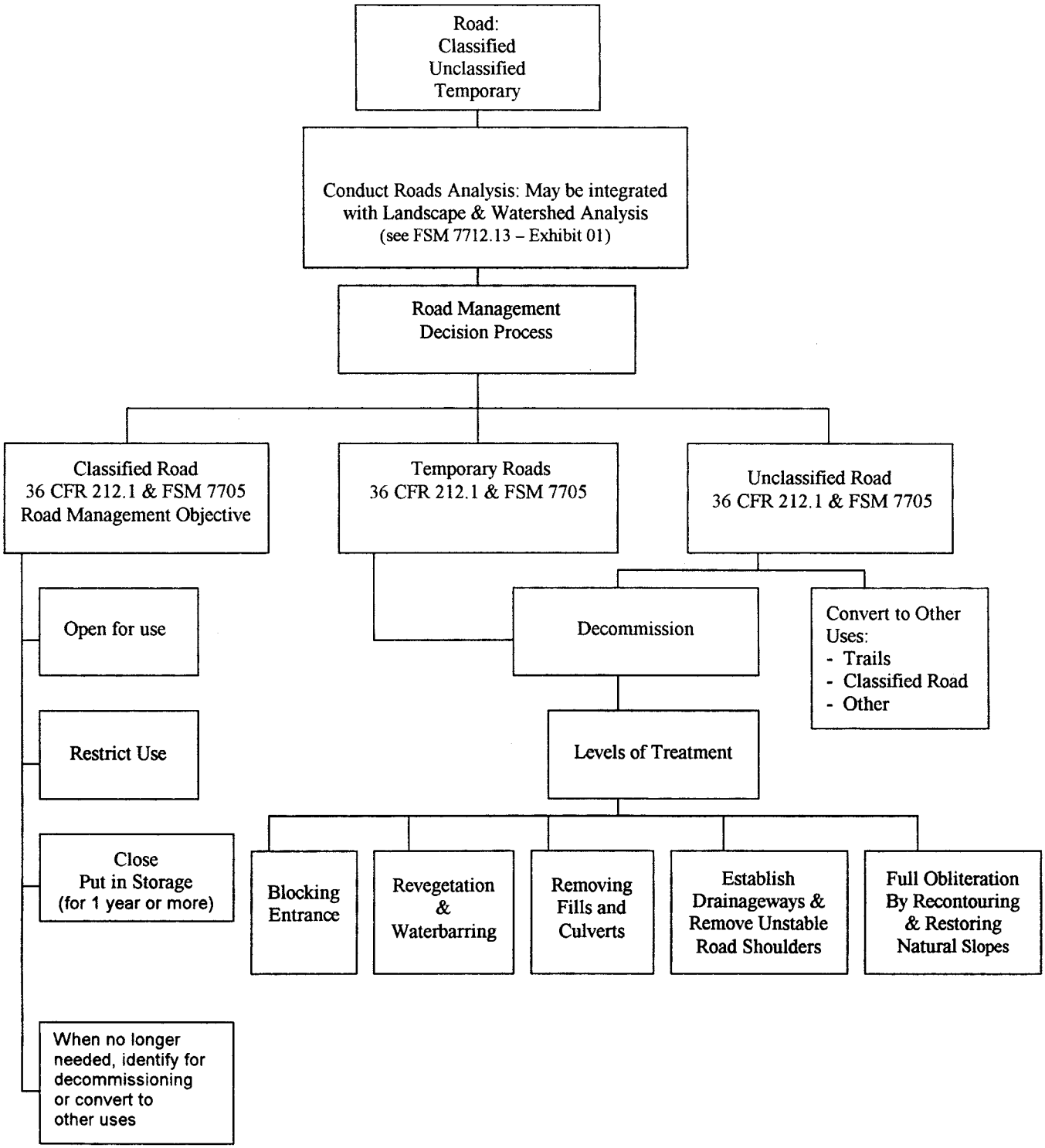
⑤Important to Forest Service administration, protection, utilization, access, and management

⑥State, Tribal, County, local, private

⑦Under Forest Service jurisdiction

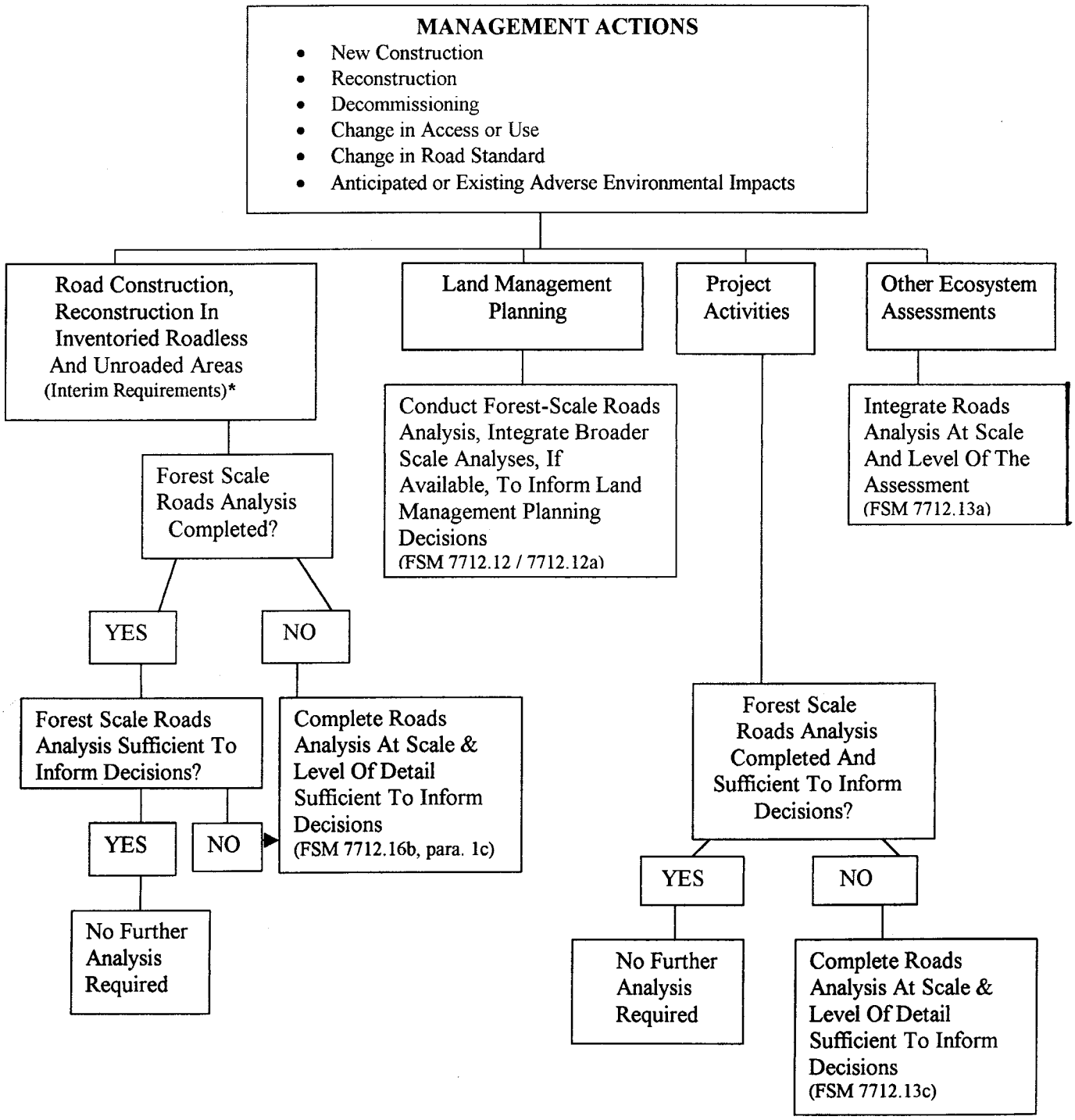
FSM 7712.1 – Exhibit 01

Road Management Options



FSM 7712.13 – Exhibit 01

Scope & Scale Of Roads Analysis



*Interim Requirements (FSM 7712.16): Compelling Need, Roads Analysis, and Environmental Impact Statement

FSM 7712.14 - Exhibit 01

Road Inventory Necessary at Various Scales of Road Analysis

Analysis and Inventory Scale	Selected Road Analysis objectives supported by road inventories	Inventory Information Needed								
		Geospatial data (maps, aerial photos, etc) ①			Physical attributes ①			Assessment of road condition ②		
		classified	unclassified	temporary	classified	unclassified	temporary	classified	unclassified	temporary
Forest & Multi-Forest Scale	• Identification of key routes for accessing NFS lands (including public roads) • Identification of strategic road management issues & priorities • Identification of key issues to be addressed at lower scales • Coordination with other government agencies and jurisdictions	Y	Y ③	N	Y	N ③	N	Y ④	N ③	N
Watershed & Lower Scales	• Identification of needed & unneeded existing roads and identification of environmental and public safety risks for all roads • Identification of site-specific priorities for road improvement and decommissioning • Identification of areas of special sensitivity, resource values, or both • Providing information needed to inform decisions at the project level	Y	Y	Y	Y	Y ⑤	Y ⑥	Y	Y	Y

① This category includes inventory information from other road jurisdictions as appropriate.

② **Condition assessments**: This category includes information needed to determine if the road is meeting resource management objectives and access needs.

③ **Forest scale – unclassified roads:** This category relies on existing data and/or readily available tools to identify unclassified roads if necessary to inform forest scale-level decisions.

④ **Forest scale – classified roads – condition assessments:** This only includes major transportation routes determined to be of key importance by the forest (generally maintenance level 3, 4, and 5 roads).

⑤ **Watershed scale – unclassified roads – physical attributes**: The minimum inventory information is location, length, condition, and any associated environmental or public safety risks or impacts.

⑥ **Watershed scale – temporary roads – physical attributes:** This category consists of the same data required as for unclassified except condition information is not necessary.

[FR Doc. 01–553 Filed 1–5–01; 4:30 pm]
BILLING CODE 3410–11–C

Federal Register

Friday,
January 12, 2001

Part VI

Department of Agriculture

Forest Service

36 CFR Part 294

Special Areas; Roadless Area Conservation; Final Rule

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 294

RIN 0596–AB77

Special Areas; Roadless Area Conservation

AGENCY: Forest Service, USDA.

ACTION: Final rule and record of decision.

SUMMARY: The Department of Agriculture is adopting this final rule to establish prohibitions on road construction, road reconstruction, and timber harvesting in inventoried roadless areas on National Forest System lands. The intent of this final rule is to provide lasting protection for inventoried roadless areas within the National Forest System in the context of multiple-use management.

EFFECTIVE DATE: This rule is effective March 13, 2001.

ADDRESSES: For additional information, refer to the Roadless Area Conservation website (*roadless.fs.fed.us*). Written inquiries may be directed to USDA Forest Service, National Forest System Roadless Project, P.O. Box 96090, Washington, DC 20090–6090.

FOR FURTHER INFORMATION CONTACT: Scott Conroy, Project Director, Forest Service (703) 605–5299 or (800) 384–7623.

SUPPLEMENTARY INFORMATION: The following outline displays the contents of the preamble for this regulation.

Introduction

Purpose and Need for the Roadless Area Conservation Rule

Roadless Area Values and Characteristics
Fiscal Considerations
National Direction vs. Local Decisionmaking
Importance of Watershed Protection
Improving Ecosystem Health
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Introduction

The Department of Agriculture is adopting this final rule to protect and conserve inventoried roadless areas on National Forest System lands. This preamble states the basis and purpose of the rule, includes responses to comments received on the proposed rule, and serves as the record of decision for this rulemaking. Preparation of the record of decision is required by the Council on Environmental Quality regulations (40 CFR 1505.2) implementing the National Environmental Policy Act (NEPA) (42 U.S.C. 4321). This document sets forth the reasons supporting the decision to adopt the final rule; the major policy issues that were raised in public comment; responses to public comment and changes adopted in response to comments; and the reasons this final rule was selected from among the alternatives considered to meet the agency's purpose and need, as described in the four volume final environmental impact statement (FEIS) and project record, which are incorporated by reference. Agency responses to comments on the draft environmental impact statement (DEIS) are contained in Volume 3 of the Forest Service Roadless Area Conservation FEIS (November 2000). Responses in Volume 3 relevant to the final rule are summarized in this document. Throughout this preamble and record of decision, citations to chapters and pages of the FEIS are provided for further information regarding the alternatives and effects analysis; for example, (FEIS Vol. 1, 3–237) refers to volume 1, chapter 3, page 237.

This final rule is available on the Forest Service website (*roadless.fs.fed.us*), along with the FEIS and much of the record supporting the decision for this final rule.

Purpose and Need for the Roadless Area Conservation Rule

The Department of Agriculture is responsible for managing National Forest System resources to sustain the health, diversity, and productivity of the nation's forests and grasslands to meet the needs of present and future generations. As noted in the USDA Forest Service Strategic Plan (2000 Revision) (*www.fs.fed.us/plan,* October 2000), demands for, and supplies of, renewable resources change over time in response to social values, new technology, and new information. In the future, expanding urban areas and increased fragmentation of private lands make it likely that the largest and most extensive tracts of undeveloped land will be those in public ownership.

This final rule prohibits road construction, reconstruction, and timber harvest in inventoried roadless areas because they have the greatest likelihood of altering and fragmenting landscapes, resulting in immediate, long-term loss of roadless area values and characteristics. Although other activities may also compromise roadless area values, they resist analysis at the national level and are best reviewed through local land management planning. Additionally, the size of the existing forest road system and attendant budget constraints prevent the agency from managing its road system to the safety and environmental standards to which it was built. Finally, national concern over roadless area management continues to generate controversy, including costly and time-consuming appeals and litigation (FEIS Vol. 1, 1–16 to 1–17). This final rule addresses these needs in the context of a national rulemaking.

Roadless Area Values and Characteristics

Inventoried roadless areas considered in this rule constitute roughly one-third of all National Forest System lands, or approximately 58.5 million acres. Although the inventoried roadless areas comprise only 2% of the land base in the continental United States, they are found within 661 of the over 2,000 major watersheds in the nation (FEIS Vol. 1, 3–50) and provide many social and ecological benefits.

As urban areas grow, undeveloped private lands continue to be converted to urban and developed areas, and rural infrastructure (such as roads, airports, and railways). An average of 3.2 million acres per year of forest, wetland, farmland, and open space were converted to more urban uses between 1992 and 1997. In comparison, 1.4 million acres per year were developed between 1982 and 1992. The rate of land development and urbanization between 1992 and 1997 was more than twice that of the previous decade, while the population growth rate remained fairly constant (FEIS Vol. 1, 3–12). In an increasingly developed landscape, large unfragmented tracts of land become more important. For example, from 1978 to 1994, the proportion of private forest ownerships of less than 50 acres nearly doubled (Birch, T.W. 1996. Private forest-land owners of the United States, 1994. Resource Bulletin NE–134. Radnor, PA: USDA Forest Service, Northeastern Experiment Station. 183 p). Subdivision and other diminishment of tract size of these lands can discourage long-term stewardship and conservation.

Inventoried roadless areas provide clean drinking water and function as biological strongholds for populations of threatened and endangered species. They provide large, relatively undisturbed landscapes that are important to biological diversity and the long-term survival of many at risk species. Inventoried roadless areas provide opportunities for dispersed outdoor recreation, opportunities that diminish as open space and natural settings are developed elsewhere. They also serve as bulwarks against the spread of non-native invasive plant species and provide reference areas for study and research (FEIS Vol. 1, 1–1 to 1–4).

The following values or features often characterize inventoried roadless areas (FEIS Vol. 1, 3–3 to 3–7):

High quality or undisturbed soil, water, and air. These three key resources are the foundation upon which other resource values and outputs depend. Healthy watersheds catch, store, and safely release water over time, protecting downstream communities from flooding; providing clean water for domestic, agricultural, and industrial uses; helping maintain abundant and healthy fish and wildlife populations; and are the basis for many forms of outdoor recreation.

Sources of public drinking water. National Forest System lands contain watersheds that are important sources of public drinking water. Roadless areas within the National Forest System contain all or portions of 354 municipal watersheds contributing drinking water to millions of citizens. Maintaining these areas in a relatively undisturbed condition saves downstream communities millions of dollars in water filtration costs. Careful management of these watersheds is crucial in maintaining the flow and affordability of clean water to a growing population.

Diversity of plant and animal communities. Roadless areas are more likely than roaded areas to support greater ecosystem health, including the diversity of native and desired nonnative plant and animal communities due to the absence of disturbances caused by roads and accompanying activities. Inventoried roadless areas also conserve native biodiversity by serving as a bulwark against the spread of nonnative invasive species.

Habitat for threatened, endangered, proposed, candidate, and sensitive species and for those species dependent on large, undisturbed areas of land. Roadless areas function as biological strongholds and refuges for many species. Of the nation's species currently listed as threatened, endangered, or proposed for listing under the Endangered Species Act, approximately 25% of animal species and 13% of plant species are likely to have habitat within inventoried roadless areas on National Forest System lands. Roadless areas support a diversity of aquatic habitats and communities, providing or affecting habitat for more than 280 threatened, endangered, proposed, and sensitive species. More than 65% of all Forest Service sensitive species are directly or indirectly affected by inventoried roadless areas. This percentage is composed of birds (82%), amphibians (84%), mammals (81%), plants (72%), fish (56%), reptiles (49%), and invertebrates (36%).

Primitive, Semi-Primitive Non-Motorized, and Semi-Primitive Motorized classes of dispersed recreation. Roadless areas often provide outstanding dispersed recreation opportunities such as hiking, camping, picnicking, wildlife viewing, hunting, fishing, cross-country skiing, and canoeing. While they may have many Wilderness-like attributes, unlike Wilderness the use of mountain bikes, and other mechanized means of travel is often allowed. These areas can also take pressure off heavily used wilderness areas by providing solitude and quiet, and dispersed recreation opportunities.

Reference landscapes. The body of knowledge about the effects of management activities over long periods of time and on large landscapes is very limited. Reference landscapes of relatively undisturbed areas serve as a barometer to measure the effects of development on other parts of the landscape.

Natural appearing landscapes with high scenic quality. High quality scenery, especially scenery with natural-appearing landscapes, is a primary reason that people choose to recreate. In addition, quality scenery contributes directly to real estate values in nearby communities and residential areas.

Traditional cultural properties and sacred sites. Traditional cultural properties are places, sites, structures, art, or objects that have played an important role in the cultural history of a group. Sacred sites are places that have special religious significance to a group. Traditional cultural properties and sacred sites may be eligible for protection under the National Historic Preservation Act. However, many of them have not yet been inventoried, especially those that occur in inventoried roadless areas.

Other locally identified unique characteristics. Inventoried roadless areas may offer other locally identified unique characteristics and values. Examples include uncommon geological formations, which are valued for their scientific and scenic qualities, or unique wetland complexes. Unique social, cultural, or historical characteristics may also depend on the roadless character of the landscape. Examples include ceremonial sites, places for local events, areas prized for collection of non-timber forest products, or exceptional hunting and fishing opportunities.

Fiscal Considerations

The Department is also concerned about building new roads in inventoried roadless areas, when there presently exists a backlog of about $8.4 billion in deferred maintenance and reconstruction on the more than 386,000 miles of roads in the Forest Transportation System. The agency

estimates that at least 60,000 miles of additional unauthorized roads exist across National Forest System lands.

The agency receives less than 20% of the funds needed annually to maintain the existing road infrastructure. As funding needs remain unmet, the cost of fixing deteriorating roads increases exponentially every year. Failure to maintain existing roads can also lead to erosion and water quality degradation and other environmental problems and potential threats to human safety. It makes little fiscal or environmental sense to build additional roads in inventoried roadless areas that have irretrievable values at risk when the agency is struggling to maintain its existing extensive road system (FEIS Vol. 1, 1–5 and 3–22). The National Forest System was founded more than 100 years ago to protect drinking water supplies and furnish a sustainable supply of timber. Neither objective is fully achievable given the present condition of the existing road system. The risks inherent in building new roads in presently roadless areas threaten environmental, social, and economic values.

Development activities in inventoried roadless areas often cost more to plan and implement than on other National Forest System lands. Some planned timber sales in inventoried roadless areas are likely to cost more to prepare and sell than they realize in revenues received. Because of the level of public controversy and analytical complexity, projects in roadless areas often require development of costly environmental impact statements for most resource development activities, including timber harvesting, in inventoried roadless areas. In some cases, road construction costs are higher due to rugged terrain or sensitive ecological factors. Many development projects in inventoried roadless areas are appealed or litigated. These factors contribute to generally higher costs for the agency to plan and implement development activities in inventoried roadless areas.

National Direction vs. Local Decisionmaking

At the national level, Forest Service officials have the responsibility to consider the ''whole picture'' regarding the management of the National Forest System, including inventoried roadless areas. Local land management planning efforts may not always recognize the national significance of inventoried roadless areas and the values they represent in an increasingly developed landscape. If management decisions for these areas were made on a case-by-case basis at a forest or regional level, inventoried roadless areas and their ecological characteristics and social values could be incrementally reduced through road construction and certain forms of timber harvest. Added together, the nation-wide results of these reductions could be a substantial loss of quality and quantity of roadless area values and characteristics over time.

In 1972, the Forest Service initiated a review of National Forest System roadless areas generally larger than 5,000 acres to determine their suitability for inclusion in the National Wilderness Preservation System. A second review process completed in 1979, known as Roadless Area Review and Evaluation II (RARE II), resulted in another nationwide inventory of roadless areas. In the more than 20 years since the completion of RARE II, Congress has designated some of these areas as Wilderness. Additional reviews have been conducted through the land management planning process and other large-scale assessments. The 58.5 million acres of inventoried roadless areas used as the basis for this analysis were identified from the most recent analysis for each national forest or grassland, including RARE II, land and resource management planning, or other large-scale assessments such as the Southern Appalachian Assessment.

Of the 58.5 million acres of inventoried roadless areas considered in the FEIS, approximately 34.3 million acres have prescriptions that allow road construction and reconstruction. The remaining 24.2 million acres are currently allocated to management prescriptions that prohibit road construction; however, protections in these existing plans may change after future forest plan amendments or revisions.

Over the past 20 years, roads have been constructed in an estimated 2.8 million of those 34.3 million acres of inventoried roadless areas. The agency anticipates that the trend of building roads in inventoried roadless areas will gradually decrease in the future even without this rule due to economic and ecological factors already discussed, changes in agency policy, increasing controversy and litigation, and potential listings under the Endangered Species Act. While these anticipated changes may reduce some of the impact to inventoried roadless areas, they would not eliminate the future threat to roadless area values (FEIS Vol. 1, 1–14 to 1–15).

On many national forests and grasslands, roadless area management has been a major point of conflict in land management planning. The controversy continues today, particularly on most proposals to harvest timber, build roads, or otherwise develop inventoried roadless areas. The large number of appeals and lawsuits, and the extensive amount of congressional debate over the last 20 years, illustrates the need for national direction and resolution and the importance many Americans attach to the remaining inventoried roadless areas on National Forest System lands (FEIS Vol. 1, 1–16). These disputes are costly in terms of both fiscal resources and agency relationships with communities of place and communities of interest. Based on these factors, the agency decided that the best means to reduce this conflict is through a national level rule.

Importance of Watershed Protection

Watershed protection is one of the primary reasons Congress reserved or authorized the purchase of National Forest System lands. Watershed health and restoration is also one of four emphasis areas in the agency's Natural Resource Agenda. Protecting the remaining healthy components of a watershed provides multiple benefits and a strong base to anchor future restoration in unprotected portions of these watersheds. Rivers, streams, lakes, and wetlands within a watershed are the circulatory system of ecosystems, and water is the vital fluid for inhabitants of these ecosystems, including people (FEIS Vol. 1, 1–1).

Inventoried roadless areas comprise a small fraction of the national landscape, representing less than 2% of the land base of the continental United States. They are, however, disproportionately important to the small percentage of the land base they occupy. Overall, National Forest System watersheds provide about 14% of the total water flow of the nation, about 33% of water in the West (FEIS Vol. 1, 3–46). Of the watersheds on National Forest System land, 661 contain inventoried roadless areas and 354 of those watersheds serve as source areas of drinking water used by millions of people across the nation. Therefore, the health of these watersheds is important to people's health throughout the United States.

Roads have long been recognized as one of the primary human-caused sources of soil and water disturbances in forested environments (FEIS Vol. 1, 3–44). For example, while landslides are a natural process, extensive research and other investigations in the West have closely associated land management activities, particularly roading and timber harvest, with accelerated incidence of landslides by several orders of magnitude (FEIS Vol.

1, 3–58). A joint study by the Forest Service and Bureau of Land Management in Oregon and Washington found that of 1,290 landslides reviewed in 41 sub-watersheds, 52% were related to roads, 31% to timber harvest, and 17% occurred in undisturbed forest (FEIS Vol. 1, 3–59). Another evaluation of landslides initiated by the Siuslaw National Forest found that roads were the source of 41% of landslides, harvest units less than 20 years old were the source of 36%, while natural forest processes accounted for the remaining 23%. Without the disturbance caused by roads and associated activities, stream channels are more likely to function naturally (FEIS Vol. 1, 3–54). Current road construction and timber harvest practices reduce the potential for damage associated with the use of earlier and less sophisticated techniques. However, even with today's improved design standards for road construction and timber harvest, these activities can still result in adverse effects to watersheds. These effects include pollution, changes to water temperatures and nutrient cycles, and increased sediment from storm or runoff events that exceed road design standards (FEIS Vol. 1, 3–45 to 3–50).

Improving Ecosystem Health

Inventoried roadless areas provide large, relatively undisturbed blocks of important habitat for a variety of terrestrial and aquatic wildlife and plants, including hundreds of threatened, endangered, and sensitive species. In addition to their ecological contributions to healthy watersheds, many inventoried roadless areas function as biological strongholds and refuges for a number of species and play a key role in maintaining native plant and animal communities and biological diversity (FEIS Vol. 1, 3–123 to 3–124). For example, about 60% of unroaded or very low road density sub watersheds within the Interior Columbia Basin Ecosystem Management Project (ICBEMP) assessment area are aquatic strongholds for salmonid populations (FEIS Vol. 1, 3–161). Inventoried roadless areas are key to recovery of salmon and steelhead stocks in decline, providing habitat to protect species until longer-term solutions can be developed for migration, passage, hatchery, and harvest problems associated with the decline of anadromous fish.

Species richness and native biodiversity are more likely to be effectively conserved in larger undisturbed landscapes, such as inventoried roadless areas (FEIS Vol. 1, 3–142). For example, inventoried roadless areas cover approximately 21% of the centers of biodiversity for animals and 10% for plants identified in ICBEMP (FEIS Vol. 1, 3–144 and 3–173). Inventoried roadless areas also provide reference landscapes that managers can use to gauge the health and condition of other land areas.

Road construction, reconstruction, and timber harvesting activities can result in fragmentation of ecosystems, the introduction of non-native invasive species, and other adverse consequences to the health and integrity of inventoried roadless areas (FEIS Vol. 1, 3–128 to 3–136). As human-caused fragmentation increases, the amount of core wildlife habitat decreases. This fragmentation results in decreased connectivity of wildlife habitat and wildlife movement, isolating some species and increasing the risk of local extirpations or extinctions (FEIS Vol. 1, 3–133). The value of inventoried roadless areas as habitat for threatened, endangered, and sensitive species and as biological strongholds can also be diminished due to these activities. For example, 220 species that are listed as threatened, endangered, or proposed for listing under the Endangered Species Act and 1,930 agency-identified sensitive species rely on habitat within inventoried roadless areas (FEIS Vol. 1, 3–180). The Department of Agriculture believes that the risks associated with certain development activities in inventoried roadless areas should be minimized and that these areas should be conserved for present and future generations.

Need for Action

Promulgating this rule is necessary to protect the social and ecological values and characteristics of inventoried roadless areas from road construction and reconstruction and certain timber harvesting activities. Without immediate action, these development activities may adversely affect watershed values and ecosystem health in the short and long term, expand the road maintenance backlog which would increase the financial burden associated with road maintenance, and perpetuate public controversy and debate over the management of these areas. The new planning rules provide for review of other activities and allow for additional protection of roadless areas, if warranted. Adoption of this final rule ensures that inventoried roadless areas will be managed in a manner that sustains their values now and for future generations.

Public Comments on the Proposed Rule

How Was Public Involvement Used in the Rulemaking Process?

In January 1998, Forest Service Chief Mike Dombeck proposed to temporarily suspend road construction and reconstruction in most inventoried roadless areas and other adjacent unroaded areas, and provided advance notice of revisions to the regulations governing the management of the Forest Transportation System. After analyzing public comments on the proposal, the Agency issued an interim rule at 36 CFR part 212, Administration of the Forest Development Transportation System: Temporary Suspension of Road Construction and Reconstruction in Unroaded Areas (February 12, 1999; 64 FR 7290). This Interim Roads Rule suspended road construction and reconstruction in certain inventoried roadless areas for 18 months (March 1999 through August 2000), while a long-term forest transportation policy was developed. During the public comment period for the Interim Roads Rule, the Agency received approximately 119,000 public comments, many of which mentioned the need for ''permanent protection'' of inventoried roadless areas.

On October 13, 1999, President William J. Clinton directed the Forest Service to develop and propose for public comment regulations that would provide appropriate long-term protection for currently inventoried roadless areas. The public, and all interested parties, were to have the opportunity to review and comment on the proposed regulations.

To comply with this presidential directive, the agency published a notice of intent to prepare a DEIS in the **Federal Register** (64 FR 56306) on October 19, 1999, and announced the initiation of the public rulemaking process to propose the protection of certain roadless areas within the National Forest System. Section 553(a) of the Administrative Procedures Act exempts public property rules from the public involvement requirements set forth in section 553. In 1971, the United States Department of Agriculture published a voluntary waiver of the exemption from the notice and comments requirements of 5 U.S.C. 553(b) and (c) (36 FR 13804). Accordingly, the Forest Service published a proposed rulemaking in the **Federal Register** and provided opportunity for public participation during the development of the proposed and final rules. (*See Rodway* v. *USDA, 514 F.2d 809* (*D.C. Cir. 1975*)).

On May 10, 2000, the Forest Service issued a proposed rule in the **Federal Register** (65 FR 30276). The notice of availability of the DEIS was published in the **Federal Register** on May 19, 2000 (65 FR 31898). The public comment period on the proposed rule and DEIS closed on July 17, 2000. The notice of availability of the FEIS was published in the **Federal Register** on November 17, 2000 (65 FR 69513).

The agency's notice of intent to prepare an environmental impact statement drew about 16,000 people to 187 public meetings and elicited more than 517,000 responses. Although the purpose of the notice of intent was merely to solicit issues that the public thought should be addressed in the development of a DEIS, the Forest Service provided maps and other information to address public concerns and questions. On March 15, 2000, two months before release of the proposed rule and DEIS, news releases and letters were sent to news media, other Federal, State, and local government agencies, libraries, and Forest Service units to explain how to obtain the proposed rule and DEIS in a variety of electronic and hardcopy formats. The proposed action and other alternatives, background information, and a schedule of public meetings were posted on the agency's Roadless Area Conservation website (*roadless.fs.fed.us*).

The Forest Service hosted two cycles of meetings during the comment period on the DEIS and proposed rule—one for information sharing and discussion and the other to collect oral comments. Written comments were collected at both meetings. About 430 public meetings were held—about 230 for information sharing and written comments and about 200 for collecting oral and written comments. Every national forest and grassland hosted at least two meetings. These meetings drew over 23,000 people nationwide.

The Forest Service also received comments by postal and electronic mail and by telefax. By the close of the comment period, the agency received over 1 million postcards or other form letters; 60,000 original letters; 90,000 electronic mail messages; and several thousand telefaxes (FEIS Vol. 1, 1–7). The Forest Service's Content Analysis Enterprise Team in Salt Lake City, Utah, organized and analyzed the comments on the proposal. Some respondents focused their remarks on provisions of the proposed rule, others concentrated on the alternatives and analyses contained in the DEIS, and many comments applied to both documents.

Information from the formal public meetings, letters, emails, telefaxes, and other sources were all included in the FEIS analysis. The Forest Service reviewed, analyzed, and responded to those comments. Responses to comments directly related to the proposed rule are included in this preamble. An explanation of the comment analysis process and how the comments were used to clarify text, modify alternatives or analysis, or augment technical information is included in Volume 3 of the FEIS.

One of the major process concerns expressed was that the agency did not give the public and governmental entities, such as Tribes, States, and counties adequate notice or time to comment on the proposed action. The agency recognizes that many groups would have preferred additional time for review and comment. However, the time period was adequate to allow for more than 1.6 million comments to be received throughout the process. Throughout the process, the agency's website has provided up-to-date information for interested parties to learn about the proposed action. The straightforward nature of the proposed rule and the sheer volume of comments received are compelling evidence that there was an adequate opportunity for the public to be heard, and sufficient information for officials to make a reasoned and informed decision.

Since the publication of the FEIS, the agency has received comments on the FEIS and the preferred alternative. Generally, these comments mirror comments received on the NOI and DEIS. The majority of these respondents asked for the prohibitions to immediately take effect on the Tongass National Forest, and for additional prohibitions on off-highway vehicle use, grazing, and mining activities. Some respondents provided additional information on potential environmental and economic effects, which the agency has reviewed and determined fall within the range of effects disclosed in the FEIS. These comments were considered by the agency in the development of the final rule and are in the project record.

What General Issues Were Identified Regarding the Proposed Rule and Draft Environmental Impact Statement?

Overview. Comments on the notice of intent, the proposed rule, and the DEIS illustrated strongly held individual values and beliefs and a wide range of views on how to manage inventoried roadless areas. These comments can be divided into two basic and very different perspectives (FEIS Vol. 1, 1–8 to 1–9). One perspective is that decisions concerning management of inventoried roadless areas should be left to the local responsible official, without national intervention. The other perspective is that national prohibitions on road construction, reconstruction, and timber harvest in inventoried roadless areas, along with a stop to other activities, must occur from a national level, as local decisionmaking does not always reflect the national significance of the issues involved. The agency considered and attempted to balance both perspectives throughout this rulemaking.

These two viewpoints focused on six major categories of issues in the DEIS as follows: public access, identification of other unroaded areas, exemptions and exceptions, environmental effects, local involvement (decisionmaking), and the effect on forest dependent communities (FEIS Vol. 1, 1–9 to 1–14).

After reviewing and analyzing the public comments received during the comment period for the proposed rule and DEIS, the agency found that these major issue categories were still valid. Public comment within these categories is incorporated in the discussions of specific issues and comments related to each section of the proposed rule. These issues also have been used for the following purposes in the rulemaking process: to determine the scope of the proposal (type of decision to be made); to develop a range of alternatives; to identify possible mitigation measures; to direct the analysis of potential environmental, social, and economic effects; and to ensure that the agency is operating within its legal authorities.

Issues Raised by Those Opposed to Prohibitions. This group indicated that inventoried roadless areas should remain available for road construction and reconstruction to obtain resources, to provide increased motorized recreation opportunities, and for other uses. These individuals expressed the viewpoint that roadless areas, with active and prudent management, could support both intrinsic benefits and commodity uses, and that local responsible officials should make management decisions on inventoried roadless areas. This group also indicated that environmental concerns should not take precedence over human needs and desired uses, and that maintaining a healthy environment should not preclude resource production, motorized access, and developed recreation opportunities.

Many members of this group also stated that conservation requires active management, such as providing roads for: thinning forest vegetation, insect and disease treatment, commodity resource production, hazardous fuels

reductions, and the development of recreation facilities. They stressed that the failure to actively manage forests and grasslands could result in insect infestations and uncharacteristic wildfire effects, and asserted that prudent management would benefit people and wildlife. They expressed concern for the impact this rule would have on future generations that would not be able to participate in a lifestyle that is dependent on resource use and production. They said that if future generations would not be able to access the land, they would not value the land.

Issues Raised by Those Who Favor Prohibitions. These respondents indicated that they viewed forestlands as whole ecosystems and that they thought roadless areas should be conserved for their intrinsic values and for esthetic benefits to humans. In their view, roadless areas should be allowed to evolve naturally through their own dynamic processes, although some proponents agreed with the need for limited stewardship activity. This second group stressed that human desire for commodity production should take second place to needs for a healthy environment (both locally and globally), for quiet natural places, for spiritual and psychological regeneration, and to meet the needs of other living things. They indicated that the social and economic needs of forest-dependent users could be met through job retraining, through development of alternative materials, and by designating already developed areas for motorized recreation and other ground-disturbing activities.

Most of the respondents in this second group maintained that the proposed rule did not prohibit enough development activities. They stated that the final rule should immediately ban timber harvest, other commodity production, and motorized recreation from roadless areas 1,000 acres or larger, and that the agency should not defer conservation of roadless areas to future land management planning processes. They also stressed that the Tongass National Forest should be included in this conservation effort, an issue that the agency specifically requested comment on in the DEIS. Many respondents in this group expressed a desire that future generations receive the benefits of clean air and water, habitat adequate to assure species diversity, and other social and ecological values provided by inventoried roadless areas.

Issues Raised by Federal, Tribal, State and Local Public Officials. The agency received many comments from Federal, Tribal, State and local public officials and agencies across the country. Letters received from these sources during the comment period on the DEIS are published in Volume 4 of the FEIS. These comments reflect a cross-section of the comments received from the public at large.

Many public officials from States and counties concerned about access to and across National Forest System lands and concerned about forest dependent communities expressed strong opposition to the proposed rule, citing negative economic impacts to these communities and commodity production industries, as well as negative impacts to rural lifestyles. Access to State-owned lands and impacts to statutory rights-of-way across public lands were major concerns as well. In general, those Western States with the greatest roadless acreage (for example, Idaho, Montana, Nevada, Utah, and Wyoming) tended to generate the greatest number of negative comments from Governors, agencies, and officials. Public officials from areas with larger urban populations generally supported the proposed rule because of their expressed desire for recreation opportunities, protection of water quality, and undisturbed landscapes.

The following examples illustrate these different views. In the State of Washington, some of the officials and agencies writing in support of the proposed rule included the Governor, King and Spokane Counties, and the Seattle City Council, while Stevens County, the City of Forks, and the City of Port Angeles were opposed (FEIS Vol. 4, 573, 579, 583 to 588). In Missouri, the Dent County Commission was opposed to the proposal while the State's Department of Natural Resources was supportive (FEIS Vol. 4, 250 to 252).

Comments from agencies also varied according to the anticipated effects to their management programs. For example, the Florida Fish and Wildlife Conservation Commission saw the proposed rule as resulting in positive benefits for native wildlife and plant communities, while the Virginia Department of Game and Inland Fisheries saw the proposal as harmful to wildlife and the management of wildlife (FEIS Vol. 4, 79 to 81, 571). Most responding Department of Transportation offices were concerned over access and maintenance issues.

Letters from Tribal officials provided mixed comments and concerns. Some Tribes were generally supportive of the proposed rule, with the provision that traditional uses of the land and access to cultural and sacred sites be allowed to continue. Other Tribes expressed concern about how the proposal might affect economic opportunities. Still others believed that the rule should further restrict certain activities in inventoried roadless areas that may affect adjacent Tribal lands.

What Specific Issues Were Raised on the Proposed Rule and What Changes Did the Agency Make From Proposed To Final Rules?

The following is a section-by-section discussion of issues raised and comments received on the proposed rule, the agency's response, and a description of changes made to the rule.

Proposed § 294.10—Purpose. This proposed section identified the agency's goal of providing lasting protection for inventoried roadless areas and other unroaded areas of the National Forest System in the context of multiple-use management.

Comment on Multiple-Use. Some respondents commented that the proposed rule did not provide for multiple-use of inventoried roadless areas, since resources cannot always be accessed and developed without roads and, therefore, for example, forest health issues could not be addressed.

Response. The Multiple-Use Sustained-Yield Act of 1960 (MUSYA) provides the Forest Service authority to manage national forest and grasslands ''for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.'' The NFMA reaffirmed multiple-use and sustained-yield as the guiding principles for land management planning of National Forest System lands (16 U.S.C. 1600, 1604).

In defining ''multiple use,'' the MUSYA, as amended, clearly provides that under multiple-use management some land will be used for less than all of the possible resource uses of the national forests and grasslands. The act also provides that even the establishment of wilderness areas is consistent with the purposes and provisions of the act. The Roadless Area Conservation rule, unlike the establishment of wilderness areas, will allow a multitude of activities including motorized uses, grazing, and oil and gas development that does not require new roads to continue in inventoried roadless areas.

Currently, a wide range of multiple uses is permitted in inventoried roadless areas subject to the management direction in forest plans. A wide range of multiple uses will still be allowable under the provisions of this rule. The National Forest System contains an extensive system of roads measuring approximately 386,000 miles. This final rule will not close or otherwise block access to any of those roads; the final rule merely prohibits the construction of new roads and the

reconstruction of existing roads in inventoried roadless areas.

Under this final rule, management actions that do not require the construction of new roads will still be allowed, including activities such as timber harvesting for clearly defined, limited purposes, development of valid claims of locatable minerals, grazing of livestock, and off-highway vehicle use where specifically permitted. Existing classified roads in inventoried roadless areas may be maintained and used for these and other activities as well. Forest health treatments for the purposes of improving threatened, endangered, proposed, or sensitive species habitat or maintaining or restoring the characteristics of ecosystem composition and structure, such as reducing the risk of uncharacteristic wildfire effects, will be allowed where access can be gained through existing roads or by equipment not requiring roads. Also, see the response to proposed § 294.12 for further discussion of the MUSYA.

Comment on Forest Plan Amendments. Many respondents asserted that the rule would supersede forest plans, the National Forest Management Act, and land management planning regulations, and thus exceed existing statutory authority. Others contended that the rule would require an amendment to forest plans.

Response. The preamble to the recent NFMA planning regulations identify that ''[p]lanning will be conducted at the appropriate level depending on the scope and scale of the issues.'' The Department went on to note that ''[f]undamental to this rule is the notion that there is a hierarchy of scale to be considered when addressing resource management issues, and that it is the nature of the issue that guides the selection of the appropriate scale and level of the organization to address it'' (65 FR 67523). The use of rulemaking to address the conservation of inventoried roadless areas is both appropriate and consistent with the NFMA implementing regulations.

Just as development and approval of forest plans must conform to existing laws and regulations, new laws or regulations, including this rule, can supersede existing forest plan management direction. This rulemaking process does not require amendments or revisions to forest plans. However, a Forest or Grassland Supervisor may consider whether an amendment or revision is appropriate given overall circumstances for a particular administrative unit.

Comment on Roadless Areas in Forest Planning. A few respondents stated that the purposed section should require the incorporation of roadless area protection into forest plans.

Response. The recently revised regulations at 36 CFR part 219 guiding the development of forest plans (November 9, 2000; 65 FR 67571) contain a requirement at § 219.9(b)(8) that provides additional protection for unroaded and inventoried roadless areas. During the plan revision process, or at other times as deemed appropriate, the responsible official must identify and evaluate inventoried roadless areas and unroaded areas and then determine which, if any, of those areas warrant additional protection and the level of protection to be afforded. For this reason, there is no need to add the suggested language to the purpose section of the final rule. In fact, inclusion of these procedures in the new planning regulations is why the procedures proposed at § 294.13 have been removed from this rule.

Summary of Changes in Section 294.10 of the Final Rule. Having considered the comments received, the agency has retained the purpose section with two changes: (1) The sentence has been reorganized to emphasize that the goal of providing lasting protection of roadless areas must occur within the context of multiple-use management; and (2) the agency has removed the reference to ''other unroaded areas'' in this section, since, as already noted, the new land and resource management planning regulations at 36 CFR part 219 provide for evaluation of these areas at the time of land and resource management plan revision (FEIS Vol. 1, 1–16).

Proposed Section 294.11 Definitions. This section set out the terms and definitions used in the proposed rule. The proposed rule contained definitions for the following terms: ''inventoried roadless areas, responsible official, road, classified road, unclassified road, road construction, road maintenance, road reconstruction, (road) realignment, (road) improvement, (road) rebuilding, unroaded area, unroaded portion of an inventoried roadless area.''

Comment on ''Inventoried Roadless Area'' Definition. Some respondents requested a modification of the definition for ''inventoried roadless area'' to include ''undeveloped areas of 1,000 acres and larger'' rather than ''undeveloped areas exceeding 5,000 acres.'' Others thought that including references to the minimum criteria for wilderness made the definition too restrictive, eliminating otherwise deserving areas from protection. Some expressed confusion over which inventories were used to determine inventoried roadless areas, and the possibility of error in identifying inventoried roadless areas.

Response. The proposed definition of inventoried roadless area was based on a group of roadless areas that were evaluated for wilderness consideration beginning in the 1970's and through subsequent planning efforts. With the publication of the DEIS and now the FEIS, the agency can now define these inventoried roadless areas as those areas identified in the set of maps contained in Volume 2 of the FEIS or subsequent revisions. These maps are maintained at the national headquarters of the Forest Service and are the official maps for the final rule. In the event a modification to correct any clerical, typographical, or other technical error is needed, the change will be made to the national headquarters maps and corrected copies of the maps made available to other administrative units. This definition does not apply to future areas that may be inventoried for wilderness consideration or other purposes. This modification, which removed the historical context for the definition of inventoried roadless area, has been included in the final rule.

Comment on ''Unroaded Area'' Definition. The identification of unroaded areas other than those already inventoried was a major issue. It was unclear to some respondents whether the presence of unclassified roads would be a factor in determining whether an area qualified as an unroaded area. Others thought that the definition of ''unroaded area'' should not include unclassified roads because such areas could not foster isolation, independence, or an undisturbed setting. Others suggested that these issues are better resolved through local land management planning. The public suggested various criteria and processes for the protection and management of these other unroaded areas.

Response. These suggestions were considered under procedural alternatives A through D in the DEIS. Since the comment period on the DEIS closed, the consideration of other unroaded areas has been addressed in the context of the final planning regulations at 36 CFR part 219. The agency agreed with the respondents who believed these types of planning issues were more appropriately addressed in the context of the planning rule and local land management planning. Thus, comments on how to consider and manage these other unroaded areas were considered in the preparation of the planning rule. As explained in the discussion of the agency's response to proposed § 294.13

later in this preamble, the provisions of the proposed rule relevant to unroaded areas have been removed. Therefore, the term ''unroaded area'' is no longer needed.

Comment on ''Responsible Official'' Definition. Some respondents wanted to know whether the responsible official for activities within an inventoried roadless area would be a District Ranger, Forest Supervisor, or Regional Forester.

Response. The appropriate responsible official, as defined in the proposed rule, depends on the decision under consideration. For example, District Rangers often make decisions regarding trail construction, special use authorizations, and wildlife habitat improvement projects. Forest Supervisors typically make decisions on major developed recreation sites, large timber sales, and ski area developments. This rule does not alter existing delegations of authority for Forest Service responsible officials. Because the scope of a proposed decision determines who will make the decision, the definition of ''responsible official'' must be broad enough to embrace the various possibilities. Therefore, the final rule retains, without change, the definition in the proposed rule.

Comment on ''Road'' Definition. Respondents expressed concern that the definition of a road was ambiguous and failed to recognize the primitive travelways used by motorized recreationists. Some respondents were concerned that the definition indicated permission for the construction of a travelway over 50 inches wide for off-road vehicles if the road was determined to be a trail. Other respondents thought that the definition of classified roads should include Revised Statute (R.S.) 2477 roads.

Response. For agency consistency, this final rule includes the same definitions of ''road,'' ''classified road,'' ''unclassified road,'' and ''temporary road'' that are contained in the National Forest System Road Management regulations (36 CFR part 212) and policy (Forest Service Manual 7700 and 7710) transmitted on January 4, 2001 for publication in the **Federal Register**. Based on consideration of public comment received on the road management proposal, these definitions were revised for clarity and a definition for ''temporary road'' was added.

A trail is established for travel by foot, stock, or trail vehicle, and can be over, or under, 50 inches wide. Nothing in this paragraph as proposed was intended to prohibit the authorized construction, reconstruction, or maintenance of motorized or non-motorized trails that are classified and managed as trails pursuant to existing statutory and regulatory authority and agency direction (FSM 2350). Nor was anything in this paragraph intended to condone or authorize the use of user created or unauthorized roads or trails. These decisions are made subject to existing agency regulations and policy and that intent has been retained in the final rule.

Future claims and existing rights for R.S. 2477 roads would not be affected by this rule. The agency recognizes valid R.S. 2477 rights-of-way. However, the validity of R.S. 2477 assertions must be evaluated on a case-by-case basis. Therefore, there is no need to modify the definition of classified road for this purpose.

Comment on Road Management Terms. Some respondents thought the definitions of ''road construction,'' ''maintenance,'' ''reconstruction,'' ''realignment,'' ''improvement,'' and ''rebuilding'' were confusing. Others wanted clarification on whether the terms applied only to classified roads, or to unclassified roads as well.

Response. As previously noted in this preamble, this final rule includes the definitions of road management terms adopted in the final National Forest System Road Management Rule and policy. The definition of ''rebuilding'' has been removed; the definition of ''road'' has expanded to include ''temporary road;'' and the other terms were revised in the final road management policy and are used verbatim in this rule for consistency.

Comment on ''Unroaded Portion of an Inventoried Roadless Area'' Definition. Many respondents considered the term and definition of ''unroaded portion of an inventoried roadless area'' confusing and remarked that they did not understand how it would be applied. In response to the identified preferred alternative in the FEIS, which would have applied the prohibitions to developed portions of inventoried roadless areas, respondents questioned why the agency would seek to protect roadless area values and characteristics in areas that have already been roaded and had timber harvest, thereby negating the very characteristics this rule seeks to protect.

Response. One of the primary objectives of this rulemaking was to resolve the longstanding controversies surrounding management of inventoried roadless areas. Without additional clarification, the definition of ''unroaded portion of an inventoried roadless area'' could have begun a new round of land management plan inventories and controversy about how to identify the boundary between the roaded and unroaded portions of these areas. This had the potential to increase rather than reduce the number of appeals and lawsuits surrounding inventoried roadless area management.

The agency agreed that the terminology and definition in the proposed rule were confusing. Therefore, it proposed in the FEIS eliminating this definition and applying the prohibitions to the entire area within an inventoried roadless area boundary.

To resolve the agency's concern about extending the controversy to future land management planning and to address the public concern about precluding timber harvesting in the portions of inventoried roadless areas that no longer possess roadless characteristics, § 294.13(b)(4) has been added. This paragraph allows timber to be cut, sold, or removed in the portions of inventoried roadless areas where roadless values and characteristics have been substantially altered due to road construction and subsequent timber harvest after the area was inventoried. No new road construction would be allowed. Decisions on whether or not an inventoried roadless area's characteristics have been substantially altered would occur during project planning and decisionmaking.

In response to the proposed rule, some respondents questioned why the agency would only exempt those portions developed after an area was inventoried, rather than exempting all developed portions regardless of when the road construction and timber harvest occurred. Some inventoried roadless areas, particularly those in the East, contained roads at the time of their inventory and timber may also have been harvested in these areas. However, the agency assumes that these prior existing developments and activities did not substantially alter the areas' roadless values and characteristics, or they would not have been inventoried for possible wilderness consideration.

For the reasons described, the term ''unroaded portion of an inventoried roadless area'' is no longer necessary and has been removed from the definitions in the final rule.

Comment on ''Roadless Area Characteristics.'' Some respondents wanted additions to the list of roadless area characteristics identified in proposed § 294.13(a), more specific characteristics for each inventoried roadless area, clarification as to their meaning, and to know how they would be used in the evaluation of inventoried roadless areas and unroaded areas during forest plan revision.

Response. Although the term ''roadless area characteristics'' was not defined in the proposed rule, proposed § 294.13 did include the list of characteristics. While proposed § 294.13 was not retained in the final rule for reasons described in the section of this preamble entitled ''Consideration of Roadless Area Conservation During Forest Plan Revision,'' the roadless area characteristics remain fundamental to the environmental analysis of the alternatives considered in this rulemaking and are critical to evaluating whether trees may be cut, removed, or sold from inventoried roadless areas pursuant to the provisions at § 294.13(b). For these reasons, the list of roadless area characteristics has been reformatted with minor changes for clarification and added to the definitions in § 294.11 of the final rule.

The definition of roadless area characteristics includes ''other locally identified unique characteristics'' to capture unique characteristics specific to individual inventoried roadless areas identified during local land management planning. Therefore, it is not necessary to identify, in this rule, characteristics for each inventoried roadless area or to add to the list in the definition. A more detailed description of these characteristics is in the section of this preamble entitled ''Roadless Area Values and Characteristics''.

Summary of Changes in § 294.11 of the Final Rule. The definitions section of the final rule reflects the preceding responses to comments received. Revisions have been made in the road management definitions included in § 294.11 to achieve consistency with the final National Forest System Road Management Rule as well as with the provisions of the final National Forest System Land and Resource Management Planning Rule. The terms ''unroaded portion of an inventoried roadless area'' and ''unroaded area'' were removed from the definitions. The first sentence was removed from the proposed rule's definition of ''inventoried roadless area'' because, while the sentence provided historical context, it was not necessary for the definition. The definition of ''roadless area characteristics'' has been added.

Proposed Section 294.12. Prohibition on road construction and reconstruction in inventoried roadless areas. This section of the proposed rule identified the road construction and reconstruction prohibitions, and exemptions and exceptions to the prohibitions. Paragraph (a) of proposed § 294.12 prohibited road construction and reconstruction in the unroaded portions of inventoried roadless areas, except for the circumstances listed in proposed paragraphs (b)(1) through (b)(4) and paragraph (c).

Comment on Agency Authority. The agency received many comments questioning whether the Forest Service had the authority to prohibit road construction through this rulemaking process, and whether the proposed rule was in conflict with existing environmental and land management laws and policies.

Response. The Forest Service routinely makes decisions to construct or not construct roads for a variety of purposes. The Secretary has clear authority to promulgate this rule, and this rule does not conflict with existing law and policy. The foundation for any exercise of power by the Federal government is the United States Constitution. The Constitutional provision that provides authority for management of public lands is the Property Clause (Article IV, Section 3). The Property Clause states that Congress has the power to dispose of and make all needful rules and regulations respecting land or other property belonging to the United States. Using this authority, Congress entrusted the Secretary of Agriculture with broad powers to protect and administer the National Forest System by passing laws, such as the Organic Administration Act of 1897 (the Organic Act), the Multiple-Use Sustained-Yield Act of 1960 (MUSYA), and the National Forest Management Act of 1976 (NFMA).

The duties that Congress assigned to the Secretary include regulating the occupancy and use of National Forest System lands and preserving the forests from destruction (16 U.S.C. 551). Through the MUSYA, Congress directed the Secretary to administer the National Forest System for multiple-use and sustained-yield of renewable resources without impairment of the productivity of the land (16 U.S.C. 528–531), thus establishing multiple-use as the foundation for management of national forests and grasslands. These multiple uses include outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The statute defines ''multiple use'' broadly, calling for management of the various uses in the combination that will best meet the needs of the American people (16 U.S.C. 531). Under this framework, courts have recognized that the MUSYA does not envision that every acre of National Forest System land be managed for every multiple use, and does envision some lands being used for less than all of the resources. As a consequence, the agency has wide discretion to weigh and decide the proper uses within any area (*Wind-River Multiple-use Advocates* v. *Espy,* 835 F. Supp. 1362, 1372 (D.Wyo.1993)).

In passing the MUSYA, Congress also affirmed the application of sustainability to the broad range of resources the Forest Service manages, and did so without limiting the agency's broad discretion in determining the appropriate resource emphasis and mix of uses. Some of the agency's past decisions have been challenged in court, leading to judicial decisions interpreting the extent of Forest Service discretion, or judgment, in managing National Forest System lands. Courts have routinely held that the Forest Service has wide discretion in deciding the proper mix of uses within any area of National Forest System lands. In the words of the Ninth Circuit Court of Appeals, the agency's authority pursuant to the MUSYA ''breathes discretion at every pore.'' (*Perkins* v. *Bergland*, 608 F.2d 803, 806 (9th Cir.1979)).

The NFMA reaffirmed multiple-use and sustained-yield as the guiding principles for land management planning of National Forest System lands (16 U.S.C. 1600, 1604). Together with other applicable laws, the NFMA authorizes the Secretary of Agriculture to promulgate regulations governing the administration and management of the National Forest Transportation System (16 U.S.C. 1608) and other such regulations as the Secretary determines necessary and desirable to carry out the provisions of the NFMA (16 U.S.C. 1613). These laws complement the long-standing authority of the Secretary to regulate the occupancy and use of the National Forest System (16 U.S.C. 551).

Comment on National Prohibitions vs. *Local Decisionmaking.* Many respondents supported the proposed national prohibition on new road construction in inventoried roadless areas. Other respondents felt there should not be a national prohibition because this would eliminate the option of making local decisions based on public input. Others felt the decisions regarding construction of roads in inventoried roadless areas should be made when forest plans are revised.

Response. The agency has addressed this issue in detail at the outset of this final rule. At the national level, Forest Service officials have the responsibility to consider the ''whole picture'' regarding the management of the National Forest System, including inventoried roadless areas. Local land management planning efforts may not always recognize the national significance of inventoried roadless areas and the values they represent in an increasingly developed landscape. If

management decisions for these areas were made on a case-by-case basis at a forest or regional level, inventoried roadless areas and their ecological characteristics and social values could be incrementally reduced through road construction and certain forms of timber harvest. Added together, the nation-wide results of these reductions could be a substantial loss of quality and quantity of roadless area values and characteristics over time.

On many national forests and grasslands, roadless area management has been a major point of conflict in land management planning. The controversy continues today, particularly on most proposals to harvest timber, build roads, or otherwise develop inventoried roadless areas. The large number of appeals and lawsuits, and the extensive amount of congressional debate over the last 20 years illustrates the need for national direction and resolution and the importance many Americans attach to the remaining inventoried roadless areas on National Forest System lands (FEIS Vol. 1, 1–16). These disputes are costly in terms of both fiscal resources and agency relationships with communities of place and communities of interest. Based on these factors, the agency decided that the best means to reduce this conflict is through a national level rule.

Comment on Access. The agency received many comments questioning how the proposed rule would affect access to lands that the agency does not manage, such as State lands or private inholdings, and access pursuant to the General Mining Law of 1872.

Response. This rule does not affect a State's or private landowner's right of access to their land. The proposed rule did not close any roads or off-highway vehicle (OHV) trails. The proposed rule provided for the construction and reconstruction of roads in inventoried roadless areas where needed pursuant to existing or outstanding rights, or as provided for by statute or treaty, including R.S. 2477 rights, access to inholdings under the Alaska National Interest Lands Conservation Act (ANILCA) provisions, or circumstances where a valid right-of-way exists.

The most common right of access to non-federally owned property surrounded by National Forest System lands is a road constructed or reconstructed on those National Forest System lands. The final rule at § 294.12(b)(3) provides for construction or reconstruction of a road in an inventoried roadless area ''if the Responsible Official determines that * * * a road is needed pursuant to reserved or outstanding rights, or as provided for by statute or treaty.'' For example, the ANILCA provides a landowner a right of access across National Forest System lands in certain circumstances, and this rule does not amend or modify that statute.

Title 36 part 251 of the Code of Federal Regulations implements the ANILCA access provisions and sets forth the procedures by which landowners may apply for access across National Forest System lands; this rule does not amend or modify that regulation. Access to non-Federal land does not have to be a road in all cases, nor does it have to be the most economical, direct, or convenient for the landowner, although the agency tries to be sensitive to the cost in time and money to the inholder. The cost to construct or reconstruct road access to non-Federal lands is usually the responsibility of the inholder, not the Forest Service. During the application process for such access, applicable laws, such as the National Environmental Policy Act and the Endangered Species Act, still must be considered.

Access for the exploration of locatable minerals pursuant to the General Mining Law of 1872 is not prohibited by this rule. Nor is reasonable access for the development of valid claims pursuant to the General Mining Law of 1872 prohibited. In some cases, access other than roads may be adequate for mineral activities. This access may include, but is not limited to, helicopter, road construction or reconstruction, or non-motorized transport. Determination of access requirements for exploration or development of locatable minerals is governed by the provisions of 36 CFR part 228.

Comments on Effect on Fire Suppression. Numerous respondents expressed concern with the effect of a road construction prohibition on fire fighter safety and access to suppress wildland fires.

Response. Proposed § 294.12(b)(1) allowed road construction and reconstruction in inventoried roadless areas when a road is needed to protect public health and safety in cases of an imminent threat of flood, fire, or other catastrophic event. In addition, using such suppression resources as smokejumpers and fire crews delivered by helicopters, the current fire suppression organization has been effective in suppressing at a small size approximately 98% of wildland fire starts in inventoried roadless areas. The agency also typically prioritizes fighting roadless and wilderness fires lower than fighting fires in more accessible and populated areas. The Agency has a long history of successfully suppressing fires in inventoried roadless areas and this high level of suppression performance is expected to continue. Furthermore, the agency rarely builds new roads to suppress fires. Building roads into inventoried roadless areas would likely increase the chance of human-caused fires due to the increased presence of people. Fire occurrence data indicates that prohibiting road construction and reconstruction in inventoried roadless areas would not cause an increase in the number of acres burned by wildland fires or in the number of large fires (FEIS Vol. 1, 3–115).

Comment on Including Other Unroaded Areas. Some respondents asserted that prohibitions should be applied to all roadless areas, not just inventoried roadless areas.

Response. The agency had adequate information to assess the effects of implementing the prohibition of road construction and limited timber harvesting in inventoried roadless areas. There was not sufficient information to make a decision regarding other uninventoried unroaded areas. Furthermore, the agency decided that these uninventoried unroaded areas would be better evaluated in the context of the new planning regulations at 36 CFR part 219.

Comment on Relationship to Other Rulemakings. Some respondents have questioned whether the agency has adequately integrated the decision to prohibit road construction and timber harvesting in inventoried roadless areas with other agency rulemaking efforts.

Response. The objective of conserving inventoried roadless areas reflects current scientific understanding of the importance of inventoried roadless area ecosystems and changing values of society as evidenced by comments received on this proposal.

This final roadless area conservation rule is entirely consistent with other Forest Service rulemaking and policy efforts, including the agency's final planning rule at 36 CFR part 219 (November 9, 2000; 65 FR 67514) and newly adopted National Forest System Road Management regulations (36 CFR part 212) and policy (Forest Service Manual 7700 and 7710). It is also consistent with the report of Secretaries Babbitt and Glickman to the President, *Managing the Impacts of Wildfire on Communities and the Environment* (September 8, 2000), the agency's *Protecting People and Sustaining Resources in Fire-Adapted Ecosystems: A Cohesive Strategy* (November 9, 2000; 65 FR 67480), and ongoing efforts to reduce the risk of fire to communities and the environment.

The planning rule provides the overall framework for planning and management of the National Forest System. No provisions in the Roadless Area Conservation rule would require land management or project planning, although managers may decide to initiate plan revisions. However, this final rule does complement the key sustainability, science, and spatial decisionmaking issues raised by the planning rule.

The planning rule also requires that during the plan revision process, or at other times as deemed appropriate, the responsible official must identify and evaluate inventoried roadless areas and unroaded areas and then determine which inventoried roadless areas and unroaded areas warrant additional protection and the level of protection to be afforded. This provision is similar to the procedural requirements proposed in May 2000, as part of the proposed Roadless Area Conservation Rule. Given their inclusion in the final planning rule, the procedural provisions have been removed from this final rule. As disclosed in the DEIS, the proposed procedures do not directly result in adverse physical or biological environmental effects, nor do the procedures cause irreversible or irretrievable resource commitments (DEIS Vol. 1, 3–223). The FEIS disclosed the combined effects of the final planning rule and the final roadless rule as being complementary, not additive (FEIS Vol. 1, 3–397; see also 65 FR 67529).

The National Forest System Road Management regulations and policy are designed to make the agency's existing road system more safe, responsive to public needs, environmentally sound, and affordable to manage. Elements of the regulation and policy requiring planning would be completed using the new planning rules. For example, under the road management policy, national forests and grasslands would have to complete an analysis of their existing road system and then incorporate this analysis into their land management plans. Consistent with the planning rule, this would be accomplished by using a science-based analysis procedure and by working cooperatively with other agency partners and the public.

Together, these requirements ensure that roadless areas and their important social and ecological characteristics will be conserved for present and future generations based on the principles of sustainability, sound science, and collaboration. The Forest Service has coordinated development of each of these rulemakings to ensure that the rules are integrated and consistent. In addition, consistency in the definitions and program emphases has been assured. The resulting rulemaking efforts efficiently align priorities and resources to implement the agency's statutory responsibilities (FEIS Vol. 1, 1–18 to 1–20).

Comment on Application to the Tongass National Forest. The agency received many comments regarding the Tongass National Forest. Many respondents stated that the Tongass should not be exempt from the provisions of the proposed rule. Others, concerned that local communities had already experienced substantial social and economic effects due to the recent revision of the Tongass Land and Resource Management Plan and other factors, thought that the Tongass should be exempt from the provisions of the proposed rule. Some respondents stated that the Forest Service should defer action on the Tongass National Forest until the next plan revision.

Response. In both the DEIS and FEIS, using the best available science and data, the agency has considered the alternatives of exempting and not exempting the Tongass National Forest, as well as deferring a decision per the proposed rule. Social and economic considerations were key factors in analyzing those alternatives, along with the unique and sensitive ecological character of the Tongass National Forest, the abundance of roadless areas where road construction and reconstruction are limited, and the high degree of ecological health. In developing the proposed action, the agency sought to balance the extraordinary ecological values of the Tongass National Forest against the needs of the local forest dependent communities in Southeast Alaska.

With the recent closure of pulp mills and the ending of long-term timber sale contracts, the timber economy of Southeast Alaska is evolving to a competitive bid process. About two-thirds of the total timber harvest planned on the Tongass National Forest over the next 5 years is projected to come from inventoried roadless areas. If road construction were immediately prohibited in inventoried roadless areas, approximately 95 percent of the timber harvest within those areas would be eliminated (FEIS Vol. 1, 3–202).

The Tongass National Forest is part of the northern Pacific coast ecoregion, an ecoregion that contains one fourth of the world's coastal temperate rainforests. As stated in the FEIS, the forest's high degree of overall ecosystem health is due to its largely undeveloped nature including the quantity and quality of inventoried roadless areas and other special designated areas. Alternatives that would immediately prohibit new road construction and timber harvest in all inventoried roadless areas would most effectively protect those values. Other alternatives that exempt, delay, or limit the application of the prohibitions would offer less protection. The environmental impacts of these alternatives are disclosed in Chapter 3 of the FEIS.

The proposed rule would have deferred a decision on whether or not the prohibitions should be applied to the Tongass National Forest until April 2004. This would have allowed an adjustment period for the timber program in Southeast Alaska to occur under provisions of the 1999 Record of Decision for the Tongass Land and Resource Management Plan Revision, but would not have assured long-term protection of the Forest's unique ecological values and characteristics.

In response to public comments, an optional social and economic mitigation measure was considered under the Tongass Not Exempt alternative that would require implementation of the final rule on the Tongass, but delay this implementation until April 2004, to provide a transition period for local communities to adjust to changes that would occur when the prohibitions take effect.

The final rule applies immediately to the Tongass National Forest but adopts a mitigation measure that both assures long-term protection and a smooth transition for forest dependent communities. The final rule provides that the prohibitions do not apply to road construction, reconstruction, and the cutting, sale or removal of timber from inventoried roadless areas on the Tongass National Forest where a notice of availability for a draft environmental impact statement for such activities has been published in the **Federal Register** prior to the date of publication of this rule in the **Federal Register**. This mitigation measure allows an adjustment period for the timber program in Southeast Alaska, but will also assure more certain long-term protection of the Forest's unique ecological values and characteristics.

Allowing road construction and reconstruction on the Tongass National Forest to continue unabated would risk the loss of important roadless area values. The agency had sufficient information to analyze the environmental, social, and economic effects of prohibiting road construction, reconstruction, and limited timber harvesting on the Tongass National Forest and did not see the value in

deferring the issue to further study prior to making a decision.

Moreover, this course of action is consistent with the provisions of the Tongass Timber Reform Act (TTRA). While the TTRA urges the Forest Service to ''seek to meet market demand'' for timber from the Tongass National Forest, the TTRA does not envision an inflexible harvest level, but a balancing of the market, the law, and other uses, including preservation. (*Alaska Wilderness Recreation and Tourism Ass'n* v. *Morrison, 67 F.3d 723, 731 (9th Cir. 1995)).* The record for this rulemaking fully supports the imposition of the prohibitions on the Tongass National Forest. However, in inventoried roadless areas the Tongass National Forest has 261 MMBF of timber under contract and 386 MMBF under a notice of availability for a DEIS, FEIS, or Record of Decision. In addition, the Tongass has 204 MMBF available in roaded areas that is sold, has a Record of Decision, or is currently in the planning process. This total of 851 MMBF is enough timber volume to satisfy about 7 years of estimated market demand.

Based on the analysis contained in the FEIS, a decision to implement the rule on the Tongass National Forest is expected to cause additional adverse economic effects to some forest dependent communities (FEIS Vol. 1, 3–326 to 3–350). During the period of transition, an estimated 114 direct timber jobs and 182 total jobs would be affected. In the longer term, an additional 269 direct timber jobs and 431 total jobs may be lost in Southeast Alaska. However, the Department believes that the long-term ecological benefits to the nation of conserving these inventoried roadless areas outweigh the potential economic loss to those local communities and that a period of transition for affected communities would still provide certain and long term protection of these lands.

The special provision at § 294.14(d) of the final rule allowing road construction, reconstruction, and the cutting, sale, or removal of timber from inventoried roadless areas on the Tongass National Forest where a notice of availability of a draft environmental impact statement for such activities has been published in the **Federal Register** prior to the date of publication of this rule in the **Federal Register** is considered necessary because of the unique social and economic conditions where a disproportionate share of the impacts are experienced throughout the entire Southeast Alaska region and concentrated most heavily in a few communities.

Comment on Exceptions and Conflict with Purpose of the Rule. Another major issue was whether there should be exemptions or exceptions from the prohibitions. A few respondents stated that the exceptions and exemptions to the prohibitions set out in proposed § 294.12 conflicted with the stated purpose of the rule. A summary of the major comments on this issue and the agency's responses follow.

Response. The exceptions to the prohibitions on road construction in inventoried roadless areas found at proposed § 294.12 responded to specific circumstances where the prohibitions might conflict with legal responsibilities to provide for public health and safety or environmental protection (FEIS Vol. 1, 2–13 to 2–14). In some cases, the exceptions could result in effects contrary to the purpose stated in the proposed rule, but the agency determined that they were necessary to honor existing law or address social or economic concerns. While the exceptions and exemptions place limited restrictions on the application of the prohibition, the stated purpose of the rule remains valid. These exceptions were only relevant to FEIS action Alternatives 2 through 4, as Alternative 1 (no action) did not prohibit any activities.

The public health and safety exception at paragraph (b)(1) in the final rule applies only when needed to protect public health and safety in cases of an imminent threat of a catastrophic event that might result in the loss of life or property. It does not constitute permission to engage in routine forest health activities, such as temporary road construction for thinning to reduce mortality due to insect and disease infestation.

The exception in paragraph (b)(2) permits entry for activities undertaken pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and other identified statutes. An example of an allowable CERCLA activity is mitigating the leaching of toxic chemicals from an abandoned mine.

Paragraph (b)(3) permits the construction and reconstruction of a road pursuant to rights granted in statute or treaty, or pursuant to reserved or outstanding rights. These include, but are not limited to, rights of access provided in ANILCA, highway rights-of-way granted under R.S. 2477, and rights granted under the General Mining Law of 1872, as amended. Rights of reasonable access for mineral exploration and development of valid claims would be governed by the General Mining Law under any of the alternatives considered in the FEIS. These rights of access may or may not include new road construction as discussed elsewhere in this preamble. Therefore, rights of access to locatable mineral exploration and development of valid claims would not be affected by the final rule or any of the alternatives analyzed in the FEIS (FEIS Vol. 1, 3–254).

Paragraph (b)(4) in the final rule permits realignment of an existing classified road when it is found to cause irreparable resource damage because of its design, location, use, or deterioration. The road must be essential for public or private access, natural resource management, or public health and safety. For the realignment exception to apply, the original road must have caused the resource damage and the resource damage cannot be corrected or mitigated by maintenance alone. Following realignment, treatment of the old roadway may include a variety of methods, such as decommissioning or by converting it to another use. An example of a situation where realignment may be appropriate is the presence of a classified road contributing sediment to a stream that is important spawning or rearing habitat for an endangered species of fish, and the sediment is having an adverse impact on the fish or its habitat. Realignment of the classified road and decommissioning the old roadway to eliminate the sediment caused by the old roadway is appropriate.

After considering the public comment on the proposed rule and conducting further analysis, three other exceptions were added to the final rule at § 294.12(b). New paragraph (5) is an exception to the prohibition to allow for reconstruction of a classified road if needed for safety based on accident experience or accident potential on that road. This exception allows for realignment or improvement in situations where road location or design is a threat to health or safety, and reconstruction would reduce that threat. New paragraph (6) was added to mitigate potential social and economic impacts in response to comments on the effects this rule might have on some State highway projects proposed as part of the National Highway System. These exceptions were not a major consideration in evaluating differences among the FEIS action alternatives because they apply to all of the prohibition alternatives. The agency considered other exemptions and exceptions, but eliminated them from detailed study (FEIS Vol. 1, 2–21 to 2–22).

An additional optional exception was considered in detail in the FEIS as a social and economic mitigation measure and was available for selection with any alternative. This exception would have allowed road construction or reconstruction where a road is needed for prospective mineral leasing activities in inventoried roadless areas (FEIS Vol. 1, 2–9). If road construction and reconstruction were allowed for all future mineral leasing, an estimated 59 miles of new roads could be constructed in inventoried roadless areas over the next five years. Road construction or reconstruction in support of future mineral leasing could continue at this level or in greater amounts into the foreseeable future. The agency estimates more than 10 million acres of inventoried roadless area could be roaded for exploration and development of leasable minerals, although the agency believes it is unlikely that more than a small percentage of these acres would contain minerals sufficient for economic development (FEIS Vol. 1, 3–250 to 260 and 313 to 321). Mineral leasing activities not dependent on road construction, such as directional (slant) drilling and underground development, would not be affected by the prohibition.

The Department has decided not to adopt the exception for future discretionary mineral leasing as identified in the FEIS because of the potentially significant environmental impacts that road construction could cause to inventoried roadless areas. Existing leases are not subject to the prohibitions. The Department has decided to adopt a more limited exception at 36 CFR 294.12(b)(7) to allow road construction needed in conjunction with the continuation, extension, or renewal of a mineral lease, on lands that were under lease by the Secretary of the Interior as of the date of publication of this rule in the **Federal Register**. Additionally, road construction needed in conjunction with a new lease may be allowed on these same lands if the lease is issued immediately upon expiration of the existing lease. The lessee would be required to start the process for issuance of a new lease prior to the expiration of the existing lease. Such road construction or reconstruction must be conducted in a manner that minimizes effects on surface resources, prevents unnecessary or unreasonable surface disturbance, and complies with all applicable lease requirements, land and resource management plan direction, regulations, and laws. Roads constructed or reconstructed pursuant to this paragraph must be obliterated when no longer needed for the purposes of the lease or upon termination or expiration of the lease, whichever is sooner.

This provision allows, but does not require, road construction and reconstruction. These decisions would be made through the regular NEPA process. For example, this paragraph does not supersede land management plan prescriptions that prohibit road construction. This exception only applies to lands in inventoried roadless areas that are currently under mineral lease. The agency has less than 1 million acres of high potential oil and gas currently under mineral lease. This provision maintains the status quo for entities that currently hold mineral leases, while at the same time limiting the potential impacts on roadless area characteristics within this identified set of lands.

Comment on Potential Misuse of Exceptions. Some respondents felt there should not be any exceptions to the prohibition on construction of roads in inventoried roadless areas, out of fear that the exceptions would be used in situations not intended. These respondents wanted to know who would review decisions granting the exceptions.

Response. The Department believes that exceptions to the prohibitions on road construction and reconstruction are warranted to address legal, social, economic, and environmental concerns. Projects proposed under any of the exceptions would still have to comply with all legal requirements and agency policy related to environmental analysis and public involvement. Depending on the specific circumstances of a particular exception, decisions would be subject to administrative appeal or internal review.

Comment on Multiple-Use Exception. Some respondents requested an additional exception to the road construction prohibition, whereby the Department would insert ''A road is needed to carry out the multiple-uses provided for in the authorities cited for these regulations.'' in § 294.12(b) of the proposed rule.

Response. The addition of the proposed exception would allow road construction in inventoried roadless areas for any multiple-use purpose, which would be counter to the purpose of protecting roadless areas.

Comment on Private Land and Utility Company Exceptions. Some respondents stated that the construction of roads should be allowed to access State or private lands and water diversions and dams. Utility companies expressed concern that they would be unable to access existing facilities in an emergency, such as a pipeline rupture or a transmission line toppled by a landslide, and that the exception at proposed paragraph (b)(1) should be expanded to accommodate access to utility facilities in order to ensure their safe operation.

Response. The proposed rule did not suspend or modify existing permits, contracts, or other legal instruments authorizing the use and occupancy of National Forest System lands. Existing roads or trails would not have been closed by the proposed rule, and existing rights of access were recognized. The final rule retains all of the provisions that recognize existing rights of access and use. Where access to these facilities is needed to ensure safe operation, a utility company may pursue necessary authorizations pursuant to the terms of the existing permit or contract. Additionally, the examples described by the utility companies could qualify for an emergency exception under paragraph (b)(1) of the final rule depending on local circumstances and risk to public health and safety.

Comment on Federal and State Highway Exceptions. Some respondents stated that the final rule should permit road construction, realignment, and reconstruction of Federal and State highways.

Response. In response to public comments, the agency has included an exception that would allow road projects funded under Title 23 of the United States Code (23 U.S.C. 317) to occur in inventoried roadless areas. The final rule at § 294.12(b)(6) allows for construction, reconstruction, or realignment of a Federal Aid Highway where the Secretary determines that the project is in the public interest or consistent with the purposes for which the land was reserved or acquired, is reasonable and prudent, and no other feasible alternative exists (FEIS Vol. 1, 2–9 to 2–14).

Summary of Changes in section 294.12 of the Final Rule. Paragraph (a) of the final rule has been revised consistent with the changes in the definitions of ''inventoried roadless areas'' and ''road'', to remove the phrases ''the unroaded portions of'' and ''This prohibition covers classified and unclassified roads,'' respectively.

Paragraph (b) in the final rule sets out certain limited exceptions to the prohibition on road construction and road reconstruction. The first four exceptions were adopted essentially as proposed with minor editing for clarity and three more exceptions were added.

Paragraph (c) of the proposed rule, which described the rule's application to the Tongass National Forest, has been removed. This change immediately applies the prohibitions in the rule to the Tongass National Forest, except as provided in a new paragraph applicable to the Tongass National Forest, which is added at § 294.14(d).

Proposed paragraph (d) is redesignated as paragraph (c) in the final rule. This paragraph permits maintenance activities for classified roads included in an inventoried roadless area, and is adopted essentially as proposed but with minor editing for clarity.

Final section 294.13. Prohibition on timber cutting, sale, or removal in inventoried roadless areas. The final rule adds a new prohibition on timber harvesting (the cutting, sale, or removal of timber): except for clearly defined, limited purposes; when incidental to the implementation of an activity not otherwise prohibited by this rule; for personal and administrative uses; or where roadless characteristics have been substantially altered in a portion of an inventoried roadless area due to the construction of a classified road and subsequent timber harvest. Both the road construction and subsequent timber harvest must have occurred after an area was designated an inventoried area. Even though this provision was not in the proposed rule, the DEIS analyzed timber harvesting prohibition alternatives for public comment and the FEIS identified a preferred alternative that included both timber harvesting and road construction prohibitions. Therefore, the public had sufficient opportunity to comment on this provision and there is adequate information to make a reasoned and informed decision.

Alternative 3 in the FEIS would prohibit timber harvesting except for stewardship and other limited purposes. Concerns over potential confusion of the interpretation of ''stewardship'' have led the agency to clearly define at § 294.13(b)(1) through (b)(4) the limited circumstances where the cutting, sale, or removal of timber in inventoried roadless areas is permitted. The final rule embodies Alternative 3, but, in contrast to the FEIS, the term ''stewardship'' does not appear in the final rule.

The cutting, sale, or removal of trees must be clearly shown through project level analysis to contribute to the ecological objectives described in § 294.13(b)(1), or under the circumstances described in paragraphs (b)(2) through (b)(4). Such management activities are expected to be rare and to focus on small diameter trees. Thinning of small diameter trees, for example, that became established as the result of missed fire return intervals due to fire suppression and the condition of which greatly increases the likelihood of uncharacteristic wildfire effects would be permissible.

Because of the great variation in stand characteristics between vegetation types in different areas, a description of what constitutes ''generally small diameter timber'' is not specifically included in this rule. Such determinations are best made through project specific or land and resource management plan NEPA analyses, as guided by ecological considerations such as those described below.

The intent of the rule is to limit the cutting, sale, or removal of timber to those areas that have become overgrown with smaller diameter trees. As described in the FEIS (Vol. 1, 3–76), areas that have become overgrown with shrubs and smaller diameter trees creating a fuel profile that acts as a ''fire ladder'' to the crowns of the dominant overstory trees may benefit ecologically from thinning treatments that cut and remove such vegetation. The risk of uncharacteristic fire intensity and spread may thus be reduced, provided the excess ladder fuels and unutilized coarse and fine fuels created by logging are removed from the site (FEIS Vol. 1, 3–91). Also, in some situations, cutting or removal of small diameter timber may be needed for recovery or conservation of threatened, endangered, proposed or sensitive species to improve stand structure or reduce encroachment into meadows or other natural openings.

In any event, all such determinations of what constitutes ''generally small diameter timber'' will consider how the cutting or removal of various size classes of trees would affect the potential for future development of the stand, and the characteristics and inter-relationships of plant and animal communities associated with the site and the overall landscape. Site productivity due to factors such as moisture and elevational gradients, site aspect, and soil types will be considered, as well as how such cutting or removal of various size classes of standing or down timber would mimic the role and legacies of natural disturbance regimes in providing the habitat patches, connectivity, and structural diversity critical to maintaining biological diversity. In all cases, the cutting, sale, or removal of small diameter timber will be consistent with maintaining or improving one or more of the roadless area characteristics as defined in § 294.11.

Comment on Scope of the Prohibitions. Many respondents urged the agency to expand the prohibitions to prohibit timber harvesting, mining, and other activities that harm the undeveloped characteristics of inventoried roadless areas.

Response. In preparing the FEIS, the scope of prohibited actions considered in detail was limited to road construction, road reconstruction, and timber harvesting, because these activities pose disproportionately greater risks of altering and fragmenting natural landscapes at regional and national scales (FEIS Vol. 1, 1–15 to 1–16). In addition, the agency can analyze potential social and ecological effects based on the five-year timber sale program of each national forest. Other uses, although potentially as harmful to roadless area values and characteristics, are not scheduled in such a fashion and are more appropriately reviewed through land and resource management planning.

The agency has decided to prohibit timber harvesting because it provides additional protection for roadless area characteristics beyond that provided by a prohibition on road construction alone. However, the agency agrees with those respondents who asserted that science-based forest management might require some level of vegetative management in inventoried roadless areas. Thus, the agency has decided to allow some timber harvesting for clearly defined purposes in the final rule at 294.13(b)(1) through (b)(4).

Comment on Wildlife Habitat Management. Many respondents, including some State wildlife management agencies, were concerned that a timber harvest prohibition would preclude all wildlife habitat management opportunities.

Response. As provided by final 294.13(b)(1), tree cutting for wildlife habitat improvement could proceed if it is designed to maintain or help restore ecosystem composition or structure to conditions within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period. This will allow the agency to manage for the full range of habitat types needed to support the diversity of native and desired non-native species.

Comments on Uncharacteristic Wildfire Effects. Of particular interest to many respondents because of the severity of the 2000 fire season, was how the agency would manage inventoried roadless areas to reduce the risk of uncharacteristic wildfire effects.

Response. The effects of uncharacteristic wildfires often include unnatural increases in wildfire size, severity, and resistance to control and the associated impacts to people and property. These uncharacteristic effects have been caused primarily by past wildfire suppression, and past timber harvesting and grazing practices. These have contributed to often-dramatic changes in some areas in wildfire frequency, size, and severity (FEIS Vol. 1, 3–72 to 3–73). The vegetative structure, density, and composition of these areas have changed when compared to less altered ecosystems (FEIS Vol. 1, 3–144).

The use of timber harvesting, as permitted by this rule, and other fuel management techniques will help maintain ecosystem composition and structure within its historic range of variability at the landscape scale. Treatment priorities will be consistent with those identified in the report Protecting People and Sustaining Resources in Fire-Adapted Ecosystems: A Cohesive Strategy (November 9, 2000; 65 FR 67480). These include wildland-urban interface areas, readily accessible municipal watersheds, and threatened and endangered species habitat. Since wildland-urban interface areas and readily accessible municipal watersheds rarely occur in or adjacent to inventoried roadless areas, most fire hazard reduction work would not begin in inventoried roadless areas for at least 20 years, the estimated time it would take to address the extremely hazardous fuel situations outside inventoried roadless areas (FEIS Vol. 1, 3–78). However, hazardous fuels treatment in inventoried roadless areas is not prohibited by this rule, so long as road construction or reconstruction is not necessary. Vegetative management would focus on removing generally small diameter trees while leaving the overstory trees intact. The cutting, sale, or removal of trees pursuant to 294.13(b)(1) must be clearly shown through project level analysis to contribute to the ecological objectives described. Such management activities are expected to be rare and to focus on small diameter trees. Thinning of small diameter trees, for example, that became established as the result of missed fire return intervals due to fire suppression and the condition of which greatly increases the likelihood of uncharacteristic wildfire effects would be permissible.

Summary of Changes in new section 294.13 of the Final Rule. The final rule adds a new prohibition on timber harvesting except for clearly defined, limited purposes, when incidental to the implementation of a management activity not otherwise prohibited by this rule; for personal or administrative use; or where roadless characteristics have been substantially altered in a portion of an inventoried roadless area due to the construction of a classified road and subsequent timber harvest. Paragraph (a) establishes a prohibition on timber cutting, sale, or removal in inventoried roadless areas except as provided in paragraph (b). Paragraph (b) makes clear that the cutting, sale, or removal of timber in inventoried roadless areas is expected to be infrequent, but allows timber cutting, sale, or removal as identified in paragraphs (b)(1) through (b)(4).

Paragraph (b)(1) allows generally small diameter timber to be cut, sold, or removed in inventoried roadless areas where it maintains one or more of the roadless area characteristics as defined in § 294.11 and: (1) improves habitat for threatened, endangered, proposed or sensitive species or (2) maintains or restores the characteristics of ecosystem composition and structure, such as to reduce uncharacteristic wildfire effects, within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period.

Paragraph (b)(2) allows timber cutting, sale, or removal in inventoried roadless areas when incidental to implementation of a management activity not otherwise prohibited by this rule. Examples of these activities include, but are not limited to trail construction or maintenance; removal of hazard trees adjacent to classified roads for public health and safety reasons; fire line construction for wildland fire suppression or control of prescribed fire; survey and maintenance of property boundaries; other authorized activities such as ski runs and utility corridors; or for road construction and reconstruction where allowed by this rule.

Paragraph (b)(3) allows timber cutting, sale, or removal for personal or administrative use as provided for at 36 CFR part 223. Personal use includes activities such as Christmas tree and firewood cutting. Administrative use includes providing materials for activities such as construction of footbridges and fences.

Paragraph (b)(4) allows the cutting, sale, or removal of timber where roadless characteristics have been substantially altered in a portion of an inventoried roadless area due to the construction of a classified road and subsequent timber harvest. The road construction and subsequent timber harvest must have occurred after the area was designated an inventoried roadless area and prior to the date of publication of this rule in the **Federal Register**. Timber may be cut, sold, or removed only in the substantially altered portion of the inventoried roadless area. This exception recognizes that road construction and timber harvesting in inventoried roadless areas may have altered the roadless characteristics to the extent that the purpose of protecting those characteristics cannot be achieved. Timber harvest should not expand the area already substantially altered by past management. This exception is subject to applicable laws, regulations, and land and resource management planning direction. Refer to the previous discussion in ''Comment on Unroaded Portion of an Inventoried Roadless Area'' in the ''Proposed § 294.11 Definitions'' section of this preamble for more information on this subject.

Proposed 294.13. Consideration of roadless area conservation during forest plan revision. This section of the proposed rule would have required the responsible official to evaluate the quality and importance of roadless area characteristics and determine whether and how to protect these characteristics in the context of multiple-use objectives during forest plan revision.

Comment on Integration with the Planning Rule. Respondents from a cross section of timber industry and business interests, State, county and Federal representatives, professional associations, and the public expressed concern that this section did not provide adequate direction on how to consider and implement the criteria and procedures during forest plan revision, leading to confusion over integration of this section with the proposed planning and road management rulemaking initiatives.

Response on Proposed Section 1294.13. The Department has decided that the appropriate place for considering protections for inventoried roadless areas, in addition to those in this rule, and protections for uninventoried unroaded areas is during the planning process pursuant to the new planning regulations at 36 CFR part 219, Subpart A.

The framework for planning allows for the development of issues leading to the proposal of special designations, and also gives ample opportunity for the public and others to collaborate on the issue at all levels of planning. Based on public comment, specific requirements for evaluating inventoried roadless areas and unroaded areas are included in § 219.9(b)(8) of the final planning rule (65 FR 67571) to emphasize that the

responsible official must evaluate these areas during the plan revision process.

The new planning regulations provide for consideration of roadless areas in the forest planning process in a fashion similar to that set out in the proposed rule at § 294.13. Based on the comments received and reasons stated previously, the Department has determined that those requirements are better considered in the context of 36 CFR part 219. Elimination of proposed § 294.13 from the final rule will not have a significant effect on the purpose or scope of the final rule or on the protections provided to inventoried roadless areas because evaluation of inventoried roadless areas and unroaded areas are now integrated into the final planning rule.

Proposed Section 294.14. Scope and applicability. Proposed paragraph (a) of this section of the proposed rule provided that existing contracts, permits, or other legal instruments authorizing the occupancy and use of National Forest System land would not be suspended or modified by the rule.

Comment on Existing Authorized Activities. Some respondents were concerned about the impact of the rule on special uses and requested clarification regarding the ability to construct or maintain roads in inventoried roadless areas to access electric power or telephone lines, pipelines, hydropower facilities, and reservoirs. Some suggested that proposed § 294.12(b)(3) be revised to read, ''A road is needed pursuant to reserved or outstanding rights or as permitted by statute, treaty or other authorities.''

Response. Section 294.14(a) of the proposed rule stated that the rule would not suspend or modify any existing permit, contract, or other legal instrument authorizing the use and occupancy of National Forest System lands. Existing authorized uses would be allowed to maintain and operate within the parameters of their current authorization, including any provisions regarding access. Adding the wording ''other authorities'' to this paragraph is not necessary as the term ''other legal instrument'' adequately covers other existing authorizations.

Under paragraph (a), road construction or reconstruction associated with ongoing implementation of special use authorizations would not be prohibited. For example, all activities anticipated and described in an authorized ski area's master plan, such as construction or maintenance of ski trails and ski runs, the use of over snow vehicles or off-highway vehicles necessary for ski area operations, including associated road construction, would not be prohibited even if a specific decision authorizing road construction has not been made as of the date of publication of this rule in the **Federal Register**. Likewise, activities necessary to a mineral lease authorization issued prior to the date of publication of this rule would not be prohibited even if a specific decision authorizing road construction has not been made as of the date of publication of this rule in the **Federal Register**. A phrase has been added to clarify that this paragraph only applies to permits, contracts, or other legal instruments issued before the date of publication of this rule in the **Federal Register**. The term ''revoke'' has been added to this provision to clarify that this final rule will not revoke existing permits, contracts, or other legal instruments.

Proposed § 294.14(b) made clear that the final rule would not require units to initiate land management plan amendments or revisions.

Comment on Land Management Plan Amendments. Some respondents commented that the proposed rule is a ''massive change'' in existing land management plan direction or land allocation, without amendment or revision of land management plans as required by the National Forest Management Act. Some respondents suggested that amendments were necessary in order to consider site-specific biological and socio-economic information.

Response. The Secretary has extensive rulemaking authority governing forest management and development of land management plans. Just as development and approval of land management plans must conform to existing laws and regulations, new laws or regulations can supersede land management plan management direction. Requiring ''conforming amendments'' to land management plans would be redundant of the rulemaking process.

Local responsible officials' discretion to initiate land and resource management plan amendments, as deemed necessary, would not be limited by this provision. There may be instances where a local responsible official elects to initiate amendment or revision of forest and grassland plans following final promulgation of this final rule. While the analysis undertaken at the national scale is sufficient for the prohibitions established pursuant to this rulemaking, the Department appreciates that additional management issues may need to be addressed, both within and outside of inventoried roadless areas. The local official is best positioned to assess whether any such adjustment is necessary. For example, although the local official is not free to re-examine the prohibitions established by this rule, it may be appropriate to consider amendments to land and resource management plans regarding plan decisions that guide the use of inventoried roadless areas in light of the final rule.

Forest Service officials have several mechanisms that allow for evaluation of forest and grassland plan implementation, including plan-specific monitoring provisions, the amendment and revision process, and project-level decisionmaking. A determination to amend or revise a land and resource management plan is based on a variety of factors. Forest Supervisors and Regional Foresters have substantial discretion in determining whether or not to initiate plan amendments or revisions.

In the early stages of forest plan amendment or revision, or any decisionmaking process involving land management practices, Regional Foresters, Forest Supervisors, and District Rangers must actively seek input and participation by State, local, and Tribal officials and other affected or interested parties. Therefore, this provision is retained without change in the final rule.

Paragraph (c), as proposed, provided that the regulation, if adopted, would not suspend or modify any decision made prior to the effective date of the final rule.

Comment on Effect on Project Planning. Some respondents questioned whether implementation of the rule would prohibit projects where planning is already underway. Most of the comments on this paragraph were related to current and future ski area development, although other land uses would be treated in a similar manner. Some respondents asserted that exemptions from the rule should include all lands or activities described in existing ski area special use permits or master development plans. Specifically listed were White Pass, Arapahoe Basin, Sierra at Tahoe, Pallavicini, Alleys Trails, Mammoth Mountain, June Mountain, Tamarack Resort and Cross Country Skiing Center, and Mammoth Snowmobile Adventures. Respondents also stated that the proposed Pelican Butte Ski Area and expansion of the Sipapu Ski Area should be allowed to continue their current planning processes and that the agency should also allow expansion of commercial recreation activities to benefit local people. Others took an opposing view, stating that the agency should not exempt from the rule any

new ski areas or expansion of any existing ski areas at Pelican Butte, Mount Ashland, Copper Creek, Sherwin, Beaver Creek, Mammoth Mountain, June Mountain, and others.

Response. Road construction and timber harvest for expansion of ski areas, resorts, or other recreation developments in inventoried roadless areas would be allowed under paragraph (a) as previously discussed, subject to existing Forest Service procedures, if special use permits are in existence prior to the date of publication of this rule in the **Federal Register** and proposed activities take place within the boundaries established by the special use authorization (FEIS Vol. 1, 3–226). The requirement that a permit be in existence prior to the effective date of this rule has been changed in the final rule to require that the permit be in existence prior to the date of publication of this rule in the **Federal Register**. This change was necessary because the effective date of this rule is delayed 60 days from the date of publication.

Road construction and timber harvest would also be allowed for new ski areas, or expansions of existing ski areas outside the existing special use permit boundaries, in inventoried roadless areas provided that the expansion or construction was approved by a signed Record of Decision, Decision Notice, or Decision Memorandum before the date of publication of the rule in the **Federal Register** (FEIS Vol. 1, 3–226). Under paragraph (c), project decisions for any activity made prior to the date of publication of the final rule in the **Federal Register** would be altered.

Summary of Changes in § 294.14 of the Final Rule. Under paragraph (a) of the final rule, road construction, road reconstruction, and timber harvest associated with ongoing implementation of special use authorizations are not prohibited. The term ''revoke'' and the date of publication of this rule in the **Federal Register** were added to clarify agency intent.

Paragraph (b) makes clear that the final rule would not require units to initiate land management plan amendments or revisions and is adopted without change.

Paragraph (c) states that project decisions made prior to the date of publication of the final rule in the **Federal Register** would not be altered. The term revoke was added to clarify agency intent. The requirement in the proposed rule that a project decision be in existence prior to the effective date of this rule has been changed in the final rule to require that the project decision be in existence prior to the date of publication of this rule in the **Federal Register**. This change was necessary because the effective date of this rule is delayed 60 days from the date of publication.

Proposed paragraph (d) was a ''severability'' or ''savings'' clause. This provision identifies the Department's intention that, in the event any provision is determined invalid, the remaining portions of the rule would remain in force. No comments were received on this provision; it has been redesignated as paragraph (f) in the final rule and retained without change.

A new paragraph (d) has been added to the final rule which provides that the prohibitions in the final rule do not apply to road construction, reconstruction, or the cutting, sale or removal of timber from inventoried roadless areas on the Tongass National Forest where a notice of availability for a draft environmental impact statement for such activities has been published in the **Federal Register** prior to the date of publication of this rule in the **Federal Register**. This mitigation measure allows an adjustment period for the timber program in Southeast Alaska, but will also assure the long-term protection of the Forest's unique ecological values and characteristics. Refer to the previous discussion in the section entitled, ''Comment on Application to the Tongass National Forest,'' in, ''Proposed § 294.12. Prohibition on road construction and reconstruction in inventoried roadless areas.''

To replace and serve the same purpose as proposed § 294.13(f), a new § 294.14(e) has been added to the final rule to address the recently adopted planning regulations at 36 CFR part 219, which require the responsible official to determine which inventoried roadless areas warrant additional protection. Consistent with the original proposal, this new paragraph (e) makes clear that, in determining whether additional protections are needed for any inventoried roadless area, the responsible official cannot reconsider or set aside the prohibitions established in § 294.12 or § 294.13.

What Other Issues Were Considered in the Final Environmental Impact Statement?

Environmental Effects. Another major issue among those who commented on the proposed rule and DEIS was the environmental effects of the alternatives on inventoried roadless area characteristics. It was also the most important consideration in selection of an alternative. The purpose and need for this proposed action is based on the premise that inventoried roadless areas have characteristics that should be conserved and maintained. Road construction, reconstruction, and timber harvesting are the activities most likely to harm the characteristics that the agency is seeking to protect. The FEIS documents the contribution of inventoried roadless area characteristics to watershed health and water quality, to biological strongholds for terrestrial and aquatic species, and to habitat for threatened, endangered, and sensitive species. The effects of road construction, reconstruction, and timber harvesting on those characteristics are also documented.

Additionally, some respondents commented on the discussion of spiritual values of inventoried roadless areas in chapter 3 of the DEIS. Some thought it was inappropriate to discuss spiritual values in an environmental analysis produced by the Federal government. Others thought these values were important to consider in the rulemaking process because inventoried roadless areas provided an important setting for their personal spiritual renewal. Reconciling divergent viewpoints on spiritual values is beyond the scope of this proposal. The decision for this rulemaking was not based on the beliefs or principles of one religion or another, but based on the science, policies and laws that guide the decisionmaking process.

Alternative 1 in the FEIS is the no action alternative and, if selected, would not have restricted activities in inventoried roadless areas. While it would not fund, authorize, compel, or carry out any activity in an inventoried roadless area, this alternative does have the greatest potential for adverse impact on the characteristics the agency seeks to protect. It allows the most roads to be constructed and reconstructed and the most timber to be harvested.

Action Alternatives 2, 3, and 4 in the FEIS all provide ecological benefits from prohibiting road construction and reconstruction. The major difference among these alternatives is that Alternative 2 does not restrict timber harvesting; Alternative 3 prohibits timber harvesting for commodity purposes, but allows timber harvesting for clearly defined purposes and circumstances; and Alternative 4 prohibits all timber cutting (except that which may be needed for protection or recovery of threatened, endangered, or proposed species). In alternatives 2, 3, and 4, personal and administrative use harvest, including firewood and Christmas tree cutting, would be permitted. Limited tree cutting could occur incidental to other management activities, such as trail construction or

maintenance, hazard tree removal adjacent to classified roads for public health and safety reasons, fire line construction for wildland fire suppression or control of prescribed fire, or survey and maintenance of property boundaries.

The preferred alternative in the FEIS would prohibit all timber harvest activities in inventories roadless areas except for clearly defined purposes. The final rule provides for the cutting, sale or removal of timber in substantially altered portions of inventoried roadless areas for any purpose as long as the activities do not require additional road construction or reconstruction. By allowing some additional level of timber harvest activity compared to the FEIS preferred alternative, there is an increase in the likelihood of related environmental impacts and decrease in the environmental benefits accrued through the more stringent prohibition in the preferred alternative.

The DEIS estimated that approximately 2.8 million of the 58.5 million acres of inventoried roadless areas had been roaded since the areas were designated as inventoried roadless areas. Some portion of these roaded areas had also been impacted by subsequent management activities facilitated by the road access. It is unknown exactly what portion of these 2.8 million acres has sustained sufficient road construction and timber harvest to substantially alter their roadless characteristics. The determination of whether roadless characteristics have been substantially altered is to be made following a site-specific evaluation. Before any project is authorized that allows the cutting, sale, or removal of timber in an inventoried roadless area, it will subject to site-specific analysis following existing laws and regulations.

Current timber harvesting practices have less impact on the environment than they have had in the past. Increased knowledge, new equipment and techniques, and the application of best management practices have helped to reduce the adverse environmental impacts of timber harvest activities. However, timber-harvesting practices still impact roadless area characteristics, contributing to the fragmentation of habitat and threatening their ability to function as biological strongholds, reference areas, and provide other roadless values.

The final rule allows timber harvesting of generally small diameter timber for limited purposes when it maintains or improves one or more roadless area characteristics and: (1) Improves threatened, endangered, proposed, and sensitive species habitat or (2) maintains or restores the characteristics of ecosystem composition and structure, such as to reduce the risks of uncharacteristic wildfire effects. The final rule also allows timber to be cut, sold, or removed where roadless characteristics have been substantially altered in a portion of an inventoried roadless area due to the construction of a classified road and subsequent timber harvest, and such road construction and subsequent timber harvest occurred after the area was designated an inventoried roadless area. Roadless area characteristics are identified in § 294.11 as: (1) High quality or undisturbed soil, water, and air; (2) sources of public drinking water; (3) diversity of plant and animal communities; (4) habitat for threatened, endangered, proposed, candidate, and sensitive species and for those species dependent on large, relatively undisturbed areas of land; (5) primitive, semi-primitive non-motorized, and semi-primitive motorized classes of dispersed recreation; (6) reference landscapes; (7) naturally appearing landscapes with high scenic quality; (8) traditional cultural properties and sacred sites; and (9) other locally identified unique characteristics (FEIS Vol. 1, 3–3 to 3–7).

Forest Dependent Communities. Impacts to forest dependent communities were a major issue among those who commented on the proposed rule and DEIS. Under Alternative 1 of the FEIS, the flow of goods and services would continue according to current policies and land management direction. Alternatives 2 through 4 could reduce future timber harvest, mineral exploration and development, and other activities such as ski area development in inventoried roadless areas. Communities with significant economic activities in these sectors could be adversely impacted. However, the effects on national social and economic systems are minor. For example, the total timber volume affected by this rule is less than 0.5 percent of total United States production, and the total oil and gas production from all National Forest System lands is currently about 0.4 percent of the current national production. None of the alternatives are likely to have measurable impacts compared to the broader social and economic conditions and trends observable at these scales, however the effects of the alternatives are not distributed evenly across the United States (FEIS Vol. 1, 3–326 to 3–350).

To reduce the economic impact of this decision, the Chief of the Forest Service will seek to implement one or more of the following provisions of an economic transition program for communities most affected by application of the prohibitions in inventoried roadless areas (FEIS Vol. 1, 2–14):

(1) Provide financial assistance to stimulate community-led transition programs and projects in communities most affected by application of the prohibitions in inventoried roadless areas;

(2) Through financial support and action plans, attract public and private interests, both financial and technical, to aid in successfully implementing local transition projects and plans by coordinating with other Federal and State agencies and;

(3) Assist local, State, Tribal and Federal partners in working with those communities most affected by the final roadless area decision.

Local Decisionmaking. The potential effect of the proposed rule on local involvement in decisionmaking was a major issue identified by many respondents to the DEIS. As described in both the DEIS and FEIS, Alternative 1 would allow local land managers the discretion on whether to construct or reconstruct roads or harvest timber for commodity purposes in inventoried roadless areas. Alternatives 2, 3, and 4 would remove the local decisionmaking authority only for these specific activities. All other management decisions regarding inventoried roadless areas would be made through National Forest System planning procedures. Under all alternatives, management decisions for unroaded areas would be made under the provisions of the new planning regulations at 36 CFR part 219. As explained in the ''*National Direction* v. *Local Decisionmaking*'' discussion, the agency has determined that national direction is needed to address the issues regarding road construction, reconstruction, and timber harvesting in inventoried roadless areas.

The Final Rule and Alternatives Considered

What Alternatives and Mitigation Measures Were Considered by the Agency?

The agency identified two methods to conserve the remaining inventoried roadless areas in the notice of intent for the proposed rule. The first method evaluated whether road construction, reconstruction, and timber harvest should be prohibited in inventoried roadless areas. The second method examined the establishment of procedures to evaluate and conserve roadless area characteristics during land

and resource management plan revisions. These methods were incorporated into the proposed rule and alternatives analyzed in the DEIS. Since publication of the proposed rule, the agency has published final Land and Resource Management Planning Regulations at 36 CFR part 219. The draft and subsequent final planning regulations also provided direction to integrate the consideration of roadless area characteristics into the amendment and revision procedures of land and resource management plans for National Forest System lands. This detailed direction in the final planning regulations eliminated the need for the procedures considered in the Roadless Area Conservation DEIS and proposed rule. Therefore, these procedures have been omitted from the FEIS and final rule.

Public comments on the notice of intent identified a variety of suggestions for alternatives, including different types and combinations of prohibitions, procedures, and exemptions (Summary of Public Comment for the Notice of Intent, Content Analysis Enterprise Team, 2000). Comments on the DEIS and proposed rule provided detailed ways in which to modify the alternatives (Summary of Public Comment for the DEIS, Content Analysis Enterprise Team, 2000).

Summaries of public comment on the notice of intent, proposed rule and the DEIS are part of the record for this rulemaking, and can be viewed at the agency's roadless website (*roadless.fs.fed.us*). The agency's response to comments on the DEIS and proposed rule can be found in Volume 3 of the FEIS. This information was used in forming the alternatives in the FEIS (Chapter 2), which frame the choices for this final rule.

With the removal of the procedures, the agency had two basic decisions to make, with four alternatives for each decision. The first decision was whether road construction, reconstruction, or timber harvesting should be prohibited in National Forest System inventoried roadless areas, or some combination of the three. The second decision was whether the proposed national prohibitions should be applied to the Tongass National Forest or modified to meet the unique situation on the Tongass.

Four alternatives, including a no action alternative, were developed to cover the range of possible prohibited activities in inventoried roadless areas consistent with the stated purpose and need. Four alternative ways of applying the prohibitions to the Tongass National Forest were developed as well (FEIS Vol. 1, 2–3 to 2–12). Various other alternatives were considered but eliminated from detailed study (FEIS Vol. 1, 2–15 to 2–22).

Prohibition Alternatives. Alternative 1 allowed road construction and reconstruction to continue, subject to existing land management plan prescriptions. There was no national restriction on timber harvesting. This was the no action alternative.

Prohibition Alternative 2 prohibited road construction and reconstruction activities, including temporary road construction, in inventoried roadless areas. There was no national restriction on timber harvesting.

Prohibition Alternative 3 prohibited road construction and reconstruction activities, including temporary road construction, in inventoried roadless areas. Timber harvesting was allowed for clearly defined stewardship purposes only, where harvesting could only be used when it maintained or improved roadless characteristics and: (1) improved habitat for threatened, endangered, proposed or sensitive species, (2) reduced uncharacteristic wildfire effects, or (3) restored ecological structure, function, process or composition. Timber harvest for commodity purposes was prohibited.

The definition of timber harvesting for stewardship purposes was reviewed and refined between the proposed rule and the FEIS to more clearly state the agency's intent and to ensure effective protection of roadless characteristics. In the DEIS, timber harvesting for stewardship purposes could be interpreted to accommodate any non-timber production resource management objective that required removal of forest vegetation. Many respondents were concerned about the agency's broad use of timber harvest for stewardship purposes on National Forest System lands. They believed that stewardship purpose timber harvest in inventoried roadless areas needed to be more clearly defined.

The agency agreed that it needed to clearly state the intended purposes for stewardship harvest in inventoried roadless areas. The FEIS identified the range of allowable objectives that are consistent with timber harvesting for stewardship purposes in inventoried roadless areas. In doing so, local decisions about timber harvesting within inventoried roadless areas must maintain or improve one or more roadless characteristics, while focusing on improving threatened, endangered, proposed, or sensitive species habitat; reducing the risk of uncharacteristic wildfire effects; or restoring ecological processes.

Alternative 4 prohibited road construction and reconstruction activities, including temporary road construction, in inventoried roadless areas. No timber cutting was allowed for stewardship or commodity purposes, except where it was necessary for the protection of threatened or endangered species.

Exceptions and Mitigation Measures. The agency identified an initial set of exceptions to the prohibition alternatives, as set out in the DEIS and proposed rule. The exceptions addressed the following circumstances where the prohibitions did not apply and are set out in the final rule at § 294.12(b)(1) through (b)(4). These include circumstances where a road is needed to: (1) protect public health and safety; (2) to conduct an environmental response action; (3) pursuant to reserved or outstanding rights or as provided for by statute or treaty; or (4) road realignment is needed to prevent irreparable resource damage by a classified road.

Based on comments received on the proposed rule and the DEIS, the agency developed and considered additional optional exceptions that mitigated the effects of the prohibition alternatives (FEIS Vol. 1, 2–8 to 2–9). These exceptions were available for selection as part of the final rule to reduce or eliminate undesirable social and economic impacts. Any or none of these optional exceptions could have been selected as part of the final rule. If selected, these exceptions would state that the responsible official may authorize road construction or reconstruction in inventoried roadless areas where: (1) reconstruction is needed to implement road safety improvements; (2) the Secretary determines that a Federal Aid Highway project is in the public interest or consistent with the purposes for which the land was reserved or acquired; or (3) a road is needed for prospective mineral leasing activities in inventoried roadless areas.

Tongass National Forest Alternatives. The second decision was to select one of the four alternatives created specifically for the Tongass National Forest (FEIS Vol. 1, 2–9). Based on public comments and the agency's decision to integrate procedures for evaluating roadless area characteristics into the planning rule, some of the Tongass alternatives presented in the DEIS were modified accordingly.

The Tongass Not Exempt alternative applied the same prohibition alternative to the Tongass National Forest that applied to the rest of National Forest System lands. An optional social and

economic mitigation measure was developed for the Tongass Not Exempt alternative that delayed implementation of the selected prohibition alternative on the Tongass National Forest until April 2004 in order to provide a transition period for communities most affected by changes that may result if this alternative were enacted.

The Tongass Exempt alternative did not apply a national prohibition to the Tongass National Forest. It allowed road construction and reconstruction on the Tongass to continue subject to existing land management plan prescriptions. Future proposals for road activities in inventoried roadless areas would be considered on a case-by-case basis.

The Tongass Deferred alternative postponed the decision on whether to apply prohibitions to the Tongass National Forest until April 2004, when an evaluation to determine whether the prohibitions against road construction and reconstruction should apply to any or all inventoried roadless areas would be conducted as part of the scheduled 5-year review of the April 1999 Tongass Land and Resource Management Plan.

The Tongass Selected Areas alternative applied the prohibitions on road construction and reconstruction within inventoried roadless areas located in certain land use designations (LUDs) identified in the Tongass Land and Resource Management Plan, specifically those of Old Growth Habitat, Semi-Remote Recreation, Remote Recreation, and LUD II. See Appendix E of Volume 1 of the FEIS for a complete description of these land use designations.

What is the Environmentally Preferred Alternative?

Under the National Environmental Policy Act, the agency is required to identify the environmentally preferred alternative (40 CFR 1505.2(b)). This is interpreted to mean the alternative that would cause the least damage to the biological and physical components of the environment, and, which best protects, preserves, and enhances historic, cultural, and natural resources (Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 FR 18026). Factors considered in identifying this alternative include: (1) fulfilling the responsibility of this generation as trustee of the environment for future generations, (2) providing for a productive and aesthetically pleasing environment, (3) attaining the widest range of beneficial uses of the environment without degradation, (4) preserving important natural components of the environment, including biodiversity, (5) balancing population needs and resource use, and (6) enhancing the quality of renewable resources.

The agency believes the alternative that best meets these objectives is Alternative 3 combined with the Tongass Not Exempt alternative, without any social or economic mitigation. Alternative 3 protects inventoried roadless areas from adverse environmental impacts associated with road construction, reconstruction, and timber harvesting for commodity purposes, as identified in Chapter 3 of the FEIS.

Alternative 4, by prohibiting timber cutting of any kind (except for protection or recovery of threatened, endangered, and proposed species), does not allow for the array of vegetation management potentially necessary to maintain or improve roadless characteristics, reduce the risks of uncharacteristic wildfire effects, or restore ecological structure, function, processes, or composition. Timber harvesting for the limited purposes under Alternative 3 would allow needed biological treatments to promote a healthy forest for future generations. Alternative 2, although providing for protection from road construction and reconstruction, would still permit harvesting of trees for commodity purposes that could conflict with protecting the physical and biological environment.

Alternative 3, like the other alternatives, contains exceptions that allow road construction and reconstruction for important human and environmental protection measures, such as protection of public health and safety from imminent threats of flood and fire, treatment to clean up hazardous pollution sites, and road realignment to prevent irreparable resource damage. These are important exceptions needed to enhance the productivity and esthetics of the environment. Social and economic mitigation measures are not part of this environmentally preferred Alternative 3 because these measures, although important to reduce the social and economic effects of the action alternatives, do not contribute to the protection of the physical or biological environment.

The Tongass National Forest is part of the northern Pacific coast ecoregion, an ecoregion that contains one fourth of the world's coastal temperate rainforests. As stated in the FEIS, the forest's high degree of overall ecosystem health is largely due to its quantity and quality of inventoried roadless areas and other special designated areas. The ''Tongass Not Exempt'' alternative would immediately apply prohibitions to all inventoried roadless areas and is the environmentally preferred alternative. The other Tongass alternatives either delay or limit the inventoried roadless area land base to which the prohibitions would apply, or defer the decision regarding prohibitions altogether. The adverse environmental impacts of these alternatives are disclosed in Chapter 3 of the FEIS.

What Is in the Final Rule and What Are the Reasons for Selecting That Alternative?

Selection of an alternative to be adopted in the final rule requires careful consideration of the environmental effects, including cumulative, social, and economic impacts, and the relative values of the various resources to arrive at a fair and reasoned decision to achieve the stated purpose and need for inventoried roadless area protection (FEIS Vol. 1, 3–392 to 3–403). As stated previously, courts have held that the agency has wide discretion in weighing and deciding the proper administration of National Forest System lands.

The Department's judgment regarding the appropriate administration of these lands is embodied in the policies described in this final rule. First and foremost, the Department wants to ensure that inventoried roadless areas sustain their values for this and future generations. By sustaining these values, a continuous flow of benefits associated with healthy watersheds and ecosystems is provided. These benefits include sources for clean drinking water, fish habitat, wildlife habitat, biological diversity, and dispersed outdoor recreational opportunities. Not only are short-term economic and environmental factors considered, but also the long-term productivity of these lands which are so critical to strong, productive economies.

Evaluation of these considerations for this decision is based primarily on these qualitative factors. Quantitative factors, such as volume of timber offered for sale, or roadless acres protected, were also considered and are helpful to distinguish and compare the alternatives (FEIS Vol. 1, 2–24 to 2–38), and their effects (FEIS Chapter 3).

Prohibition Alternatives. Alternative 1 in the FEIS has the greatest potential for adverse impact on watershed health and water quality by allowing increased sedimentation and disruption of hydrologic processes; the greatest potential for adverse impact on biodiversity by fragmenting habitat for threatened, endangered, and sensitive

species; the greatest potential for adverse impact on aquatic and terrestrial habitat; and the greatest potential for increase in competition from invasive non-native species. This alternative was not selected because it did not meet the specified purpose and need for this action.

Action Alternatives 2, 3, and 4 in the FEIS all provide ecological benefits from prohibiting road construction and reconstruction. The major difference among these alternatives is that Alternative 2 allows timber harvesting without restriction; Alternative 3 prohibits timber harvesting for commodity purposes, but allows timber harvesting for clearly defined purposes and limited circumstances; and Alternative 4 prohibits all timber cutting (except that which may be needed for protection or recovery of threatened, endangered, or proposed species). Personal and administrative use harvest, including firewood and Christmas tree cutting, would be permitted. Tree removal could occur when associated with management activities not otherwise prohibited by the final rule, such as trail construction or maintenance, hazard tree removal adjacent to classified roads for public health and safety reasons, fire line construction for wildland fire suppression or control of prescribed fire, or survey and maintenance of property boundaries.

Alternative 2 was not selected because it posed more risks to roadless characteristics than Alternatives 3 or 4. Timber harvesting for clearly defined, limited purposes can be a valuable tool for conserving and improving roadless area values and should be available as a management option for the local responsible official. Therefore, the Department did not select Alternative 4 and is selecting Alternative 3.

Reducing the risk of uncharacteristic wildfire effects is one way of restoring ecological processes. The final rule recognizes this by eliminating ''reducing the risk of uncharacteristic wildfire effects'' as a separate purpose and instead uses it as an example of restoring ecological processes. Also, to address concern about the meaning and implementation of stewardship purpose timber harvest that ''restores ecological structure, function, processes, and composition'' described in the FEIS, the final rule eliminates use of the term ''stewardship''. Instead, the rule relies on the purposes specifically listed and mirrors language from the new planning regulations at 36 CFR part 219 stating that timber harvest is allowed in order to maintain or restore the characteristics of ecosystem composition and structure within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period.

Alternatives 2 through 4 could reduce future timber harvest, mineral exploration and development, and other activities such as ski area development in inventoried roadless areas. Communities with significant economic activities in these sectors could be adversely impacted. However, the effects on the social and economic situation nationally are minor. For example, the reduction in timber harvest from National Forest System lands is less than 3%, which is less than 0.5 percent of total United States timber production. The total oil and gas production from all National Forest System lands is about 0.4 percent of the current national production, and the oil and gas resources located inside inventoried roadless areas are an insignificant portion of total resources.

Rights of reasonable access to prospect and explore lands open to mineral entry and to develop valid claims, would be unaffected under these alternatives as provided by the General Mining Law. Reasonable rights of access may include, but are not limited to, road construction and reconstruction, helicopters, or other nonmotorized access (FEIS Vol. 1, 3–254). None of the alternatives are likely to have measurable impacts compared to the broader social and economic conditions and trends observable at these scales; however, the effects of the alternatives are not distributed evenly across the United States (FEIS Vol. 1, 3–329 to 3–350).

Comment was received concerning the cumulative relationship of the Roadless Area Conservation Rule with the Bureau of Land Management's proposed rule for Mining Claims Under the General Mining Laws; Surface Management, published on February 9, 1999 (64 FR 6422). Since that comment was received, the Mining Claims rule became final (65 FR 69998, November 21, 2000). Both the final Roadless Area Conservation Rule and the final Bureau of Land Management mining rule have comparable goals to prevent unnecessary or undue degradation of public lands. However, the Roadless Area Conservation Rule at 294.12(b)(3) does not affect rights of reasonable access to prospect and explore lands open to mineral entry and to develop valid claims. Reasonable access includes, road construction or reconstruction for mining activities covered under the General Mining Law, while the performance standards at proposed 3809.420(c) would require that permitted roads and structures be designed, constructed, and maintained to control or prevent erosion, siltation, and air pollution and to minimize impacts to resources. Cumulative effects of these two rules are expected to be minimal because of the exception for locatable minerals under § 294.12(b)(3) in the final roadless rule.

Exceptions. The Department is adopting the exceptions for road safety projects and for Federal Aid Highway projects. The exception for road safety projects is a narrow exception that only allows road reconstruction where past experience or expert opinion has indicated that the road design would present a threat to public safety. The Department decided to adopt the Federal Aid Highway exception to allow road construction based on social considerations and Federal-State relationships. The Department believes that this exception will have a very limited application, and the Secretary of Agriculture retains the discretion to approve or deny authorization when warranted (23 U.S.C. 317). The analysis in the FEIS identified only one application of this exception in the next five years for a proposed 5.5-mile State highway relocation project on the Chugach National Forest in Alaska (FEIS Vol. 1, 3–33).

After publication of the FEIS for Roadless Area Conservation, the Department of Energy (DOE) and the Office of Management and Budget (OMB) received and shared with the Forest Service several letters from mining interests outlining their concerns with the preferred alternative. The Forest Service also received comments directly from the National Mining Association. DOE provided an analysis of potential impacts related to oil and gas resources, and compiled information on coal resources as well. Upon being informed of these concerns, the Forest Service evaluated the information provided by DOE and others. The Forest Service also met with and discussed these concerns with DOE.

The FEIS analysis focused on impacts to coal, phosphate, and oil and gas resources, based on input from the national forests and grasslands and from public comment on the draft environmental impact statement (DEIS) and proposed rule (May 10, 2000; 65 FR 30276). Comment received from DOE on the DEIS was focused only on transmission line corridors. Potential economic impacts related to existing coal and phosphate operations with known plans to expand into inventoried roadless areas were quantified in the FEIS (Vol. 1, pp. 3–308 to 3–324). Areas of known high potential for coal,

phosphate, and oil and gas were also discussed (Vol. 1. pp. 3–254 to 3–260). With respect to oil and gas, no attempt was made to estimate the proportion of these resources within inventoried roadless areas because of the high degree of uncertainty of these estimates.

After publication of the FEIS for Roadless Area Conservation, the Department of Energy (DOE) raised concerns about the potential impacts on leasable energy minerals, particularly for natural gas and coal, if the final Roadless Area Conservation Rule did not allow road building in support of exploration and development for leasable minerals.

Currently, the NFS lands play a minor role in providing natural gas resources, only about 0.4% of national production (76.4 billion cubic feet) in 1999. The resource estimates by DOE were made assuming that the resources are homogenously distributed across play areas, which is generally not the case with oil and gas resources. It is reasonable to assume, under the current demand conditions, that there will be increased interest in development of natural gas resources on federal lands and elsewhere. Some of these areas are not currently available for leasing, as a result of leasing decisions or local forest and grassland plan decisions. Moreover, current access restrictions would make many of these resources unavailable in the near future. In addition, the steep terrain that is typical of many inventoried roadless areas often makes these areas difficult to access for environmental and/or economic reasons. The likelihood of resources being recovered from inventoried roadless areas even in the absence of a final roadless rule is small, except where leases already exist. Finally, where accessible, exploration and development of these resources would likely take about 5–10 years before production would begin.

The FEIS described the coal production from NFS lands as accounting for about 7% of national production in 1999. The analysis acknowledged the increasing national demand for coal, particularly the low-sulfur coal found primarily in the western U.S. About 2.5 million acres of coal-bearing rock were estimated to occur within inventoried roadless areas in the interior West.

A concern raised by DOE and others was the potential effect on users of this low sulfur coal, primarily electric utilities in the East. According to DOE, many utility and industrial boilers have been designed to blend the western coal with other higher sulfur coal to meet their Clean Air Act compliance goals. The DOE analysis did not provide any information on the availability of substitute sources of coal if supply from existing mines is reduced.

Overall, the U.S. has abundant coal reserves. Also, alternative sources of low-sulfur coal do exist, concentrated in the western U.S., mostly in Colorado, Montana, and Wyoming. Additionally, the abundant sources of low cost-coal and available technology, such as scrubbers, will enable electric utilities to meet their Clean Air Act compliance goals.

Several commentators on the DEIS, including the Governor of the State of Utah, had questions about access to state-owned coal. As discussed in the FEIS, access based on existing rights would not be affected by the final rule, therefore, access is guaranteed to coal held under existing rights.

The FEIS identified potential impacts on future phosphate mining on the Caribou National Forest, the only area of active phosphate mining on NFS lands. The FEIS acknowledged that phosphate production from the Caribou accounts for about 12% of national production, and is used to supply regional producers of phosphate fertilizer products and elemental phosphorous. The analysis included an estimate of phosphate resources within inventoried roadless areas of 873.3 million tons, and a description that about 8,000 acres of the area of Known Phosphate Lease Areas are within inventoried roadless areas.

In a letter to OMB, the National Mining Association provided estimates of phosphate reserves in Idaho, Wyoming, Utah, and Montana potentially impacted by the final rule. The company currently mining on the Caribou made these estimates. No documentation was provided for the basis of the estimates. However, their open pit mining estimates for Idaho were less than the resources identified in the FEIS in inventoried roadless areas alone.

In conclusion, the information provided by DOE and others provides additional context to the analysis. However, for coal and phosphate, the impacts noted in these comments fall within the range of effects disclosed in the FEIS. For oil and gas, the Forest Service continues to believe there is a high degree of uncertainty in the available information. Moreover, it seems likely that even if resources do underlie inventoried roadless areas, they would be among the last areas entered for exploration and development for the reasons described above. After careful review of the information provided by DOE and private parties, the agency has determined that the information does not materially alter the environmental analysis disclosed in the FEIS and does not constitute significant new circumstances or information relevant to environmental concerns bearing on the rulemaking effort.

The Department has decided not to adopt the exception for future discretionary mineral leasing because of the potentially significant environmental impacts that road construction could cause to inventoried roadless areas, but instead determined a more limited exception is appropriate. Existing mineral leases are not subject to the prohibitions, nor is the continuation, extension, or renewal of an existing mineral lease on lands under lease by the Secretary of the Interior as of the date of publication of this rule in the **Federal Register**. Additionally, road construction or reconstruction may be authorized for new leases on these same lands in the event that application for a new lease is made prior to termination or expiration of the existing lease.

The Department recognizes that this decision may have major adverse economic impacts on a few communities dependent on mineral leasing from inventoried roadless areas. However, if road construction and reconstruction were allowed for future mineral leasing on lands not under mineral lease as of the date of publication of this rule in the **Federal Register**, an estimated 59 miles of new roads would be constructed in inventoried roadless areas over the next five years. Road construction or reconstruction in support of future mineral leasing on lands not presently under mineral lease could continue at this level or in greater amounts into the foreseeable future. Over an estimated 10 million acres of inventoried roadless areas could be roaded for exploration and development of leasable minerals, although the agency believes it is unlikely that more than a small percentage of these acres would contain minerals sufficient for economic development.

The effects of road construction over time could substantially alter valuable roadless area characteristics by fragmenting habitat, increasing soil disturbance, decreasing water quality, and providing new avenues for the invasion of non-native invasive species. Mineral leasing activities not dependent on road construction, such as directional (slant) drilling and underground development, would not be affected by the prohibition.

The final rule extends indefinitely the timeframe for which roads can be

constructed on areas currently under lease, which are estimated to be less than 1 million acres in extent, or less than 2 percent of the total acreage of inventoried roadless areas. The environmental effects of this extension fall between those described in the FEIS for the preferred alternative, which would have allowed road construction or reconstruction only for the duration of an existing lease, and those described in the FEIS under the potential social and economic mitigation measures, which would have provided an exception for mineral leasing activities within all inventoried roadless areas, with no limitations.

Relative to the preferred alternative, the final rule will somewhat diminish the potential beneficial effects of the overall prohibition on road construction and reconstruction in the areas affected by the minerals leasing exception, due to the greater amount of area potentially disturbed and the effects of associated activities. However, by limiting the area potentially affected to only those areas currently under lease, the potential extent of these activities and their impacts are identified and limited.

Tongass National Forest Alternatives. The Tongass Exempt alternative described in the FEIS was not selected. Allowing road construction and reconstruction on the Tongass National Forest to continue unabated would risk the loss of important roadless area values.

The Tongass Deferred alternative was not selected because the agency presently has sufficient information to make this decision, and the decisionmaking processes used have identified the environmental, social, and economic issues that must be addressed. There is no need to postpone the decision.

The Tongass Selected Areas alternative did not meet the purpose and need as well as the selected alternative. Important roadless area values would be lost or diminished because of the road construction, reconstruction, and timber harvesting activities that this alternative allowed.

By applying the final rule to the Tongass National Forest immediately, but allowing road construction, reconstruction, and the cutting, sale, and removal of timber from inventoried roadless areas where a notice of availability for a draft environmental impact statement for such activities has been published in the **Federal Register** prior to the date of publication of this rule in the **Federal Register**, a period of transition is available to affected communities while providing certainty for long term protection of these lands.

The Tongass National Forest has 261 MMBF of timber under contract and 386 MMBF under a notice of availability of a DEIS, FEIS, or Record of Decision. In addition, the Tongass has 204 MMBF available in roaded areas that is sold, has a Record of Decision, or is currently in the planning process. This total of 852 MMBF is enough timber volume to satisfy about seven years of estimated market demand. During the period of transition, an estimated 114 direct timber jobs and 182 total jobs would be affected. In the longer-term, an additional 269 direct timber jobs and 431 total jobs could be lost in Southeast Alaska if current demand trends continue and no other adjustments are provided to allow for more harvest from other parts of the forest. The exception for projects with a notice of availability for a draft environmental impact statement on the Tongass National Forest is because of the unique social and economic conditions where a disproportionate share of the impacts are experienced throughout the entire Southeast Alaska region and most heavily in a few communities.

Decision Summary. It is the decision of the Secretary of Agriculture to select Prohibition Alternative 3 and the Tongass Not Exempt Alternative identified in the FEIS as the final rule, with modifications. These modifications include: (1) an exception to the prohibition on road construction and reconstruction for mineral leasing in areas under mineral lease as of the date of publication of this rule in the **Federal Register**; (2) an exception to the timber harvest prohibition for the cutting, sale, or removal of timber in portions of inventoried roadless areas where construction of a classified road and subsequent timber harvest have substantially altered the roadless characteristics, and the road construction and subsequent timber harvest occurred after the area was designated an inventoried roadless area and prior to the date of publication of this rule in the **Federal Register**; and (3) the immediate application of the prohibitions to the Tongass National Forest with a provision that exempts road construction, road reconstruction, and the cutting, sale, or removal of timber if a notice of availability for a DEIS for such activities has been published in the **Federal Register** prior to the date of publication of this rule in the **Federal Register**. The final rule best meets the agency's goal of maintaining the health and contributions of existing inventoried roadless areas by preserving the relatively undisturbed characteristics of those areas, thereby protecting watershed health and ecosystem integrity. In evaluating the comments received from the public, the Department believes that there is adequate relevant information to assess reasonably foreseeable significant adverse impacts (40 CFR 1502.22). The FEIS for this final rule documents the adverse impacts road construction and timber harvesting can have in inventoried roadless areas. This final rule reduces potential impacts to a greater degree and with more certainty than Prohibition Alternatives 1 and 2 and the other Tongass National Forest alternatives.

The final rule retains the ability to use timber harvesting for clearly defined purposes where necessary to meet ecological needs, allowing accomplishment of ecological objectives that Alternative 4 would preclude. Allowing clearly defined, limited timber harvest of generally small diameter trees will maintain a valuable management option for the agency to help improve habitat for threatened, endangered, proposed, or sensitive species recovery and to help restore ecological composition and structure, such as reducing the risk of uncharacteristic wildfire effects. As habitat fragmentation, subdivision, and urbanization of lands continues nationally, this decision allows the agency to avoid most human-caused fragmentation of National Forest System inventoried roadless areas to preserve management options for future generations. Finally, these inventoried roadless areas will remain available to all Americans for a variety of dispersed recreation opportunities.

The final rule:

(1) Recognizes that the agency's first and highest priority is to ensure sustainability for resources under its jurisdiction. It protects inventoried roadless areas from the activities that most directly threaten their fundamental characteristics through the alteration of natural landscapes and fragmentation of forestlands.

(2) Protects public health by promoting watershed health and maintaining important sources of clean drinking water for current and future generations.

(3) Responds to the major issues identified in public comments.

(4) Is fiscally responsible, and does not increase the financial burden by adding expensive roads the agency cannot afford to maintain.

(5) Exemplifies the agency's responsibility as a world leader in natural resource conservation by setting an example for the global community.

(6) Recognizes that some communities, such as those in Southeast Alaska, bear a disproportionate share of the burden, and offers assistance to mitigate those impacts.

This decision is expected to cause additional adverse economic effects to forest dependent communities because of the potential reduction in future timber harvest, mineral leasing, and other activities (FEIS Vol. 1, 3–326 to 3–350). However, the Department believes that the long-term ecological benefits to the nation of conserving these inventoried roadless areas outweigh the potential economic loss to those local communities. To reduce the economic impacts of this decision, the Chief of the Forest Service will seek to implement one or more of the following provisions of an economic transition program for communities most affected by application of the prohibitions in inventoried roadless areas:

(1) Provide financial assistance to stimulate community-led transition programs and projects in communities most affected by application of the prohibitions in inventoried roadless areas;

(2) Through financial support and action plans, attract public and private interests, both financial and technical, to aid in successfully implementing local transition projects and plans by coordinating with other Federal and State agencies; and

(3) Assist local, State, Tribal and Federal partners in working with those communities most affected by the final roadless area decision.

Regulatory Certifications

This final rule was reviewed under USDA procedures, Executive Order (E.O.) 12866 on Regulatory Planning and Review, and the major rule provisions of the Small Business Regulatory Enforcement and Fairness Act (5 U.S.C. 800). The Office of Management and Budget (OMB) has determined that this is a major rule, because this rule may have an annual effect of $100 million or more on the economy or, in some sectors, may affect productivity, competition, or jobs. Consequently, the rule is subject to OMB review under E.O. 12866 and a regulatory impact analysis has been prepared for this final rule. This rule is not expected to interfere with an action taken or planned by another agency nor raise new legal or policy issues. This action will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs.

Regulatory Impacts

Summary of the Results of the Regulatory Impact Analysis. Many of the benefits and costs associated with the final rule were not quantifiable. Therefore, many of the costs and benefits are described qualitatively. Although the analysis does not provide a quantitative measure of net benefits, the Department believes the benefits of the rule outweigh the costs.

Local-level analysis cannot easily incorporate the economic effects associated with nationally significant issues. Therefore, the Department believes the aggregate transactions costs (costs associated with the time and effort needed to make decisions) of local level decisions would be much higher than the transactions costs of a national policy, because of the controversy surrounding roadless area management.

National Forest System lands provide a variety of goods and services to the American public. Use of the national forests and grasslands for both commodities and amenity services varies over time, in response to changing market conditions, consumer preferences, and other factors. For the purpose of this analysis, the baseline describes the likely mix of goods and services from the national forests and grasslands in the near future in the absence of the final rule, which is likely to affect some goods and services, while having no effect on others. Details on the environmental effects of the final rule can be found in the Forest Service Roadless Area Conservation Final Environmental Impact Statement (FEIS).

Most of the benefits of the rule result from maintaining roadless areas in their current state, and, therefore, maintaining the current stream of benefits from these areas. The costs are primarily associated with lost opportunities, since the final rule would limit some types of development activities that might have occurred in the future without this rule. Table 1 summarizes the potential benefits and costs of the rule.

Potential Benefits Of The Roadless Rule. Undisturbed landscapes provide a variety of monetary and non-monetary benefits to the public. Many of these benefits are associated with the protection of ecological, social, and economic values in inventoried roadless areas.

Air and water quality would be maintained at a higher level than under the baseline. Higher water quality provides a higher level of protection for drinking water sources, reduces treatment costs for irrigation, reservoirs, and other downstream facilities and maintains the value of water-based recreation activities. Higher air quality protects not only values associated with human health, but also improves visibility and benefits recreation and adjacent private property values.

A greater degree of protection of biological diversity and threatened and endangered species would occur if roads and commodity timber harvest were prohibited in inventoried roadless areas as opposed to the baseline. As a result, ecological values would be maintained. Passive use values related to the existence of biological diversity and threatened and endangered species would be maintained, as well as values associated with protecting these areas for future generations.

A number of other benefits are associated with maintaining healthy wildlife and fish populations at a level higher than under the baseline. Some game species are likely to benefit from this protection, which would maintain quality hunting and fishing experiences both within inventoried roadless areas and beyond. Other types of recreation experiences, such as wildlife viewing, also would benefit.

Inventoried roadless areas are important in providing remote recreation opportunities. A greater number of acres in these recreation settings would be maintained than under the baseline. Remote areas are also important settings for many outfitter and guide services. Maintaining these areas increases the ability of the agency to accommodate additional demand for these types of recreation special use authorizations.

Inventoried roadless areas provide a remote recreation experience without the activity restrictions of Wilderness (for example, off-highway vehicle use and mountain biking). Maintaining roadless areas would likely lessen visitation pressure on Wilderness compared to the baseline.

The risk of introducing non-native invasive species would be reduced if road access were not available. This is beneficial to grazing permittees with allotments in inventoried roadless areas, and to collectors of non-timber forest products by maintaining forage quality and quantity, and forest products that cannot compete with invasive species. The reduced probability of introduction would also benefit forest health in inventoried roadless areas and would contribute to the maintenance of biological diversity.

Some planned timber sales in inventoried roadless areas are likely to cost more to prepare and sell than they realize in revenues received. To the extent that these sales will not take

place, a financial efficiency savings would be realized. Implementing the rule could result in agency cost savings. First, local appeals and litigation about some management activities in roadless areas could be reduced, which would avoid future costs. Secondly, the reduction in new miles of roads constructed would reduce the number of miles the agency is responsible for maintaining in the future, resulting in avoiding up to an additional $219,000 per year of costs.

Potential Costs Of The Roadless Rule. The prohibition on road construction, reconstruction, and timber harvest except for clearly defined, limited purposes would reduce development of roaded access to resources within inventoried roadless areas compared to the baseline. Roads are required for most timber sales to be economically feasible. For those sales that are financially profitable, the rule would reduce net revenues. In addition to lost revenue, there would be an estimated immediate impact of 461 fewer timber jobs and 841 total jobs, with an associated annual loss of $20.7 million in direct income and $36.2 million in total income. In the longer term, an additional 269 timber jobs and 431 total jobs could be affected from harvest reductions on the Tongass National Forest. The longer-term income effect was estimated at $12.4 million in direct income and $20.2 million in total income. A reduction in the timber program could also affect about 160 Forest Service jobs, with an additional 100 jobs affected on the Tongass in the longer term.

Jobs associated with road construction and reconstruction for timber harvest and other activities would also be fewer than under the baseline. Initially, between 43 and 51 direct jobs and between 88 and 104 total jobs could be affected by reduced road construction and reconstruction. An additional 39 direct jobs and 78 total jobs could be affected by harvest reductions on the Tongass National Forest in the longer term.

The impact on mineral resources will vary, depending on factors such as prices, technology change, and substitutes. Reasonable access to conduct exploration and development of valid claims for locatable minerals (metallic and nonmetallic minerals subject to appropriation under the General Mining Law of 1872) would continue. Such access may involve some level of road construction that, depending on the stage of exploration or development, could range from helicopters, temporary or unimproved roads, more permanent, improved roads, or nonmotorized transport.

Exploration for and development of leasable minerals (such as oil, gas, coal, and geothermal) on areas not already under lease would likely be limited because roads are often needed for these activities. In the short-term, up to 546 direct and 3,095 total jobs could be affected, with direct annual income effects of $36 million and total income effects of $128 million. Payments to states could be reduced by about $3.2 million per year. Between 308 and 1,371 million tons of coal resources on the Grand Mesa, Uncompahgre, and Gunnison and Manti-LaSal National Forests could be unavailable for development as a result of this rule. About 873 million tons of phosphate resources on the Caribou National Forest may also be unavailable. Other inventoried roadless areas may contain additional coal and phosphate resources. An estimated mean of 11.3 trillion cubic feet of undiscovered natural gas and 550 million barrels of undiscovered oil resources could also be affected. Effects on saleable minerals (such as sand, gravel, stone, and pumice) are expected to be negligible.

New roads have the potential to reduce current operating costs for other users, for example grazing permittees and collectors of non-timber forest products, by allowing faster and easier access. These potential cost reductions would not be realized if road construction is prohibited. The agency, however, builds few roads for recreation, grazing, or collection of non-timber forest products, and this pattern is unlikely to change. New roads built for other purposes may provide additional access for recreationists, including hunters and anglers. Prohibiting construction of new roads would have minimal impacts on these groups, since all temporary roads and many of the other planned roads would be closed once the intended activity is concluded. Therefore, the number of additional road miles that would be available for recreational or other uses would be small.

Opportunities for some types of recreation special uses may be limited in the future. Developed recreation use and road-based recreation uses in general are more likely to occur at higher densities outside of inventoried roadless areas than under the baseline, since expansion into inventoried roadless areas would not occur. However, roads are rarely constructed into inventoried roadless areas for recreation purposes. The development of new ski areas within inventoried roadless areas would be unlikely. Other, new non-recreation special uses may be limited in the future as well. Such special uses include communication sites and energy-related transmission uses (such as ditches and pipelines, and electric transmission lines).

There could be a slight increase in the risk from uncharacteristic wildland fire or insect and disease as a result of reduced opportunities for forest health treatments. However, the Forest Service would likely treat few acres of inventoried roadless areas regardless of the issuance of the Roadless Rule, since moderate and high risk forests in inventoried roadless areas would be given a low priority for treatment, unless there was an imminent threat to public safety, private property, water quality, or threatened and endangered species. While overall fire hazard can still be reduced without roads, restricted road access would likely increase the cost of treatments, which would result in fewer acres treated. Some fuel treatment techniques available under the baseline would not be economically or logistically feasible. Of the 14 million acres in inventoried roadless areas identified as potentially requiring fuel treatment, 6.5 million could still be treated with prescribed fire without mechanical pretreatment. The use of timber harvest for fuel management would be limited to those activities that reduce uncharacteristic wildfire effects through the cutting, sale, or removal of small diameter timber that maintains or improves one or more of the roadless characteristics. For the next five years, about 22,000 acres could be treated by the limited timber harvest allowed under the final rule. Although this is a significant decline in treatment acres compared to acres that would have been harvested under the baseline, the total acreage affected is less than 1 percent of all inventoried roadless area that potentially require mechanical pretreatment.

Agency costs could increase compared to the baseline for some types of activities. Fuel treatment and other ecological restoration treatment costs in inventoried roadless areas would likely increase, but the impact on agency costs is likely to be negligible since treatment in most inventoried roadless areas is a lower priority.

The goods and services that could not be produced from inventoried roadless areas without road construction are likely to be produced either on other parts of National Forest System land or on other lands. Substitute production could result in adverse environmental effects on these other lands. The following Table 1 summarizes the costs and benefits of the final rule.

TABLE 1.—SUMMARY OF COSTS AND BENEFITS OF THE ROADLESS AREA CONSERVATION RULE COMPARED TO THE BASELINE

Category	Baseline	Final rule
Air quality [1]	Potential increase in dust, vehicle emissions associated with road use and management activities in inventoried roadless areas.	Air quality is maintained in inventoried roadless areas.
Water quality [1]	Potential increase in sediment associated with roads and management activities in inventoried roadless areas.	Water quality is maintained in inventoried roadless areas.
Land base available for dispersed recreation activities [1].	Decrease in remote settings, increase in developed settings on National Forest System lands.	Current land base for remote and developed settings is maintained on National Forest System lands.
Quality of fishing and hunting for recreation, commercial, and subsistence users [1]..	Potential habitat degradation, increase in roaded access, and decrease in remote hunting and fishing opportunities.	Existing hunting and fishing quality and access in inventoried roadless areas maintained. Opportunities for remote experiences are maintained.
Forage quality for livestock grazing [1]	Increased risk of non-palatable invasive species.	Existing forage quality is maintained.
Non-timber forest products [1]	Increased risk of invasive species displacing desired products.	Non-timber forest products maintained at current levels.
Existence and bequest values [1]	Potential decrease due to loss of biological diversity and increased risks to threatened and endangered species habitat in inventoried roadless areas.	Values maintained at existing levels due to conservation of biological diversity and habitat for threatened and endangered species in inventoried roadless areas.
Agency costs associated with planning activities [1].	No change in current costs associated with appeals and litigation on roadless area management.	Savings in costs associated with appeals and litigation on roadless area management.
Agency cost associated with road maintenance [2].	Increase up to $219,000 per year in maintenance cost associated with new roads in inventoried roadless areas.	No increase in road maintenance costs in inventoried roadless areas.
Projected timber harvest (average annual) from inventoried roadless areas [3].	146.7 million board feet	74.3 million board feet.
Timber related jobs [4]	No change to current estimates of future timber associated direct and total jobs.	Estimated job loss of 461 direct jobs and 841 total jobs. An additional 269 direct and 431 total jobs could be affected in Alaska in the longer term.
Timber related income [4]	No change to current estimates of future timber associated direct and total income.	Estimated annual income loss of about $20.7 million direct income and $36.2 million total income. An additional $12.4 million direct income and $20.2 million total income could be affected in Alaska in the longer term.
Road construction jobs [5]	No change to current estimates of future road construction direct jobs.	Projected annual job loss ranging from 43 to 51 direct jobs and between 88 and 104 total jobs. An additional 39 direct and 78 total jobs could be affected in Alaska in the longer term.
Exploration and development for locatable minerals (gold, silver, lead, etc.) [1].	Existing mineral availability continues subject to General Mining Law of 1872.	Access continues subject to General Mining Law of 1872.
Exploration and development for leasable minerals (oil, gas, coal, etc.) [1].	Existing mineral availability continues along with current exploration and development costs.	Exploration and development in areas not under lease as of the date of publication of this rule and requiring roads would be precluded.
Leasable minerals related jobs [6]	No change to current estimates of future mineral associated direct and indirect jobs.	Potential effect on mining related employment is a decrease of 546 direct and 3,095 total jobs.
Leasable minerals related income [6]	No change to current estimates of future minerals associated direct and total income.	Potential effect on mining related annual income is $36.2 million less direct and $127.8 million less total income.
Payments to states for leasable minerals	Payments will continue to vary as extraction varies over time.	Payments associated with coal and phosphate could be reduced by $3.2 million per year.
Leasable mineral resources	No change to current estimates of available leasable resources.	About 873 million tons of phosphate and 308 to 1,371 million tons of coal would likely be unavailable for development. About 11.3 trillion cubic feet of undiscovered gas and 550 million barrels of undiscovered oil resources may be unavailable.
Exploration and development for salable minerals (sand, stone, gravel, pumice, etc.) [1].	Existing mineral availability continues along with current exploration and development costs.	In a few isolated cases, development requiring roads may be precluded or costs may increase.
Operating costs for grazing permittees [1]	Increased access can potentially decrease cost.	No change in operating costs.

TABLE 1.—SUMMARY OF COSTS AND BENEFITS OF THE ROADLESS AREA CONSERVATION RULE COMPARED TO THE BASELINE—Continued

Category	Baseline	Final rule
Operating costs for collectors of non-timber products [1].	Increased access can potentially decrease cost.	No change in operating costs.
Special-use authorizations (such as communications sites, electric transmission lines, pipelines) [1].	Current use and occupancies	Current use and occupancies not affected, future developments requiring roads excluded in inventoried roadless areas unless one of the exceptions applies.
Forest health [1]	Potential lower cost of treatment due to increased access.	Slightly increased risk because of fewer treatment opportunities. Cost of current treatments remains unchanged.

[1] Analysis based on qualitative discussion.
[2] Analysis based on historic Agency data on expenditures.
[3] Analysis based on forest-level data on projected timber volumes in inventoried roadless areas.
[4] Analysis based on Agency data from Timber Sales Program Information System Reporting System (TSPIRS) and IMPLAN model multipliers.
[5] Analysis based on Agency estimates of historic expenditures and IMPLAN model multipliers.
[6] Analysis based on Agency production estimates and IMPLAN model multipliers.

Summary of the Results of the Final Regulatory Flexibility Analysis. The Department is promulgating a final rule for roadless area conservation that does not impose regulations on small entities. The rule would not suspend or modify any existing permit, contract, or other legal instrument authorizing the occupancy and use of National Forest System land.[1] The rule could affect future opportunities for small entities, but the agency cannot predict at any given time what authorized uses a small entity might want to pursue on National Forest System lands.

Data are limited for linking the proposed rule to effects on small businesses. The agency does not typically collect information about the size of businesses that seek permission to operate on National Forest System lands. The agency sought information to the extent possible by specifically requesting additional information in the initial regulatory flexibility analysis.

The rulemaking has the potential to affect a subset of small businesses that may seek opportunities on National Forest System lands in the future. The primary effect of the rule on small businesses is the potential to affect the future supply of commodity outputs or commercial opportunities for businesses. The change in resource availability is expected to be small across most regions in the country. Therefore, future business opportunities are not likely to be reduced to any great extent in comparison to continuation of current management policies. However, the effects may be more pronounced in the Intermountain and Alaska Regions, with the effects in Alaska increasing in the longer term.

Small businesses in the wood products sector most likely to be affected are logging and sawmill operations. Reductions in the harvest of softwood sawtimber, particularly in the western U.S., are most likely to affect small businesses, since these sectors are dominated by small business. With the exception of the Intermountain (Utah, Nevada, western Wyoming, and southern Idaho) and Alaska Regions, reductions in harvest are estimated to range from less than one percent to four percent. The reduction in the Intermountain Region is estimated to be nine percent. Harvest effects on the Tongass National Forest will be reduced about 18 percent in the short-term, but in the longer-term, harvest could be reduced by about 60 percent absent further adjustments to the Tongass Land and Resource Management Plan.

In the mining sector, small businesses most likely to be affected are businesses involved in the exploration and development of leasable minerals. The final Roadless Area Conservation rule will affect exploration and development for leasable minerals in inventoried roadless areas in the future where road construction is required, except in areas presently under lease.

The potential effects on small businesses involved in livestock grazing and the collection of non-timber forest products are expected to be negligible. There will be fewer roads available for use in the future under the final rule, but the number of miles that would have been built in the next five years and that would have remained open for use is minor compared to the entire National Forest System road system.

Special use authorizations on National Forest System land could be affected by the final rule, if road access is required. Most of the special uses potentially affected are dominated by large businesses, such as businesses in communication, electric services, gas production and distribution, and resort development. Small businesses with outfitter and guide permits are expected to benefit from the final rule, since these businesses are often dependent on providing services to recreationists interested in remote recreation activities that are often found in inventoried roadless areas.

The effect of the final rulemaking on small governmental jurisdictions is tied to possible reductions in commodity outputs in cases where some portion of federal receipts is returned to the states for distribution to counties, and to changes in the jurisdiction's economic base from changes in employment and business opportunities related to National Forest System outputs and management. Payments to states from timber receipts will be unaffected by the final Roadless Rule through 2006 because the ''Secure Rural Schools and Community Self-Determination Act of 2000'' was signed into law on October 30 (Pub. L. 106–393). This legislation allows counties to select a payment based on historic payment levels rather than payments based on current receipts. However, this legislation does not affect revenue sharing of federal receipts from mineral leasing on national grasslands and from public domain lands of the national forests. Therefore, the final rule may result in a reduction in those receipts in the future, which would affect revenues shared with states and counties. The agency has also chosen to pursue funds to assist communities undergoing economic transition resulting from implementation of the final Roadless Rule. Such assistance could include financial assistance to stimulate community-led transition programs and projects, support to attract public and

[1] Because the roadless rule does not directly regulate small entities, the Department does not believe the Regulatory Flexibility Act applies to this rule.

private interests in implementing local transition projects, coordination with other Federal and State agencies, and assisting local, State, Tribal, and Federal partners to work with the most affected communities. The Forest Service will pursue a six-year economic transition program. The Economic Adjustment Program will be used to fund or support projects that will be specific to the needs of individual communities and important to the national forest or grassland. The Forest Service anticipates requesting $72.5 million in support of these activities between fiscal years 2001 and 2006.

Environmental Impact

The Endangered Species Act of 1973, As Amended. A biological evaluation was prepared which analyzed the potential effects of the action alternatives on threatened, endangered, and proposed species. This evaluation, along with other supporting documentation for the rule, was provided to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service as part of consultation and conferencing under the Endangered Species Act. Both agencies concurred with the determination in the biological evaluation that all of the action alternatives analyzed in the biological evaluation may affect, but are not likely to adversely affect threatened or endangered species or adversely modify designated critical habitat; are not likely to jeopardize proposed species or adversely modify proposed critical habitat; and may beneficially affect threatened, endangered, and proposed species and critical habitat. Copies of these letters of concurrence are in the project record and can be viewed at the Roadless Area Conservation project website.

Other Required Disclosures. The agency has prepared a final environmental impact statement in concert with this rule. In it, the direct, indirect, and cumulative effects of the final rule and alternatives are disclosed. None of the prohibition alternatives are an action that requires consultation under the Fish and Wildlife Coordination Act because they do not require water to be impounded or diverted. The FEIS may be obtained from various sources as indicated in the **ADDRESSES** section of this document.

The Indiana Department of Natural Resources (IDNR) questioned whether the agency had adequately taken into account effects on historic properties and expressed concern that the rule would cause ''neglect of historic properties.'' The IDNR urged the Forest Service to consult with the Indiana State Historic Preservation Officer pursuant to Section 106 of the National Historic Preservation Act (NHPA). First, the FEIS does evaluate and display the effects of the final rule regarding cultural resources (FEIS Vol. 1, 3–232 to 3–237). The FEIS also makes clear that the prohibitions will not inhibit existing access to historic sites. As for the Section 106 NHPA process, this rulemaking does not constitute an ''undertaking'' as defined in 36 CFR 800.16. The regulations established by the Advisory Council for Historic Preservation make clear that once an agency determines that it has no undertaking, or that its undertaking has no potential to affect historic properties, the agency has no further Section 106 obligations.

Controlling Paperwork Burdens on the Public

This rule does not contain any record keeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 and, therefore, imposes no paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) and implementing regulations at 5 CFR part 1320 do not apply.

Unfunded Mandates Reform

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), the Department has assessed the effects of this proposed rule on State, local, and Tribal governments, and on the private sector. This proposed rule does not compel the expenditure of $100 million or more by any State, local, or Tribal government, or anyone in the private sector. Therefore, a statement under Section 202 of the Act is not required.

No Takings Implications

This rule has been reviewed for its impact on private property rights under Executive Order 12630. The Department determined that this proposed rule does not pose a risk of taking Constitutionally protected private property; in fact, the proposed rule honors access to private property pursuant to statute and to outstanding or reserved rights.

Civil Justice Reform Act

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. The proposed revision: (1) preempts all State and local laws and regulations that are found to be in conflict with or that would impede its full implementation; (2) does not retroactively affect existing permits, contracts, or other instruments authorizing the occupancy and use of National Forest System lands; and (3) does not require administrative proceedings before parties may file suit in court challenging these provisions.

Federalism and Consultation with Tribal Governments

The agency considered this rule under the requirements of Executive Order 12612 and found the rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the agency determined that no further assessment on federalism implications is necessary at this time. In addition, the consultation requirements under Executive Order 13132, effective November 2, 1999 were reviewed. This new Order calls for enhanced consultation with State and local government officials and emphasizes increased sensitivity to their concerns.

Forest Service line officers in the field were asked to make contact with Tribes to ensure awareness of the initiative and of the rulemaking process. Outreach to Tribes has been conducted at the national forest and grassland level, which is how Forest Service government-to-government dialog with Tribes is typically conducted.

Outreach to State and local governments has taken place both in the field and Washington offices. Forest Service officials have contacted State and local governmental officials and staffs to explain the notice of intent and the rulemaking process. The agency met with and responded to a variety of information requests from local officials and State organizations, such as the National Governors Association and the Western Governors Association.

In the development of this rule comments received from States, Tribes, and local governments in response to the notice of intent to prepare an environmental impact statement published October 19, 1999 (64 FR 56306) were carefully considered. Following publication of the proposed rule, the agency met with State, Tribal, and local government officials to explain and clarify the proposed rule and the accompanying environmental impact statement. The extent to which additional consultation was appropriate under Executive Order 13132 was considered. In addition, the Forest Service responsible official will seek input and participation by State, local, and Tribal officials in the early stages of forest and project planning regarding

subsequent decisions for inventoried roadless areas.

List of Subjects in 36 CFR Part 294

Forests and forest products, Highways and roads, Land and resource management planning, National forests, Navigation (air), Recreation and recreation areas, and Wilderness areas.

For the reasons set forth in this preamble, part 294 of Title 36 of the Code of Federal Regulations is amended as follows:

PART 294—SPECIAL AREAS

1. Add and reserve §§ 294.3–294.9, designate §§ 294.1 through 294.9 as subpart A, and add a subpart heading to read as follows:

Subpart A—Miscellaneous Provisions

2. Remove the authority citations that follow §§ 294.1 and 294.2 and add an authority citation for the newly designated Subpart A to read as follows:

Authority: 16 U.S.C. 472, 551, and 1131.

3. Add a new Subpart B to read as follows:

Subpart B—Protection of Inventoried Roadless Areas

Sec.
294.10 Purpose.
294.11 Definitions.
294.12 Prohibition on road construction and road reconstruction in inventoried roadless areas.
294.13 Prohibition on timber cutting, sale, or removal in inventoried roadless areas.
294.14 Scope and applicability.

Authority: 16 U.S.C. 472, 529, 551, 1608, 1613; 23 U.S.C. 201, 205.

Subpart B—Protection of Inventoried Roadless Areas

§ 294.10 Purpose.

The purpose of this subpart is to provide, within the context of multiple-use management, lasting protection for inventoried roadless areas within the National Forest System.

§ 294.11 Definitions.

The following terms and definitions apply to this subpart:

Inventoried roadless areas. Areas identified in a set of inventoried roadless area maps, contained in Forest Service Roadless Area Conservation, Final Environmental Impact Statement, Volume 2, dated November 2000, which are held at the National headquarters office of the Forest Service, or any subsequent update or revision of those maps.

Responsible official. The Forest Service line officer with the authority and responsibility to make decisions regarding protection and management of inventoried roadless areas pursuant to this subpart.

Road. A motor vehicle travelway over 50 inches wide, unless designated and managed as a trail. A road may be classified, unclassified, or temporary.

(1) *Classified road.* A road wholly or partially within or adjacent to National Forest System lands that is determined to be needed for long-term motor vehicle access, including State roads, county roads, privately owned roads, National Forest System roads, and other roads authorized by the Forest Service.

(2) *Unclassified road.* A road on National Forest System lands that is not managed as part of the forest transportation system, such as unplanned roads, abandoned travelways, and off-road vehicle tracks that have not been designated and managed as a trail; and those roads that were once under permit or other authorization and were not decommissioned upon the termination of the authorization.

(3) *Temporary road.* A road authorized by contract, permit, lease, other written authorization, or emergency operation, not intended to be part of the forest transportation system and not necessary for long-term resource management.

Road construction. Activity that results in the addition of forest classified or temporary road miles.

Road maintenance. The ongoing upkeep of a road necessary to retain or restore the road to the approved road management objective.

Road reconstruction. Activity that results in improvement or realignment of an existing classified road defined as follows:

(1) *Road improvement.* Activity that results in an increase of an existing road's traffic service level, expansion of its capacity, or a change in its original design function.

(2) *Road realignment.* Activity that results in a new location of an existing road or portions of an existing road, and treatment of the old roadway.

Roadless area characteristics. Resources or features that are often present in and characterize inventoried roadless areas, including:

(1) High quality or undisturbed soil, water, and air;

(2) Sources of public drinking water;

(3) Diversity of plant and animal communities;

(4) Habitat for threatened, endangered, proposed, candidate, and sensitive species and for those species dependent on large, undisturbed areas of land;

(5) Primitive, semi-primitive non-motorized and semi-primitive motorized classes of dispersed recreation;

(6) Reference landscapes;

(7) Natural appearing landscapes with high scenic quality;

(8) Traditional cultural properties and sacred sites; and

(9) Other locally identified unique characteristics.

§ 294.12 Prohibition on road construction and road reconstruction in inventoried roadless areas.

(a) A road may not be constructed or reconstructed in inventoried roadless areas of the National Forest System, except as provided in paragraph (b) of this section.

(b) Notwithstanding the prohibition in paragraph (a) of this section, a road may be constructed or reconstructed in an inventoried roadless area if the Responsible Official determines that one of the following circumstances exists:

(1) A road is needed to protect public health and safety in cases of an imminent threat of flood, fire, or other catastrophic event that, without intervention, would cause the loss of life or property;

(2) A road is needed to conduct a response action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or to conduct a natural resource restoration action under CERCLA, Section 311 of the Clean Water Act, or the Oil Pollution Act;

(3) A road is needed pursuant to reserved or outstanding rights, or as provided for by statute or treaty;

(4) Road realignment is needed to prevent irreparable resource damage that arises from the design, location, use, or deterioration of a classified road and that cannot be mitigated by road maintenance. Road realignment may occur under this paragraph only if the road is deemed essential for public or private access, natural resource management, or public health and safety;

(5) Road reconstruction is needed to implement a road safety improvement project on a classified road determined to be hazardous on the basis of accident experience or accident potential on that road;

(6) The Secretary of Agriculture determines that a Federal Aid Highway project, authorized pursuant to Title 23 of the United States Code, is in the public interest or is consistent with the purposes for which the land was reserved or acquired and no other reasonable and prudent alternative exists; or

(7) A road is needed in conjunction with the continuation, extension, or

renewal of a mineral lease on lands that are under lease by the Secretary of the Interior as of January 12, 2001 or for a new lease issued immediately upon expiration of an existing lease. Such road construction or reconstruction must be conducted in a manner that minimizes effects on surface resources, prevents unnecessary or unreasonable surface disturbance, and complies with all applicable lease requirements, land and resource management plan direction, regulations, and laws. Roads constructed or reconstructed pursuant to this paragraph must be obliterated when no longer needed for the purposes of the lease or upon termination or expiration of the lease, whichever is sooner.

(c) Maintenance of classified roads is permissible in inventoried roadless areas.

§ 294.13 Prohibition on timber cutting, sale, or removal in inventoried roadless areas.

(a) Timber may not be cut, sold, or removed in inventoried roadless areas of the National Forest System, except as provided in paragraph (b) of this section.

(b) Notwithstanding the prohibition in paragraph (a) of this section, timber may be cut, sold, or removed in inventoried roadless areas if the Responsible Official determines that one of the following circumstances exists. The cutting, sale, or removal of timber in these areas is expected to be infrequent.

(1) The cutting, sale, or removal of generally small diameter timber is needed for one of the following purposes and will maintain or improve one or more of the roadless area characteristics as defined in § 294.11.

(i) To improve threatened, endangered, proposed, or sensitive species habitat; or

(ii) To maintain or restore the characteristics of ecosystem composition and structure, such as to reduce the risk of uncharacteristic wildfire effects, within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period;

(2) The cutting, sale, or removal of timber is incidental to the implementation of a management activity not otherwise prohibited by this subpart;

(3) The cutting, sale, or removal of timber is needed and appropriate for personal or administrative use, as provided for in 36 CFR part 223; or

(4) Roadless characteristics have been substantially altered in a portion of an inventoried roadless area due to the construction of a classified road and subsequent timber harvest. Both the road construction and subsequent timber harvest must have occurred after the area was designated an inventoried roadless area and prior to January 12, 2001. Timber may be cut, sold, or removed only in the substantially altered portion of the inventoried roadless area.

§ 294.14 Scope and applicability.

(a) This subpart does not revoke, suspend, or modify any permit, contract, or other legal instrument authorizing the occupancy and use of National Forest System land issued prior to January 12, 2001.

(b) This subpart does not compel the amendment or revision of any land and resource management plan.

(c) This subpart does not revoke, suspend, or modify any project or activity decision made prior to January 12, 2001.

(d) This subpart does not apply to road construction, reconstruction, or the cutting, sale, or removal of timber in inventoried roadless areas on the Tongass National Forest if a notice of availability of a draft environmental impact statement for such activities has been published in the **Federal Register** prior to January 12, 2001.

(e) The prohibitions and restrictions established in this subpart are not subject to reconsideration, revision, or rescission in subsequent project decisions or land and resource management plan amendments or revisions undertaken pursuant to 36 CFR part 219.

(f) If any provision of the rules in this subpart or its application to any person or to certain circumstances is held invalid, the remainder of the regulations in this subpart and their application remain in force.

Dated: January 5, 2001.

Dan Glickman,

Secretary.

[FR Doc. 01–726 Filed 1–5–01; 3:45 pm]

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Friday,
January 12, 2001

Part VII

Department of the Treasury

Office of the Secretary

31 CFR Part 10

Regulations Governing Practice Before the Internal Revenue Service; Proposed Rule

DEPARTMENT OF THE TREASURY

Office of the Secretary

31 CFR Part 10

[REG–111835–99]

RIN 1545–AY05

Regulations Governing Practice Before the Internal Revenue Service

AGENCY: Office of the Secretary, Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This notice proposes modifications of the regulations governing practice before the Internal Revenue Service (Circular 230). These regulations would affect individuals who are eligible to practice before the Internal Revenue Service. The proposed modifications would clarify the general standards of practice before the Internal Revenue Service and would modify the standards for providing advice regarding tax shelters. This document also provides notice of a public hearing on the proposed regulations.

DATES: Comments and requests to speak and outlines of topics to be discussed from persons wishing to speak at the public hearing scheduled for May 2, 2001, in the auditorium of the Internal Revenue Building at 1111 Constitution Avenue, NW., Washington, DC 20224, must be received by April 12, 2001.

ADDRESSES: Send submissions to: CC:M&SP:RU (REG–111835–99), room 5226, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 am and 5 pm to: CC:M&SP:RU (REG–111835–99), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Submit comments and data via electronic mail (email) to http://www.irs.gov/tax_regs/regslist.html.

FOR FURTHER INFORMATION CONTACT: Concerning issues for comment, Richard Goldstein at (202) 622–7820 or Brinton Warren at (202) 622–4940; concerning submissions of comments and delivering comments, Guy Traynor at (202) 622–7180; (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, W:CAR:MP:FP:S:O, Washington, DC 20224. Comments on the collection of information should be received by March 13, 2001. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the Office of the Director of Practice, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proper collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collection of information in these proposed regulations is in §§ 10.6, 10.29, and 10.30. Section 10.6 requires an enrolled agent to maintain records and educational materials regarding his or her satisfaction of the qualifying continuing professional education credit. Section 10.6 also requires sponsors of qualifying continuing professional education programs to maintain records and educational material concerning these programs and those who attended them. The collection of this material helps to ensure that individuals enrolled to practice before the Internal Revenue Service are informed of the newest developments in Federal tax practice.

Section 10.29 requires a practitioner to obtain and retain for a reasonable period written consents to representation whenever such representation directly conflicts with the interests of the practitioner or the interests of another client of the practitioner. The consents are to be obtained after full disclosure of the conflict is provided to each party. Section 10.30 requires a practitioner to retain for a reasonable period any communication and the list of persons to whom that communication was provided with respect to public dissemination of fee information. The collection of consents to representation and communications concerning practitioner fees protects the practitioner against claims of impropriety and ensures the integrity of the tax administration system.

Estimated total annual recordkeeping burden is 50,000 hours.

Estimated annual burden per recordkeeper varies from 30 minutes to 1 hour, depending on individual circumstances, with an estimated average of 54 minutes.

Estimated number of recordkeepers is 56,000.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by section 6103 of the Internal Revenue Code.

Background

Section 330 of title 31 of the United States Code authorizes the Secretary of the Treasury to regulate the practice of representatives before the Treasury Department. The Secretary of the Treasury is authorized, after notice and an opportunity for a proceeding, to suspend or disbar from practice before the Department those representatives who are incompetent, disreputable, or who violate regulations prescribed under section 330 of title 31. Pursuant to section 330 of title 31, the Secretary has published the regulations in Circular 230 (31 CFR part 10). These regulations authorize the Director of Practice to act upon applications for enrollment to practice before the Internal Revenue Service, to make inquiries with respect to matters under the Director's jurisdiction, to institute proceedings for suspension or disbarment from practice before the Internal Revenue Service, and to perform such other duties as are necessary to carry out these functions.

The regulations have been amended from time to time to address various specific issues in need of resolution. For example, on February 23, 1984, the regulations were amended to provide standards for providing opinions used in tax shelter offerings (49 FR 6719). On October 17, 1985, the regulations were amended to conform to legislative changes requiring the disqualification of an appraiser who is assessed a penalty

under section 6701 of the Internal Revenue Code for aiding and abetting the understatement of a tax liability (50 FR 42014). The regulations were most recently amended on June 20, 1994 (59 FR 31523), to provide standards for tax return preparation, to limit the use of contingent fees in tax return or refund claim preparation, to provide expedited rules for suspension, and to clarify or amend certain other items.

On June 15, 1999, an advance notice of proposed rulemaking was published (64 FR 31994) requesting comments on amendments to the regulations that would take into account legal developments, professional integrity and fairness to practitioners, taxpayer service, and sound tax administration. On May 5, 2000, an advance notice of proposed rulemaking was published (65 FR 30375) requesting comments on amendments to the regulations relating to standards of practice governing tax shelters and other general matters.

Summary of Comments

Twenty-seven written comments have been submitted concerning the revision of Circular 230. All comments received have been considered and are available for public inspection upon request. The following paragraphs provide a summary of significant comments.

A few commentators expressed concern that, under the current regulations, a practitioner may be in violation of the regulations if the practitioner fails to furnish information or documents subject to a lawful request for documents made by an officer or employee of the Internal Revenue Service where neither the practitioner nor the practitioner's client possesses or controls the documents. These commentators suggested that § 10.20 of the regulations be clarified to provide that there is no violation of the regulations if the information or documents are not in the possession or control of the practitioner or the practitioner's client.

Some commentators expressed concern about a practitioner's obligation when notifying a client of any noncompliance with the revenue laws. The commentators recommended that a practitioner be required to advise the client of the action necessary to correct the error or omission and the consequences of not taking such action when notifying a client of any noncompliance with the revenue laws. Some commentators expressed concern about the current practice used by some practitioners to obtain oral consents to represent parties where there is a direct conflict of interest. They recommended that a practitioner be required to obtain written consents to represent parties where there is a direct conflict of interest.

Some commentators suggested that § 10.22 be amended specifically to permit a practitioner to demonstrate due diligence for purposes of these regulations based on the practitioner's reliance on the work product of an associate or partner. It also was suggested that § 10.24 be amended to permit a practitioner to share fees with a suspended or disbarred person during the period of suspension or disbarment, respectively.

Several commentators noted that the regulations regarding solicitation are not consistent with recent court decisions concerning in-person contacts of potential clients by certified public accountants. They suggested that the restrictions on in-person contacts be liberalized for all practitioners. It also was suggested that the prohibition of deceptive public solicitations be extended to deceptive private solicitations and that practitioners be prohibited from associating with an individual who uses deceptive solicitation practices, regardless of whether the deceptive practices related to business connected with the practitioner.

One commentator suggested that the regulations be modified to require the Director of Practice to notify a practitioner whenever a complaint has been filed against the practitioner, whether or not any action is taken against the practitioner as a result of the complaint.

Several comments were received recommending changes to the regulation of opinion writing by practitioners. Commentators recommended that new opinion standards be promulgated with respect to tax shelter opinions that are rendered for the purpose of establishing a reasonable cause and good faith defense to the accuracy-related penalties under section 6662 of the Internal Revenue Code (''reasonable cause opinions''). These commentators suggested that standards for such opinions impose factual due diligence requirements that, in particular, restrict the reliance on hypothetical facts or factual assumptions as the basis for such opinions. Some commentators suggested that reliance on factual assumptions regarding the business purpose or noneconomic consequences of a transaction be treated as inherently unreasonable. Comments also were received on whether and to what extent reliance in an opinion on taxpayer representations or certifications should be permitted and the conditions under which a practitioner may rely on the opinions of other practitioners.

Several commentators recommended that the new standards impose requirements with respect to the legal analysis contained in reasonable cause opinions, particularly that such opinions contain no unreasonable legal assumptions, address all material tax issues, evaluate relevant legal authorities and consider applicable judicial doctrines and statutory and regulatory anti-abuse rules. One commentator, however, thought it was unnecessary to impose an explicit requirement in Circular 230 that reasonable cause opinions address the applicability of relevant judicial doctrines. Another commentator considered it sufficient for Circular 230 merely to require that reasonable cause opinions consider the substance and purpose of the transaction under scrutiny.

Comments also were received as to whether a reasonable cause opinion should unambiguously opine on a comfort level of ''more likely than not'' or higher, should state that it is issued to establish reasonable cause, and other matters. A few commentators expressed concern that the definition of a tax shelter utilized in any opinion standards not be overly broad and that opinion standards under Circular 230 be coordinated with opinion-related requirements under the accuracy-related penalties. One commentator suggested that the opinion standards provide that satisfaction of the standards would meet a practitioner's obligations under Circular 230, but would not determine the persuasiveness of, and the taxpayer's good faith reliance on, the opinion. Two commentators also suggested that standards be promulgated for written advice used for marketing purposes.

Commentators generally did not oppose the expansion of sanctions to encompass lesser sanctions such as censure. Commentators did not support attribution of practitioner misconduct to other members of the practitioner's firm. Several commentators, however, stated that in instances where there has been a knowing participation or acquiescence in such misconduct by other members of a firm or a pattern of abuse by members of a firm, sanctions extending beyond the individual practitioner may be appropriate.

The majority of commentators supported a contingent fee limitation with respect to original tax returns if the fee arrangement was contingent on the return position being sustained. Such fee arrangements may indicate an inappropriate reliance on the ''audit

lottery.'' The commentators believed that the same considerations were not as persuasive with respect to amended tax returns.

Commentators generally did not favor the imposition of restrictions in Circular 230 on confidentiality imposed on practitioners by clients or on clients by practitioners.

Explanation of Provisions

Who May Practice

Paragraph (d)(2) of § 10.3 of the regulations provides a list of issues with respect to which an enrolled actuary is authorized to represent a taxpayer in limited practice before the Internal Revenue Service. This list of issues would be expanded under the proposed regulations to include issues involving 26 U.S.C. 419 (treatment of funded welfare benefits), 419A (qualified asset accounts), 420 (transfers of excess pension assets to retiree health accounts), 4972 (tax on nondeductible contributions to qualified employer plans), 4976 (taxes with respect to funded welfare benefit plans), and 4980 (tax on reversion of qualified plan assets to employer).

Enrollment

Section 10.6 of the regulations sets forth the conditions for renewal of enrollment to practice before the Internal Revenue Service. One condition for renewal of enrollment is that the enrolled agent complete a minimum number of hours of continuing professional education. Paragraph (f) of § 10.6 of the regulations requires that there be a written outline and/or textbook for each course. Under the proposed regulations, a continuing education program may qualify for purposes of this part if the course requires suitable electronic educational materials, a written outline, or a textbook.

The regulations permit any individual who is enrolled as an actuary by the Joint Board for the Enrollment of Actuaries to enroll and qualify to practice before the Internal Revenue Service by filing with the Service a written declaration that such individual is currently qualified as an enrolled actuary. New paragraph 10.6(o) would be added to clarify that the renewal of enrollment of actuaries also is governed by the regulations concerning the Joint Board for the Enrollment of Actuaries at 20 CFR 901.1 *et seq.*

Information to be Furnished

Section 10.20 of the regulations requires a practitioner to submit documents or information whenever a lawful request for such documents or information is made by a duly authorized officer or employee of the Internal Revenue Service. The provision does not provide an exception if the practitioner or the practitioner's client does not possess or control the requested documents or information. Under the proposed regulations, paragraph (a) of § 10.20 would be modified to clarify that a practitioner is required to promptly respond to a lawful and proper request for documents by either submitting the requested information or advising the requesting officer or employee why the information cannot be provided (e.g., the documents requested are privileged, or the documents are not controlled by either the practitioner or the practitioner's client). If the documents are not controlled by either the practitioner or the practitioner's client, the provision would require the practitioner, to the extent possible, to identify any persons who may have the requested documents in their control.

Knowledge of Client's Omission

Section 10.21 of the regulations requires a practitioner to advise a client promptly of any noncompliance by the client with the revenue laws. Under the proposed regulations, a practitioner also would be required to advise the client of the manner in which the error or omission may be corrected and the possible consequences of not taking such corrective action.

Diligence as to Accuracy

Section 10.22 of the regulations requires a practitioner to exercise due diligence in preparing or assisting in the preparation, approving, and filing of documents relating to Internal Revenue Service matters. Section 10.22 also requires a practitioner to exercise due diligence in determining the correctness of oral or written representations made to the Department of Treasury or with reference to any matter administered by the Internal Revenue Service. The proposed regulations would clarify that a practitioner is presumed to have exercised due diligence if the practitioner relies on the work product of another person and the practitioner used reasonable care in engaging, supervising, training and evaluating such person.

Assistance from Disbarred or Suspended Persons

Section 10.24 of the regulations prohibits a practitioner, in practice before the Internal Revenue Service, from employing, accepting assistance from, accepting employment from, or becoming a subagent for, a disbarred or suspended person. Section 10.24 also precludes a practitioner from accepting assistance from any former government employee where the provisions of § 10.26 of the current regulations (§ 10.25 of the proposed regulations) or any Federal law would be violated. Section 10.24 of the proposed regulations clarifies that a practitioner is prohibited from accepting assistance from or assisting a disbarred or suspended practitioner if the assistance relates to matters constituting practice before the Internal Revenue Service. The proposed regulations, however, would not require practitioners to disassociate themselves from a suspended or disbarred person as long as the other proscriptions regarding disbarred or suspended persons are observed. Practitioners who are partners of a law or accountancy partnership, for example, would not be required to expel another partner who was subject to discipline simply because the disciplined partner might otherwise share in fees derived from services rendered by others before the Internal Revenue Service.

Practice by Partners of Government Employees

Section 10.25 of the regulations precludes partners of former Government employees from practice with respect to matters in which the employee personally and substantially participated. This provision would be removed under the proposed regulations because the statutory prohibition implemented by this provision (18 U.S.C. 207(c)) has been repealed.

Practice by Former Government Employees, Their Partners and Their Associates

Section 10.26 of the current regulations places restrictions on the practice of former Government employees, their partners, and their associates with respect to certain matters that the former Government employees participated in during the course of their Government employment. This section would be renumbered as § 10.25 under the proposed regulations and would be amended to reflect changes to the Federal statutes governing post-employment restrictions applicable to former Government employees.

Fees and Confidentiality

Paragraph (b) of § 10.28 of the current regulations precludes a practitioner from charging his or her client a contingent fee for the preparation of an original tax return, but permits the

practitioner to charge a contingent fee for the preparation of an amended tax return or a claim for refund (other than a claim for refund made on an original tax return). Section 10.28 would be renumbered as § 10.27 and paragraph (b) would be clarified to provide that a practitioner is prohibited from charging a contingent fee not only for preparation of an original tax return, but also for advice rendered in connection with a position taken or to be taken on an original tax return. A practitioner would be permitted, however, to charge a contingent fee both for the preparation of, and for advice rendered in connection with a position taken, or to be taken on, an amended tax return or a claim for refund if the practitioner reasonably anticipates that the amended tax return or refund claim will receive substantive review by the Internal Revenue Service. In addition, a contingent fee would be defined to include any fee that is based, in whole or in part, on whether or not a position taken on a tax return or in a refund claim is sustained, an indemnity agreement, a guarantee, recission rights, insurance or any other arrangement by which the practitioner will compensate or reimburse the taxpayer or another person if a position taken on a tax return or in a refund claim is not sustained.

The proposed regulations would not prohibit confidentiality agreements. Confidentiality restrictions imposed by clients may raise an ethical inquiry as to the effects of such arrangements on a practitioner's ability to represent his or her clients. See Illinois State Bar Association Advisory Opinion on Professional Conduct 00–01 (October 2000)(a conflict of interest arises with respect to other similar clients when a lawyer agrees not to disclose ideas of a third party to reduce a client's tax obligations). Commentators asserted that such confidentiality restrictions were not an issue appropriate for regulation under Circular 230. Commentators also asserted that confidentiality restrictions imposed by practitioners on clients were an appropriate contractual arrangement for the benefit of practitioners. The Treasury Department remains concerned, however, about confidentiality restrictions and specifically invites comments on whether the final regulations should address such restrictions, and, if so, in what manner.

Return of Client's Records

Section 10.28 of the proposed regulations would specifically require a practitioner to return a client's records when the client makes a request for such records, whether or not a dispute regarding fees exists. The practitioner may retain a copy of those records.

Conflicting Interests

Section 10.29 of the regulations prohibits a practitioner from representing conflicting interests before the Internal Revenue Service, except with the express consent of all directly interested parties after full disclosure. Under the proposed regulations, a practitioner would be required to obtain the written consents of the clients before representing clients with conflicting interests. The practitioner would be required to retain the written consents for at least 36 months after the conclusion of the representation of the clients and to present copies of such consents to the Internal Revenue Service, if requested to do so.

In addition, the proposed regulations would provide that a practitioner may not represent a party in his or her practice before the Internal Revenue Service if that representation may be materially limited by the practitioner's own interests, unless practitioner reasonably believes the representation will not be adversely affected and the client consents after full disclosure, including disclosure of the implications of the potential conflict and the risks involved.

Solicitation

Section 10.30 of the regulations governs the manner in which practitioners may contact potential business clients. The proposed regulations would update the solicitation rules to reflect recent court decisions and to respond to comments received in connection with this rulemaking. Under the proposed regulations, a practitioner would be permitted to contact potential business clients using any medium that is not prohibited by Federal or state statutes or other rules applicable to the practitioner regarding the uninvited solicitation of prospective clients. The proposed regulations also would expand the prohibition of deceptive solicitation practices to cover private, as well as public, solicitations, expand the prohibition against providing assistance to or accepting assistance from an individual who uses deceptive solicitation practices, whether or not such practices are in connection with the relationship the individual has with the practitioner, and include electronic mail, facsimile, and hand-delivered flyers in the definition of communication.

Negotiation of Taxpayer Checks

Section 10.31 of the regulations prohibits a practitioner who prepares income tax returns from negotiating a check with respect to income tax issued to a taxpayer other than the practitioner. The proposed regulations would clarify that this prohibition is not limited to checks issued for income taxes, but applies to all checks issued to the practitioner's clients by the Government with respect to matters before the Internal Revenue Service. The proposed regulations also would clarify that practitioners are not prohibited from negotiating checks issued to their own partnerships, corporations, etc.

Tax Shelter Opinions

Two sections of the proposed regulations would provide standards governing tax shelter opinions. New § 10.35 would apply to all tax shelter opinions that conclude that the Federal tax treatment of a tax shelter item or items is more likely than not (or at a higher level of confidence) the proper treatment. Section 10.33 would be revised in scope to apply to all tax shelter opinions not governed by § 10.35 that a practitioner knows or has reason to believe will be used or referred to by persons other than the practitioner to promote, market or recommend a tax shelter. For purposes of §§ 10.33 and 10.35 of the proposed regulations, the definition of a tax shelter would conform to the definition found in section 6662(d)(2)(C)(iii) of the Internal Revenue Code.

The Treasury Department and the Internal Revenue Service recognize that the proposed rules in §§ 10.33 and 10.35 of the proposed regulations may regulate opinion standards with respect to transactions that had not previously been subject to the rules governing tax shelter opinions. The proposed regulations would exclude opinions relating to municipal bonds and qualified retirement plans. The Treasury Department and the Internal Revenue Service specifically request comment on whether the regulations should exempt other transactions from the requirements for tax shelter opinions and, if so, the types of other transactions that should be exempted.

Tax Shelter Opinions Used by Third Parties to Market Tax Shelters

Section 10.33 currently governs advice by a practitioner concerning the Federal tax aspects of a tax shelter either appearing or referred to in offering materials, or used or referred to in connection with sales promotion efforts, and directed to persons other than the

client who engaged the practitioner to give the advice. The proposed regulations would revise the scope of § 10.33 to govern a tax shelter opinion that does not conclude that the Federal tax treatment of an item or items is more likely than not the proper treatment and that a practitioner knows or has reason to believe will be used or referred to by persons other than the practitioner to promote, market or recommend the tax shelter to one or more taxpayers. The proposed regulations would clarify that § 10.33 governs tax shelter opinions prepared for use by third parties that are promoting the tax shelter, irrespective of whether such promotional efforts are conducted publicly or privately. The proposed regulations also would modify the definition of a material Federal tax issue and define a tax shelter item as an item of income, gain, loss, deduction or credit if the item is directly or indirectly attributable to a tax shelter.

Section 10.33 would require a practitioner who provides a written opinion with respect to a tax shelter item or items to comply with a series of requirements with respect to each such item. A practitioner would be required to make inquiry as to all relevant facts, be satisfied that the opinion takes account of all relevant facts, and that the material facts are accurately and completely described in the opinion. Furthermore, the opinion could not be based, directly or indirectly, on any unreasonable factual assumptions. An unreasonable factual assumption would include a factual assumption that the practitioner knows or has reason to believe is incorrect, incomplete, inconsistent or implausible. An unreasonable factual assumption also would include a factual assumption regarding a fact or facts that the practitioner could reasonably request to be provided or to be represented.

The proposed regulations would permit a practitioner, where it would be reasonable based on all the facts and circumstances, to rely upon factual representations, statements, findings or agreements. The proposed regulations would further provide that a practitioner need not conduct an audit or independent verification of a factual representation, but that reliance would not be permitted on factual representations that the practitioner knows or has reason to believe are unreasonable, incorrect, incomplete, inconsistent or implausible (*e.g.,* a representation that there are business reasons for a transaction without describing those reasons, a representation that a transaction is potentially profitable apart from tax benefits without providing adequate factual support, or a valuation that is inconsistent with the facts of the transaction).

The proposed regulations would provide that the opinion must clearly identify the facts upon which the opinion's conclusions are based, contain a reasoned analysis of the pertinent facts and legal authorities and not assume the favorable resolution of any Federal tax issue material to the analysis or otherwise rely on unreasonable legal assumptions. The proposed regulations also would require that the opinion not contain legal analyses or conclusions that are inconsistent with each other.

The practitioner would be required to ascertain that all material Federal tax issues with respect to the tax shelter item or items have been considered and that all of those material Federal tax issues involving the reasonable possibility of a challenge by the Internal Revenue Service are fully and fairly addressed. The opinion would be required to state that the practitioner has considered the possible application to the facts of all potentially relevant judicial doctrines, including the step transaction, business purpose, economic substance, substance over form, and sham transaction doctrines, as well as potentially relevant statutory and regulatory anti-abuse rules, and the opinion must analyze whether the tax shelter item or items is (are) vulnerable to challenge under all such potentially relevant doctrines and anti-abuse rules.

The proposed regulations would require that the opinion clearly provide the practitioner's conclusion as to the likelihood that a typical investor of the type to whom the tax shelter is or will be marketed will prevail with respect to the merits of each material Federal tax issue that involves the reasonable possibility of a challenge by the Internal Revenue Service or clearly state that the practitioner is unable to reach a conclusion with respect to one or more issues. Further, the opinion would be required to fully describe the reasons for the practitioner's conclusions or fully describe the reasons for the inability to reach a conclusion.

The practitioner would be required to reach an overall conclusion as to the likelihood that the Federal tax treatment of the tax shelter item or items is the proper treatment or, where the practitioner is unable to reach such a conclusion, clearly state that the practitioner is unable to reach such an overall conclusion. Where an overall conclusion cannot be reached, the opinion would be required to fully describe the reasons for the practitioner's inability to reach an overall conclusion. Moreover, the fact that the practitioner's opinion does not reach a conclusion that the Federal tax treatment of a tax shelter item or items is more likely than not the proper treatment, or that the practitioner is unable to reach an overall conclusion, would be required to be clearly and prominently disclosed on the first page of the opinion. The opinion also would be required to clearly and prominently disclose that it was not written for the purpose of establishing reasonable belief or reasonable cause and good faith under sections 6662 and 6664, respectively, of the Internal Revenue Code. The proposed regulations also would clarify that in ascertaining that all material Federal tax issues have been considered, evaluating the merits of those issues and evaluating whether the Federal tax treatment of the tax shelter item or items is the proper treatment, the possibility that a return will not be audited, that an issue will not be raised on audit, or that an issue will be settled may not be taken into account.

The proposed regulations would require the practitioner to take reasonable steps to assure that any written materials or promotional efforts that distribute, reflect or refer to the tax shelter opinion correctly and fairly represent the nature and extent of the opinion.

The proposed regulations also would address reliance on the opinions of others. The proposed regulations would require that the practitioner be knowledgeable in all of the aspects of Federal tax law relevant to the opinion being rendered. A practitioner would not be permitted to provide a tax shelter opinion that does not reach a conclusion on all the material Federal tax issues that involve a reasonable possibility of challenge by the Internal Revenue Service or does not reach an overall conclusion (or, alternatively, fails to clearly state that such conclusions cannot be reached), unless at least one other competent practitioner provides an opinion with respect to all of the other material Federal tax issues which involve a reasonable possibility of challenge by the Internal Revenue Service, and with respect to the tax shelter item or items. The practitioner also would be required, upon reviewing such other opinion and any written materials that distribute, reflect or refer to such opinion, to have no reason to believe that the other practitioner has not complied with § 10.33 or that the overall conclusion reached by such practitioner is incorrect on its face.

"More Likely Than Not" Tax Shelter Opinions

Under the proposed regulations, new standards would be applicable to practitioners who provide tax shelter opinions that conclude that the Federal tax treatment of a tax shelter item or items is more likely than not (or at a higher level of confidence) the proper treatment. Such opinions potentially provide a basis for establishing reasonable belief and reasonable cause and good faith under the provisions of sections 6662 and 6664 of the Internal Revenue Code, respectively. These proposed rules would apply to all tax shelter opinions that reach a more likely or not, or higher, overall conclusion, regardless of whether they were rendered in connection with promotional efforts conducted by a third party or directly to a potential tax shelter investor. The proposed regulations also would define a material Federal tax issue. A tax shelter item would be defined in the same manner as in § 10.33.

Section 10.35 would require a practitioner who provides a written opinion with respect to a tax shelter item or items to comply with a series of requirements with respect to each such item. A practitioner would be required to make inquiry as to all relevant facts, be satisfied that the opinion takes account of all relevant facts, and be satisfied that the material facts are accurately and completely described in the opinion. Furthermore, the opinion could not be based, directly or indirectly, on any unreasonable factual assumptions. An unreasonable factual assumption would include a factual assumption that the practitioner knows or has reason to believe is incorrect, incomplete, inconsistent or implausible. An unreasonable factual assumption also would include a factual assumption regarding a fact or facts that the practitioner could reasonably request to be provided or to be represented. Furthermore, an unreasonable factual assumption would include a factual assumption that the transaction has a business reason, an assumption with respect to the potential profitability of the transaction apart from tax benefits, or an assumption with respect to a material valuation issue.

The proposed regulations would permit a practitioner, where it would be reasonable based on all the facts and circumstances, to rely on factual representations, statements, findings, or agreements of the taxpayer or other persons. The proposed regulations would further provide that a practitioner need not conduct an audit or independent verification of a factual representation, but that reliance would not be permitted on factual representations that the practitioner knows or has reason to believe are unreasonable, incorrect, incomplete, inconsistent or implausible (e.g., a representation that there are business reasons for a transaction without describing those reasons, a representation that a transaction is potentially profitable apart from tax benefits without providing adequate factual support, or a valuation that is inconsistent with the facts of the transaction).

The proposed regulations would provide that the opinion must clearly identify the facts upon which the opinion's conclusions are based, contain a reasoned analysis of the pertinent facts and legal authorities and not assume the favorable resolution of any Federal tax issue material to the analysis or otherwise rely on unreasonable factual assumptions. The proposed regulations also would require that the opinion not contain legal analysis or conclusions that are inconsistent with each other.

The practitioner would be required to ascertain that all material Federal tax issues with respect to the tax shelter item or items have been considered and that all of those material Federal tax issues involving the reasonable possibility of a challenge by the Internal Revenue Service are fully and fairly addressed. The opinion would be required to state that the practitioner has considered the possible application to the facts of all potentially relevant judicial doctrines, including the step transaction, business purpose, economic substance, substance over form, and sham transaction doctrines, as well as potentially relevant statutory and regulatory anti-abuse rules, and the opinion must analyze whether the tax shelter item or items is (are) vulnerable to challenge under all such potentially relevant doctrines and anti-abuse rules.

The proposed regulations would require that the opinion clearly provide the practitioner's conclusion as to the likelihood that the taxpayer will prevail with respect to the merits of each material Federal tax issue that involves a reasonable possibility of challenge by the Internal Revenue Service and must unambiguously conclude that the Federal tax treatment of the tax shelter item or items more likely than not (or at a higher level of confidence) is the proper treatment. The proposed regulations also would clarify that in ascertaining that all material Federal tax issues have been considered, evaluating the merits of those issues and evaluating whether the Federal tax treatment of the tax shelter item or items is the proper treatment, the possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be settled may not be taken into account.

The proposed regulations would require the practitioner to take reasonable steps to assure that any written materials or promotional efforts that distribute, reflect or refer to the tax shelter opinion correctly and fairly represent the nature and extent of the opinion. The proposed regulations also would require that the practitioner be knowledgeable in all of the relevant aspects of Federal tax law at the time the opinion is rendered. The practitioner who is providing an overall conclusion that the Federal tax treatment of a tax shelter item or items more likely than not (or at a higher level of confidence) is the proper treatment may rely on the opinion of another practitioner with respect to certain issues only if the practitioner is satisfied that the other practitioner is sufficiently knowledgeable regarding such issues and the practitioner has no reason to believe that such opinion should not be relied upon. To the extent the practitioner relies on such opinion, the opinion rendered by the practitioner must identify the other practitioner, state the date on which the opinion was rendered, and set forth the conclusions reached in such opinion. Furthermore, the practitioner must be satisfied that the combined analysis, taken as a whole, satisfies the requirements of this § 10.35.

The Treasury Department and the Internal Revenue Service intend to modify the advice standards in the regulations under section 6662 of the Internal Revenue Code (pertaining to whether a taxpayer other than a corporation reasonably believed at the time a tax return was filed that the tax treatment of a tax shelter item was more likely than not the proper treatment of that item) and under section 6664 of the Internal Revenue Code (pertaining to whether a taxpayer acted with reasonable cause and in good faith with respect to a tax shelter item) to provide that opinions can satisfy those standards only if such opinions satisfy the standards of Circular 230.

Procedures to Ensure Compliance

Section 10.36 of the proposed regulations provides that a practitioner who is a member of, associated with, or employed by a firm must take reasonable steps, consistent with his or her authority and responsibility for the firm's practice advising clients regarding matters arising under the

Federal tax laws, to make certain that the firm has adequate procedures in effect for purposes of ensuring compliance with §§ 10.33, 10.34 and 10.35. The Director of Practice would be authorized to take disciplinary action against any practitioner for failing to comply with this requirement if the practitioner through willfulness, recklessness, or gross incompetence does not take such reasonable steps and one or more persons who are members of, associated with, or employed by the firm have, while they were members of, associated with, or employed by the firm, engaged in a pattern or practice of failing to comply with §§ 10.33, 10.34 or 10.35. The Director of Practice also would be authorized to take disciplinary action against any practitioner who takes such steps but has actual knowledge that one or more persons who are members of, associated with, or employed by the firm have, while they were members of, associated with, or employed by the firm, engaged in a pattern or practice of failing to comply with §§ 10.33, 10.34 or 10.35 and the practitioner through willfulness, recklessness, or gross incompetence fails to take prompt action, consistent with his or her authority and responsibility for the firm's practice advising clients regarding matters under the Federal tax law, to correct such pattern or practice.

Sanctions

Section 10.50 of the regulations authorizes the Secretary of the Treasury to disbar or suspend any practitioner from practice before the Internal Revenue Service after notice and an opportunity for a proceeding. Under the proposed regulations, the Secretary also would be permitted to censure the practitioner after notice and an opportunity for a proceeding. Censure is a public reprimand. Additionally, the authority to disqualify an appraiser would be relocated to paragraph (b) of § 10.50 of the regulations.

Disreputable Conduct

Section 10.51 of the regulations defines disreputable conduct for which a practitioner may be disbarred or suspended. The proposed regulations would provide that a practitioner who engages in disreputable conduct also may be censured. The definition of disreputable conduct also would be modified to include conviction of any felony involving conduct that renders the practitioner unfit to practice before the Internal Revenue Service.

Institution of Proceeding

Section 10.54 authorizes the Director of Practice to institute a proceeding to suspend or disbar a practitioner if the Director believes the practitioner has violated any provisions of the laws or regulations governing practice before the Internal Revenue Service. The section would be renumbered as § 10.60 under the proposed regulations and would specify that the Director of Practice also may institute a proceeding to censure the practitioner if the Director believes the practitioner has violated any provisions of the laws or regulations governing practice before the Internal Revenue Service. Under the proposed regulations, the procedures set forth in § 10.60 would apply to proceedings to disqualify an appraiser.

Conferences

Section 10.55 authorizes the Director of Practice to confer with a practitioner regarding allegations of misconduct. The provision permits a practitioner to offer his or her consent to voluntary suspension to prevent the institution or conclusion of a disbarment proceeding. The provision would be renumbered as § 10.61 and would be changed to permit a practitioner to also offer his or her consent to censure to prevent the institution or conclusion of a disbarment proceeding. The provision also would apply to conferences with an appraiser regarding allegations of misconduct and would permit the appraiser to offer his or her voluntary consent to disqualification.

Service of Complaint and Other Papers

Sections 10.57 and 10.80 of the regulations permit the Director of Practice to serve a complaint or any other paper upon a practitioner or appraiser by certified mail. If the certified mail is not claimed, the Director of Practice may serve the complaint by first class mail. The proposed regulations would consolidate these provisions under § 10.63 and would specify that service by first class mail is complete if the complaint is mailed to the practitioner or appraiser at his or her last known address as determined under section 6212 of the Internal Revenue Code.

Answer

Sections 10.58 and 10.81 of the regulations require a practitioner or an appraiser to file an Answer whenever the Director of Practice files a complaint against him or her under the regulations. These provisions also establish the time for filing an Answer and prescribe certain requirements as to the content of an Answer. The proposed regulations would consolidate these provisions under § 10.64, which section would require that the Answer to the complaint be signed by the respondent or the respondent's authorized representative and include an acknowledgment that knowing and willful false statements may be punishable under 18 U.S.C. 1001.

Reply to Answer

Sections 10.60 and 10.83 permit the Director of Practice to file a reply to the respondent's answer at the Director's discretion or at the request of the Administrative Law Judge. Under the proposed regulations, these provisions would be consolidated under § 10.66 and that section would require the Director of Practice to file a reply to the respondent's answer if the Administrative Law Judge orders that a reply be filed.

Motions and Requests

Sections 10.62 and 10.85 of the regulations permit the Director of Practice and the respondent to file motions and requests in hearings before an Administrative Law Judge with the Director or the Administrative Law Judge. Under the proposed regulations, these provisions would be consolidated under § 10.68 and would clarify that the Administrative Law Judge may direct that motions or requests be filed at a place specified by the Administrative Law Judge.

Effect of Disbarment, Suspension, or Censure

Section 10.73 of the regulations prohibits a disbarred practitioner from practicing before the Internal Revenue Service unless and until authorized to do so by the Director of Practice. The regulations also prohibit a suspended practitioner from practicing before the Internal Revenue Service during the period of suspension. Under the proposed regulations, this section would be renumbered as § 10.79 and would also provide that the Director of Practice may make a practitioner's future right to practice before the Internal Revenue Service subject to his or her meeting certain conditions designed to promote high standards of conduct.

Expedited Suspension Upon Criminal Conviction or Loss of License for Cause

Paragraph (b)(2) of § 10.76 of the regulations permits the Director of Practice to institute a proceeding to suspend any practitioner who has, within 5 years of the date on which the complaint instituting the proceeding is served, been convicted of any crime

under title 26 of the United States Code or a felony under title 18 of the United States Code involving dishonesty or breach of trust. Under the proposed regulations this provision would be renumbered as § 10.82 and would permit the Director of Practice to institute a proceeding to suspend any practitioner who has been convicted of any crime under the Internal Revenue Code, any crime involving dishonesty or breach of trust (regardless of whether such crime constituted a felony under title 18 of the United States Code), or any felony that involved conduct that renders the practitioner unfit to practice before the Internal Revenue Service (regardless of whether such felony was pursuant to title 18 of the United States Code or involved dishonesty or breach of trust).

Consolidation of Appraiser Disqualification Rules

The current regulations contain, in separate provisions, virtually identical rules applicable to disciplinary proceedings against practitioners and appraisers. The proposed rules would consolidate the rules regarding sanctions of practitioners and appraisers under subpart C and the rules regarding the conduct of disciplinary proceedings under subpart D.

Proposed Effective Date

These regulations are proposed to apply on the date that final regulations are published in the **Federal Register**.

Special Analyses

It has been determined that these regulations are not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities because the general requirements, including the collection of information requirements, of these regulations are substantially the same as the requirements of the regulations that these regulations will replace. Persons authorized to practice have long been required to comply with certain standards of conduct when practicing before the Internal Revenue Service. These regulations do not alter the basic nature of the obligations and responsibilities of these practitioners. These regulations clarify those obligations in response to public comments and judicial decisions, and make other modifications to reflect the development of electronic media. In addition, the added requirements for tax shelter opinions imposed by these regulations will have no impact on the substantial number of small entities who have been satisfying these requirements when they provide such opinions. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. 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 businesses.

Comments and Public Hearing

Before the regulations are adopted as final regulations, consideration will be given to any written comments and electronic comments that are submitted timely to the Internal Revenue Service. The Internal Revenue Service and Treasury Department specifically request comments on the clarity of the proposed regulations and how they can be made easier to understand. All comments will be available for public inspection and copying.

The public hearing is scheduled for May 2, 2001, from 8 am. to 11 am., and will be held in the auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the 10th Street entrance, located between Constitution and Pennsylvania Avenues, NW. All visitors must present photo identification to enter the building. Visitors will not be admitted beyond the immediate entrance area more than 15 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments and an outline of the topics to be discussed and the time to be devoted to each topic by April 12, 2001. A period of 10 minutes will be allocated to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting information

The principal authors of these regulations are Richard S. Goldstein and Brinton Warren, Office of Associate Chief Counsel (Procedure & Administration), Administrative Provisions and Judicial Practice Division, but other personnel from the Internal Revenue Service and Treasury Department participated in their development.

List of Subjects in 31 CFR Part 10

Accountants, Administrative practice and procedure, Lawyers.

Proposed Amendments to the Regulations

Accordingly, 31 CFR part 10 is proposed to be revised to read as follows:

PART 10—PRACTICE BEFORE THE INTERNAL REVENUE SERVICE

Sec.
10.0 Scope of part.

Subpart A—Rules Governing Authority to Practice

10.1 Director of Practice.
10.2 Definitions.
10.3 Who may practice.
10.4 Eligibility for enrollment.
10.5 Application for enrollment.
10.6 Enrollment.
10.7 Representing oneself; participating in rulemaking; limited practice; special appearances; and return preparation.
10.8 Customhouse brokers.

Subpart B—Duties and Restrictions Relating to Practice Before the Internal Revenue Service

10.20 Information to be furnished.
10.21 Knowledge of client's omission.
10.22 Diligence as to accuracy.
10.23 Prompt disposition of pending matters.
10.24 Assistance from or to disbarred or suspended persons and former Internal Revenue Service employees.
10.25 Practice by former Government employees, their partners and their associates.
10.26 Notaries.
10.27 Fees.
10.28 Return of client's records.
10.29 Conflicting interests.
10.30 Solicitation.
10.31 Negotiation of taxpayer checks.
10.32 Practice of law.
10.33 Tax shelter opinions used by third parties to market tax shelters.
10.34 Standards for advising with respect to tax return positions and for preparing or signing returns.
10.35 More likely than not tax shelter opinions.
10.36 Procedures to ensure compliance.

Subpart C—Sanctions for Violation of the Regulations

10.50 Sanctions.
10.51 Incompetence and disreputable conduct.
10.52 Violation of regulations.
10.53 Receipt of information concerning practitioner.

Subpart D—Rules Applicable to Disciplinary Proceedings

10.60 Institution of proceeding.

10.61 Conferences.
10.62 Contents of complaint.
10.63 Service of complaint and other papers.
10.64 Answer.
10.65 Supplemental charges.
10.66 Reply to answer.
10.67 Proof; variance; amendment of pleadings.
10.68 Motions and requests.
10.69 Representation.
10.70 Administrative Law Judge.
10.71 Hearings.
10.72 Evidence.
10.73 Depositions.
10.74 Transcript.
10.75 Proposed findings and conclusions.
10.76 Decision of the Administrative Law Judge.
10.77 Appeal to the Secretary.
10.78 Decision of the Secretary.
10.79 Effect of disbarment, suspension, or censure.
10.80 Notice of disbarment, suspension, censure, or disqualification.
10.81 Petition for reinstatement.
10.82 Expedited suspension upon criminal conviction or loss of license for cause.

Subpart E—General Provisions

10.90 Records.
10.91 Saving clause.
10.92 Special orders.
10.93 Effective date.

Authority: Sec. 3, 23 Stat. 258, secs. 2–12, 60 Stat. 237 et seq.; 5 U.S.C. 301, 500, 551–559; 31 U.S.C. 330; Reorg. Plan No. 26 of 1950, 15 FR 4935, 64 Stat. 1280, 3 CFR 1949–1953 Comp., P. 1017.

§ 10.0 Scope of part.

This part contains rules governing the recognition of attorneys, certified public accountants, enrolled agents, and other persons representing taxpayers before the Internal Revenue Service. Subpart A of this part sets forth rules relating to authority to practice before the Internal Revenue Service; subpart B of this part prescribes the duties and restrictions relating to such practice; subpart C of this part prescribes the sanctions for violating the regulations; subpart D of this part contains the rules applicable to disciplinary proceedings; and subpart E of this part contains general provisions including provisions relating to the availability of official records.

Subpart A—Rules Governing Authority to Practice

§ 10.1 Director of practice.

(a) *Establishment of office.* The office of the Director of Practice is established in the Office of the Secretary of the Treasury. The Director of Practice is appointed by the Secretary of the Treasury, or his or her designate.

(b) *Duties.* The Director of Practice acts on applications for enrollment to practice before the Internal Revenue Service; makes inquires with respect to matters under his or her jurisdiction; institutes and provides for the conduct of disciplinary proceedings relating to attorneys, certified public accountants, enrolled agents, enrolled actuaries and appraisers; and performs other duties as are necessary or appropriate to carry out his or her functions under this part or as are prescribed by the Secretary of the Treasury, or his or her designate.

(c) *Acting Director of Practice.* The Secretary of the Treasury, or his or her designate, will designate an officer or employee of the Treasury Department to act as Director of Practice in the absence of the Director or a vacancy in that office.

§ 10.2 Definitions.

As used in this part, except where the context clearly indicates otherwise:

(a) *Attorney* means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia.

(b) *Certified public accountant* means any person who is duly qualified to practice as a certified public accountant in any State, possession, territory, Commonwealth, or the District of Columbia.

(c) *Commissioner* refers to the Commissioner of Internal Revenue.

(d) *Director* refers to the Director of Practice.

(e) *Practice before the Internal Revenue Service* comprehends all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to, preparing and filing documents, corresponding and communicating with the Internal Revenue Service, and representing a client at conferences, hearings, and meetings.

(f) *Practitioner* means any individual described in paragraphs (a), (b), (c), or (d) of § 10.3 of this part.

(g) A *tax return* includes an amended tax return and a claim for refund.

(h) *Service* means the Internal Revenue Service.

§ 10.3 Who may practice.

(a) *Attorneys.* Any attorney who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Service by filing with the Service a written declaration that he or she is currently qualified as an attorney and is authorized to represent the party(ies) on whose behalf he or she acts.

(b) *Certified public accountants.* Any certified public accountant who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Service by filing with the Service a written declaration that he or she is currently qualified as a certified public accountant and is authorized to represent the party(ies) on whose behalf he or she acts.

(c) *Enrolled agents.* Any individual enrolled as an agent pursuant to this part who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Service.

(d) *Enrolled actuaries.* (1) Any individual who is enrolled as an actuary by the Joint Board for the Enrollment of Actuaries pursuant to 29 U.S.C. 1242 who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Service by filing with the Service a written declaration stating that he or she is currently qualified as an enrolled actuary and is authorized to represent the party(ies) on whose behalf he or she acts.

(2) Practice as an enrolled actuary is limited to representation with respect to issues involving the following statutory provisions in title 26 of the United States Code: sections 401 (relating to qualification of employee plans), 403(a) (relating to whether an annuity plan meets the requirements of section 404(a)(2)), 404 (relating to deductibility of employer contributions), 405 (relating to qualification of bond purchase plans), 412 (relating to funding requirements for certain employee plans), 413 (relating to application of qualification requirements to collectively bargained plans and to plans maintained by more than one employer), 414 (relating to definitions and special rules with respect to the employee plan area), 419 (relating to treatment of funded welfare benefits), 419A (relating to qualified asset accounts), 420 (relating to transfers of excess pension assets to retiree health accounts), 4971 (relating to excise taxes payable as a result of an accumulated funding deficiency under section 412), 4972 (relating to tax on nondeductible contributions to qualified employer plans), 4976 (relating to taxes with respect to funded welfare benefit plans), 4980 (relating to tax on reversion of qualified plan assets to employer), 6057 (relating to annual registration of plans), 6058 (relating to information required in connection with certain plans of deferred compensation), 6059 (relating to periodic report of actuary), 6652(e) (relating to the failure to file annual registration and other notifications by

pension plan), 6652(f) (relating to the failure to file information required in connection with certain plans of deferred compensation), 6692 (relating to the failure to file actuarial report), and 7805(b) (relating to the extent to which a Internal Revenue Service ruling or determination letter coming under the statutory provisions listed here will be applied without retroactive effect); and 29 U.S.C. 1083 (relating to the waiver of funding for nonqualified plans).

(3) An individual who practices before the Internal Revenue Service pursuant to paragraph (d)(1) of this section is subject to the provisions of this part in the same manner as attorneys, certified public accountants and enrolled agents.

(e) *Others.* Any individual qualifying under paragraph (c) of § 10.5 or § 10.7 is eligible to practice before the Internal Revenue Service to the extent provided in those sections.

(f) *Government officers and employees, and others.* An individual, who is an officer or employee of the executive, legislative, or judicial branch of the United States Government; an officer or employee of the District of Columbia; a Member of Congress; or a Resident Commissioner may not practice before the Internal Revenue Service if such practice violates 18 U.S.C. 203 or 205.

(g) *State officers and employees.* No officer or employee of any State, or subdivision of any State, whose duties require him or her to pass upon, investigate, or deal with tax matters for such State or subdivision, may practice before the Internal Revenue Service, if such employment may disclose facts or information applicable to Federal tax matters.

§ 10.4 Eligibility for enrollment.

(a) *Enrollment upon examination.* The Director of Practice may grant enrollment to an applicant who demonstrates special competence in tax matters by written examination administered by, or administered under the oversight of, the Director and who has not engaged in any conduct that would justify the censure, suspension, or disbarment of any practitioner under the provisions of this part.

(b) *Enrollment of former Internal Revenue Service employees.* The Director of Practice may grant enrollment to an applicant who, by virtue of his or her past service and technical experience in the Internal Revenue Service, has qualified for such enrollment and who has not engaged in any conduct that would justify the censure, suspension, or disbarment of any practitioner under the provisions of this part, under the following circumstances—

(1) The former employee applies for enrollment to the Director of Practice on a form supplied by the Director and supplies the information requested on the form and such other information regarding the experience and training of the applicant as may be relevant.

(2) An appropriate office of the Internal Revenue Service, at the request of the Director of Practice, will provide the Director with a detailed report of the nature and rating of the applicant's work while employed by the Service and a recommendation whether such employment qualifies the applicant technically or otherwise for the desired authorization.

(3) Enrollment based on an applicant's former employment with the Internal Revenue Service may be of unlimited scope or it may be limited to permit the presentation of matters only of the particular class or only before the particular unit or division of the Service for which the applicant's former employment has qualified the applicant.

(4) Application for enrollment based on an applicant's former employment with the Internal Revenue Service must be made within 3 years from the date of separation from such employment.

(5) An applicant for enrollment who is requesting such enrollment based on his or her former employment with the Internal Revenue Service must have had a minimum of 5 years continuous employment with the Service during which he or she must have been regularly engaged in applying and interpreting the provisions of the Internal Revenue Code and the regulations thereunder relating to income, estate, gift, employment, or excise taxes.

(6) For the purposes of paragraph (b)(5) of this section, an aggregate of 10 or more years of employment in positions involving the application and interpretation of the provisions of the Internal Revenue Code, at least 3 of which occurred within the 5 years preceding the date of application, is the equivalent of 5 years continuous employment.

(c) *Natural persons.* Enrollment to practice may be granted only to natural persons.

§ 10.5 Application for enrollment.

(a) *Form; address.* An applicant for enrollment must file an application on Form 23, ''Application for Enrollment to Practice Before the Internal Revenue Service'', properly executed under oath or affirmation, with the Director of Practice. The address of the applicant entered on Form 23 will be the address under which a successful applicant is enrolled and is the address to which the Director will send correspondence concerning enrollment. An enrolled agent must send notification of any change to his or her enrollment address to the Director of Practice, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224, or at such other address specified by the Director. This notification must include the enrolled agent's name, old address, new address, social security number, signature, and the date.

(b) *Fee.* The application for enrollment must be accompanied by a check or money order in the amount set forth on Form 23, payable to the Internal Revenue Service, which amount constitutes a fee charged to each applicant for enrollment. This fee will be retained by the United States whether or not the applicant is granted enrollment.

(c) *Additional information; examination.* The Director of Practice, as a condition to consideration of an application for enrollment, may require the applicant to file additional information and to submit to any written or oral examination under oath or otherwise. The Director will, on written request filed by an applicant, afford such applicant the opportunity to be heard with respect to his or her application for enrollment.

(d) *Temporary recognition.* On receipt of a properly executed application, the Director of Practice may grant the applicant temporary recognition to practice pending a determination as to whether enrollment to practice should be granted. Temporary recognition will be granted only in unusual circumstances and it will not be granted, in any circumstance, if the application is not regular on its face, if the information stated in the application, if true, is not sufficient to warrant enrollment to practice, or if there is any information before the Director indicating that the statements in the application are untrue or that the applicant would not otherwise qualify for enrollment. Issuance of temporary recognition does not constitute enrollment to practice or a finding of eligibility for enrollment, and the temporary recognition may be withdrawn at any time by the Director.

(e) *Appeal from denial of application.* The Director of Practice must inform the applicant as to the reason(s) for any denial of an application for enrollment. The applicant may, within 30 days after receipt of the notice of denial of enrollment, file a written appeal of the denial of enrollment with the Secretary

of the Treasury. A decision on the appeal will be rendered by the Secretary of the Treasury, or his or her designate, as soon as practicable.

§ 10.6 Enrollment.

(a) *Roster.* The Director of Practice will maintain rosters of all individuals—

(1) Who have been granted active enrollment to practice before the Internal Revenue Service;

(2) Whose enrollment has been placed in inactive status for failure to meet the requirements for renewal of enrollment;

(3) Whose enrollment has been placed in inactive retirement status;

(4) Who have been censured, suspended, or disbarred from practice before the Internal Revenue Service;

(5) Whose offer of consent to resign from enrollment to practice before the Internal Revenue Service has been accepted by the Director of Practice under § 10.61 of this part; and

(6) Whose application for enrollment has been denied.

(b) *Enrollment card.* The Director of Practice will issue an enrollment card to each individual whose application for enrollment to practice before the Internal Revenue Service is approved after the effective date of this regulation. Each enrollment card will be valid for the period stated on the enrollment card. Enrollment cards issued to individuals before February 1, 1999, are invalid. An individual is not eligible to practice before the Service if his or her enrollment card is not valid.

(c) *Term of enrollment.* Each individual enrolled to practice before the Internal Revenue Service will be accorded active enrollment status subject to his or her renewal of enrollment as provided in this part.

(d) *Renewal of enrollment.* To maintain active enrollment to practice before the Internal Revenue Service, each individual enrolled is required to have his or her enrollment renewed. Failure by an individual to receive notification from the Director of Practice of the renewal requirement will not be justification for the failure to satisfy this requirement.

(1) All individuals enrolled to practice before the Internal Revenue Service must apply for renewal of enrollment between November 1, 2001, and January 31, 2002. Those who receive initial enrollment between November 1, 2001, and January 31, 2002, must apply for renewal of enrollment by March 1, 2002. The renewal will be effective April 1, 2002.

(2) Thereafter, applications for renewal will be required between November 1, 2004, and January 31, 2005, and between November 1 and January 31 of every subsequent third year. Those who receive initial enrollment during the renewal application period must apply for renewal of enrollment by March 1 of the renewal year. Renewed enrollment will be effective April 1, 2005, and April 1 of every subsequent third year.

(3) The Director of Practice will notify the individual of his or her renewal of enrollment and will issue the individual a card evidencing renewal.

(4) A reasonable nonrefundable fee may be charged for each application for renewal of enrollment filed with the Director of Practice.

(5) Forms required for renewal may be obtained from the Director of Practice, Internal Revenue Service, Washington, DC 20224.

(e) *Condition for renewal: Continuing professional education.* In order to qualify for renewal of enrollment, an individual enrolled to practice before the Internal Revenue Service must certify, on the application for renewal form prescribed by the Director of Practice, that he or she has satisfied the following continuing professional education requirements.

(1) *For renewed enrollment effective April 1, 2002.* (i) A minimum of 24 hours of continuing education credit must be completed between January 1, 2001, and January 31, 2002.

(ii) An individual who receives initial enrollment between January 1, 2001, and January 31, 2002, is exempt from the continuing education requirement for the renewal of enrollment effective April 1, 2002, but is required to file a timely application for renewal of enrollment.

(2) *For renewed enrollment effective April 1, 2005, and every third year thereafter.* (i) A minimum of 72 hours of continuing education credit must be completed between February 1, 2002, and January 31, 2005, and during each subsequent three year period. Each such three year period is known as an enrollment cycle.

(ii) A minimum of 16 hours of continuing education credit must be completed in each year of an enrollment cycle.

(iii) An individual who receives initial enrollment during an enrollment cycle must complete two (2) hours of qualifying continuing education credit for each month enrolled during the enrollment cycle. Enrollment for any part of a month is considered enrollment for the entire month.

(f) *Qualifying continuing education*—(1) *General.* To qualify for continuing education credit, a course of learning must—

(i) Be a qualifying program designed to enhance professional knowledge in Federal taxation or Federal tax related matters, *i.e.,* programs comprised of current subject matter in Federal taxation or Federal tax related matters, including accounting, tax preparation software and taxation; and

(ii) Be conducted by a qualifying sponsor.

(2) *Qualifying programs*—(i) *Formal programs.* A formal program qualifies as continuing education programs if it—

(A) Requires attendance. Additionally, the program sponsor must provide each attendee with a certificate of attendance; and

(B) Requires that the program be conducted by a qualified instructor, discussion leader, or speaker, i.e., a person whose background, training, education and experience is appropriate for instructing or leading a discussion on the subject matter of the particular program; and

(C) Provides or requires a written outline, textbook, or suitable electronic educational materials.

(ii) *Correspondence or individual study programs (including taped programs).* Qualifying continuing education programs include correspondence or individual study programs that are conducted by qualifying sponsors and completed on an individual basis by the enrolled individual. The allowable credit hours for such programs will be measured on a basis comparable to the measurement of a seminar or course for credit in an accredited educational institution. Such programs qualify as continuing education programs if they—

(A) Require registration of the participants by the sponsor;

(B) Provide a means for measuring completion by the participants (*e.g.,* a written examination), including the issuance of a certificate of completion by the sponsor; and

(C) Provide a written outline, textbook, or suitable electronic educational materials.

(iii) *Serving as an instructor, discussion leader or speaker.* (A) One hour of continuing education credit will be awarded for each contact hour completed as an instructor, discussion leader, or speaker at an educational program that meets the continuing education requirements of paragraph (f) of this section.

(B) Two hours of continuing education credit will be awarded for actual subject preparation time for each contact hour completed as an instructor, discussion leader, or speaker at such programs. It is the responsibility of the individual claiming such credit to

maintain records to verify preparation time.

(C) The maximum credit for instruction and preparation may not exceed 50 percent of the continuing education requirement for an enrollment cycle.

(D) An instructor, discussion leader, or speaker who makes more than one presentation on the same subject matter during an enrollment cycle, will receive continuing education credit for only one such presentation for the enrollment cycle.

(iv) *Credit for published articles, books, etc.* (A) Continuing education credit will be awarded for publications on Federal taxation or Federal tax related matters, including accounting, financial management, tax preparation software, and taxation, provided the content of such publications is current and designed for the enhancement of the professional knowledge of an individual enrolled to practice before the Internal Revenue Service.

(B) The credit allowed will be on the basis of one hour credit for each hour of preparation time for the material. It is the responsibility of the person claiming the credit to maintain records to verify preparation time.

(C) The maximum credit for publications may not exceed 25 percent of the continuing education requirement of any enrollment cycle.

(3) *Periodic examination.* (i) Individuals may establish eligibility for renewal of enrollment for any enrollment cycle by—

(A) Achieving a passing score on each part of the Special Enrollment Examination administered under this part during the three year period prior to renewal; and

(B) Completing a minimum of 16 hours of qualifying continuing education during the last year of an enrollment cycle.

(ii) Courses designed to help an applicant prepare for the examination specified in paragraph (a) of § 10.4 are considered basic in nature and are not qualifying continuing education.

(g) *Sponsors.* (1) Sponsors are those responsible for presenting programs.

(2) To qualify as a sponsor, a program presenter must—

(i) Be an accredited educational institution;

(ii) Be recognized for continuing education purposes by the licensing body of any State, possession, territory, Commonwealth, or the District of Columbia responsible for the issuance of a license in the field of accounting or law;

(iii) Be recognized by the Director of Practice as a professional organization or society whose programs include offering continuing professional education opportunities in subject matters within the scope of paragraph (f)(1)(i) of this section; or

(iv) File a sponsor agreement with the Director of Practice and obtain approval of the program as a qualified continuing education program.

(3) A qualifying sponsor must ensure the program complies with the following requirements—

(i) Programs must be developed by individual(s) qualified in the subject matter;

(ii) Program subject matter must be current;

(iii) Instructors, discussion leaders, and speakers must be qualified with respect to program content;

(iv) Programs must include some means for evaluation of technical content and presentation;

(v) Certificates of completion must be provided those who have successfully completed the program; and

(vi) Records must be maintained by the sponsor to verify the participants who attended and completed the program for a period of three years following completion of the program. In the case of continuous conferences, conventions, and the like, records must be maintained to verify completion of the program and attendance by each participant at each segment of the program.

(4) Professional organizations or societies wishing to be considered as qualified sponsors must request this status from the Director of Practice and furnish information in support of the request together with any further information deemed necessary by the Director.

(5) A professional organization or society recognized as a qualified sponsor by the Director of Practice will retain its status for one enrollment cycle. The Director will publish the names of such sponsors on a periodic basis.

(h) *Measurement of continuing education coursework.* (1) All continuing education programs will be measured in terms of contact hours. The shortest recognized program will be one contact hour.

(2) A contact hour is 50 minutes of continuous participation in a program. Credit is granted only for a full contact hour, i.e., 50 minutes or multiples thereof. For example, a program lasting more than 50 minutes but less than 100 minutes will count as one contact hour.

(3) Individual segments at continuous conferences, conventions and the like will be considered one total program. For example, two 90-minute segments (180 minutes) at a continuous conference will count as three contact hours.

(4) For university or college courses, each semester hour credit will equal 15 contact hours and a quarter hour credit will equal 10 contact hours.

(i) *Recordkeeping requirements.* (1) Each individual applying for renewal must retain for a period of three years following the date of renewal of enrollment the information required with regard to qualifying continuing professional education credit hours. Such information includes—

(i) The name of the sponsoring organization;

(ii) The location of the program;

(iii) The title of the program and description of its content;

(iv) Written outlines, course syllibi, textbook, and/or electronic materials provided or required for the course;

(v) The dates attended;

(vi) The credit hours claimed;

(vii) The name(s) of the instructor(s), discussion leader(s), or speaker(s), if appropriate; and

(viii) The certificate of completion and/or signed statement of the hours of attendance obtained from the sponsor.

(2) To receive continuing education credit for service completed as an instructor, discussion leader, or speaker, the following information must be maintained for a period of three years following the date of renewal of enrollment—

(i) The name of the sponsoring organization;

(ii) The location of the program;

(iii) The title of the program and description of its content;

(iv) The dates of the program; and

(v) The credit hours claimed.

(3) To receive continuing education credit for publications, the following information must be maintained for a period of three years following the date of renewal of enrollment—

(i) The publisher;

(ii) The title of the publication;

(iii) A copy of the publication;

(iv) The date of publication; and

(v) Records that substantiate the hours worked on the publication.

(j) *Waivers.* (1) Waiver from the continuing education requirements for a given period may be granted by the Director of Practice for the following reasons—

(i) Health, which prevented compliance with the continuing education requirements;

(ii) Extended active military duty;

(iii) Absence from the United States for an extended period of time due to employment or other reasons, provided the individual does not practice before

the Internal Revenue Service during such absence; and

(iv) Other compelling reasons, which will be considered on a case-by-case basis.

(2) A request for waiver must be accompanied by appropriate documentation. The individual is required to furnish any additional documentation or explanation deemed necessary by the Director of Practice. Examples of appropriate documentation could be a medical certificate or military orders.

(3) A request for waiver must be filed no later than the last day of the renewal application period.

(4) If a request for waiver is not approved, the individual will be placed in inactive status, so notified by the Director of Practice, and placed on a roster of inactive enrolled individuals.

(5) If a request for waiver is approved, the individual will be notified and issued a card evidencing renewal.

(6) Those who are granted waivers are required to file timely applications for renewal of enrollment.

(k) *Failure to comply.* (1) Compliance by an individual with the requirements of this part is determined by the Director of Practice. An individual who fails to meet the requirements of eligibility for renewal of enrollment will be notified by the Director at his or her enrollment address by first class mail. The notice will state the basis for the determination of noncompliance and will provide the individual an opportunity to furnish information in writing relating to the matter within 60 days of the date of the notice. Such information will be considered by the Director in making a final determination as to eligibility for renewal of enrollment.

(2) The Director of Practice may require any individual, by notice sent by first class mail to his or her enrollment address, to provide copies of any records required to be maintained under this part. The Director may disallow any continuing professional education hours claimed if the individual fails to comply with this requirement.

(3) An individual who has not filed a timely application for renewal of enrollment, who has not made a timely response to the notice of noncompliance with the renewal requirements, or who has not satisfied the requirements of eligibility for renewal will be placed on a roster of inactive enrolled individuals. During this time, the individual will be ineligible to practice before the Internal Revenue Service.

(4) Individuals placed in inactive enrollment status and individuals ineligible to practice before the Internal Revenue Service may not, directly or indirectly, indicate that they are enrolled to practice before the Service, or use the term ''enrolled agent,'' the designation ''E. A.,'' or other form of reference to eligibility to practice before the Service.

(5) An individual placed in an inactive status may be reinstated to an active enrollment status by filing an application for renewal of enrollment and providing evidence of the completion of all required continuing professional education hours for the enrollment cycle. Continuing education credit under this subsection may not be used to satisfy the requirements of the enrollment cycle in which the individual has been placed back on the active roster.

(6) An individual placed in an inactive status must file an application for renewal of enrollment and satisfy the requirements for renewal as set forth in this section within three years of being placed in an inactive status. The name of such individual otherwise will be removed from the inactive enrollment roster and his or her enrollment will terminate. Eligibility for enrollment must then be reestablished by the individual as provided in this section.

(7) Inactive enrollment status is not available to an individual who is the subject of a disciplinary matter in the Office of Director of Practice.

(l) *Inactive retirement status.* An individual who no longer practices before the Internal Revenue Service may request being placed in an inactive status at any time and such individual will be placed in an inactive retirement status. The individual will be ineligible to practice before the Service. Such individual must file a timely application for renewal of enrollment at each applicable renewal or enrollment period as provided in this section. An individual who is placed in an inactive retirement status may be reinstated to an active enrollment status by filing an application for renewal of enrollment and providing evidence of the completion of the required continuing professional education hours for the enrollment cycle. Inactive retirement status is not available to an individual who is subject of a disciplinary matter in the Office of Director of Practice.

(m) *Renewal while under suspension or disbarment.* An individual who is ineligible to practice before the Internal Revenue Service by virtue of disciplinary action is required to be in conformance with the requirements for renewal of enrollment before his or her eligibility is restored.

(n) *Verification.* The Director of Practice may review the continuing education records of an enrolled individual and/or qualified sponsor in a manner deemed appropriate to determine compliance with the requirements and standards for renewal of enrollment as provided in paragraph (f) of this section.

(o) *Enrolled Actuaries.* The enrollment and the renewal of enrollment of actuaries authorized to practice under paragraph (d) of § 10.3 are governed by the regulations of the Joint Board for the Enrollment of Actuaries at 20 CFR 901.1 *et seq.*

§ 10.7 Representing oneself; participating in rulemaking; limited practice; special appearances; and return preparation.

(a) *Representing oneself.* Individuals may appear on their own behalf before the Internal Revenue Service provided they present satisfactory identification.

(b) *Participating in rulemaking.* Individuals may participate in rulemaking as provided by the Administrative Procedure Act. See 5 U.S.C. 553.

(c) *Limited practice*—(1) *In general.* Subject to the limitations in paragraph (c)(2) of this section, an individual who is not a practitioner may represent a taxpayer before the Internal Revenue Service in the circumstances described in this paragraph (c)(1), even if the taxpayer is not present, provided the individual presents satisfactory identification and proof of his or her authority to represent the taxpayer. The circumstances described in this paragraph (c)(1) are as follows:

(i) An individual may represent a member of his or her immediate family.

(ii) A regular full-time employee of an individual employer may represent the employer.

(iii) A general partner or a regular full-time employee of a partnership may represent the partnership.

(iv) A bona fide officer or a regular full-time employee of a corporation (including a parent, subsidiary, or other affiliated corporation), association, or organized group may represent the corporation, association, or organized group.

(v) A regular full-time employee of a trust, receivership, guardianship, or estate may represent the trust, receivership, guardianship, or estate.

(vi) An officer or a regular employee of a governmental unit, agency, or authority may represent the governmental unit, agency, or authority in the course of his or her official duties.

(vii) An individual may represent any individual or entity, who is outside the United States, before personnel of the Internal Revenue Service when such representation takes place outside the United States.

(viii) An individual who prepares and signs a taxpayer's tax return as the preparer, or who prepares a tax return but is not required (by the instructions to the tax return or regulations) to sign the tax return, may represent the taxpayer before revenue agents, customer service representatives or similar officers and employees of the Internal Revenue Service during an examination of the taxable year or period covered by that tax return, but this right does not permit such individual to represent the taxpayer, regardless of the circumstances requiring representation, before appeals officers, revenue officers, Counsel or similar officers or employees of the Service or the Department of Treasury.

(2) *Limitations.* (i) An individual who is under suspension or disbarment from practice before the Internal Revenue Service may not engage in limited practice before the Service under paragraph (c)(1) of this section.

(ii) The Director, after notice and opportunity for a conference, may deny eligibility to engage in limited practice before the Internal Revenue Service under paragraph (c)(1) of this section to any individual who has engaged in conduct that would justify censuring, suspending, or disbarring a practitioner from practice before the Service.

(iii) An individual who represents a taxpayer under the authority of paragraph (c)(1) of this section is subject, to the extent of his or her authority, to such rules of general applicability regarding standards of conduct and other matters as the Director of Practice prescribes.

(d) *Special appearances.* The Director of Practice may, subject to such conditions as he or she deems appropriate, authorize an individual who is not otherwise eligible to practice before the Service to represent another person in a particular matter.

(e) *Preparing tax returns and furnishing information.* Any individual may prepare a tax return, appear as a witness for the taxpayer before the Internal Revenue Service, or furnish information at the request of the Service or any of its officers or employees.

(f) *Fiduciaries.* For purposes of this part, a fiduciary (i.e., a trustee, receiver, guardian, personal representative, administrator, or executor) is considered to be the taxpayer and not a representative of the taxpayer.

§ 10.8 Customhouse brokers.

Nothing contained in the regulations in this part will affect or limit the right of a customhouse broker, licensed as such by the Commissioner of Customs in accordance with the regulations prescribed therefor, in any customs district in which he or she is so licensed, at the local office of the Internal Revenue Service or before the National Office of the Service, to act as a representative in respect to any matters relating specifically to the importation or exportation of merchandise under the customs or internal revenue laws, for any person for whom he or she has acted as a customhouse broker.

Subpart B—Duties and Restrictions Relating to Practice Before the Internal Revenue Service

§ 10.20 Information to be furnished.

(a) *To the Internal Revenue Service.* A practitioner must, on a proper and lawful request by a duly authorized officer or employee of the Internal Revenue Service, promptly submit records or information in any matter before the Internal Revenue Service unless the practitioner believes in good faith and on reasonable grounds that the records or information are privileged. Where the requested records or information are not in the possession or control of the practitioner or the practitioner's client, the practitioner must promptly notify the requesting officer or employee, and must provide any information that either the practitioner or the practitioner's client has regarding the identity of any person who may have possession or control of the requested records or information. A practitioner may not interfere, or attempt to interfere, with any proper and lawful effort by the Service or its officers or employees to obtain any record or information unless the practitioner believes in good faith and on reasonable grounds that the record or information is privileged.

(b) *To the Director of Practice.* When a proper and lawful request is made by the Director of Practice, a practitioner must provide the Director with any information the practitioner has concerning a violation or possible violation of the regulations in this part by any person, and to testify regarding this information in any proceeding instituted under this part, unless the practitioner believes in good faith and on reasonable grounds that the information is privileged.

§ 10.21 Knowledge of client's omission.

A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission, the manner in which corrective action may be taken, and the possible consequences of not taking corrective action.

§ 10.22 Diligence as to accuracy.

(a) *In general.* A practitioner must exercise due diligence—

(1) In preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters;

(2) In determining the correctness of oral or written representations made by the practitioner to the Department of the Treasury; and

(3) In determining the correctness of oral or written representations made by the practitioner to clients with reference to any matter administered by the Internal Revenue Service.

(b) *Reliance on others.* Except as provided in §§ 10.33, 10.34, and 10.35, a practitioner will be presumed to have exercised due diligence for purposes of this section if the practitioner relies on the work product of another person and the practitioner used reasonable care in engaging, supervising, training, and evaluating the person, taking proper account of the nature of the relationship between the practitioner and the person.

§ 10.23 Prompt disposition of pending matters.

A practitioner may not unreasonably delay the prompt disposition of any matter before the Internal Revenue Service.

§ 10.24 Assistance from or to disbarred or suspended persons and former Internal Revenue Service employees.

A practitioner may not, knowingly and directly or indirectly:

(a) Accept assistance from or assist any person who is under disbarment or suspension from practice before the Internal Revenue Service if the assistance relates to a matter or matters constituting practice before the Service.

(b) Accept assistance from any former government employee where the provisions of § 10.25 of this part or any Federal law would be violated.

§ 10.25 Practice by former Government employees, their partners and their associates.

(a) *Definitions.* For purposes of this section—

(1) *Assist* means to act in such a way as to advise, furnish information to, or

otherwise aid another person, directly or indirectly.

(2) *Government employee* is an officer or employee of the United States or any agency of the United States, including a *special government employee* as defined in 18 U.S.C. 202(a), or of the District of Columbia, or of any State, or a member of Congress or of any State legislature.

(3) *Member of a firm* is a sole practitioner or an employee or associate thereof, or a partner, stockholder, associate, affiliate or employee of a partnership, joint venture, corporation, professional association or other affiliation of two or more practitioners who represent nongovernmental parties.

(4) *Practitioner* includes any individual described in paragraph (f) of § 10.2.

(5) *Official responsibility* means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action, with or without knowledge of the action.

(6) *Participate or participation* means substantial involvement as a Government employee by making decisions, or preparing or reviewing documents with or without the right to exercise a judgment of approval or disapproval, or participating in conferences or investigations, or rendering advice of a substantial nature.

(7) *Rule* includes Treasury Regulations, whether issued or under preparation for issuance as Notices of Proposed Rule Making or as Treasury Decisions; revenue rulings; and revenue procedures published in the Internal Revenue Bulletin. *Rule* does not include a *transaction* as defined in paragraph (a)(8) of this section.

(8) *Transaction* means any decision, determination, finding, letter ruling, technical advice, Chief Counsel advice, or contract or the approval or disapproval thereof, relating to a particular factual situation or situations involving a specific party or parties whose rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service, or other legal rights, are determined or immediately affected therein and to which the United States is a party or in which it has a direct and substantial interest, whether or not the same taxable periods are involved. *Transaction* does not include *rule* as defined in paragraph (a)(7) of this section.

(b) *General rules.* (1) No former Government employee may, subsequent to his or her Government employment, represent anyone in any matter administered by the Internal Revenue Service if the representation would violate 18 U.S.C. 207 or any other laws of the United States.

(2) No former Government employee who participated in a transaction may, subsequent to his or her Government employment, represent or knowingly assist, in that transaction, any person who is or was a specific party to that transaction.

(3) A former Government employee who within a period of one year prior to the termination of Government employment had official responsibility for a transaction may not, within two years after his or her Government employment is ended, represent or knowingly assist in that transaction any person who is or was a specific party to that transaction.

(4) No former Government employee may, within one year after his or her Government employment is ended, appear before any employee of the Treasury Department in connection with the publication, withdrawal, amendment, modification, or interpretation of a rule in the development of which the former Government employee participated or for which, within a period of one year prior to the termination of his or her Government employment, he or she had official responsibility. This paragraph (b)(4) does not, however, preclude such former employee from appearing on his or her own behalf or from representing a taxpayer before the Internal Revenue Service in connection with a transaction involving the application or interpretation of such a rule with respect to that transaction, provided that such former employee does not utilize or disclose any confidential information acquired by the former employee in the development of the rule.

(c) *Firm representation.* (1) No member of a firm of which a former Government employee is a member may represent or knowingly assist a person who was or is a specific party in any transaction with respect to which the restrictions of paragraph (b)(2) or (3) of this section apply to the former Government employee, in that transaction, unless the firm isolates the former Government employee in such a way to ensure that the former Government employee cannot assist in the representation.

(2) When isolation of a former Government employee is required under paragraph (c)(1) of this section, a statement affirming the fact of such isolation must be executed under oath by the former Government employee and by another member of the firm acting on behalf of the firm. The statement must clearly identify the firm, the former Government employee, and the transaction(s) requiring isolation and it must be filed with the Director of Practice and in such other place and in the manner prescribed by rule or regulation.

(d) *Pending representation.* Practice by former Government employees, their partners and associates with respect to representation in specific matters where actual representation commenced before adoption of this regulation is governed by the regulations set forth at 31 CFR part 10 immediately preceding the adoption of these regulations. The burden of showing that representation commenced before adoption of the revised regulations lies with the former Government employees, and their partners and associates.

§ 10.26 Notaries.

A practitioner may not take acknowledgments, administer oaths, certify papers, or perform any official act as a notary public with respect to any matter administered by the Internal Revenue Service and for which he or she is employed as counsel, attorney, or agent, or in which he or she may be in any way interested. (26 Op. Atty. Gen. 236).

§ 10.27 Fees.

(a) *Generally.* A practitioner may not charge an unconscionable fee for representing a client in a matter before the Internal Revenue Service.

(b) *Contingent fees.* A practitioner may not charge a contingent fee for preparing an original tax return or for any advice rendered in connection with a position taken or to be taken on an original tax return. A practitioner may charge a contingent fee for preparing, or for any advice rendered in connection with a position taken or to be taken on, an amended tax return or a claim for refund (other than a claim for refund made on an original tax return) if the practitioner reasonably anticipates at the time the fee arrangement is entered into that the amended tax return or refund claim will receive substantive review by the Internal Revenue Service. For purposes of this section, a contingent fee is any fee that is based, in whole or in part, on whether or not a position taken on a tax return or in a refund claim is sustained by the Service or in litigation. A contingent fee includes an indemnity agreement, a guarantee, rescission rights, insurance, or any other arrangement under which the taxpayer or other person would be entitled to be compensated or reimbursed by the practitioner in the event a position taken on a tax return or

in a refund claim is not sustained, or any other arrangement that has a similar effect.

§ 10.28 Return of client's records.

On the request of a client, a practitioner must promptly return any and all records of the client. The existence of a dispute over fees does not relieve the practitioner of his or her responsibility under this section. The practitioner may retain copies of the records returned to a client.

§ 10.29 Conflicting interests.

(a) A practitioner may not represent potential conflicting interests in his or her practice before the Internal Revenue Service, unless—

(1) The practitioner reasonably believes that the representation of any party before the Service will not be adversely affected; and

(2) All parties represented by the practitioner who have an interest in the matter before the Service expressly consent in writing to the representation after the practitioner has fully disclosed the potential conflict.

(b) Copies of the written consents must be retained by the practitioner for at least 36 months from the date of the conclusion of the representation of the affected clients and the written consents must be provided to any officer or employee of the Internal Revenue Service on request.

(c) A practitioner may not represent a party in his or her practice before the Internal Revenue Service if the representation of the party may be materially limited by the practitioner's own interests, unless the practitioner reasonably believes the representation will not be adversely affected and the client consents after the practitioner has fully disclosed the potential conflict, including disclosure of the implications of the potential conflict and the risks involved.

§ 10.30 Solicitation.

(a) *Advertising and solicitation restrictions.* (1) A practitioner may not, with respect to any Internal Revenue Service matter, in any way use or participate in the use of any form of public communication or private solicitation containing a false, fraudulent, or coercive statement or claim; or a misleading or deceptive statement or claim. Enrolled agents, in describing their professional designation, may not utilize the term of art ''certified'' or ''licensed'' or indicate an employer/employee relationship with the Service. Examples of acceptable descriptions are ''enrolled to represent taxpayers before the Internal Revenue Service,'' ''enrolled to practice before the Internal Revenue Service,'' and ''admitted to practice before the Internal Revenue Service.'' Enrolled agents and enrolled actuaries may abbreviate such designation as either EA or E.A. Examples of unacceptable descriptions are ''Internal Revenue Service (or IRS) Enrolled Agent,'' ''Enrolled Agent of the Internal Revenue Service (or IRS),'' ''Certified Enrolled Agent,'' or ''Licensed to practice before the Internal Revenue Service (or IRS).''

(2) A practitioner may not make, directly or indirectly, an uninvited written or oral solicitation of employment in matters related to the Internal Revenue Service if the solicitation violates Federal or State law or other applicable rule, *e.g.,* attorneys are precluded from making a solicitation that is prohibited by the rules of the State bar to which they are members. Any lawful solicitation made by or on behalf of a practitioner eligible to practice before the Service must, nevertheless, clearly identify the solicitation as such and, if applicable, identify the source of the information used in choosing the recipient.

(b) *Fee information.* (1)(i) A practitioner may publish the availability of a written schedule of fees and disseminate the following fee information—

(A) Fixed fees for specific routine services.

(B) Hourly rates.

(C) Range of fees for particular services.

(D) Fee charged for an initial consultation.

(ii) Any statement of fee information concerning matters in which costs may be incurred must include a statement disclosing whether clients will be responsible for such costs.

(2) A practitioner may charge no more than the rate(s) published under paragraph (b)(1) of this section for a reasonable period of time after the last date on which the schedule of fees was published (which, in no event, may be shorter than 30 days).

(c) *Communication of fee information.* Fee information may be communicated in professional lists, telephone directories, print media, mailings, electronic mail, facsimile, hand delivered flyers, radio, television, and any other method. The method chosen, however, must not cause the communication to become untruthful, deceptive, or otherwise in violation of these regulations. A practitioner may not persist in attempting to contact a prospective client if the prospective client has made it known to the practitioner that he or she does not desire to be solicited. In the case of radio and television broadcasting, the broadcast must be recorded and the practitioner must retain a recording of the actual transmission. In the case of direct mail and e-commerce communications, the practitioner must retain a copy of the actual communication, along with a list or other description of persons to whom the communication was mailed or otherwise distributed. The copy must be retained by the practitioner for a period of at least 36 months from the date of the last transmission or use.

(d) *Improper associations.* A practitioner may not, in matters related to the Internal Revenue Service, assist, or accept assistance from, any person or entity who, to the knowledge of the practitioner, obtains clients or otherwise practices in a manner forbidden under this section.

§ 10.31 Negotiation of taxpayer checks.

A practitioner who prepares tax returns may not endorse or otherwise negotiate any check issued to a client by the government in respect of a Federal tax liability.

§ 10.32 Practice of law.

Nothing in the regulations in this part may be construed as authorizing persons not members of the bar to practice law.

§ 10.33 Tax shelter opinions used by third parties to market tax shelters.

(a) *In general.* A practitioner who provides a tax shelter opinion that does not conclude that the Federal tax treatment of a tax shelter item or items is more likely than not the proper treatment must comply with each of the following requirements with respect to each such item.

(1) *Factual matters.* (i) The practitioner must make inquiry as to all relevant facts, be satisfied that the opinion takes account of all relevant facts, and be satisfied that the material facts (including factual assumptions and representations) are accurately and completely described in the opinion and in any related offering materials or sales promotion materials.

(ii) The opinion must not be based, directly or indirectly, on any unreasonable factual assumptions (including assumptions as to future events). Unreasonable factual assumptions include—

(A) A factual assumption that the practitioner knows or has reason to believe is incorrect, incomplete, inconsistent with an important fact or another factual assumption, or implausible in any material respect; or

(B) A factual assumption regarding a fact or facts that the practitioner could reasonably request to be provided or to be represented.

(iii) A practitioner may, where it would be reasonable based on all the facts and circumstances, rely upon factual representations, statements, findings, or agreements (factual representations) (including representations describing the specific business reasons for the transaction, the potential profitability of the transaction apart from tax benefits, or a valuation prepared by an independent party). Factors relevant to whether such factual representations are reasonable include, but are not limited to, whether the person making the factual representations is knowledgeable as to the facts being represented and is the appropriate person to make such factual representations. A practitioner does not need to conduct an audit or independent verification of a factual representation, but the practitioner may not rely on factual representations if the practitioner knows or has reason to believe, based on his or her background and knowledge, that the relevant information is, or otherwise appears to be, unreasonable, incorrect, incomplete, inconsistent with an important fact or another factual representation, or implausible in any material respect. For example, a representation is incomplete if it states that there are business reasons for the transaction without describing those reasons, or if it states that a transaction is potentially profitable apart from tax benefits without providing adequate factual support. In addition, a valuation is inconsistent with an important fact or factual assumption or is implausible if it appears to be based on facts that are inconsistent with the facts of the transaction.

(iv) If the fair market value of property or the expected financial performance of an investment is relevant to the tax shelter item, a practitioner may not accept an appraisal or financial projection as support for the matters claimed therein unless—

(A) The appraisal or financial projection makes sense on its face;

(B) The practitioner reasonably believes that the person making the appraisal or financial projection is reputable and competent to perform the appraisal or projection; and

(C) The appraisal is based on the definition of fair market value prescribed under the relevant Federal tax provisions.

(v) If the fair market value of purchased property is to be established by reference to its stated purchase price, the practitioner must examine the terms and conditions on which the property was (or is to be) purchased to determine whether the stated purchase price reasonably may be considered to be its fair market value.

(2) *Relate law to facts.* (i) The opinion must relate the applicable law to the relevant facts.

(ii) The opinion must clearly identify the facts upon which the opinion's conclusions are based.

(iii) The opinion must contain a reasoned analysis of the pertinent facts and legal authorities and must not assume the favorable resolution of any Federal tax issue material to the analysis or otherwise rely on any unreasonable legal assumptions.

(iv) The opinion must not contain legal analyses or conclusions with respect to Federal tax issues that are inconsistent with each other.

(3) *Analysis of material Federal tax issues.* The practitioner must ascertain that all material Federal tax issues have been considered, and that all of those issues that involve the reasonable possibility of a challenge by the Internal Revenue Service have been fully and fairly addressed. The opinion must state that the practitioner has considered the possible application to the facts of all potentially relevant judicial doctrines, including the step transaction, business purpose, economic substance, substance over form, and sham transaction doctrines, as well as potentially relevant statutory and regulatory anti-abuse rules, and the opinion must analyze whether the tax shelter item is vulnerable to challenge under all potentially relevant doctrines and anti-abuse rules. In analyzing such judicial doctrines and statutory and regulatory anti-abuse rules, the opinion must take into account the typical investor's non-tax and tax purposes (and the relative weight of such purposes) for entering into a transaction and for structuring a transaction in a particular manner.

(4) *Evaluation of material Federal tax issues.* The practitioner must, where possible, clearly provide his or her conclusion as to the likelihood that a typical investor of the type to whom the tax shelter is or will be marketed will prevail on the merits with respect to each material Federal tax issue that involves the reasonable possibility of a challenge by the Internal Revenue Service. If the practitioner is unable to reach such a conclusion with respect to one or more Federal tax issues, he or she must clearly state that he or she is unable to reach such a conclusion with respect to those issues. The practitioner's opinion must fully describe the reasons for the practitioner's conclusions or fully describe the reasons for his or her inability to reach a conclusion as to one or more issues.

(5) *Overall conclusion.* (i) The practitioner must, where possible, clearly provide an overall conclusion as to the likelihood that the Federal tax treatment of the tax shelter item or items is the proper treatment. If the practitioner is unable to reach such an overall conclusion, he or she must clearly state that he or she is unable to reach such an overall conclusion and the opinion must fully describe the reasons for the practitioner's inability to reach a conclusion.

(ii) The fact that the practitioner's opinion does not reach an overall conclusion that the Federal tax treatment of the tax shelter item or items is more likely than not the proper treatment, or the fact that the practitioner is unable to reach an overall conclusion, must be clearly and prominently disclosed on the first page of the opinion.

(iii) The opinion must clearly and prominently disclose on the first page of the opinion that the opinion was not written for the purpose of establishing—

(A) Under section 6662(d)(2)(C)(i)(II) of the Internal Revenue Code and 26 CFR 1.6662–4(g)(4), that a taxpayer other than a corporation reasonably believed at the time a tax return was filed that the tax treatment of a tax shelter item was more likely than not the proper treatment of that item; or

(B) Under section 6664(c)(1) of the Internal Revenue Code and 26 CFR 1.6664–4(e), that a corporate taxpayer acted with reasonable cause and in good faith with respect to a tax shelter item.

(iv) In ascertaining that all material Federal tax issues have been considered, evaluating the merits of those issues and evaluating whether the Federal tax treatment of the tax shelter item or items is the proper treatment, the possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be settled may not be taken into account.

(6) *Description of opinion.* The practitioner must take reasonable steps to assure that any written materials or promotional efforts that distribute, reflect or refer to the tax shelter opinion, correctly and fairly represent the nature and extent of the opinion.

(b) *Competence to provide opinion; reliance on opinions of others.* (1) The practitioner must be knowledgeable in all of the aspects of Federal tax law relevant to the opinion being rendered.

(i) A practitioner may not provide a tax shelter opinion that does not clearly provide his or her conclusion as to the

likelihood that a typical investor of the type to whom the tax shelter is or will be marketed will prevail on the merits with respect to each material Federal tax issue that involves the reasonable possibility of a challenge by the Internal Revenue Service (or, alternatively, if the practitioner is unable to reach a conclusion with respect to one or more material Federal tax issues, an opinion that does not clearly state that he or she is unable to reach a conclusion with respect to those issues), or does not provide an overall conclusion as to the likelihood that the Federal tax treatment of the tax shelter item or items is the proper treatment (or, alternatively, if the practitioner is unable to reach an overall conclusion, an opinion that does not clearly state that he or she is unable to reach such an overall conclusion), unless—

(A) At least one other competent practitioner provides an opinion on the likely outcome with respect to all of the other material Federal tax issues which involve a reasonable possibility of challenge by the Internal Revenue Service, and with respect to the tax shelter item or items; and

(B) The practitioner, on reviewing such other opinions and any written materials that distribute, reflect or refer to such other opinions, has no reason to believe that the other practitioner did not comply with the standards of paragraph (a) of this section.

(ii) Notwithstanding the foregoing, a practitioner who has not been retained to provide an overall evaluation may issue an opinion on less than all the material tax issues only if he or she has no reason to believe, based on his or her knowledge and experience, that an overall conclusion given by the practitioner who reaches an overall conclusion is incorrect on its face. Such practitioner also must ensure that the limited opinion satisfies the requirements of this section that are otherwise applicable.

(2) *Financial forecasts and projections.* A practitioner who makes financial forecasts or projections relating to or based on the tax consequences of the tax shelter item that are included in written materials disseminated to any or all of the same persons as the opinion may rely on the opinion of another practitioner as to any or all material Federal tax issues, provided that the practitioner who desires to rely on the other opinion has no reason to believe the practitioner rendering such other opinion has not complied with the standards of paragraph (a) of this § 10.33, and the requirements of paragraphs (b)(1)(i)(A) and (B) and the first sentence of paragraph (b)(1)(ii) of this section are satisfied. The practitioner's report must disclose any material Federal tax issue not covered by, or incorrectly opined on, by the other opinion, and shall set forth his or her opinion with respect to each such issue in a manner that satisfies the requirements of paragraph (a) of this section.

(c) *Definitions.* For purposes of this section—

(1) *Practitioner* includes any individual described in paragraph (f) of § 10.2.

(2) The definition of *tax shelter* is set forth in section 6662(d)(2)(C)(iii) of the Internal Revenue Code.

(3) A *tax shelter item* is an item of income, gain, loss, deduction or credit if the item is directly or indirectly attributable to a tax shelter as defined in section 6662(d)(2)(C)(iii) of the Internal Revenue Code.

(4) A *tax shelter opinion,* as the term is used in this section, is written advice by a practitioner concerning the Federal tax aspects of a tax shelter item or items that a practitioner knows or has reason to believe will be used or referred to by a person other than the practitioner (or person who is a member of, associated with, or employed by the practitioner's firm or company) in promoting, marketing or recommending the tax shelter to one or more taxpayers, irrespective of whether such promotional, marketing, or similar activities are conducted privately or publicly. The term tax shelter opinion includes the Federal tax aspects or tax risks portion of offering materials prepared for the person who is promoting, marketing or recommending the tax shelter by or at the direction of a practitioner, whether or not a separate opinion letter is issued or whether or not the practitioner's name is referred to in offering materials or in connection with sales promotion efforts. Similarly, a financial forecast or projection prepared by a practitioner is a tax shelter opinion if it is predicated on assumptions regarding Federal tax aspects of the investment and that meets the other requirements of the first sentence of this paragraph. The term tax shelter opinion does not include advice provided in connection with the review of portions of offering or sales promotion materials, provided neither the name of the practitioner or the practitioner's firm, nor the fact that a practitioner has rendered advice concerning the Federal tax aspects, is referred to in the offering materials or related sales promotion efforts.

(5) A *material Federal tax issue,* as the term is used in this section, is any Federal tax issue the resolution of which could have a significant impact (whether beneficial or adverse) on a taxpayer under any reasonably foreseeable circumstance. A material Federal tax issue includes the potential applicability of penalties, additions to tax, or interest charges that reasonably could be asserted by the Internal Revenue Service with respect to the tax shelter item.

(6) The following examples illustrate this section—

Example 1. A practitioner is requested by a third party to prepare a memorandum evaluating whether the purported Federal tax treatment of a tax shelter item arising from a series of transactions will be sustained if challenged by the Internal Revenue Service. The practitioner concludes that there is a realistic possibility that the purported treatment of the tax shelter item is the proper treatment and has reason to believe that the third party will use or refer to the memorandum he prepares in promoting, marketing or recommending the transaction to one or more taxpayers. The memorandum is a tax shelter opinion for purposes of this section.

Example 2. A practitioner writes a memorandum that evaluates whether a hypothetical taxpayer which enters into a series of transactions can offset a preexisting capital gain against certain losses arising from the series of transactions. The practitioner concludes that, while a significant purpose for entering into the series of transactions is the avoidance or evasion of Federal income tax within the meaning of section 6662(d)(2)(C)(iii) of the Internal Revenue Code, there is a realistic possibility that the tax loss arising from this series of transactions is the proper treatment. The practitioner plans to provide this memorandum directly to clients who have capital gains. The memorandum is not a tax shelter opinion for purposes of this section because the promoting, marketing or recommending of the tax shelter is not being done by a person other than the practitioner.

§ 10.34 Standards for advising with respect to tax return positions and for preparing or signing returns.

(a) *Realistic possibility standard.* A practitioner may not sign a tax return as a preparer if the practitioner determines that the tax return contains a position that does not have a realistic possibility of being sustained on its merits (the realistic possibility standard) unless the position is not frivolous and is adequately disclosed to the Internal Revenue Service. A practitioner may not advise a client to take a position on a tax return, or prepare the portion of a tax return on which a position is taken, unless—

(1) The practitioner determines that the position satisfies the realistic possibility standard; or

(2) The position is not frivolous and the practitioner advises the client of any

opportunity to avoid the accuracy-related penalty in section 6662 of the Internal Revenue Code by adequately disclosing the position and of the requirements for adequate disclosure.

(b) *Advising clients on potential penalties.* A practitioner advising a client to take a position on a tax return, or preparing or signing a tax return as a preparer, must inform the client of the penalties reasonably likely to apply to the client with respect to the position advised, prepared, or reported. The practitioner also must inform the client of any opportunity to avoid any such penalty by disclosure, if relevant, and of the requirements for adequate disclosure. This paragraph (b) applies even if the practitioner is not subject to a penalty with respect to the position.

(c) *Relying on information furnished by clients.* A practitioner advising a client to take a position on a tax return, or preparing or signing a tax return as a preparer, generally may rely in good faith without verification upon information furnished by the client. The practitioner may not, however, ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.

(d) *Definitions.* For purposes of this section—

(1) *Realistic possibility.* A position is considered to have a realistic possibility of being sustained on its merits if a reasonable and well informed analysis by a person knowledgeable in the tax law would lead such a person to conclude that the position has approximately a one in three, or greater, likelihood of being sustained on its merits. The authorities described in 26 CFR 1.6662–4(d)(3)(iii), or any successor provision, of the substantial understatement penalty regulations may be taken into account for purposes of this analysis. The possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be settled may not be taken into account.

(2) *Frivolous.* A position is frivolous if it is patently improper.

§ 10.35 More likely than not tax shelter opinions.

(a) *In general.* A practitioner who provides a tax shelter opinion that concludes that the Federal tax treatment of a tax shelter item or items is more likely than not (or at a higher level of confidence) the proper treatment must comply with each of the following requirements with respect to each such item.

(1) *Factual matters.* (i) The practitioner must make inquiry as to all relevant facts, be satisfied that the opinion takes account of all relevant facts, and be satisfied that the material facts (including factual assumptions and representations) are accurately and completely described in the opinion, and, where appropriate, in any related offering materials or sales promotion materials.

(ii) The opinion must not be based, directly or indirectly, on any unreasonable factual assumptions (including assumptions as to future events). Unreasonable factual assumptions include—

(A) A factual assumption that the practitioner knows or has reason to believe is incorrect, incomplete, inconsistent with an important fact or another factual assumption, or implausible in any material respect; or

(B) A factual assumption regarding a fact or facts that the practitioner could reasonably request to be provided or to be represented.

(C) A factual assumption that the transaction has a business reason, an assumption that the transaction is potentially profitable apart from tax benefits, or an assumption with respect to a material valuation issue.

(iii) A practitioner may, where it would be reasonable based on all the facts and circumstances, rely on factual representations, statements, findings, or agreements of the taxpayer or other persons ((factual representations) (including representations describing the specific business reasons for the transaction, the potential profitability of the transaction apart from tax benefits, or a valuation prepared by an independent party). Factors relevant to whether such factual representations are reasonable include, but are not limited to, whether the person making the factual representations is knowledgeable as to the facts being represented and is the appropriate person to make such factual representations. A practitioner does not need to conduct an audit or independent verification of a factual representation, but the practitioner may not rely on factual representations if the practitioner knows or has reason to believe, based on his or her background and knowledge, that the relevant information is, or otherwise appears to be, unreasonable, incorrect, incomplete, inconsistent with an important fact or another factual representation, or implausible in any material respect. For example, a representation is incomplete if it states that there are business reasons for the transaction without describing those reasons, or if it states that a transaction is potentially profitable apart from tax benefits without providing adequate factual support. In addition, a valuation is inconsistent with an important fact or factual assumption or is implausible if it appears to be based on facts that are inconsistent with the facts of the transaction.

(iv) If the fair market value of property or the expected financial performance of an investment is relevant to the tax shelter item, a practitioner may not accept an appraisal or financial projection as support for the matters claimed therein unless—

(A) The appraisal or financial projection makes sense on its face;

(B) The practitioner reasonably believes that the person making the appraisal or financial projection is reputable and competent to perform the appraisal or projection; and

(C) The appraisal is based on the definition of fair market value prescribed under the relevant Federal tax provisions.

(v) If the fair market value of purchased property is to be established by reference to its stated purchase price, the practitioner must examine the terms and conditions on which the property was (or is to be) purchased to determine whether the stated purchase price reasonably may be considered to be its fair market value.

(2) *Relate law to facts.* (i) The opinion must relate the applicable law to the relevant facts.

(ii) The opinion must clearly identify the facts upon which the opinion's conclusions are based.

(iii) The opinion must contain a reasoned analysis of the pertinent facts and legal authorities and must not assume the favorable resolution of any Federal tax issue material to the analysis or otherwise rely on any unreasonable legal assumptions.

(iv) The opinion must not contain legal analyses or conclusions with respect to Federal tax issues that are inconsistent with each other.

(3) *Analysis of material Federal tax issues.* The practitioner must ascertain that all material Federal tax issues have been considered, and that all of those issues which involve the reasonable possibility of a challenge by the Internal Revenue Service have been fully and fairly addressed. The opinion must state that the practitioner has considered the possible application to the facts of all potentially relevant judicial doctrines, including the step transaction, business purpose, economic substance, substance over form, and sham transaction doctrines, as well as potentially relevant

statutory and regulatory anti-abuse rules, and the opinion must analyze whether the tax shelter item is vulnerable to challenge under all potentially relevant doctrines and anti-abuse rules. In analyzing such judicial doctrines and statutory and regulatory anti-abuse rules, the opinion must take into account the taxpayer's non-tax and tax purposes (and the relative weight of such purposes) for entering into a transaction and for structuring a transaction in a particular manner.

(4) *Evaluation of material Federal tax issues and overall conclusion.* (i) The practitioner must clearly provide his or her conclusion as to the likelihood that an investor (or, where the practitioner is relying on a representation as to the characteristics of potential investors, a typical investor of the type to whom the tax shelter is or will be marketed) will prevail on the merits with respect to each material Federal tax issue that involves the reasonable possibility of a challenge by the Internal Revenue Service. This requirement is not satisfied by including a statement in the opinion that the practitioner was unable to opine with respect to certain material Federal tax issues, including but not limited to whether the transaction has a business purpose or economic substance.

(ii) The opinion must unambiguously conclude that the Federal tax treatment of the tax shelter item or items is more likely than not (or at a higher level of confidence) the proper tax treatment. A favorable overall conclusion may not be based solely on the conclusion that the taxpayer more likely than not will prevail on the merits of each material Federal tax issue.

(iii) In ascertaining that all material Federal tax issues have been considered, evaluating the merits of those issues and evaluating whether the Federal tax treatment of the tax shelter item or items is the proper tax treatment, the possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be settled may not be taken into account.

(5) *Description of opinion.* The practitioner must take reasonable steps to assure that any written materials or promotional efforts that distribute, reflect or refer to the tax shelter opinion, correctly and fairly represent the nature and extent of the opinion.

(b) *Competence to provide opinion; reliance on opinions of others.* (1) The practitioner must be knowledgeable in all of the aspects of Federal tax law relevant to the opinion being rendered. If the practitioner is not sufficiently knowledgeable to render an informed opinion with respect to particular material Federal tax issues, then the practitioner may rely on the opinion of another practitioner with respect to such issues, provided the practitioner is satisfied that the other practitioner is sufficiently knowledgeable regarding such issues and the practitioner does not know and has no reason to believe that such opinion should not be relied on.

(2) To the extent the practitioner relies on an opinion of another practitioner, the opinion rendered by the practitioner must identify the other practitioner, state the date on which the opinion was rendered, and set forth the conclusions reached in such opinion.

(3) The practitioner also must be satisfied that the combined analysis, taken as a whole, satisfies the requirements of this § 10.35.

(4) *Financial forecasts and projections.* A practitioner who makes financial forecasts or projections relating to or based on the tax consequences of the tax shelter item that are included in written materials disseminated to any or all of the same persons as the opinion may rely on the opinion of another practitioner as to any or all material Federal tax issues, provided that the practitioner who desires to rely on the other opinion has no reason to believe the practitioner rendering such other opinion has not complied with the standards of paragraph (a) of this § 10.35, is satisfied that the other practitioner is sufficiently knowledgeable and does not know and has no reason to believe that the opinion of the other practitioner should not be relied on. The practitioner's report must disclose any material Federal tax issue not covered by, or incorrectly opined on, by the other opinion, and shall set forth his or her opinion with respect to each such issue in a manner that satisfies the requirements of paragraph (a) of this section.

(c) *Definitions.* For purposes of this section—

(1) *Practitioner* includes any individual described in paragraph (f) of § 10.2.

(2) The definition of *tax shelter* is set forth in section 6662(d)(2)(C)(iii) of the Internal Revenue Code. Excluded from the term are municipal bonds and qualified retirement plans.

(3) A *tax shelter item* is an item of income, gain, loss, deduction or credit if the item is directly or indirectly attributable to a tax shelter as defined in section 6662(d)(2)(C)(iii) of the Internal Revenue Code.

(4) A *tax shelter opinion,* as the term is used in this section, is written advice by a practitioner concerning the Federal tax aspects of a tax shelter item or items. The term tax shelter opinion includes the Federal tax aspects or tax risks portion of offering materials prepared by or at the direction of a practitioner, whether or not a separate opinion letter is issued and whether or not the practitioner's name is referred to in offering materials or in connection with sales promotion efforts. Similarly, a financial forecast or projection prepared by a practitioner is a tax shelter opinion if it is predicated on assumptions regarding Federal tax aspects of the investment and that meets the other requirements of the first sentence of this paragraph. The term tax shelter opinion does not include advice provided in connection with the review of portions of offering materials or sales promotion materials, provided neither the name of the practitioner or the practitioner's firm nor the fact that a practitioner has rendered advice concerning the Federal tax aspects, is referred to in the offering materials or related sales promotion materials.

(5) A *material Federal tax issue,* as the term is used in this section, is any Federal tax issue the resolution of which could have a significant impact (whether beneficial or adverse) on a taxpayer under any reasonably foreseeable circumstance.

(d) *Effect of opinion that meets these standards.* An opinion of a practitioner that meets these requirements will satisfy the practitioner's responsibilities under this section, but the persuasiveness of the opinion with regard to the tax issues in question and the taxpayer's good faith reliance on the opinion will be separately determined under applicable provisions of the law and regulations.

(e) For purposes of advising the Director of Practice whether an individual may have violated § 10.33 or § 10.35, the Director is authorized to establish an Advisory Committee composed of at least five individuals authorized to practice before the Internal Revenue Service. Under procedures established by the Director, such Advisory Committee will, at the request of the Director, review and make recommendations with regard to the alleged violations of § 10.33 or § 10.35.

§ 10.36 Procedures to ensure compliance.

A practitioner who is a member of, associated with, or employed by a firm must take reasonable steps, consistent with his or her authority and responsibility for the firm's practice advising clients regarding matters arising under the Federal tax laws, to make certain that the firm has adequate procedures in effect for purposes of ensuring compliance with §§ 10.33,

10.34, and 10.35. The Director of Practice may take disciplinary action against any practitioner for failing to comply with the requirements of the preceding sentence if, and only if—

(a) The practitioner through willfulness, recklessness, or gross incompetence does not take such reasonable steps and the practitioner and one or more persons who are members of, associated with, or employed by the firm have, in connection with their practice with the firm, engaged in a pattern or practice of failing to comply with § 10.33, § 10.34 or § 10.35; or

(b) The practitioner takes such reasonable steps but has actual knowledge that one or more persons who are members of, associated with, or employed by the firm have, in connection with their practice with the firm, engaged in a pattern or practice of failing to comply with § 10.33, § 10.34 or § 10.35 and the practitioner, through willfulness, recklessness, or gross incompetence, fails to take prompt action, consistent with his or her authority and responsibility for the firm's practice advising clients regarding matters under the Federal tax laws, to correct such pattern or practice.

Subpart C—Sanctions for Violation of the Regulations

§ 10.50 Sanctions.

(a) *Authority to censure, suspend, or disbar.* The Secretary of the Treasury, or his or her designate, after notice and an opportunity for a proceeding, may censure, suspend or disbar any practitioner from practice before the Internal Revenue Service if the practitioner is shown to be incompetent or disreputable, fails to comply with any regulation in this part, or with intent to defraud, willfully and knowingly misleads or threatens a client or prospective client. Censure is a public reprimand.

(b) *Authority to disqualify.* The Secretary of the Treasury, or his or her designate, after due notice and opportunity for hearing, may disqualify any appraiser with respect to whom a penalty has been assessed under section 6701(a) of the Internal Revenue Code.

(1) If any appraiser is disqualified pursuant to this subpart C, such appraiser is barred from presenting evidence or testimony in any administrative proceeding before the Department of Treasury or the Internal Revenue Service, regardless of whether such evidence or testimony would pertain to an appraisal made prior to or after such date.

(2) Any appraisal made by a disqualified appraiser after the effective date of disqualification will not have any probative effect in any administrative proceeding before the Department of the Treasury or the Internal Revenue Service. However, an appraisal otherwise barred from admission into evidence pursuant to this section may be admitted into evidence solely for the purpose of determining the taxpayer's reliance in good faith on such appraisal.

§ 10.51 Incompetence and disreputable conduct.

Incompetence and disreputable conduct for which a practitioner may be censured, suspended or disbarred from practice before the Internal Revenue Service includes, but is not limited to—

(a) Conviction of any criminal offense under the revenue laws of the United States;

(b) Conviction of any criminal offense involving dishonesty, or breach of trust;

(c) Conviction of any felony under Federal or State law for which the conduct involved renders the practitioner unfit to practice before the Internal Revenue Service;

(d) Giving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof, or to any tribunal authorized to pass upon Federal tax matters, in connection with any matter pending or likely to be pending before them, knowing such information to be false or misleading. Facts or other matters contained in testimony, Federal tax returns, financial statements, applications for enrollment, affidavits, declarations, or any other document or statement, written or oral, are included in the term *information.*

(e) Solicitation of employment as prohibited under § 10.30, the use of false or misleading representations with intent to deceive a client or prospective client in order to procure employment, or intimating that the practitioner is able improperly to obtain special consideration or action from the Internal Revenue Service or officer or employee thereof.

(f) Willfully failing to make a Federal tax return in violation of the revenue laws of the United States, willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax, or knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof.

(g) Misappropriation of, or failure properly and promptly to remit funds received from a client for the purpose of payment of taxes or other obligations due the United States.

(h) Directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the Internal Revenue Service by the use of threats, false accusations, duress or coercion, by the offer of any special inducement or promise of advantage or by the bestowing of any gift, favor or thing of value.

(i) Disbarment or suspension from practice as an attorney, certified public accountant, public accountant, or actuary by any duly constituted authority of any State, possession, territory, Commonwealth, the District of Columbia, any Federal court of record or any Federal agency, body or board.

(j) Knowingly aiding and abetting another person to practice before the Internal Revenue Service during a period of suspension, disbarment, or ineligibility of such other person.

(k) Contemptuous conduct in connection with practice before the Internal Revenue Service, including the use of abusive language, making false accusations and statements, knowing them to be false, or circulating or publishing malicious or libelous matter.

(l) Giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent opinions on questions arising under the Federal tax laws. False opinions described in this paragraph (l) include those which reflect or result from a knowing misstatement of fact or law, from an assertion of a position known to be unwarranted under existing law, from counseling or assisting in conduct known to be illegal or fraudulent, from concealing matters required by law to be revealed, or from consciously disregarding information indicating that material facts expressed in the tax opinion or offering material are false or misleading. For purposes of this paragraph, reckless conduct is a highly unreasonable omission or misrepresentation involving an extreme departure from the standards of ordinary care that a practitioner should observe under the circumstances. A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted knowingly, recklessly, or through gross incompetence. Gross incompetence includes conduct that reflects gross indifference, preparation which is grossly inadequate under the

circumstances, and a consistent failure to perform obligations to the client.

§ 10.52 Violation of regulations.

A practitioner may be censured, suspended or disbarred from practice before the Internal Revenue Service for any of the following—

(a) Willfully violating any of the regulations contained in this part.

(b) Recklessly or through gross incompetence (within the meaning of § 10.51(l)) violating § 10.33, § 10.34, or § 10.35.

§ 10.53 Receipt of information concerning practitioner.

(a) *Officer or employee of the Internal Revenue Service.* If an officer or employee of the Internal Revenue Service has reason to believe that a practitioner has violated any provision of this part, the officer or employee will promptly make a written report to the Director of Practice of the alleged violation.

(b) *Other persons.* Any person other than an officer or employee of the Internal Revenue Service having information of a violation of any provision of this part may make an oral or written report of the alleged violation to the Director of Practice or any officer or employee of the Service. If the report is made to an officer or employee of the Service, the officer or employee will make a written report of the alleged violation to the Director.

Subpart D—Rules Applicable to Disciplinary Proceedings

§ 10.60 Institution of proceeding.

(a) Whenever the Director of Practice determines that a practitioner violated any provision of the laws or regulations governing practice before the Internal Revenue Service, the Director may reprimand the practitioner or, in accordance with § 10.62, institute a proceeding for censure, suspension, or disbarment of the practitioner.

(b) Whenever the Director of Practice is advised or becomes aware that a penalty has been assessed against an appraiser under section 6701(a) of the Internal Revenue Code, the Director may reprimand the appraiser or, in accordance with § 10.62, institute a proceeding for disqualification of the appraiser.

(c) A proceeding for censure, suspension, or disbarment of a practitioner or disqualification of an appraiser is instituted by the filing of a complaint, the contents of which are more fully described in § 10.62. Except as provided in § 10.82, a proceeding will not be instituted under this section unless the proposed respondent previously has been advised in writing of the facts or conduct warranting such action and has been accorded an opportunity to provide an explanation or description of mitigating circumstances.

§ 10.61 Conferences.

(a) *In general.* The Director of Practice may confer with a practitioner or an appraiser concerning allegations of misconduct irrespective of whether a proceeding for censure, suspension, disbarment, or disqualification has been instituted against the practitioner or appraiser. If the conference results in a stipulation in connection with a proceeding in which the practitioner or appraiser is the respondent, the stipulation may be entered in the record by either party to the proceeding.

(b) *Resignation or voluntary suspension or censure.* To avoid the institution or conclusion of a proceeding under paragraph (a) of § 10.60, a practitioner may offer his or her consent to the issuance of a censure, suspension or disbarment, or may resign, as the case may be, from practice before the Internal Revenue Service. It is within the discretion of the Director of Practice to accept the offered censure, suspension, disbarment, or resignation, in accordance with the consent offered.

(c) *Voluntary disqualification.* To avoid the institution or conclusion of a proceeding under paragraph (b) of § 10.60, an appraiser may offer his or her consent to disqualification. It is within the discretion of the Director of Practice to accept the offered disqualification in accordance with the consent offered.

§ 10.62 Contents of complaint.

(a) *Charges.* A complaint must name the respondent, give a plain and concise description of the allegations that constitute the basis for the proceeding, and be signed by the Director of Practice. A complaint is sufficient if it fairly informs the respondent of the charges brought so that he or she is able to prepare a defense. In the case of a complaint filed against an appraiser, the complaint is sufficient if it refers to a penalty imposed previously on the respondent under section 6701(a) of the Internal Revenue Code.

(b) *Demand for answer.* The Director of Practice must notify the respondent of the place and time for answering the complaint, the time for which may not be less than 15 days from the date of service of the complaint, and notice must be given that a decision by default may be rendered against the respondent in the event an answer is not filed as required.

§ 10.63 Service of complaint and other papers.

(a) *Complaint.* The complaint or a copy of the complaint must be served on the respondent by certified mail or first class mail, as provided below; by delivering it to the respondent or the respondent's authorized representative in person; by leaving it at the office or place of business of the respondent or the respondent's authorized representative; or in any other manner that has been agreed to by the respondent. Where service is by certified mail, the returned post office receipt duly signed by or on behalf of the respondent will be proof of service. If the certified mail is not claimed or accepted by the respondent and is returned undelivered, complete service may be made on the respondent by mailing the complaint to the respondent by first class mail, provided the complaint is addressed to the respondent at the respondent's last known address as determined under section 6212 of the Internal Revenue Code and the regulations thereunder. If service is made on the respondent or the respondent's authorized representative in person, by leaving the complaint at the office or place of business of the respondent or the respondent's authorized representative, or by other means agreed to by the respondent, the sworn or affirmed written statement of service by the person making service, setting forth the manner of service, including the place, recipient, date and time of service, will be proof of service.

(b) *Service of papers other than complaint.* Any paper other than the complaint may be served on the respondent as provided in paragraph (a) of this section or by mailing the paper by first class mail to the respondent at his or her last known address as determined under section 6212 of the Internal Revenue Code and the regulations thereunder, or by mailing the paper by first class mail to the respondent's authorized representative. This mailing constitutes complete service.

(c) *Filing of papers.* Whenever the filing of a paper is required or permitted in connection with a proceeding under this part, and the place of filing is not specified by these regulations, rule, or order of the Administrative Law Judge, the paper must be filed with the Director of Practice, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224. All papers must be filed in duplicate.

§ 10.64 Answer.

(a) *Filing.* The respondent's answer must be filed in writing within the time

specified in the complaint unless, on application of the respondent, the time is extended by the Director of Practice or the Administrative Law Judge. The answer is to be filed in duplicate with the Director.

(b) *Contents.* The answer must contain a statement of facts that constitute the respondent's grounds of defense. The respondent must specifically admit or deny each allegation set forth in the complaint, except that the respondent may state that the respondent is without sufficient information to admit or deny a specific allegation. The respondent, nevertheless, may not deny a material allegation in the complaint which the respondent knows to be true, or state that the respondent is without sufficient information to form a belief, when the respondent possesses the required information. The respondent also must state affirmatively any special matters of defense on which he or she relies.

(c) *Failure to deny or answer allegations in the complaint.* Every allegation in the complaint that is not denied in the answer is deemed admitted and may be considered proved; no further evidence in respect of such allegation need be adduced at a hearing. Failure to file an answer within the time prescribed (or within the time for answer as extended by the Director of Practice or the Administrative Law Judge), constitutes an admission of the allegations of the complaint and a waiver of hearing, and the Administrative Law Judge may make the decision by default without a hearing or further procedure.

(d) *Signature.* The answer must be signed by the respondent or the respondent's authorized representative and must include a statement directly above the signature acknowledging that the statements made in the answer are true and correct and that knowing and willful false statements may be punishable under 18 U.S.C. 1001.

§ 10.65 Supplemental charges.

If it appears that the respondent, in his or her answer, falsely and in bad faith, denies a material allegation of fact in the complaint or states that the respondent has insufficient knowledge to form a belief, when the respondent in fact possesses such information, or if it appears that the respondent has knowingly introduced false testimony during proceedings for his or her censure, suspension, disbarment, or disqualification, the Director of Practice may file supplemental charges against the respondent. The supplemental charges may be tried with other charges in the case, provided the respondent is given due notice of the charges and is afforded an opportunity to prepare a defense to such charges.

§ 10.66 Reply to answer.

The Director of Practice may file a reply to the respondent's answer, but unless otherwise ordered by the Administrative Law Judge, no reply to the respondent's answer is required. If a reply is not filed, new matter in the answer is deemed denied.

§ 10.67 Proof; variance; amendment of pleadings.

In the case of a variance between the allegations in pleadings and the evidence adduced in support of the pleadings, the Administrative Law Judge may order or authorize amendment of the pleadings to conform to the evidence. The party who would otherwise be prejudiced by the amendment must be given a reasonable opportunity to address the allegations of the pleadings as amended and the Administrative Law Judge must make findings on any issue presented by the pleadings as amended.

§ 10.68 Motions and requests.

Unless the Administrative Law Judge directs otherwise, motions and requests may be filed with the Director of Practice or with the Administrative Law Judge.

§ 10.69 Representation.

A respondent or proposed respondent may appear in person or he or she may be represented by a practitioner. The Director of Practice may be represented by an attorney or other employee of the Internal Revenue Service.

§ 10.70 Administrative Law Judge.

(a) *Appointment.* Proceedings on complaints for the censure, suspension or disbarment of a practitioner or the disqualification of an appraiser will be conducted by an Administrative Law Judge appointed as provided by 5 U.S.C. 3105.

(b) *Powers of the Administrative Law Judge.* The Administrative Law Judge, among other powers, has the authority, in connection with any proceeding under § 10.60 assigned or referred to him or her, to do the following—

(1) Administer oaths and affirmations;

(2) Make rulings on motions and requests, which rulings may not be appealed prior to the close of a hearing except in extraordinary circumstances and at the discretion of the Administrative Law Judge;

(3) Determine the time and place of hearing and regulate its course and conduct;

(4) Adopt rules of procedure and modify the same from time to time as needed for the orderly disposition of proceedings;

(5) Rule on offers of proof, receive relevant evidence, and examine witnesses;

(6) Take or authorize the taking of depositions;

(7) Receive and consider oral or written argument on facts or law;

(8) Hold or provide for the holding of conferences for the settlement or simplification of the issues with the consent of the parties;

(9) Perform such acts and take such measures as are necessary or appropriate to the efficient conduct of any proceeding; and

(10) Make decisions.

§ 10.71 Hearings.

(a) *In general.* An Administrative Law Judge will preside at the hearing on a complaint filed under paragraph (c) of § 10.60 for the censure, suspension, or disbarment of a practitioner or disqualification of an appraiser. Hearings will be stenographically recorded and transcribed and the testimony of witnesses will be taken under oath or affirmation. Hearings will be conducted pursuant to 5 U.S.C. 556. A hearing in a proceeding requested under paragraph (g) of § 10.82 will be conducted *de novo.*

(b) *Failure to appear.* If either party to the proceeding fails to appear at the hearing, after notice of the proceeding has been sent to him or her, the party will be deemed to have waived the right to a hearing and the Administrative Law Judge may make his or her decision against the absent party by default.

§ 10.72 Evidence.

(a) *In general.* The rules of evidence prevailing in courts of law and equity are not controlling in hearings on complaints filed under paragraph (c) of § 10.60. However, the Administrative Law Judge may exclude evidence that is irrelevant, immaterial, or unduly repetitious.

(b) *Depositions.* The deposition of any witness taken pursuant to § 10.73 may be admitted into evidence in any proceeding instituted under § 10.60.

(c) *Proof of documents.* Official documents, records, and papers of the Internal Revenue Service and the Office of Director of Practice are admissible in evidence without the production of an officer or employee to authenticate them. Any such documents, records, and papers may be evidenced by a copy attested or identified by an officer or employee of the Service or the Treasury Department, as the case may be.

(d) *Exhibits.* If any document, record, or other paper is introduced in evidence as an exhibit, the Administrative Law Judge may authorize the withdrawal of the exhibit subject to any conditions that he or she deems proper.

(e) *Objections.* Objections to evidence are to be made in short form, stating the grounds for the objection. Except as ordered by the Administrative Law Judge, argument on objections will not be recorded or transcribed. Rulings on objections are to be a part of the record, but no exception to a ruling is necessary to preserve the rights of the parties.

§ 10.73 Depositions.

(a) Depositions for use at a hearing may be taken, with the written approval of the Administrative Law Judge, by either the Director of Practice or the respondent or their duly authorized representatives. Depositions may be taken before any officer duly authorized to administer an oath for general purposes or before an officer or employee of the Internal Revenue Service who is authorized to administer an oath in internal revenue matters.

(b) The party taking the deposition must provide the deponent and the other party with 10 days written notice of the deposition, unless the deponent and the parties agree otherwise. The notice must specify the name of the deponent, the time and place where the deposition is to be taken, and whether the deposition will be taken by oral or written interrogatories. When a deposition is taken by written interrogatories, any cross-examination also will be by written interrogatories. Copies of the written interrogatories must be served on the other party with the notice of deposition, and copies of any written cross-interrogation must be mailed or delivered to the opposing party at least 5 days before the date that the deposition will be taken, unless the parties mutually agree otherwise. A party on whose behalf a deposition is taken must file the responses to the written interrogatories or a transcript of the oral deposition with the Administrative Law Judge and serve copies on the opposing party and the deponent. Expenses in the reporting of depositions will be borne by the party that requested the deposition.

§ 10.74 Transcript.

In cases where the hearing is stenographically reported by a Government contract reporter, copies of the transcript may be obtained from the reporter at rates not to exceed the maximum rates fixed by contract between the Government and the reporter. Where the hearing is stenographically reported by a regular employee of the Internal Revenue Service, a copy will be supplied to the respondent either without charge or upon the payment of a reasonable fee. Copies of exhibits introduced at the hearing or at the taking or depositions will be supplied to the parties upon the payment of a reasonable fee (Sec. 501, Public Law 82–137) (65 Stat. 290) (31 U.S.C. 483a).

§ 10.75 Proposed findings and conclusions.

Except in cases where the respondent has failed to answer the complaint or where a party has failed to appear at the hearing, the parties must be afforded a reasonable opportunity to submit proposed findings and conclusions and their supporting reasons to the Administrative Law Judge.

§ 10.76 Decision of the Administrative Law Judge.

As soon as practicable after the conclusion of a hearing and the receipt of any proposed findings and conclusions timely submitted by the parties, the Administrative Law Judge will make the decision in the case. The decision must include a statement of findings and conclusions, as well as the reasons or basis for making such findings and conclusions, and an order of censure, suspension, disbarment, disqualification, or dismissal of the complaint. The Administrative Law Judge will file the decision with the Director of Practice, who will transmit a copy of the decision to the respondent or the respondent's authorized representative. In the absence of an appeal to the Secretary of the Treasury, or review of the decision on motion of the Secretary, the decision of the Administrative Law Judge will without further proceedings become the decision of the Secretary of the Treasury 30 days after the date of the Administrative Law Judge's decision.

§ 10.77 Appeal to the Secretary.

Within 30 days from the date of the Administrative Law Judge's decision, either party may appeal to the Secretary of the Treasury, or his or her designate. The respondent must file his or her appeal with the Director of Practice in duplicate and notice of appeal must include exceptions to the decision of the Administrative Law Judge and supporting reasons for such exceptions. If the Director files an appeal, he or she must transmit a copy to the respondent. Within 30 days after receipt of an appeal or copy thereof, the other party may file a reply brief in duplicate with the Director. If the reply brief is filed by the Director, he or she must transmit a copy of it to the respondent. The Director must transmit the entire record to the Secretary of the Treasury, or his or her designate, after the appeal and any reply brief has been filed.

§ 10.78 Decision of the Secretary.

On appeal from or review of the decision of the Administrative Law Judge, the Secretary of the Treasury, or his or her designate, will make the agency decision. A copy of the agency's decision will be transmitted to the respondent by the Director of Practice.

§ 10.79 Effect of disbarment, suspension, or censure.

(a) *Disbarment.* Where the final order in a case is against the respondent and is for disbarment, the respondent will not be permitted to practice before the Internal Revenue Service unless and until authorized to do so by the Director of Practice pursuant to § 10.81.

(b) *Suspension.* Where the final order in a case is against the respondent and is for suspension, the respondent will not be permitted to practice before the Internal Revenue Service during the period of suspension.

(c) *Censure.* Where the final order in the case is against the respondent and is for censure, the respondent may be permitted to practice before the Internal Revenue Service, but the respondent's future representations may be subject to conditions prescribed by the Director of Practice designed to promote high standards of conduct. For example, where a practitioner is censured because he or she failed to advise his or her clients about a potential conflict of interest and obtain the clients' written consents, the Director of Practice may require the practitioner to provide the Director or another Internal Revenue Service official with a copy of all future consents obtained by the practitioner, whether or not such consents are specifically requested.

§ 10.80 Notice of disbarment, suspension, censure, or disqualification.

On the issuance of a final order censuring, suspending, or disbarring a practitioner or a final order disqualifying an appraiser, the Director of Practice may give notice of the censure, suspension, disbarment, or disqualification to appropriate officers and employees of the Internal Revenue Service and to interested departments and agencies of the Federal government. The Director may determine the manner of giving notice to the proper authorities of the State by which the censured, suspended, or disbarred person was licensed to practice.

§ 10.81 Petition for reinstatement.

The Director of Practice may entertain a petition for reinstatement from any person disbarred from practice before the Internal Revenue Service or any disqualified appraiser after the expiration of 5 years following such disbarment or disqualification. Reinstatement may not be granted unless the Director is satisfied that the petitioner, thereafter, is not likely to conduct himself contrary to the regulations in this part, and that granting such reinstatement would not be contrary to the public interest.

§ 10.82 Expedited suspension upon criminal conviction or loss of license for cause.

(a) *When applicable.* Whenever the Director of Practice determines that a practitioner is described in paragraph (b) of this section, the Director may institute a proceeding under this section to suspend the practitioner from practice before the Internal Revenue Service.

(b) *To whom applicable.* This section applies to any practitioner who, within 5 years of the date a complaint instituting a proceeding under this section is served—

(1) Has had his or her license to practice as an attorney, certified public accountant, or actuary suspended or revoked for cause (not including a failure to pay a professional licensing fee) by any authority or court, agency, body, or board described in § 10.51(i); or

(2) Has been convicted of any crime under title 26 of the United States Code, any crime involving dishonesty or breach of trust, or any felony for which the conduct involved renders the practitioner unfit to practice before the Internal Revenue Service.

(c) *Instituting a proceeding.* A proceeding under this section will be instituted by a complaint that names the respondent, is signed by the Director of Practice, is filed in the Director's office, and is served according to the rules set forth in paragraph (a) of § 10.63. The complaint must give a plain and concise description of the allegations that constitute the basis for the proceeding. The complaint must notify the respondent—

(1) Of the place and due date for filing an answer;

(2) That a decision by default may be rendered if the respondent fails to file an answer as required;

(3) That the respondent may request a conference with the Director of Practice to address the merits of the complaint and that any such request must be made in the answer; and

(4) That the respondent may be suspended either immediately following the expiration of the period by which an answer must be filed or, if a conference is requested, immediately following the conference.

(d) *Answer.* The answer to a complaint described in this section must be filed no later than 30 calendar days following the date the complaint is served, unless the Director of Practice extends the time for filing. The answer must be filed in accordance with the rules set forth in § 10.64, except as otherwise provided in this section. A respondent is entitled to a conference with the Director only if the conference is requested in a timely filed answer. If a request for a conference is not made in the answer or the answer is not timely filed, the respondent will be deemed to have waived his or her right to a conference and the Director may suspend such respondent at any time following the date on which the answer was due.

(e) *Conference.* The Director of Practice or his or her designee will preside at a conference described in this section. The conference will be held at a place and time selected by the Director, but no sooner than 14 calendar days after the date by which the answer must be filed with the Director, unless the respondent agrees to an earlier date. An authorized representative may represent the respondent at the conference. Following the conference, upon a finding that the respondent is described in paragraph (b) of this section, or upon the respondent's failure to appear at the conference either personally or through an authorized representative, the Director may immediately suspend the respondent from practice before the Internal Revenue Service.

(f) *Duration of suspension.* A suspension under this section will commence on the date that written notice of the suspension is issued. A practitioner's suspension will remain effective until the earlier of the following—

(1) The Director of Practice lifts the suspension after determining that the practitioner is no longer described in paragraph (b) of this section or for any other reason; or

(2) The suspension is lifted by an Administrative Law Judge or the Secretary of the Treasury in a proceeding referred to in paragraph (g) of this section and instituted under § 10.60.

(g) *Proceeding instituted under § 10.60.* If the Director of Practice suspends a practitioner under this section, the practitioner may ask the Director to issue a complaint under § 10.60. The request must be made in writing within 2 years from the date on which the practitioner's suspension commences. The Director must issue a complaint requested under this paragraph within 30 calendar days of receiving the request.

Subpart E—General Provisions

§ 10.90 Records.

(a) *Availability.* The Director of Practice will make available for public inspection at the Office of Director of Practice the roster of all persons enrolled to practice, the roster of all persons censured, suspended, or disbarred from practice before the Internal Revenue Service, and the roster of all disqualified appraisers. Other records of the Director may be disclosed upon specific request, in accordance with the applicable disclosure rules of the Internal Revenue Service and the Treasury Department.

(b) *Disciplinary procedures.* A request by a practitioner or appraiser that a hearing in a disciplinary proceeding concerning him or her be public, and that the record of such disciplinary proceeding be made available for inspection by interested persons may be granted by the Director of Practice where the parties stipulate in advance to protect from disclosure confidential tax information in accordance with all applicable statutes and regulations.

§ 10.91 Saving clause.

Any proceeding instituted under this part, but not closed prior to the effective date of these revised regulations, will not be affected by the revisions. Any proceeding under this part based on conduct engaged in prior to the effective date of these regulations may be instituted subsequent to the effective date of these revisions. Conduct engaged in prior to the effective date of these regulations is subject to the regulations in effect at the time the conduct occurred.

§ 10.92 Special orders.

The Secretary of the Treasury reserves the power to issue such special orders as he or she deems proper in any cases within the purview of this part.

§ 10.93 Effective date.

Subject to § 10.91, Part 10 is applicable on the date final regulations are published in the **Federal Register**.

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

Approved: January 3, 2001.

Jonathan Talisman,

Assistant Secretary (Tax Policy).

[FR Doc. 01–499 Filed 1–11–01; 8:45 am]

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Federal Register

Friday,
January 12, 2001

Part VIII

Department of the Treasury

Office of Foreign Assets Control

31 CFR Part 540

Highly Enriched Uranium (HEU) Agreement Assets Control Regulation; Interim Rule

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 540

Highly Enriched Uranium (HEU) Agreement Assets Control Regulations

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Interim rule.

SUMMARY: The Office of Foreign Assets Control of the U.S. Department of the Treasury is issuing regulations to implement the President's declaration in Executive Order 13159 of June 21, 2000 of a national emergency and order blocking certain property and interests in property of the Government of the Russian Federation that are directly related to the implementation of the Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons, dated February 18, 1993, and related contracts and agreements.

DATES: *Effective date:* January 12, 2001.

Comments: Written comments must be received no later than February 12, 2001. Comments may be submitted either via regular mail to the attention of David W. Mills, Chief, Policy Planning and Program Management Division, rm. 2176 Main Treasury Annex, 1500 Pennsylvania Ave., NW., Washington, DC 20220 or via OFAC's website (http://www.treas.gov/ofac).

FOR FURTHER INFORMATION CONTACT: Dennis P. Wood, Chief of Compliance Programs, tel.: 202/622–2490, Steve I. Pinter, Acting Chief of Licensing, tel.: 202/622–2480, or Barbara C. Hammerle, Acting Chief Counsel, tel.: 202/622–2410, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220.

SUPPLEMENTARY INFORMATION:

Electronic Availability

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Background

On June 21, 2000, the President issued Executive Order 13159 (65 FR 39279, June 26, 2000), declaring a national emergency with respect to the risk of nuclear proliferation created by the accumulation of a large volume of weapons-usable fissile material in the territory of the Russian Federation and invoking the authority of, *inter alia,* the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.* (''IEEPA''). Pursuant to the Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons, dated February 18, 1993, and related contracts and agreements (collectively, the ''HEU Agreements''), weapons-grade uranium extracted from Russian nuclear weapons is converted to low enriched uranium for use in commercial reactors. The order blocks and protects from attachment, judgment, decree, lien, execution, garnishment, or other judicial process that property and interests in property of the Government of the Russian Federation that are directly related to the implementation of the HEU Agreements that are in the United States, that are or hereafter come within the United States, or that are or hereafter come within the possession or control of U.S. persons, including their overseas branches. The order authorizes the Secretary of the Treasury, in consultation with the Secretaries of State and Energy, to take such actions, including the promulgation of rules and regulations, as may be necessary to carry out the purposes of the order. To implement Executive Order 13159 the Office of Foreign Assets Control of the U.S. Department of the Treasury is promulgating the HEU Agreement Assets Control Regulations (the ''Regulations'').

Section 540.201 of subpart B of the Regulations implements section 2 of Executive Order 13129 (the ''Executive Order'') by blocking that property and interests in property of the Government of the Russian Federation that are directly related to the implementation of the HEU Agreements that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of U.S. persons, including their overseas branches. Section 540.201 implements section 2 of the Executive Order by prohibiting U.S. persons from transferring, paying, exporting, withdrawing or otherwise dealing in property blocked pursuant to the Executive Order.

Section 540.202 also implements section 2 of the Executive Order by making null and void any transfer or attempted transfer of blocked property after the effective date of the Executive Order absent a license or other authorization issued pursuant to the Executive Order and this part.

Subpart C provides definitions of terms used in the Regulations. Subpart D sets forth interpretive guidance for the Regulations. For example, § 540.405 makes clear that any transaction that is ordinarily incident to a licensed transaction and necessary to give effect to the licensed transaction is also authorized, except in the case where such an ordinarily incident transaction involves any attachment, judgment, decree, lien, execution, garnishment, or other judicial process which has the effect of encumbering the property or interest in property of the Government of the Russian Federation directly related to the implementation of the HEU Agreements in any manner that is not explicitly authorized within the terms of the license.

Transactions otherwise prohibited under part 540 but found to be consistent with U.S. policy may be authorized by general licenses contained in subpart E or by a specific license issued pursuant to the procedures described in subpart D of part 501 of 31 CFR chapter V. The general licenses contained in subpart E include an authorization in § 540.504 for U.S. financial institutions to debit blocked accounts for normal service charges. Penalties for violations of the Regulations are described in subpart G of the Regulations.

Because the Regulations involve a foreign affairs function, the provisions of Executive Order 12866 and the Administrative Procedure Act (5 U.S.C. 553) (the ''APA'') requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date, are inapplicable. However, because of the importance of the issues raised by these regulations, this rule is issued in interim form and comments will be considered in the development of final regulations. Accordingly, the Department encourages interested persons who wish to comment to do so at the earliest possible time to permit the fullest consideration of their views.

The period for submission of comments will close February 12, 2001. 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 when submitted by regular mail to the person submitting the comments and will not consider them in the development of final regulations. In the interest of accuracy and completeness, the Department requires comments in written form.

All public comments on these regulations will be a matter of public record. Copies of public record concerning these regulations will be made available, not sooner than March 13, 2001, and will be obtainable from OFAC's website (*http://www.treas.gov/ofac*). If that service is unavailable, written requests for copies may be sent to: Office of Foreign Assets Control, U.S. Department of the Treasury, 1500 Pennsylvania Ave., NW., Washington, DC 20220, Attn: Merete Evans.

Because no notice of proposed rulemaking is required for this rule, the Regulatory Flexibility Act (5 U.S.C. 601–612) does not apply.

Paperwork Reduction Act

The collections of information related to the Regulations are contained in 31 CFR part 501 (the ''Reporting and Procedures Regulations''). Pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), those collections of information have been previously approved by the Office of Management and Budget (''OMB'') under control number 1505–0164. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

List of Subjects in CFR Part 540

Administrative practice and procedure, Blocking of assets, Government of the Russian Federation, HEU Agreement, Nuclear materials, Penalties, Reporting and recordkeeping requirements, Uranium.

For the reasons set forth in the preamble, 31 CFR chapter V is amended by adding part 540 to read as follows:

PART 540—HIGHLY ENRICHED URANIUM (HEU) AGREEMENT ASSETS CONTROL REGULATIONS

Subpart A—Relation of This Part to Other Laws and Regulations

Sec.
540.101 Relation of this part to other laws and regulations.

Subpart B—Prohibitions

540.201 Prohibited transactions involving blocked property.
540.202 Effect of transfers violating the provisions of this part.
540.203 Holding of funds in interest-bearing accounts; investment and reinvestment.

Subpart C—General Definitions

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540.302 Effective date.
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Subpart E—Licenses, Authorizations and Statements of Licensing Policy

540.501 Effect of license or authorization.
540.502 Exclusion from licenses.
540.503 Payments and transfers to blocked accounts in U.S. financial institutions.
540.504 Entries in certain accounts for normal service charges authorized.

Subpart F—Reports

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540.701 Penalties.
540.702 Prepenalty notice.
540.703 Response to prepenalty notice; informal settlement.
540.704 Penalty imposition or withdrawal.
540.705 Administrative collection; referral to United States Department of Justice.

Subpart H—Procedures

540.801 Procedures.
540.802 Delegation by the Secretary of the Treasury.

Subpart I—Paperwork Reduction Act

540.901 Paperwork Reduction Act notice.

Authority: 3 U.S.C. 301; 31 U.S.C. 321(b); 50 U.S.C. 1601–1651, 1701–1706; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); E.O. 13159, 65 FR 39279 (June 26, 2000).

Subpart A—Relation of This Part to Other Laws and Regulations

§ 540.101 Relation of this part to other laws and regulations.

(a) This part is separate from, and independent of, the other parts of this chapter, with the exception of part 501 of this chapter, the recordkeeping and reporting requirements and license application and other procedures which apply to this part. Actions taken pursuant to part 501 of this chapter with respect to the prohibitions contained in this part are considered actions taken pursuant to this part. Differing foreign policy and national security circumstances may result in differing interpretations of similar language among the parts of this chapter. No license or authorization contained in or issued pursuant to those other parts authorizes any transaction prohibited by this part. No license or authorization contained in or issued pursuant to any other provision of law or regulation authorizes any transaction prohibited by this part.

(b) Nothing contained in these regulations shall relieve a person from any requirement to obtain a license or other authorization from any department or agency of the United States Government in compliance with applicable laws and regulations subject to the jurisdiction of that department or agency, and no license contained in or issued pursuant to this part relieves the involved parties from complying with any other applicable laws or regulations.

Subpart B—Prohibitions

§ 540.201 Prohibited transactions involving blocked property.

(a) Except as otherwise authorized by regulations, orders, directives, rulings, instructions, licenses, or otherwise, the property or property interests of the Government of the Russian Federation that are directly related to the implementation of the Highly Enriched Uranium (HEU) Agreements, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of U.S. persons are blocked and may not be transferred, paid, exported, withdrawn or otherwise dealt in.

(b) Unless otherwise authorized by this part or by a specific license expressly referring to this part, any attachment, judgment, decree, lien,

execution, garnishment, or other judicial process is null and void with respect to any blocked property or interest in blocked property covered by this part.

§ 540.202 Effect of transfers violating the provisions of this part.

(a) Any transfer after the effective date (see § 540.302) that is in violation of any provision of this part or of any regulation, order, directive, ruling, instruction, or license issued pursuant to this part, and that involves any property or interest in property blocked pursuant to § 540.201(a) is null and void and shall not be the basis for the assertion or recognition of any interest in or right, remedy, power, or privilege with respect to such property or property interests.

(b) No transfer before the effective date shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or any interest in, any property or interest in property blocked pursuant to § 540.201, unless the person with whom such property is held or maintained, prior to that date, had written notice of the transfer or by any written evidence had recognized such transfer.

(c) Unless otherwise provided, an appropriate license or other authorization issued by or pursuant to the direction or authorization of the Director of the Office of Foreign Assets Control before, during, or after a transfer shall validate such transfer or render it enforceable to the same extent that it would be valid or enforceable but for the provisions of the International Emergency Economic Powers Act, this part, and any regulation, order, directive, ruling, instruction, or license issued pursuant to this part.

(d) Transfers of property that otherwise would be null and void or unenforceable by virtue of the provisions of this section shall not be deemed to be null and void or unenforceable as to any person with whom such property was held or maintained (and as to such person only) in cases in which such person is able to establish to the satisfaction of the Director of the Office of Foreign Assets Control each of the following:

(1) Such transfer did not represent a willful violation of the provisions of this part by the person with whom such property was held or maintained;

(2) The person with whom such property was held or maintained did not have reasonable cause to know or suspect, in view of all the facts and circumstances known or available to such person, that such transfer required a license or authorization issued pursuant to this part and was not so licensed or authorized, or if a license or authorization did purport to cover the transfer, that such license or authorization had been obtained by misrepresentation of a third party or withholding of material facts or was otherwise fraudulently obtained; and

(3) The person with whom such property was held or maintained filed with the Office of Foreign Assets Control a report setting forth in full the circumstances relating to such transfer promptly upon discovery that:

(i) Such transfer was in violation of the provisions of this part or any regulation, ruling, instruction, license or other direction, or authorization issued pursuant to this part;

(ii) Such transfer was not licensed or authorized by the Director of the Office of Foreign Assets Control; or

(iii) If a license did purport to cover the transfer, such license had been obtained by misrepresentation of a third party or withholding of material facts or was otherwise fraudulently obtained.

Note to paragraph (d) of § 540.202: The filing of a report in accordance with the provisions of paragraph (d)(3) of this section shall not be deemed evidence that the terms of paragraphs (d)(1) and (d)(2) of this section have been satisfied. [End Note]

§ 540.203 Holding of funds in interest-bearing accounts; investment and reinvestment.

(a) Except as provided in paragraphs (c) or (d) of this section, or as otherwise directed by the Office of Foreign Assets Control, any U.S. person holding funds, such as currency, bank deposits, or liquidated financial obligations, subject to § 540.201 shall hold or place such funds in a blocked interest-bearing account located in the United States.

(b)(1) For purposes of this section the term *blocked interest-bearing account* means a blocked account:

(i) In a federally-insured U.S. bank, thrift institution, or credit union, provided the funds are earning interest at rates which are commercially reasonable; or

(ii) With a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934, provided the funds are invested in a money market fund or U.S. Treasury Bills.

(2) For purposes of this section, a rate is commercially reasonable if it is the rate currently offered to other depositors on deposits or instruments of comparable size and maturity.

(3) Funds held or placed in a blocked account pursuant to this paragraph (b) may not be invested in instruments the maturity of which exceeds 180 days. If interest is credited to a separate blocked account or sub-account, the name of the account party on each account must be the same.

(c) Blocked funds held in instruments the maturity of which exceeds 180 days at the time the funds become subject to § 540.201 may continue to be held until maturity in the original instrument, provided any interest, earnings, or other proceeds derived therefrom are paid into a blocked interest-bearing account in accordance with paragraph (b) or (d) or this section.

(d) Blocked funds held in accounts or instruments outside the United States at the time the funds become subject to § 540.201 may continue to be held in the same type of accounts or instruments, provided the funds earn interest at rates which are commercially reasonable.

(e) This section does not create an affirmative obligation for the holder of blocked tangible property, such as chattels or real estate, or of other blocked property, such as debt or equity securities, to sell or liquidate such property at the time the property becomes subject to § 540.201. However, the Office of Foreign Assets Control may issue licenses permitting or directing such sales in appropriate cases.

(f) Funds subject to this section may not be held, invested, or reinvested in a manner which provides immediate financial or economic benefit or access to the Government of the Russian Federation or its entities, nor may their holder cooperate in or facilitate the pledging or other attempted use as collateral of blocked funds or other assets.

Subpart C—General Definitions

§ 540.301 Blocked account; blocked property.

The terms *blocked account* and *blocked property* shall mean any account or property subject to the prohibition in § 540.201 and with respect to which payments, transfers, exportations, withdrawals, or other dealings may not be made or effected except pursuant to an authorization or license from the Office of Foreign Assets Control expressly authorizing such action.

§ 540.302 Effective date.

The term *effective date* refers to the effective date of the applicable prohibitions and directives contained in this part which is 12:01 a.m., Eastern Daylight Time, June 22, 2000.

§ 540.303 Entity.

The term *entity* means a partnership, association, trust, joint venture,

corporation, or other organization, group, or subgroup.

§ 540.304 Government of the Russian Federation.

(a) The term *Government of the Russian Federation* means the Government of the Russian Federation, any political subdivision, agency, or instrumentality thereof, and any person owned or controlled by, or acting for or on behalf of, the Government of the Russian Federation.

(b) Any person or entity to the extent such person or entity is or has been, or to the extent that there is reasonable cause to believe that such person or entity is, or has been, since the effective date, (see § 540.302) acting or purporting to act directly or indirectly on behalf of any of the foregoing.

§ 540.305 HEU Agreements.

The term *HEU Agreements* means the Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons, dated February 18, 1993; the Initial Implementing Contract, Contract Number DE–AC01–93NE50067, dated January 14, 1994; and all current and future amendments thereto; as well as the related current and future implementing agreements, memoranda of understanding, protocols, and contracts, including all current and future amendments thereto, to include without limitation the following:

(a) Memorandum of Agreement Between the United States, Acting By and Through the United States Department of State, and the United States Department of Energy and the United States Enrichment Corporation (USEC), for USEC to Serve as the United States Government's Executive Agent under the Agreement Between the United States and the Russian Federation Concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons, dated April 18, 1997;

(b) Agreement Between the United States Department of Energy and the Ministry of the Russian Federation for Atomic Energy Concerning the Transfer of Source Material to the Russian Federation signed at Washington on March 24, 1999, with Implementing Agreement and Administrative Arrangement, dated March 24, 1999, and related letter agreements; and

(c) UF6 Feed Component Implementing Contract Among Cameco Europe S.A. and Compagnie General des Matieres Nucleaires and Nukem, Inc. and Nukem Nukclear Gmbh and AO Techsnabexport, Tenex Contract # 08843672/90100–02D, dated March 24, 1999.

§ 540.306 Highly Enriched Uranium (HEU).

The term *highly enriched uranium or HEU* means uranium enriched to twenty (20) percent or greater in the isotope U235.

§ 540.307 Licenses; general and specific.

(a) Except as otherwise specified, the term *license* means any license or authorization contained in or issued pursuant to this part.

(b) The term *general license* means any license or authorization the terms of which are set forth in subpart E of this part.

(c) The term *specific license* means any license or authorization not set forth in subpart E of this part but issued pursuant to this part.

Note to § 540.307. See § 501.801 of this chapter on licensing procedures. [End note]

§ 540.308 Low Enriched Uranium (LEU).

The term *low enriched uranium or LEU* means uranium enriched to less than twenty (20) percent in the isotope U235.

§ 540.309 Natural uranium.

The term *natural uranium* means uranium found in nature, with an average concentration of 0.711 percent by weight of the isotope U235.

§ 540.310 Person.

The term *person* means an individual or entity.

§ 540.311 Property; property interest.

The terms *property and property interest* include but are not limited to, money, checks, drafts, bullion, bank deposits, savings accounts, debts, indebtedness, obligations, notes, guarantees, debentures, stocks, bonds, coupons, any other financial instruments, bankers acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership, or indebtedness, letters of credit and any documents relating to any rights or obligations thereunder, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendors' sales agreements, land contracts, leaseholds, ground rents, real estate and any other interest therein, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks, copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, services of any nature whatsoever, contracts of whatever nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interests therein, present, future, or contingent.

§ 540.312 Transfer.

The term *transfer* means any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, convey, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and, without limitation upon the foregoing, shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the making of any payment; the setting off of any obligation or credit; the appointment of any agent, trustee, or fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or levy of or under any judgment, decree, attachment, injunction, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition; the exercise of any power of appointment, power of attorney, or other power; or the acquisition, disposition, transportation, importation, exportation, or withdrawal of any security.

§ 540.313 United States.

The term *United States* means the United States, its territories and possessions, and all areas under the jurisdiction or authority thereof.

§ 540.314 United States person; U.S. person.

The term *United States person or U.S. person* means any United States citizen, permanent resident alien, juridical person organized under the laws of the United States or any jurisdiction within the United States, including foreign branches, or any person in the United States.

§ 540.315 Uranium-235 (U235).

The term *uranium-235 or U235* means the fissile isotope found in natural uranium.

§ 540.316 Uranium enrichment.

The term *uranium enrichment* means the process of increasing the concentration of the isotope U235 relative to that of the isotope U238.

§ 540.317 Uranium feed; natural uranium feed.

The term *uranium feed or natural uranium feed* means natural uranium in the form of UF6 suitable for uranium enrichment.

§ 540.318 Uranium Hexafluoride (UF6).

The term *uranium hexafluoride or UF6* means a compound of uranium and fluorine.

§ 540.319 U.S. financial institution.

The term *U.S. financial institution* means any U.S. entity (including its foreign branches) that is engaged in the business of accepting deposits, making, granting, transferring, holding, or brokering loans or credits, or purchasing or selling foreign exchange, securities, commodity futures or options, or procuring purchasers and sellers thereof, as principal or agent; including but not limited to, depository institutions, banks, savings banks, trust companies, securities brokers and dealers, commodity futures and options brokers and dealers, forward contract and foreign exchange merchants, securities and commodities exchanges, clearing corporations, investment companies, employee benefit plans, and U.S. holding companies, U.S. affiliates, or U.S. subsidiaries of any of the foregoing. This term includes those branches, offices and agencies of foreign financial institutions that are located in the United States, but not such institutions' foreign branches, offices, or agencies.

Subpart D—Interpretations

§ 540.401 Reference to amended sections.

Except as otherwise specified, reference to any section of this part or to any regulation, ruling, order, instruction, direction, or license issued pursuant to this part shall be deemed to refer to the same as currently amended.

§ 540.402 Effect of amendment.

Any amendment, modification, or revocation of any section of this part or of any order, regulation, ruling, instruction, or license issued by or under the direction of the Director of the Office of Foreign Assets Control shall not, unless otherwise specifically provided, affect any act done or omitted to be done, or any civil or criminal suit or proceeding commenced or pending prior to such amendment, modification, or revocation. All penalties, forfeitures, and liabilities under any such order, regulation, ruling, instruction, or license continue and may be enforced as if such amendment, modification, or revocation had not been made.

§ 540.403 Termination and acquisition of an interest in blocked property.

(a) Whenever a transaction licensed or authorized by or pursuant to this part results in the transfer of property (including any property interest) away from the Government of the Russian Federation, such property shall no longer be deemed to be property in which the Government of the Russian Federation has or has had an interest unless there exists in the property another interest of the Government of the Russian Federation, the transfer of which has not been effected pursuant to license or other authorization.

(b) Unless otherwise specifically provided in a license or authorization issued pursuant to this part, if property (including any property interest) is transferred or attempted to be transferred to the Government of the Russian Federation, such property shall be deemed to be property in which there exists an interest of the Government of the Russian Federation.

§ 540.404 Setoffs prohibited.

A setoff against blocked property (including a blocked account), whether by a U.S. bank or other U.S. person, is a prohibited transfer under § 540.201 if effected after the effective date (see § 540.302).

§ 540.405 Transactions incidental to a licensed transaction.

Any transaction ordinarily incident to a licensed transaction and necessary to give effect thereto is also authorized, except for any attachment, judgment, decree, lien, execution, garnishment, or other judicial process which has the effect of encumbering the property or interest in property of the Government of the Russian Federation directly related to the implementation of the HEU agreements, or any transaction involving a debit to a blocked account or transfer of blocked property not explicitly authorized within the terms of a license.

Subpart E—Licenses, Authorizations and Statements of Licensing Policy

§ 540.501 Effect of license or authorization.

(a) No license or other authorization contained in this part, or otherwise issued by or under the direction of the Director of the Office of Foreign Assets Control, authorizes or validates any transaction effected prior to the issuance of the license, unless specifically provided in such license or authorization.

(b) No regulation, ruling, instruction, or license authorizes any transaction prohibited under this part unless the regulation, ruling, instruction or license is issued by the Office of Foreign Assets Control and specifically refers to this part. No regulation, ruling, instruction, or license referring to this part shall be deemed to authorize any transaction prohibited by any provision of this chapter unless the regulation, ruling, instruction, or licenses specifically refers to such provision.

(c) Any regulation, ruling, instruction, or license authorizing any transaction otherwise prohibited under this part has the effect of removing a prohibition contained in this part from the transaction, but only to the extent specifically stated by its terms. Unless the regulation, ruling, instruction, or license otherwise specifies, such an authorization does not create any right, duty, obligation, claim, or interest in, or with respect to, any property which would not otherwise exist under ordinary principles of law.

§ 540.502 Exclusion from licenses.

The Director of the Office of Foreign Assets Control reserves the right to exclude any person, property, or transaction from the operation of any license or from the privileges conferred by any license. The Director of the Office of Foreign Assets Control also reserves the right to restrict the applicability of any license to particular persons, property, transactions, or classes thereof. Such actions are binding upon all persons receiving actual or constructive notice of the exclusions or restrictions.

§ 540.503 Payments and transfers to blocked accounts in U.S. financial institutions.

Any payment of funds or transfer of credit in which the Government of the Russian Federation has any interest that is directly related to the implementation of the HEU Agreements and that comes within the possession or control of a U.S. financial institution must be blocked in an account on the books of that financial institution. A transfer of funds or credit by a U.S. financial institution between blocked accounts in its branches or offices is authorized, provided that no transfer is made from an account within the United States to an account held outside the United States, and further provided that a transfer from a blocked account may only be made to another blocked account held in the same name.

Note to § 540.503. Please refer to § 501.603 of this chapter for mandatory reporting requirements regarding financial transfers. See also § 501.203 concerning the obligation to hold blocked funds in interest-bearing accounts. [End note]

§ 540.504 Entries in certain accounts for normal service charges authorized.

(a) A U.S. financial institution is authorized to debit any blocked account held by that financial institution in payment or reimbursement for normal service charges owed to it by the owner of the blocked account.

(b) As used in this section, the term *normal service charge* shall include charges in payment or reimbursement for interest due; cable, telegraph, internet, or telephone charges; postage costs; custody fees; small adjustment charges to correct bookkeeping errors; and, but not by way of limitation, minimum balance charges, notary and protest fees, and charges for reference books, photocopies, credit reports, transcripts of statements, registered mail, insurance, stationery and supplies, and other similar items.

Subpart F—Reports

§ 540.601 Records and reports.

For additional provisions relating to required records and reports, see part 501, subpart C, of this chapter.

Subpart G—Penalties

§ 540.701 Penalties.

(a) Attention is directed to section 206 of the International Emergency Economic Powers Act (the ''Act'') (50 U.S.C. 1705), which is applicable to violations of the provisions of any license, ruling, regulation, order, direction, or instruction issued by or pursuant to the direction or authorization of the Secretary of the Treasury pursuant to this part or otherwise under the Act. Section 206 of the Act, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Public Law 101–410, as amended, 28 U.S.C. 2461 note), provides that:

(1) A civil penalty not to exceed $11,000 per violation may be imposed on any person who violates or attempts to violate any license, order, or regulation issued under the Act;

(2) Whoever willfully violates or willfully attempts to violate any license, order, or regulation issued under the Act, upon conviction, shall be fined not more than $50,000, and if a natural person, may also be imprisoned for not more than 10 years; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.

(b) The criminal penalties provided in the Act are subject to increase pursuant to 18 U.S.C. 3571.

(c) Attention is also directed to 18 U.S.C. 1001, which provides that whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device, a material fact, or makes any materially false, fictitious, or fraudulent statement or representation or makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry shall be fined under title 18, United States Code, or imprisoned not more than five years, or both.

(d) Violations of this part may also be subject to relevant provisions of other applicable laws.

§ 540.702 Prepenalty notice.

(a) *When required.* If the Director of the Office of Foreign Assets Control has reasonable cause to believe that there has occurred a violation of any provision of this part or a violation of the provisions of any license, ruling, regulation, order, direction, or instruction issued by or pursuant to the direction or authorization of the Secretary of the Treasury pursuant to this part or otherwise under the International Emergency Economic Powers Act, and the Director determines that further proceedings are warranted, the Director shall notify the alleged violator of the agency's intent to impose a monetary penalty by issuing a prepenalty notice. The prepenalty notice shall be in writing. The prepenalty notice may be issued whether or not another agency has taken any action with respect to the matter.

(b) *Contents of notice—(1) Facts of violation.* The prepenalty notice shall describe the violation, specify the laws and regulations allegedly violated, and state the amount of the proposed monetary penalty.

(2) *Right to respond.* The prepenalty notice also shall inform the respondent of respondent's right to make a written presentation within the applicable 30 day period set forth in section 540.703 as to why a monetary penalty should not be imposed or why, if imposed, the monetary penalty should be in a lesser amount than proposed.

(c) *Informal settlement prior to issuance of prepenalty notice.* At any time prior to the issuance of a prepenalty notice, an alleged violator may request in writing that, for a period not to exceed sixty (60) days, the agency withhold issuance of the prepenalty notice for the exclusive purpose of effecting settlement of the agency's potential civil monetary penalty claims. In the event the Director grants the request, under terms and conditions within his discretion, the Office of Foreign Assets Control will agree to withhold issuance of the prepenalty notice for a period not to exceed 60 days and will enter into settlement negotiations of the potential civil monetary penalty claim.

§ 540.703 Response to prepenalty notice; informal settlement.

(a) *Deadline for response.* The respondent may submit a response to the prepenalty notice within the applicable 30 day period set forth in this paragraph. The Director may grant, at his discretion, an extension of time in which to submit a response to the prepenalty notice. The failure to submit a response within the applicable time period set forth in this paragraph shall be deemed to be a waiver of the right to respond.

(1) *Computation of time for response.* A response to the prepenalty notice must be postmarked or date-stamped by the U.S. Postal Service (or foreign postal service, if mailed abroad) or courier service provider (if transmitted to OFAC by courier) on or before the 30th day after the postmark date on the envelope in which the prepenalty notice was mailed. If the respondent refused delivery or otherwise avoided receipt of the prepenalty notice, a response must be postmarked or date-stamped on or before the 30th day after the date on the stamped postal receipt maintained at the Office of Foreign Assets Control. If the prepenalty notice was personally delivered to the respondent by a non-U.S. Postal Service agent authorized by the Director, a response must be postmarked or date-stamped on or before the 30th day after the date of delivery.

(2) *Extensions of time for response.* If a due date falls on a federal holiday or weekend, that due date is extended to include the following business day. Any other extensions of time will be granted, at the Director's discretion, only upon the respondent's specific request to the Office of Foreign Assets Control.

(b) *Form and method of response.* The response must be submitted in writing and may be handwritten or typed. The response need not be in any particular form. A copy of the written response may be sent by facsimile, but the original must also be sent to the Office of Foreign Assets Control Civil Penalties Division by mail or courier and must be

postmarked or date-stamped, in accordance with paragraph (a) of this section.

(c) *Contents of response.* A written response must contain information sufficient to indicate that it is in response to the prepenalty notice.

(1) A written response must include the respondent's full name, address, telephone number, and facsimile number, if available, or those of the representative of the respondent.

(2) A written response should either admit or deny each specific violation alleged in the prepenalty notice and also state if the respondent has no knowledge of a particular violation. If the written response fails to address any specific violation alleged in the prepenalty notice, that alleged violation shall be deemed to be admitted.

(3) A written response should include any information in defense, evidence in support of an asserted defense, or other factors that the respondent requests the Office of Foreign Assets Control to consider. Any defense or explanation previously made to the Office of Foreign Assets Control or any other agency must be repeated in the written response. Any defense not raised in the written response will be considered waived. The written response should also set forth the reasons why the respondent believes the penalty should not be imposed or why, if imposed, it should be in a lesser amount than proposed.

(d) *Default.* If the respondent elects not to submit a written response within the time limit set forth in paragraph (a) of this section, the Office of Foreign Assets Control will conclude that the respondent has decided not to respond to the prepenalty notice. The agency generally will then issue a written penalty notice imposing the penalty proposed in the prepenalty notice.

(e) *Informal settlement.* In addition to or as an alternative to a written response to a prepenalty notice, the respondent or respondent's representative may contact the Office of Foreign Assets Control as advised in the prepenalty notice to propose the settlement of allegations contained in the prepenalty notice and related matters. However, the requirements set forth in paragraph (f) of this section as to oral communication by the representative must first be fulfilled. In the event of settlement at the prepenalty stage, the claim proposed in the prepenalty notice will be withdrawn, the respondent will not be required to take a written position on allegations contained in the prepenalty notice, and the Office of Foreign Assets Control will make no final determination as to whether a violation occurred. The amount accepted in settlement of allegations in a prepenalty notice may vary from the civil penalty that might finally be imposed in the event of a formal determination of violation. In the event no settlement is reached, the time limit specified in paragraph (a) of this section for written response to the prepenalty notice remains in effect unless additional time is granted by the Office of Foreign Assets Control.

(f) *Representation.* A representative of the respondent may act on behalf of the respondent, but any oral communication with the Office of Foreign Assets Control prior to a written submission regarding the specific allegations contained in the prepenalty notice must be preceded by a written letter of representation, unless the prepenalty notice was served upon the respondent in care of the representative.

§ 540.704 Penalty imposition or withdrawal.

(a) *No violation.* If, after considering any response to the prepenalty notice and any relevant facts, the Director of the Office of Foreign Assets Control determines that there was no violation by the respondent named in the prepenalty notice, the Director shall notify the respondent in writing of that determination and the cancellation of the proposed monetary penalty.

(b) *Violation.* (1) If, after considering any written response to the prepenalty notice, or default in the submission of a written response, and any relevant facts, the Director of the Office of Foreign Assets Control determines that there was a violation by the respondent named in the prepenalty notice, the Director is authorized to issue a written penalty notice to the respondent of the determination of violation and the imposition of the monetary penalty.

(2) The penalty notice shall inform the respondent that payment or arrangement for installment payment of the assessed penalty must be made within 30 days of the date of mailing of the penalty notice by the Office of Foreign Assets Control.

(3) The penalty notice shall inform the respondent of the requirement to furnish the respondent's taxpayer identification number pursuant to 31 U.S.C. 7701 and that such number will be used for purposes of collecting and reporting on any delinquent penalty amount.

(4) The issuance of the penalty notice finding a violation and imposing a monetary penalty shall constitute final agency action. The respondent has the right to seek judicial review of that final agency action in federal district court.

§ 540.705 Administrative collection; referral to United States Department of Justice.

In the event that the respondent does not pay the penalty imposed pursuant to this part or make payment arrangements acceptable to the Director of the Office of Foreign Assets Control within 30 days of the date of mailing of the penalty notice, the matter may be referred for administrative collection measures by the Department of the Treasury or to the United States Department of Justice for appropriate action to recover the penalty in a civil suit in federal district court.

Subpart H—Procedures

§ 540.801 Procedures.

For license application procedures and procedures relating to amendments, modifications, or revocations of licenses; administrative decisions; rulemaking; and requests for documents pursuant to the Freedom of Information and Privacy Acts (5 U.S.C. 552 and 552a), see subpart D of part 501 of this chapter.

§ 540.802 Delegation by the Secretary of the Treasury.

Any action that the Secretary of the Treasury is authorized to take pursuant to Executive Order 13159 of June 21, 2000 (65 FR 39279, June 26, 2000) and any further executive orders relating to the national emergency declared in Executive Order 13159 may be taken by the Director of the Office of Foreign Assets Control or by any other person to whom the Secretary of the Treasury has delegated authority so to act.

Subpart I—Paperwork Reduction Act

§ 540.901 Paperwork Reduction Act notice.

For approval by the Office of Management and Budget (''OMB'') under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) of information collections relating to recordkeeping and reporting requirements, licensing procedures (including those pursuant to statements of licensing policy), and other procedures, see § 501.901 of this chapter. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

Dated: December 26, 2000.

R. Richard Newcomb,

Director, Office of Foreign Assets Control.

Approved: January 2, 2001.

Elisabeth A. Bresee,

Assistant Secretary (Enforcement), Department of the Treasury.

[FR Doc. 01–689 Filed 1–8–01; 8:45 am]

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January 12, 2001

Part IX

Department of Energy

Office of Energy Efficiency and Renewable Energy

10 CFR Part 430

Energy Conservation Program for Consumer Products: Clothes Washer Energy Conservation Standards; Final Rule

Finding of No Significant Impact; Energy Conservation Program for Consumer Products; Notice

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

10 CFR Part 430

[Docket No. EE–RM–94–403]

RIN 1904–AA67

Energy Conservation Program for Consumer Products: Clothes Washer Energy Conservation Standards

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

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE or Department) has determined that revised energy conservation standards for clothes washers will result in significant conservation of energy, are technologically feasible, and are economically justified. On this basis, the Department today amends the existing energy conservation standards for standard-size clothes washers as proposed and as recommended by stakeholders. The Department also amends the standards for compact clothes washers as well as making minor amendments to the test procedure for measuring the energy efficiency of clothes washers.

DATES: The effective date of this rule is January 1, 2004, except that the effective date of the amendments to appendix J to subpart B of part 430 is February 12, 2001.

The Director of the Federal Register approved the incorporation by reference as of January 1, 2004, of certain publications listed in this rule.

ADDRESSES: A copy of the Technical Support Document (TSD) may be read at the DOE Freedom of Information Reading Room, U.S. Department of Energy, Forrestal Building, Room 1E–190, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–3142, between the hours of 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays. Copies of the TSD can be obtained from the Codes and Standards Internet site at: http://www.eren.doe.gov/buildings/codes_standards/applbrf/clwasher.html or from the U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Forrestal Building, Mail Station EE–41, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–9127.

FOR FURTHER INFORMATION CONTACT: Bryan Berringer, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Forrestal Building, Mail Station EE–41, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–0371, E-mail: Bryan.Berringer@ee.doe.gov, or Eugene Margolis, Deputy Assistant General Counsel, U.S. Department of Energy, Office of General Counsel, Forrestal Building, Mail Station GC–72, 1000 Independence Avenue, SW., Washington, DC 20585–0103, (202) 586–9526, E-mail: Eugene.Margolis@hq.doe.gov.

SUPPLEMENTARY INFORMATION: The Department of Energy (DOE or Department) is incorporating by reference, test procedures from the American Association of Textile Chemists and Colorists (AATCC). These test procedures are set forth in the standards publications listed below:

1. American Association of Textile Chemists and Colorists Test Method 118—1997, *Oil Repellency: Hydrocarbon Resistance Test* (reaffirmed 1997).

2. American Association of Textile Chemists and Colorists Test Method 79—2000, *Absorbency of Bleached Textiles* (reaffirmed 2000).

Copies of these standards publications may be viewed at the Freedom of Information Reading Room, U.S. Department of Energy, Forrestal Building, Room 1E–190, 1000 Independence Avenue, SW., Washington, DC 20585–0101, telephone (202) 586–3142, between the hours of 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Copies of the above standards incorporated by reference can be obtained from the American Association of Textile Chemists and Colorists, P.O. Box 1215, Research Triangle Park, NC 27709, telephone (919) 549–8141, telefax (919) 549–8933, or electronic mail: *orders@aatcc.org.*

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I. Introduction

A. Consumer Overview

1. Background

The Department of Energy (DOE or Department) is directed by the Energy Policy and Conservation Act, as amended, to consider establishing minimum efficiency standards for various consumer products, including clothes washers. Today's standards are consistent with these requirements of the law. DOE is amending almost ten-year-old minimum efficiency standards for new standard-sized residential clothes washers. These amended standards take into account a decade of technological advancements and will save consumers and the nation money, significant amounts of energy and water,

and have substantial environmental and economic benefits.

Interested parties involved in this rulemaking, including manufacturers and energy efficiency advocates, jointly proposed these clothes washer efficiency standards to the Department. The parties believe these to be the highest standards which are technologically feasible and economically justified as required by law. The standards, as proposed by the parties, consist of two stages. The first stage begins on January 1, 2004, and requires that all new residential clothes washers manufactured after that date be 22 percent more efficient than today's minimally compliant clothes washer. The second stage begins on January 1, 2007, and requires that all new residential clothes washers manufactured after that date be 35 percent more efficient than today's minimally compliant clothes washer. Delaying the standard implementation date for the higher efficiency level gives manufacturers more time to research and develop lower-cost solutions to achieve higher standards.

The Department has reviewed the Joint Proposal and agrees the recommended standard is the highest efficiency level that is technologically feasible and economically justified as required by law. The Department therefore is amending the energy conservation standard for the standard-size residential clothes washers as recommended in the Joint Proposal.

2. Clothes Washer Features

The amended efficiency levels can be met by either top- or front-loading designs. In fact, there are vertical-axis top-loading and horizontal-axis front-loading washers on the market today that already meet the higher 2007 standard. Thus, consumers will have the same range of clothes washers as they have today. Furthermore, the clothes washer energy efficiency standard will not impact clothes washer features valued by consumers such as door placement, capacity, water temperature and adjustable load sizes. The Department does not expect the cleaning ability or the reliability and repair costs of washing machines to be changed by the design changes anticipated under the clothes washer amended standards and repair parts will continue to be available for today's washers.

The energy and water savings result primarily from a variety of innovative designs such as more efficient use of hot and cold water by using more accurate sensors that can detect the clothing load and use only as much water for washing as is necessary. The new washers also use higher spin speeds to remove more water from the clothes so less time and energy is needed to dry the clothes.

3. Consumer Benefits

Table 1 summarizes the ''vital statistics'' of today's typical clothes washer. Table 2 presents the implications for the average consumer of the 2004 and 2007 clothes washer standards.

TABLE 1.—VITAL STATISTICS OF TODAY'S TYPICAL CLOTHES WASHERS

Average price	$421.
Number of washes per year	392.
Annual utility bill	$115.
Life expectance	14.1 years.
Energy consumption	3.23 kWh per wash (1266 kWh per year).
Water consumption	39.2 gallons per wash (15,366 gallons per year).

TABLE 2.—IMPLICATIONS OF NEW STANDARDS FOR THE AVERAGE CONSUMER

Year standard comes into effect	2004 (Stage 1)	2007 (Stage 2).
New clothes washer price	$474	$670.
Estimated price increase	$53	$249.
Annual utility bill savings	$15	$48.
Median payback period	3.5 years	5.0 years.
Average net savings over appliance life	$103	$260.
Energy savings per wash	0.612 kWh	1.361 kWh.
Energy savings per year	239 kWh	533 kWh.
Water savings per wash	4.0 gallons	18.1 gallons.
Water savings per year	1568 gallons	7,095 gallons.

Currently, the typical clothes washer has a price of $421 and costs $115 a year in energy and water bills. In order to meet the 2004 standard, the Department estimates that the price of a washer will be $474, an increase of $53. This price increase will be offset by an annual savings of about $15 on the utility bills. In order to meet the 2007 standard, the Department estimates that the price of a washer will be $670, an increase of $249. This price increase will be offset by an annual savings of about $48. It should be noted that DOE based its estimate of the incremental retail cost for the 2007 standards on manufacturer cost estimates for horizontal-axis machines submitted to the Department in 1997. New cost information derived from vertical-axis washers now in the market that meet the 2007 standards indicate that the incremental prices could be substantially less. Based on the Department's analysis, the incremental price of these high-efficiency vertical-axis washers would be approximately $150.[1]

The Department recognizes that few consumers are actually typical in the energy and water prices that they pay and the number of wash loads that they do per year. Consequently, the Department has investigated the effects of the different energy and water prices across the nation and different clothes washer usage patterns. The Department estimates that about 90 percent and 81 percent of all consumers purchasing a new washer will save money as a result of the 2004 and 2007 standards, respectively.

The Department also investigated how these standards might affect low income consumers and senior households. The Department estimates that about 90 percent and 81 percent of all low income consumers purchasing a new washer will save money as a result of the 2004 and 2007 standards,

[1] Assumes a $75 incremental manufacturer cost and a total mark-up of 1.99 (TSD Chapter 5 section 5.4.1 and Chapter 6 section 6.1).

respectively. For senior households, these values are 84 and 72 percent.

4. National Benefits

The standards will provide large benefits to the nation. DOE estimates the standards will save 5.52 quads of energy over 27 years (2004 to 2030). This is equivalent to the total energy consumption of all U.S. homes over a period of approximately 3.3 months. By 2020, the standards will avoid the construction of four 400 megawatt coal-fired plants and eleven 400 megawatt gas-fired plants. These energy savings will result in cumulative greenhouse gas emission reductions of 95.1 million metric tons (Mt) of carbon dioxide (CO_2) equivalent, or an amount equal to that produced by three million cars in a year. Additionally, air pollution will have cumulative reduction by the elimination of 253.5 thousand metric tons of nitrous oxides (NO_X) and 28.1 thousand metric tons of sulfur dioxide (SO_2) from 2004 to 2030. The cumulative water savings are estimated at 11 trillion gallons, enough water to supply the needs of 6.6 million households for 25 years, meaning less water will be pumped from America's aquifers and rivers, and less strain will be placed on many of the nation's water and sewer systems. In total, we estimate the net economic benefit to the nation of this standard will be $15.3 billion from 2004 to 2030.

Please note that you can find additional information about clothes washers on the DOE web-site at: *www.eren.doe.gov/buildings/codes_standards/applbrf/clwasher.html.*

B. Authority

Part B of Title III of the Energy Policy and Conservation Act, Pub. L. 94–163, as amended by the National Energy Conservation Policy Act, Pub. L. 95–619, by the National Appliance Energy Conservation Act (NAECA), Pub. L. 100–12, by the National Appliance Energy Conservation Amendments of 1988, Pub. L. 100–357, and the Energy Policy Act of 1992, Pub. L. 102–486 [2] (the Act or EPCA) created the Energy Conservation Program for Consumer Products other than Automobiles. The consumer products subject to this program (often referred to hereafter as ''covered products'') include clothes washers.

Under the Act, the program consists essentially of three parts: Testing, labeling, and Federal energy conservation standards. The Department, in consultation with the National Institute of Standards and Technology, amends or establishes new test procedures for each of the covered products. Section 323 of EPCA, 42 U.S.C. 6293. Test procedures appear at 10 CFR part 430, subpart B.

The Federal Trade Commission (FTC) prescribes rules governing the labeling of covered products after DOE publishes test procedures. Section 324(a) of EPCA, 42 U.S.C. 6294(a). At the present time, there are Federal Trade Commission rules requiring labels for clothes washers.

Any new or amended standard must be designed so as to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. Section 325(o)(2)(A) of EPCA, 42 U.S.C. 6295(o)(2)(A).

Section 325(o)(2)(B)(i) of EPCA, 42 U.S.C. 6295(o)(2)(B)(i), provides that before DOE determines whether a standard is economically justified, it must first solicit comments on a proposed standard. After reviewing comments on the proposal, DOE must then determine that the benefits of the standard exceed its burdens, based, to the greatest extent practicable, on a weighing of the following seven factors:

''(I) The economic impact of the standard on the manufacturers and on the consumers of the products subject to such standard;

(II) The savings in operating costs throughout the estimated average life of the covered product in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered products which are likely to result from the imposition of the standard;

(III) The total projected amount of energy savings likely to result directly from the imposition of the standard;

(IV) Any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard;

(V) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard;

(VI) The need for national energy conservation; and

(VII) Other factors the Secretary considers relevant.''

C. Background

1. Current Standards

The existing clothes washer efficiency standards have been in effect since 1994. Energy efficiency for a clothes washer is measured in terms of an energy factor (EF), which measures overall clothes washer efficiency, in terms of cubic feet per kilowatt-hour per cycle, and is determined by the DOE test procedure. 10 CFR Part 430, Subpart B, Appendix J. The current clothes washer efficiency standards are as follows:

- top-loading, compact (less than 1.6 cubic feet capacity), EF = 0.90
- top-loading, standard (1.6 cubic feet or greater capacity), EF = 1.18
- top-loading, semi-automatic, must have an unheated rinse option
- front-loading, must have an unheated rinse option
- suds-saving, must have an unheated rinse option

2. History of Previous Rulemakings

On November 14, 1994, DOE published an Advance Notice of Proposed Rulemaking (ANOPR). 59 FR 56423. On November 19, 1998, DOE published a Supplemental ANOPR. (Hereafter referred to as the 1998 Supplemental ANOPR.) 63 FR 64344. In the 1998 Supplemental ANOPR, DOE provided interested persons an opportunity to comment on:

(1) The product classes that we propose to analyze;

(2) The analytical framework, models (*e.g.,* the Government Regulatory Impact Model (GRIM)), and tools (*e.g.,* a Monte Carlo sampling methodology, and life-cycle-cost (LCC) and national energy savings (NES) spreadsheets) we used to perform analyses of the impacts of standards; and

(3) The results of preliminary analyses for LCC, payback and national energy savings contained in the Preliminary Technical Support Document: Energy Efficiency Standards for Consumer Products: Clothes Washers (TSD) dated October 1998 and summarized in the 1998 Supplemental ANOPR.

On October 5, 2000, DOE published a Notice of Proposed Rulemaking (NOPR or proposed rule) for energy efficiency standards. 65 FR 59550. For the NOPR, we analyzed the energy savings, benefits and burdens of amended energy conservation standards for clothes washers and shared the results of these analyses with all stakeholders. Based on these analyses, several of the major stakeholders, including clothes washer manufacturers and energy efficiency advocates, submitted to the Department a joint proposal for the highest standard level which they believed to be technologically feasible and economically justified (hereafter referred as the Joint Comment). (Joint Comment, No. 204). Based on our review of the Joint Comment, we found the proposed standards technologically

[2] Part B of Title III of the Energy Policy and Conservation Act, as amended by the National Energy Conservation Policy Act, the National Appliance Energy Conservation Act, the National Appliance Energy Conservation Amendments of 1988, and the Energy Policy Act of 1992, is referred to in this rule as the ''Act.'' Part B of Title III is codified at 42 U.S.C. 6291 *et seq.* Part B of Title III of the Energy Policy and Conservation Act, as amended by the National Energy Conservation Policy Act only, is referred to in this rule as the National Energy Conservation Policy Act.

feasible and economically justified. Therefore, we proposed to amend the energy conservation standard for clothes washers for residential applications as recommended in the Joint Comment and announced a public hearing, which was held on November 15, 2000.

Included in the NOPR for energy efficiency standards were revisions to the clothes washer test procedure. The test procedure revisions we made were necessary due to discrepancies uncovered in the measurement of remaining moisture content (RMC). The discrepancies were found to be caused by variations in the properties of the energy test cloth. The situation has been addressed in the test procedure revisions by adding provisions for cloth certification based on the results of extractor testing and the derivation of a cloth-specific correction factor. In addition, we incorporated minor editorial changes to help clarify both Appendices J and J1 of the test procedure based on the joint proposal by stakeholders. These changes, as proposed in the NOPR, are included in this final rule.

3. Process Improvement

A moratorium was placed on publication of proposed or final rules for appliance efficiency standards as part of the FY 1996 appropriations legislation. Pub. L. 104–134. That moratorium expired on September 30, 1996.

On July 15, 1996, the Department published a Process Improvement Rule establishing procedures, interpretations and policies to guide the Department in the consideration of new or revised appliance efficiency standards (Procedures for Consideration of New or Revised Energy Conservation Standards for Consumer Products, 61 FR 36974, July 15, 1996). DOE has followed the Process Improvement Rule, to the extent possible, in developing the clothes washer standard.

We developed an analytical framework for the clothes washer standards rulemaking for our stakeholders. The analytical framework described the different analyses (*e.g.,* LCC, payback and manufacturing impact analyses (MIA)) to be conducted, the method for conducting them, the use of new LCC and national energy savings (NES) spreadsheets, and the relationship between the various analyses. We have conducted several meetings, workshops and discussions regarding energy efficiency standards for clothes washers. These workshops included discussions on proposed design options and a preliminary engineering analysis on November 15, 1996; development of an analytical framework for appliance standards rulemaking on July 23, 1997; and development of two new spreadsheet tools for LCC and NES on March 11, 1998. We conducted public hearings on December 15, 1998, to receive additional comments on the 1998 Supplemental ANOPR and on July 22, 1999, to discuss the process, analytical tools and uncertainties with the test procedures. We conducted a public hearing on November 15, 2000, to receive comment on proposed efficiency standards addressed in the NOPR published on October 5, 2000.

In the NOPR, we also incorporated the recommendations made by the Advisory Committee on Appliance Energy Efficiency Standards on April 21, 1998. (Advisory Committee, No. 96). These recommendations relate to using the full range of consumer marginal energy prices (CMEP) in the LCC analysis (replacing the use of national average energy prices), defining a range of energy price futures for each fuel used in the economic analyses and defining a range of primary energy conversion factors and associated emission reductions, based on the generation displaced by energy efficiency standards for each rulemaking. Marginal energy prices are used in the LCC, payback and the NPV portion of the NES analyses. Because the NES results are inputs to the analyses for utility, emissions and employment; these analyses are also impacted by using marginal rates.

4. Test Procedures

Federal test procedures for clothes washers were first established in 1977. Simultaneous with the NOPR for clothes washer standards, the Department was also in the process of revising the clothes washer test procedure. The Department needed to address a number of innovative technologies for which there were no test procedures. A number of proposals were published, including one on December 22, 1993, (58 FR 67710) and another on March 23, 1995, (60 FR 15330). In its comments to the March 1995 proposed rule, the Association of Home Appliance Manufacturers (AHAM) requested that DOE adopt an additional new test procedure, that captures current consumer habits that affect energy use, which would be used in considering the revision of the clothes washer energy conservation standards, and would go into effect upon issuance of standards.

On April 22, 1996, the Department issued a supplemental Notice of Proposed Rulemaking proposing such a new test procedure, Appendix J1, as well as certain additional revisions to the currently applicable test procedure in appendix J to subpart B of 10 CFR part 430. 61 FR 17589. The supplemental notice was published to seek comments on whether DOE should adopt the AHAM recommended test procedure with certain changes. The final rule, published on August 27, 1997, adopted this recommendation. 62 FR 45484. Appendix J is the current applicable test procedure, and it will expire on December 31, 2003. Appendix J1 is informational and will not become mandatory until the energy conservation standards of this rule become effective on January 1, 2004. The appendix J test procedure specifies an energy efficiency descriptor called the energy factor (EF). The appendix J1 test procedure specifies an energy efficiency descriptor called the modified energy factor (MEF) which replaces the EF. Contrasting with the previous EF descriptor, the MEF descriptor incorporates clothes dryer energy by consideration of the remaining moisture content (RMC) of clothes leaving the clothes washer. Other substantive differences between the test procedures include using different water temperatures for testing and using cloth loads in J1 but not in J. The issuance of the test procedure final rule was a major step in accelerating the development of clothes washer standards. The test procedure final rule provided the basis upon which the energy and water consumption calculations could be determined.

During this standards rulemaking, it was discovered that the test cloth to be used for determining the RMC was giving inconsistent results. The Department investigated possible causes for the inconsistent test results, and results are summarized in the DOE report, ''Development of a Standardized Energy Test Cloth for Measuring Remaining Moisture Content in a Residential Clothes Washer,'' May 2000. (DOE, No. 200). As part of our investigation into the cause of these discrepancies, we found that various lots of test cloth will yield inconsistent RMC results. To understand the effects of operating variables and cloth specifications, it was necessary to conduct laboratory tests to determine RMC. To insure that test results would not be influenced or biased by any manufacturer's product (clothes washer), we used an extractor to remove moisture content. An extractor is a centrifuge—basically a rotating basket that has a controllable speed to produce a variety of centrifugal forces. The speed was varied to impose different centripetal accelerations on the test load. These accelerations are reported in

terms of gravitational acceleration (g). We also soaked the cloth in a tub at controlled temperature rather than use the agitated soak cycle provided by a typical washer. The RMC tests closely resemble those specified in the clothes washer test procedure.

An extractor-based test has been established to examine RMC values at different gravitational forces (g-forces). A correction factor is derived by which the deviation between a new production batch of test cloth and a standard reference test cloth is measured. This deviation is measured as the root mean square between the set of measured RMC values and the set of standard RMC values. If this absolute deviation is below 2 percent, then no correction factors are needed in MEF tests using that batch of cloth. If the absolute root-mean-square (RMS) difference between the cloth RMC values and standard RMC values is above 2 percent, then correction factors must be applied when using the cloth to test the MEF of a clothes washer.

As part of this rulemaking, we included revisions to the test procedure based on our proposed language addressed in the May 2000 report dealing with the energy test cloth, RMC, extractor testing and the correction factor and Joint Stakeholders Comment. (Joint Comment, No. 204). In addition, we incorporated AHAM's comments and Joint Stakeholders Comment requesting minor editorial changes to help clarify both appendices J and J1. (AHAM, Nos. 197 and 199, and Joint Comment, No. 204). These changes have been included in their entirety in this rulemaking pertaining to the test procedure.

II. General Discussion

A. Test Procedures

As addressed in the NOPR for energy efficiency standards, we included revisions to the test procedure dealing with the energy test cloth, RMC, extractor testing and the correction factor based on our May 2000 report, which can be found in appendix C of the TSD. We also incorporated changes suggested in AHAM's comments and in the Joint Comment requesting minor editorial changes to help clarify both appendices J and J1 of the test procedure. (AHAM, Nos. 197 and 199, and Joint Comment, No. 204). In addition, during the public hearing held on November 15, 2000, and in a written statement, AHAM requested that the test procedure be further clarified and enhanced by incorporating additional changes. These changes have been included in their entirety in this final rule. A more complete discussion of these comments is found in section IV of this rule.

B. Technological Feasibility

1. General

There are top- and front-loading clothes washers in the market at all of the efficiency levels prescribed in today's final rule. The Department, therefore, believes all of the efficiency levels contained in today's final rule for both top- and front-loading clothes washers are technologically feasible as required by 325(o)(2)(A) of EPCA, as amended.

2. Maximum Technologically Feasible Levels

The Act requires the Department, in considering any new or amended standards, to consider those that ''shall be designed to achieve the maximum improvement in energy efficiency * * * which the Secretary determines is technologically feasible and economically justified.'' (Section 325(o)(2)(A)). Accordingly, for each class of product considered in this rulemaking, a maximum technologically feasible (max tech) design option was identified and considered as discussed in the NOPR. 65 FR 59550, 59555–56 (October 5, 2000). See section V. Analytical Results and Conclusions for details of the levels analyzed for this rulemaking.

The Department considers design options technologically feasible if they are already in use by the respective industry or research has progressed to the development of a working prototype. The Process Improvement Rule sets forth a definition of technological feasibility as follows: ''Technologies incorporated in commercially available products or in working prototypes will be considered technologically feasible.'' 10 CFR 430, subpart C, appendix A(4)(a)(4)(I).

In consultation with interested parties, the Department developed a list of design options on all possible energy saving designs for consideration. The Department gathered design option information from previous clothes washer analyses, trade publications, industry research organizations, product brochures from domestic and foreign manufacturers, and appliance conferences, including the International Appliance Technical Conference (IATC). The ''Draft Report on Design Options for Clothes Washers'' and ''Draft Report on the Preliminary Engineering Analysis for Clothes Washers'' provide details on the potential technologies. The following designs were considered: Improved fill control, tighter tub tolerance, added insulation, increased motor efficiency, thermostatically controlled mixing values, improved water extraction, horizontal-axis, horizontal-axis with recirculation, advanced control/sensor, suds-saving, direct drive motor, automatic fill control, reduced thermal mass, electrolytic disassociation of water, ultrasonic washing, bubble action, and ozonated laundering. (Clothes Washer Public Workshop, No. 55B and 55C). Based on this information the Department determined that a 50 percent reduction in the energy use of the baseline model (corresponding to an MEF of 1.634) is the maximum technologically feasible level for both the Top-Loading, Standard (1.6 $ft.^3$ or greater capacity) and Front-Loading classes.

Additionally, under the guidelines in the Process Improvement Rule, DOE conducted a screening analysis to eliminate from consideration, early in the process, any design option which is not practicable to manufacture, install, or service, will eliminate product utility features, or for which there are safety concerns that can not be resolved. In order to conduct the screening analysis, the Department gathered information regarding all current technology options and prototype designs. In consultation with interested parties, the Department developed a list of design options for consideration in the rulemaking. All technologically feasible design options were considered in the screening analysis, and none were rejected.

C. Energy Savings

1. Determination of Savings

The Department forecasted energy savings through the use of a national energy savings (NES) spreadsheet as discussed in the NOPR. 65 FR 59550, 59556, 59563–68 (October 5, 2000).

2. Significance of Savings

Under section 325(o)(3)(B) of the Act, the Department is prohibited from adopting a standard for a product if that standard would not result in ''significant'' energy savings. While the term ''significant'' has never been defined in the Act, the U.S. Court of Appeals, *in Natural Resources Defense Council* v. *Herrington,* 768 F.2d 1355, 1373 (D.C. Cir. 1985), concluded that Congressional intent in using the word ''significant'' was to mean ''non-trivial.'' The savings to the nation are 5.52 quads of energy over 27 years (2004 to 2030) which is equivalent to the total energy consumption of all U.S. homes over a period of approximately 3.3 months. We

consider this to be non-trivial and therefore determine it to be significant.

D. Economic Justification

As noted earlier, Section 325(o)(2)(B)(i) of the Act provides seven factors to be evaluated in determining whether a conservation standard is economically justified.

1. Economic Impact on Manufacturers and on Consumers

We considered the economic impact on manufacturers and on consumers as discussed in the NOPR. 65 FR 59550, 59556 (October 5, 2000). The clothes washer industry would experience a cumulative NPV loss of between $421.1–528.4 million representing between 29.2 and 36.7 percent of base case industry value. The Department estimates that about 89 percent and 81 percent of all consumers purchasing a new washer will save money as a result of the 2004 and 2007 standards, respectively. In total, we estimate the benefit to the nation of this standard will be $15.3 billion from 2004 to 2030.

2. Life-Cycle-Costs

We considered life-cycle-costs as discussed in the NOPR. 65 FR 59550, 59556–57 (October 5, 2000). At the 1.04 MEF level, consumers would experience a savings in LCC of $103, while they would experience a LCC savings of $260 at the 1.26 MEF level that would go into effect in 2007. The payback for the 1.04 MEF level is 3.5 years, and 5.0 years for the 1.26 MEF.

3. Energy Savings

While significant conservation of energy is a separate statutory requirement for imposing an energy conservation standard, the Act requires DOE, in determining the economic justification of a standard, to consider the total projected energy savings that are expected to result directly from revised standards. The Department used the NES spreadsheet results, discussed earlier, in its consideration of total projected savings. The savings to the nation are 5.52 quads of energy over 27 years (2004 to 2030).

4. Lessening of Utility or Performance of Products

This factor cannot be quantified. In establishing classes of products, the Department tries to eliminate any degradation of utility or performance in the products under consideration in this rulemaking.

An issue of utility that was considered in this rule concerns the consumer utility of vertical-axis (V-axis) and horizontal-axis (H-axis) machines. We conducted consumer focus groups and a conjoint analysis study to address this issue. A conjoint analysis is a quantitative method to estimate the value consumers place on the clothes washer attributes. The focus group and conjoint results indicate that price is the most important attribute when consumers are purchasing a new clothes washer, although in each case another attribute is virtually tied with price in terms of importance. In the focus groups, 83 percent of the respondents included price in their top ten list of important clothes washer attributes, while 81 percent included wash tub capacity in that same list. In the conjoint analysis, price had the highest relative importance score (26 percent), followed closely by the availability of a wash load size option on the control panel (25 percent). Of the six attributes included in the conjoint analysis survey, door placement was the fifth most important attribute with a relative importance score of 11 percent (for further information, see Chapter 8 and appendix G of the TSD).

5. Impact of Lessening of Competition

This factor seeks the views of the Attorney General to determine the potential impacts on competition resulting from the imposition of the proposed energy efficiency standard.

In order to assist the Attorney General in making such a determination, the Department provided the Attorney General with copies of the NOPR and the Technical Support Document for review. In a letter responding to the NOPR, the Attorney General concluded ''that the proposed clothes washer standard would not adversely affect competition.'' (Department of Justice, No. 233 at 2). The letter is printed at the end of today's rule.

6. Need of the Nation To Conserve Energy

We reported the environmental effects from today's final rule in the NOPR. 65 FR 59550, 59557, 59578–79 (October 5, 2000). The energy savings this final rule will result in cumulative greenhouse gas emission reductions of 95.1 million metric tons (Mt) of carbon dioxide (CO_2) equivalent, or an amount equal to that produced by three million cars every year. Additionally, air pollution will be reduced by the elimination of 253.5 thousand metric tons of nitrous oxides (NO_X) and 28.1 thousand metric tons of sulfur dioxide (SO_2) from 2004 to 2030.

7. Other Factors

This provision allows the Secretary of Energy, in determining whether a standard is economically justified, to consider any other factors that the Secretary deems to be relevant. Section 325(o)(2)(B)(i)(VI) of EPCA, 42 U.S.C. 6295(o)(2)(B)(i)(VI).

Under this provision, we considered the water savings from each standard level. The Department received numerous comments asking for the inclusion of a water factor standard in addition to the MEF standard. (City of Austin, Nos. 105 at 1 and 187 at 2; City of Bellingham, Washington, Department of Public Works, No. 106 at 1; Lower Colorado River Authority (LRCA), No. 109 at 1; Amy Vicker and Associates, Inc., No. 110 at 1; City of San Diego, No. 123 at 1; City of Santa Barbara, Public Works Department, No. 125 at 1; City of Seattle, No. 126 at 2; Santa Clara valley Water District, No. 127 at 1; American Water Works Association, No. 149 at 1; City of Redmond, Office of the Mayor, No. 153 at 1; Massachusetts Water Resources Authority, No. 152 at 4; State of New Mexico, Office of the State Engineer, No. 158 at 1). As stated previously, the Department considered water savings as a factor in determining the economic justification of the clothes washer standard level. The water savings are estimated at 11 trillion gallons, enough water to supply the needs of 6.6 million households for 25 years, meaning less water will be pumped from America's aquifers and rivers, and less strain will be placed on many of the nation's water and sewer systems. However, the Department does not have the authority to prescribe a minimum water factor standard.

The Secretary has also strongly considered the Joint Comment. This proposal adopts a two stage implementation process oriented toward mitigating financial impacts on manufacturers and ensuring no loss of product utility for consumers. Thus, we are adopting the Joint Comment proposal.

E. Standards Incorporated by Reference

Section 325(o)(2)(A) of EPCA specifies that any new or amended energy conservation standard the Department prescribes shall be designed to ''achieve the maximum improvement in energy efficiency * * * which the Secretary determines is technologically feasible and economically justified.'' Consistent with the EPCA directive that the standard achieve maximum improvement in the energy efficiency, it follows that the test procedure to measure efficiency be both valid and repeatable, in other words, provide consistent results. During this standards rulemaking process it was discovered that the test cloth used for determining remaining moisture content (RMC) was

giving inconsistent results. The effect of RMC on modified energy factor and hence energy efficiency can be substantial. This is discussed in the proposed rule under section III.A. *Test Procedure,* 65 FR 59555 (October 5, 2000). After investigating possible causes for the inconsistent test results, we found that various lots of test cloth had been treated with a stain or water repellant finish that would affect RMC. Consequently, the American Association of Textile Chemists and Colorists (AATCC) Test Method 118–1997, *Oil Repellency: Hydrocarbon Resistence Test* (reaffirmed 1997), and Test Method 79–2000, *Absorbency of Bleached Textiles* (reaffirmed 2000), were added to the proposed rule, under appendix J1 to subpart B of part 430, to determine whether such a finish was present in a test cloth. Also, a procedure was added to ''wash out'' that finish, so that any test cloth would be equivalent to any other test cloth and therefore produce consistent results. Both of the above procedures were accepted by the stakeholders under the Joint Comment recommendation submitted to the Department by clothes washer manufacturers and energy conservation advocates (Joint Comment, No. 204), and are incorporated by reference in today's final rule.

III. Methodology

As discussed in the NOPR, the Department developed new analytical tools for this rulemaking. The first tool was a spreadsheet that calculates LCC and payback period. The second calculates national energy savings and national net present value (NPV). The Department also completely revised the methodology used in assessing manufacturer impacts including the adoption of the Government Regulatory Impact Model (GRIM). Additionally, DOE developed a new approach using the National Energy Modeling System (NEMS) to estimate impacts of clothes washers energy efficiency standards on electric utilities and the environment. 65 FR 59550, 59557–71 (October 5, 2000).

In general, when information is based on periodic forecasts and surveys such as the Annual Energy Outlook (AEO) forecasts of energy prices and the Residential Energy Consumption Survey (RECS), both from the Energy Information Administration (EIA), we try to use the latest available information. The analysis in support of the NOPR was performed using RECS1993 and AEO1999 data. Just prior to publication of the NOPR both RECS1997 and AEO2000 data became available. Although we did not expect a significant difference in results by updating to RECS1997 and AEO2000, we stated our intent to use this updated information for the final rule. We have updated the analysis for Trial Standard Level 3 using RECS1997 and AEO2000 and have included it in appendix R of the TSD.

IV. Discussion of Comments

A. Test Procedure

During the public hearing held on November 15, 2000 and in a written statement, AHAM requested that the test procedure be further clarified and enhanced by incorporating the following additional changes:

(1) Specify that the test cloth can be used for up to 60 runs in appendix J, as proposed for J1.

(2) Specify that appendix J1 (currently informational) is the test procedure to be used to determine which models meet Energy Star requirements prior to implementation of the January 1, 2004 standard requirement.

(3) Require that a permanent marking be applied to future test cloth lots.

(4) Implement a process to publish the correction factors on future test cloth lots (*i.e.*, publish in **Federal Register**, on web-site, or by letter). (AHAM, No. 211)

These changes to the test procedure are proposed by AHAM for clarification and consistency purposes only. No objections were raised at the public hearing or in written comments to this proposal, and the Department believes they would clarify the test procedure without changing any test results. Therefore, Item #1 will be included in the final rule for consistency in Appendices J and J1. Item #2 will be addressed by letter from DOE to the stakeholders specifying that Appendix J1 along with the revisions in this final rule will be used to determine which models meet Energy Star requirements starting January 1, 2001. Item #3 will be included in the final rule by adding a statement to require that the test cloth have a permanent marking identifying the lot. Item #4 will be addressed by DOE notifying stakeholders via the Internet site at: http://www.eren.doe.gov/buildings/codes_standards/applbrf/clwasher.html with the lot number and correction factors along with the accepted laboratories and mills to be used.

B. Standard

Since we started work on this rulemaking following the 1991 standard final rule, we have had eight public hearings/workshops and three public solicitations for comment. As noted above, DOE published an ANOPR on November 14, 1994. 59 FR 56423. On November 19, 1998, DOE published a Supplemental ANOPR. 63 FR 64344. On October 5, 2000, DOE published a Notice of Proposed Rulemaking (NOPR). 65 FR 59550. In preparation of the NOPR, we conducted several analyses regarding the energy savings, benefits, and burdens of amended energy conservation standards for clothes washers and have shared the results of these analyses with all stakeholders. Based on these analyses, several of the major stakeholders, including clothes washer manufacturers and energy efficiency advocates, submitted to the Department a joint proposal for the highest standard level which they believed to be technologically feasible and economically justified. As a result, based on the aforementioned, we proposed to amend the energy conservation standard for clothes washers for residential applications as recommended in the joint proposal. We announced a public hearing, which was held on November 15, 2000.

Today's final rule standards are based on the joint proposal submitted to the Department by clothes washer manufacturers and energy conservation advocates. (Joint Comment, No. 204). The joint stakeholders consist of the following: Alliance Laundry Systems LLC; Amana Appliances; Asko Incorporated; Frigidaire Home Products; General Electric Appliances (GEA); Maytag Corporation; Miele, Inc.; Fisher & Paykel Ltd; Whirlpool Corporation; Alliance to Save Energy; American Council for an Energy Efficient Economy (ACEEE); Appliance Standards Awareness Project; California Energy Commission (CEC); City of Austin, Texas; Natural Resources Defense Council (NRDC); Northwest Power Planning Council; and Pacific Gas and Electric (PG&E). The proposal as submitted in the Joint Comment consists of four parts as follows:

Clothes Washer Energy Standard. The clothes washer energy standards for standard class clothes washers shall be 1.04 modified energy factor (MEF) in 1/1/2004 and 1.26 MEF in 1/1/2007. The energy test procedure will be revised to ensure that variability between test cloths will not significantly affect remaining moisture content (RMC) results. Additional clarifications will also be made to test procedure.

Energy Star Labeling Program. Energy Star levels shall be set as follows: Standard Class Clothes Washers—1.26 MEF in 2001; 1.42 MEF in 2004; Refrigerator/Freezers—10% better than the 2001 standard in 2001; change to 15% better than the 2001 in 2004.

Tax Credit for the Production of Energy Efficient Clothes Washers and Refrigerator-Freezers. The credit shall provide for two energy efficiency tiers, each with separately designated funds. There is $30 million in each designated fund per company per efficiency tier. Cap of $60 million per company for the two funds or yearly cap with carry forward. Annual total tax credit cannot exceed in any taxable year 2% of corporate gross revenues as determined by average of 3 prior years.

Standard Class Clothes Washers: Two tiers coterminous 2001–2006; $50 per unit for products manufactured with a 1.26 MEF and $100 per unit for products manufactured with a 1.42 MEF, increasing to 1.5 MEF in 2004. Includes residential-style ''coin-operated'' washers.

Refrigerators: First tier effective in 2001. $50 per unit for products manufactured 10% above 2001 minimum efficiency standard. Credit runs through 2004. Second tier also effective in 2001 and runs through 2006. It is $100 for products manufactured 15% above the 2001 minimum efficiency standard. Credits apply to automatic defrost refrigerator-freezers only, at 16.5 cubic feet internal volume and above.

Voluntary Industry Water Program. Water factor reporting shall be part of a voluntary industry sponsored program. AHAM members agree to publicly disclose through AHAM, water factors for each model that meets Energy Star/Tax Credit MEF levels, starting sometime in calendar year 2001. In calendar year 2002 and each year thereafter, industry-wide shipment weighted average water factors for units shipped in the previous year shall be reported by AHAM. Water factor calculations will use appendix J water factor through 2003 and will use Appendix J1 thereafter. Starting in 2007, AHAM members agree to report water factor for all models. AHAM will sponsor water conference.'' (Joint Comment, No. 204).

This rulemaking only addresses the clothes washer energy standards of this proposal. The above standard, based on this proposal would go into effect in stages, with the first stage going into effect on January 1, 2004, and the second stage going into effect on January 1, 2007 (hereafter referred to as the 2004 standard and 2007 standard, respectively). The initial standard is a 22 percent reduction in energy consumption over the current standard (or a MEF of 1.04). The later, more stringent standard, is a 35 percent reduction in energy consumption over the current standard (or a MEF of 1.26). Both top-loading vertical-axis and front-loading horizontal-axis design clothes washers are currently available in retail appliance stores at these levels.

In response to the NOPR, we received additional comments supporting the proposed energy conservation standard announced from AHAM (representing Alliance Laundry Systems LLC; Asko Incorporated; Amana Appliances; AB Electrolux (Frigidaire Home Products); GEA, Fisher & Paykel Ltd; Maytag Corporation; Miele, Inc.; and Whirlpool Corporation), manufacturers, energy efficiency advocates, utilities and consumers. (AHAM, No. 212 at 1; Amana, No. 223 at 1; Whirlpool, No. 236 at 2; Maytag, No. 230 at 2; ACEEE, Nos. 214 & 227; NRDC, No. 225 at 2; AWWA, No. 234; Comment No. 218). However, Oregon Office of Energy (OOE) request a standard level at a 40 percent improvement over the baseline washer or a MEF of 1.36. (OOE, No. 219 at 2).

We also received three comments from Congress. Representative Ralph Regula (R–OH) supports this rulemaking and believes it should be approved without delay. (Comment No. 220) Representatives Joe Knollenberg (R–MI) and Wally Herger (R–CA) are asking for 120- and 90-day extensions of the comment period, respectively. (Docket No. EE–RM/STD–98–440, Comment No. 73 at 68 and Comment No. 239). This rulemaking process for clothes washers began on November 14, 1994, almost 6 years ago with the publication of the Advanced Notice of Proposed Rulemaking. 59 FR 56423. Subsequently, there were eight public hearings/workshops and three public solicitations for comment. Thus, DOE is adopting the proposed rule and does not plan to extend the comment period.

C. Two Standards in One Rulemaking

The Competitive Enterprise Institute (CEI) and Consumer Alert (CA) commented that the statute does not specifically allow for the creation of two standards in one rulemaking. (CEI & CA, No. 207 at 2; CEI, No. 228 at 3). More specifically, these comments contended that the 2007 standard, coming only 3 years after the 2004 standard, violates the requirement in section 325 of the Act that an amended standard for these products ''shall apply to products manufactured after a date which is 5 years after * * * the effective date of the previous amendment * * * '' 42 U.S.C. 6395(m).

DOE disagrees with this comment. In this rulemaking, DOE is complying with the mandate in section 325(g)(4)(B) of the Act to determine whether to amend the standards in effect for clothes washers. Consistent with section 325(m), section 325(g)(4)(C) of the Act provides that a second and any subsequent amendments shall apply to products manufactured five years after the effective date of the previous amendment, except that in no case may the amended standard apply to products manufactured within 3 years after publication of the standard. Today's amended final rule will have been published 6½ years after the effective date of the previous final rule, in conformity with the statute, and applies to products manufactured 3 years or more after its publication date.

Nothing in the Act precludes DOE, in carrying out its duty to determine whether to amend the existing standards, from promulgating amendments that take effect in two stages. In this rulemaking, DOE has determined that an interim 2004 standard is technologically feasible and economically justified. This less stringent interim standard gives industry sufficient lead time to depreciate their current assets and plan a more orderly transition of their production facilities. Delaying the implementation date for the higher efficiency level gives manufacturers more time to research and develop lower cost solutions to achieve higher standards. Under the provisions in the Act, DOE may not apply subsequent amendments of these standards to products manufactured within 5 years after the effective date of the second or final stage of this rule (*i.e.,* until 2012).

AHAM and the NRDC both support DOE's position that there is nothing in the statute which prohibits rule amendments that consist of initial or interim standards and more stringent or final standards. (Mr. Samuels of AHAM, No. 216CC at 23; Mr. Goldstein of NRDC, No. 216CC at 56).

Thus, DOE is adopting the rule, as proposed.

D. Consumer Information Statement

The Consumer Federation of America (CFA) commented that it believes that the Consumer Overview section could be improved to include the following information: Impact on the ''first cost'' or purchase price, impact on LCC (*i.e.* energy costs and water savings), payback period, impact of a rule on affordability of product for the average consumer and especially the low and moderate income population, and environmental implications/benefits of a rulemaking. (CFA, Nos. 210 & 232 at 2). In addition, as it was recommended by the Appliance Standards Advisory Committee at its October 24, 2000, meeting, the consumer information

statement (Consumer Overview) should be in simplified language so that it is understandable to the consumer. (Advisory Committee Meeting Transcripts dated October 24, 2000, at 43). These changes have been made to the Consumer Overview section of this final rule.

E. Consumer Input

CEI and CA commented that they believe there was inadequate consumer input into the rulemaking process. (CEI & CA, No. 209). General Electric (GE) commented that DOE has given adequate time for consumer input by holding numerous comment periods and hearings. (Mr. Jones of GE, No. 216CC at 74). Since we started work on this rulemaking in 1991 we have had eight public hearings/workshops and three public solicitations for comment. DOE published an ANOPR on November 14, 1994 with a 75 day comment period. 59 FR 56423. On November 19, 1998, DOE published a Supplemental ANOPR and held a public hearing on December 15, 1998 with a 75 day comment period. 63 FR 64344. All of the technical information pertaining to the Supplemental ANOPR and a copy of the Supplemental ANOPR were made available immediately thereafter on our Internet site. On October 5, 2000 DOE published a NOPR and held a public hearing on November 15, 2000 with a 60 day comment period. 65 FR 59550. All of the technical information pertaining to the NOPR and a copy of the NOPR were made available immediately thereafter on our Internet site.

Since February 1999, the Department received 10 letters from consumers opposing the proposed energy efficiency standards and about 200 comments opposing a ban on top-loading vertical-axis clothes washers. (Comment No. 217). In addition, we responded to about 200 e-mails and phone calls by sending in return a fact-sheet and a copy of the rule. On the other hand, the Department received over 600 letters from consumers supporting the energy conservation standards at a 40 percent improvement in efficiency (today's requirement is for a 35 percent improvement by 2007). (Comment Nos. 191, 192, 193, 196, & 201). We have also received comments from consumer advocate groups such as the Arizona Consumers Council, Center for Environmental Citizenship, Coalition for Consumer Rights, Residential Providers Association of Oregon, and others supporting the energy conservation standards at a 40 percent improvement in efficiency. (Comment No. 191). In addition, in selecting today's standards, we considered the results of the consumer focus groups and a conjoint analysis study we performed to address the consumer utility issue pertaining to top-loading vertical-axis and front-loading horizontal-axis machines. Based on the above, DOE concludes that many consumers are concerned that a new standard would ban, or have the unintended effect of banning, top-loading vertical-axis clothes washers. The Department notes that the standard adopted today mandates a minimum level of energy efficiency and that at least three clothes washer manufacturers currently have top-loading clothes washers which meet the 2007 standards.

In conclusion, we believe there has been ample time and opportunity for public comment and that consumer input has been received and consumer interests represented and considered.

F. Energy and Economic Analyses

The Department received several comments with respect to various elements of the energy and economic analyses. This section addresses product classes, incremental retail costs, water savings, detergent savings, LCC and payback, and cost effectiveness.

G. Product Classes

Currently, DOE divides clothes washers into classes based on size and features, such as suds-saving. For the existing standards, DOE defines residential clothes washers in the following classes:

- Top-loading, compact (less than 1.6 cubic feet capacity);
- Top-loading, standard (1.6 cubic feet or greater capacity);
- Top-loading, semi-automatic;
- Front-loading; and
- Suds-saving.

In the NOPR, the Department indicated it would maintain the current product classes.

The Department received several comments on its proposal to maintain separate product classes for top-loading and front-loading washers and to establish the same efficiency requirement for both. OOE commented that DOE should follow the lead of the Federal Trade Commission and establish only two classes of automatic clothes washers—standard and compact—as there is no basis for doing otherwise and to avoid consumer confusion. (OOE, No. 219 at 8). NRDC commented that it made more sense to collapse the V-axis and H-axis classes into a single class. (Mr. Goldstein of NRDC, No. 216CC at 57). Whirlpool commented that it fully supports the consolidation of the top- and front-loading standard capacity classes. (Whirlpool, No. 236). Maytag commented that it fully agrees with the Department's conclusion that a single efficiency standard for standard class top-and front-loading washers is clearly justified. (Maytag, No. 230 at 2). Amana commented that it supports the Department's proposal to have the same energy-efficiency standard for V-axis and H-axis washers while maintaining separate classes for these products on the basis of differences in technology, cost and utility/performance. It believes, however, that the Department should correct the designations from top- and front-loading to V-axis and H-axis. (Amana, No. 223 at 5).

The Department agrees that currently both V-axis and H-axis washers can achieve the same range of efficiency and that different efficiency standards are not warranted based on axis of rotation or orientation of loading. For this reason, the Department proposed a single minimum efficiency for the existing ''standard'' size top-loading and front-loading washers. However DOE is concerned that in the future these classes may have a different potential for efficiency improvement. Therefore, in today's final rule, the Department is maintaining both the Standard Top-Loading and Front-Loading product classes but is requiring a single efficiency standard level for both the Standard Top-Loading and Front-Loading classes of washers.

Additionally, Amana requested that the Department segregate the standard size washer class into subclasses on the basis of capacity in cubic feet to eliminate the potential of confusion and prevent consumers from being misled in comparing washers of different sizes and mistakenly purchasing a smaller one that consumes more energy. (Amana, No. 223 at 4). The Department understands that the FTC labeling could lead to confusion for the consumer. We do not believe, however, that this issue can be addressed by defining additional efficiency subclasses. The Department will take up this matter with FTC to study this issue.

The Department received several comments on the issue of increasing the volume definition of the compact class from 1.6 cubic feet to 2.0 cubic feet. Maytag commented that it agreed with the Department's proposal to maintain the existing 1.6 cubic feet definition of the compact product class since it believes increasing the compact class to 2.0 cubic feet could place manufacturers who have complied with more stringent efficiency standards at a competitive disadvantage. (Maytag, No. 230 at 2). The OOE commented it was generally

indifferent to the Department's decision to keep the definition of the compact class at less than 1.6 cubic foot capacity. However, OOE deplores that the Department has not examined the potential to improve the energy efficiency of these products. (OOE, No. 219 at 7). Whirlpool commented that it disagrees with the Department's proposal to maintain the current less than 1.6 cubic feet definition for compact washers and recommends that the Department redefine the ''compact'' class to instead be either ''top-loading units less than 2.0 cubic feet in capacity with external width not to be in excess of 22.5 inches *OR* top-loading units that are less than 1.6 cubic feet in capacity and not more than 24 inches in width.'' (Whirlpool, No. 236 at 3).

The Department appreciates Whirlpool's suggested language to redefine the compact class. However, given that this proposed change in definition is new and was not subject to public notice and comment, the implications are not fully understood. Thus, the Department is maintaining the current classification for the compact class.

Whirlpool commented that it disagrees with the MEF value of 0.65 for the compact class and suggested that, based on its testing, an MEF of 0.57 more accurately reflects the current EF standard of 0.9. (Whirlpool, No. 236 at 3). Since the compact class was not analyzed, it is the Department's intention that current clothes washers for this class qualify under the new MEF minimum energy efficiency requirement. The Department has conducted sample calculations and testing on both a 1.46 cubic feet washer and a 1.93 cubic feet washer. Based on the findings, the Department is maintaining the 0.65 MEF value.

H. Incremental Retail Costs

The American Council for an Energy Efficient Economy (ACEEE) commented that DOE based its estimate of incremental retail cost for the proposed standards on manufacturer cost estimates for horizontal-axis machines. ACEEE adds that manufacturers stated at the NOPR hearing that incremental costs may well be less than estimated. ACEEE further remarks that this observation is supported by the Department's own reverse engineering analysis, which found mid-point incremental manufacturer costs for V-axis machines that meet or exceed the 2007 standard to be approximately $75. Applying the mark-ups used in the DOE analysis, ACEEE calculates a $140 incremental retail price which is lower than the $249 incremental retail price used by the Department in its analysis. Based on its analysis of past rulemakings, ACEEE believes that the incremental price will be around $50. To capture the full range of possible future prices, ACEEE recommends that DOE state that the incremental price will be in the range of $50–$239. ACEEE does not believe DOE should revise its analysis using this range since the proposed standards clearly meet the NAECA criteria at $239 and would certainly meet these criteria if the costs were lower. (ACEEE, No. 227 at 1).

The Oregon Office of Energy (OOE) also commented that the engineering analysis for washers meeting the proposed standard (MEF=1.26) overstates the manufacturing costs of this level. OOE states that DOE based its analysis on the assumption that the standard would only be met with H-axis clothes washer designs. OOE commented that in recent months it has become clear to the Oregon Energy Office that manufacturers will meet the proposed new standard with fairly traditional top-loading, vertical-axis designs that incorporate programmable electronic controls. (OOE, No. 219 at 3).

As commented by ACEEE and OOE, the engineering cost and performance data used in the DOE analysis for the proposed standard level is based on H-axis technology. The decision to base the engineering analysis on H-axis technology was made in response to AHAM comments in 1996 (AHAM, No. 67 at 1) and 1998 (AHAM, No. 84 and 86) that manufacturers could not achieve levels of efficiency improvement beyond 25 percent with traditional V-axis clothes washers. More recently, two manufacturers introduced high-efficiency V-axis clothes washers into the U.S. market that meet or exceed the performance requirements of the 2007 standard. The Department had efficiency testing performed on three commercially available high-efficiency washers and one prototype V-axis washer. Additionally, the Department had these washers disassembled and analyzed to estimate their manufacturing costs. As commented by ACEEE, these washers had a lower estimated cost range then their H-axis counterparts. Thus, the Department agrees with ACEEE that the price estimates used by the Department in its analysis may be at the high end of what may be expected and that lower prices for the proposed efficiency would only improve the justification of the standards. The Department notes that in this period of rapid technological advances and new product introductions, assessing the future cost and performance of clothes washers is an uncertain exercise. As with any forecast, there is a range of uncertainty in the forecasted results.

Additionally, ACEEE reasoned that given the downward trend in the Producer Price Index, it was likely that clothes washer manufacturers would achieve future productivity gains and design improvements that would allow them to have lower costs than submitted in 1997. (ACEEE, No. 227 at 1). The Department agrees that the recent introduction of high efficiency V-axis designs and the reverse-engineering results on these designs indicates that the price impact of the standard on consumers may be lower than expected. Consideration of a PPI deflator however appears to the Department as very speculative. In order to comply with NAECA and assure that the standards that are adopted are economically justifiable, the Department adopts price and cost estimates that can be made with a fairly high degree of certainty. While historic price data as indicated in the Consumer Price Index (CPI) and Producer Price Index (PPI) may indicate trends or tendency towards real price decreases, the reasons behind these trends are unclear. While it is fairly certain that real prices for appliances will not increase given the same quality and type of product, the possibility of a continuing decrease is far from certain. The Department therefore utilizes an analysis that assumes constant real prices for the same quality and type of clothes washer.

I. Water Savings

OOE commented that the 35 percent level of energy reduction can be achieved by a V-axis design which may have programmable electronic controls and, therefore, the assumed water savings may be less than the level stated in the analysis. (OOE, No. 219 at 2, 3 & 4).

The Department believes that while an H-axis washer typically is a design approach that results in water savings, there is no guarantee of water savings with any design approach, at any level of energy efficiency. Water use may be increased by, for example, adding more cold rinses without impacting a minimum MEF level. The Department has relied on manufacturer data based on what manufacturers would build at each standard level. The water use data presented by manufacturers estimates the same water savings at both the 35 percent and 40 percent levels using horizontal-axis technology and only a slightly higher water usage level at the 25 percent level using vertical-axis technology. As we can now observe in the marketplace, similar V-axis washer

technology may be used to achieve a 35 percent level or even a 40 percent level.

J. Detergent Savings

OOE commented that DOE should include detergent savings that owners of H-axis machines (and any others that reliably deliver equivalent water savings) will experience at the 40 percent improvement and above (MEF standard levels of 1.36 and above). (OOE, No. 219 at 6 & 7). Unilever HPC commented that it is erroneous and arbitrary to state that you can save detergent using high efficiency washers because the amount of detergent used is a purely discretionary consumer decision. It further commented that to include detergent savings is to imply a cleaning performance standard which the proposed standard does not actually address. (Mr. Linard of Unilever, No. 216CC at 84).

The Department believes that while some consumers may use less detergent even at MEF levels of 1.26 as estimated by the OOE in the Pacific Northwest, others may use currently more expensive detergents specially manufactured for H-axis washers. OOE also states that there is every reason to expect that detergent manufacturers will have a difficult time significantly increasing the price of these detergents to compensate for reductions in use. No evidence is provided to support that statement. There is no conclusive proof of what price consumers will pay for detergent in 2007 when the standard takes effect at levels equivalent to that achieved by H-axis washers.

K. Life-Cycle-Costs and Payback

The Regulatory Studies Program at the Mercatus Center at George Mason University (Center) commented that the Department used different savings estimates at different places in the NOPR and the TSD. (Center, No. 224 at 5). The NOPR presented values based both on point estimates and also more detailed estimates based on distributions of input values. The primary results used in the analysis of Payback Periods and life-cycle-costs are based on a distribution of inputs used to create a distribution of LCC and Payback Periods. This methodology allows consideration of ranges of inputs (*e.g.* numbers of loads per year, energy price) rather than just using typical or average values. Table 3 presents the results of a simplified point value analysis that uses average input values for each variable and calculates a single output value. Tables 4 and 5 present the results of a more detailed simulation of 10,000 households which has input distributions for each variable and output distributions for each result.

We calculated the distributed results using 10,000 individual payback periods and found their average, rather than dividing the average retail price increase by the average annual savings. These two methods of determining the average payback period are not mathematically equivalent. The average retail price increase and the average operating cost savings shown are also determined from distributions to account for the differences in fuel prices, how often households do the wash, etc. (see Chapter 7 of the TSD for details). To avoid confusion, for this final rule, the Department has modified the Consumer Overview to reflect the more detailed distribution-derived values for price and operating cost.

TABLE 3.—SINGLE POINT VALUES

MEF level/year	Single point values (for U.S. mix of fuel types)			
	Payback period (Years)	Delta retail price on most likely based incremental manufacturer costs	Operating cost savings, (Avg. Inputs used)	Mean LCC savings
1.04/2004	3.2	$53	$16	$105
1.26/2007	4.7	240	51	262

TABLE 4.—DISTRIBUTION-DERIVED VALUES

MEF level/year	Distributions					
	Payback (years)		Delta retail price		Annual operating cost savings	
	Mean	Median	Mean	Median	Mean	Median
1.04/2004	4.6	3.5	$53	$47	$15	$13
1.26/2007	6.8	5.0	249	177	48	43

TABLE 5.—DISTRIBUTION-BASED LCC SAVINGS

MEF level/year	Distributions	
	LCC savings	
	Mean	Median
1.04/2004	$103	$81
1.26/2007	260	208

L. Cost Effectiveness

The Edison Electric Institute (EEI) states that at least 90 percent of consumers should have lower life-cycle-costs under any new standard. EEI then argues that the proposed clothes washer standards are not economically justified since only 80–81 percent of consumers will have lower life-cycle-costs, and only 72 percent of senior citizens will have lower-life-cycle costs. Additionally, EEI believes that a

payback period of 7 years is too long. (EEI, No. 209 at 1). The Department disagrees. First of all, EEI states no reason why 90 percent should be an acceptable level. Secondly, EPCA requires the Department to consider LCC as just one of the factors in determining economic justification of a standard level. In determining economic justification, EPCA directs the Secretary to determine whether the benefits of a standard exceed the burdens. Consumer LCC and payback, the resulting energy savings, the need for national energy conservation and the economic impacts on manufacturers and consumers are just a few of the factors that the Secretary must consider. There is no mathematical formula given or used for weighing the benefits and burdens of the various factors.

Furthermore, because of wide variations in usage rates and energy prices across the country, no national standard can be designed to minimize, or even reduce, life-cycle-costs for all consumers. The Department analyzes the expected impacts of proposed standards on consumers taking these differences into account. However, there will always be some consumers who will have higher life-cycle-costs under any national standard. In making its determination regarding the overall benefits and burdens of any standard, the Department considers both the magnitude of any adverse effects that are expected on consumers, as well as the total number or any groupings of consumers that might be adversely affected. However, the Department does not recognize any arbitrary mathematical threshold for LCC benefits as suggested by EEI, and the ratio of consumers with LCC savings versus those with LCC increases will vary from rulemaking to rulemaking depending on the various benefits and burdens of each unique rulemaking.

The Mercatus Center stated that the proposed clothes washer standards are not economically justified. (Center, No. 224 at 17). The Center claimed that the standard will harm the majority of consumers and will take away consumer choice by eliminating top-loading, vertical-axis clothes washers. The Center recommended that the Department not go forward with the proposed standard and stated that since the Department believes that consumers pass up energy efficient washers because they are misinformed about operating costs, that the Department should construct a program to correct this deficiency. The Center further stated that consumers do not need to be coerced into saving money.

Much of the Center's comment is a philosophical argument against the use of Federal energy efficiency standards as a means of modifying consumer product choices or behavior. In its comment, the Center grades the Department on issues such as whether the Department has identified a significant market failure, has identified an appropriate Federal role, has examined alternative approaches, has maximized net benefits and has understood individual choice and property impacts. Most of these issues had been resolved by the Congress when they enacted the statutory requirements which guide and limit the Department's decision-making process. Furthermore, when tested in the court in *Natural Resources Defense Council* v. *Herrington*, 768 F. 2d 1355, 1406–07 (D.C. Cir. 1985), the court stated that ''the entire point of a mandatory program was to change consumer behavior.'' As is stated under section I.*B. Authority* at the beginning of this final rulemaking, the Act requires the Department to ''establish standards designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified.'' This emphasis on maximizing energy savings may or may not lead to standards that also maximize economic benefits—although in this case the proposed clothes washer standards would produce National and consumer benefits that are very close the maximum of the standard levels analyzed.

Most of the analysis presented by the Center assumes that the standards would eliminate top-loading, vertical-axis clothes washers. As is discussed in the Energy and Economic Analyses comments, while the original manufacturer data submitted assumed that all clothes washers at and above a 35 percent improvement would be horizontal-axis machines, manufacturers have already begun offering top-loading, vertical-axis clothes washers that would meet the 2007 standard. Thus, a key assumption made by the Center is incorrect.

In another part of its analysis, the Center speculated that if consumers used their clothes washers less than average, they would experience lower benefits. This is true, and as discussed in the response to the EEI comment above, and the LCC and Payback discussion, the Department analyzed the expected impacts of the proposed standards on consumers taking usage and other differences into account. As reported in the Conclusion section of today's rule, the Department found that 20 percent of consumers would experience higher life-cycle-costs under the 2007 standard, and that the impact was considered in the decision for today's rule.

V. Analytical Results and Conclusion

A. Analytical Results

We examined six trial standard levels. Table 6 presents the baseline and trial standard levels, the associated MEF values and the percentage reduction in energy use from the baseline achieved at the trial standard level. Trial Standard Level 3 contains two stages of standards which were proposed in the Joint Comment. (Joint Comment, No. 204).

TABLE 6.—TRIAL STANDARD LEVELS FOR CLOTHES WASHERS

Trial standard level	MEF	Percent reduction in energy use
Baseline	0.817	0.
1	1.021	20.
2	1.089	25.
3	1.04 in 2004	~22 in 2004
	1.26 in 2007	~35 in 2007.
4	1.257	35.
5	1.362	40.
6	1.634	50.

The Department presented the results of its analytical analysis in the NOPR which are unchanged for today's final rule. 65 FR 59550, 59571–81 (October 5, 2000).

We also added, for comparative evaluation purposes, the results of Trial Standard Level 3 using the RECS97 and AEO2000 data. These results have been included as an Appendix R of the TSD. The rulemaking process is such that months to years can take place between the time an analysis is completed and a final rule is issued. During that time span, conditions or data are likely to change and the Department attempts to insure that any such changes will not compromise the robustness of the analysis or lead to a different conclusion. For example, the NOPR used the AEO1999 forecast of electricity prices and electricity generation mix to determine energy savings and net present value. Since the analysis was completed, the AEO2000 forecast became available. The Department examined the impact of the AEO2000 forecast on energy savings and net present value. The energy savings reported in the NOPR ranged from 2.12 to 7.53 Quads. Using the data from AEO2000 shows the energy saving which ranged from 2.09 to 7.44 Quads. The net present values reported in the NOPR ranged from 3.66 to 16.88 billion dollars. Using the data from AEO2000 shows the NPV which ranged from 3.76 to 16.89 billion dollars. The Department does not consider these changes to be meaningful or a reason to revise the analysis. Additionally, it would be incorrect to select only one portion of the analysis for revision, such as the electric price, without also examining other related inputs, such as equipment prices, which also might have slightly changed. While the Department acknowledges that the analysis performed for the NOPR does not fully reflect some of the changes in the industry and energy markets that have occurred more recently, the Department believes that the analysis is still a valid basis for today's final rule.

B. Conclusion

The Act specifies that any new or amended energy conservation standard for any type (or class) of covered product shall be designed to achieve the maximum improvement in energy efficiency which the Secretary determines is technologically feasible and economically justified. Section 325(o)(2)(A), 42 U.S.C. 6295(o)(2)(A). In determining whether a standard is economically justified, the Secretary must determine whether the benefits of the standard exceed its burdens. Section 325(o)(2)(B)(i), 42 U.S.C. 6295(o)(2)(B)(i). The amended standard must result in significant conservation of energy. Section 325(o)(3)(B), 42 U.S.C. 6295(o)(3)(B).

We considered the impacts of standards beginning with the most efficient level. We have included a summary of the analysis results in Table 7 to aid the reader in the discussion of the benefits and burdens for the different trial standard levels.

TABLE 7.—SUMMARY ANALYSIS RESULTS

Trial Standard Level	6	5	4	3	2	1
MEF	1.63	1.36	1.26	1.04 in 2004, 1.26 in 2007	1.09	1.02
Total Energy Saved (Quads)	7.53	6.03	5.99	5.52	4.04	2.12
Water Savings (trillion gallons)	10.85	12.94	12.94	11.59	9.09	0.53
NPV (Billion $)	10.79	16.73	16.88	15.3	14.29	3.66
Emissions:						
Carbon Equivalent (Mt)	134.6	107.3	106.2	95.1	70.9	38.1
Discounted Carbon Equivalent (Mt) [1]	35.6	28.6	28.3	24.1	19.0	10.2
NO_X (kt)	364	283.1	280.6	253.5	193.6	115.6
Discounted NO_X (kt) [1]	108.3	85.2	84.0	70.8	58.3	33.8
SO_2 (kt) [2]	31.41	30.31	30.31	28.11	30.31	31.41
Discounted SO_2 (kt) [1]	8.3	8.0	8.1	7.3	8.0	8.3
Manufacturer Impacts:						
Cumulative Loss in Industry NPV ($ Million) [3]	474.5–648.9	453.1–524.9	510.1–612.5	421.1–528.4	409.9–566.2	19.2–90.1
% Change in Industry NPV	(33.0)–(45.2)	(31.7)–(36.5)	(35.4)–(42.5)	(29.2)–(36.7)	(28.5)–(39.3)	(1.3)–(6.3)
Standard Deviation % NPV	27.7	27.7	17.7	15.8	11.4	11.5
Life-Cycle-Cost ($):						
Mean Savings ($)	176	243	242	103/260	211	61
Percent Households LCC Less than Baseline	69	80	79	81/90	87	84
Median Payback (years)	7.0	5.1	5.1	3.5/5.0	4.0	0.6

[1] The Department makes no effort to monetize the benefits of the emission reductions, but there may be time related differences in the perceived value of the emissions depending on when they occur, as with monetized benefits that accumulate over time. Emission reductions that occur sooner are often more desirable than equivalent reductions that occur later. Like monetary benefits, the health, recreational and ecosystem benefits that result from emission reductions are often perceived to have a greater value if they occur sooner, rather than later. To the extent that the different trial standard levels have slightly different shipment distributions over time, some trial standard levels might have a slightly higher proportion of earlier emission reductions than another trial standard level. To show the possible effect of the different timing patterns of the emissions, the Department is also presenting discounted emissions. These calculations were done using the same seven percent discount rate as was used for discounting monetized benefits.

[2] Results only include household SO_2 emissions reductions because SO_2 emissions from power plants are capped by clean air legislation. Thus, SO_2 emissions will only be negligibly affected by possible water heater standards.

[3] Includes impacts on dryer and repair business.

1. Trial Standard Level 6—MEF 1.63

First, we considered the most efficient level (max tech), MEF 1.63, which saves a total of 7.53 quads of energy through 2030. This is a significant amount of energy. The cumulative water savings through 2030 would be 10.85 trillion gallons. The emissions reductions through 2030 would total 134.6 Mt of carbon equivalent, 364 kt of NO_X, and 31.41 kt of SO_2. At this level, consumers experience a mean savings in LCC of $176, with a median payback of 7.0 years.

At Trial Standard Level 6, the clothes washer industry would experience a cumulative NPV loss of between $474.5—648.9 million which represents between 33.0 and 45.2 percent of the clothes washer industry value absent standards ($1,439.1 million—base case). This impact is not evenly distributed among the six major manufacturers.[3] The large variability of impacts is attributed to the presence of existing product for some manufacturers at this efficiency level which means that some firms may gain a competitive advantage. This variability is measured by the standard deviation of individual companies' changes in NPV.[4] At this level, the standard deviation in individual companies' percentage change in NPV is 27.7 percent. Given the high industry impacts and the uneven burden on individual firms, there exists a significant risk of industry consolidation.

At this trial standard level a small company with an assumed market share of 2.1 percent would lose 90.7 to 102.8 percent of its value. A small company with an assumed market share of 4.2 percent would lose 166 to 178.1 percent of its value. Based on the major loss in company value associated with meeting this standard level, it is likely that one or both of the two smaller manufacturers[5] would cease to produce clothes washers covered by the standard and might also cease to market commercial clothes washers. These values can be found in Chapter 11 in Table 11.39 of the TSD.

The Department concludes that the burdens of Trial Standard Level 6 outweigh the benefits. Consequently, the Department concludes Trial Standard Level 6 is not economically justified.

2. Trial Standard Level 5—MEF 1.36

Next, we considered a 1.36 MEF, which saves a total of 6.03 quads of energy through 2030, also a significant amount. The cumulative water savings through 2030 for this trial standard level would be 12.94 trillion gallons. The emissions reductions through 2030 would total 107.3 Mt of carbon equivalent, 283.1 kt of NO_X, and 30.31 kt of SO_2. At this level, consumers experience a mean savings in LCC of $243, with a median 5.1 year payback.

The clothes washer industry would experience a cumulative NPV loss of between $453.1–524.9 million. This represents between 31.7 and 36.5 percent of industry value absent standards ($1,439.1 million—base case). For the same reason in Trial Standard Level 6, this impact is not evenly distributed among the six major manufacturers. At this level the standard deviation in individual companies' percentage change in NPV is 27.7 percent. (Refer to Chapter 11 of the TSD for a description of the calculation method for standard deviation.) Given the high industry impacts and the uneven burden on individual firms, there exists a significant risk of industry consolidation.

At this trial standard level a small company with an assumed market share of 2.1 percent would lose 87.7 to 92.7 percent of its value. A small company with an assumed market share of 4.2 percent would lose 160.3 to 165.3 percent of its value. Based on the major loss in company value associated with meeting this standard level, it is likely that one or both of the two smaller manufacturers[6] would cease to produce clothes washers covered by the standard and might also cease to market commercial clothes washers. These values can be found in Chapter 11 in Table 11.39 of the TSD.

The Department concludes that the burdens of Trial Standard Level 5 outweigh the benefits. Consequently, the Department concludes Trial Standard Level 5 is not economically justified.

3. Trial Standard Level 4—MEF 1.26

Next, we considered a 1.26 MEF, which saves a total of 5.99 quads of energy through 2030, a significant amount. Just as in the case of the 1.36 MEF, the cumulative water savings through 2030 would equal 12.94 trillion gallons. The cumulative emissions reductions through 2030, however, are slightly lower for the 1.26 MEF because the cumulative energy savings is lower for this standard level than the 1.36 MEF. The 1.26 MEF level would save 106.2 Mt of carbon equivalent, 280.6 kt of NO_X, and 30.31 kt of SO_2. At this level, consumers experience a mean savings in LCC of $242 with a median payback of 5.1 years.

Under a 1.26 MEF standard, the clothes washer industry would experience a cumulative NPV loss of between $510.1–612.5 million. This represents between 35.4 and 42.5 percent of industry value absent standards ($1,439.1 million—base case). Compared to Trial Standard Levels 5 and 6, this impact is more evenly distributed amongst the six major manufacturers as represented by a standard deviation in individual companies' NPV of 17.7 percent, and thus there exists less risk of industry consolidation. Refer to Chapter 11 of the TSD for a description of the calculation method for standard deviation. This lower standard deviation reflects the greater diversity of designs, approaches and engineering flexibility to meet this efficiency level compared to Trial Standard Levels 5 and 6. However, given the high level of investment required to meet this efficiency level and an inability to spread fixed costs over large volumes, small manufacturers are particularly vulnerable. At this trial standard level a small company with an assumed market share of 2.1 percent would lose 91.8 to 98.9 percent of its value. A small company with an assumed market share of 4.2 percent would lose 164.4 to 171.6 percent of its value. Based on the major loss in company value associated with meeting this standard level, it is likely that one or both of the two smaller manufacturers[7] would cease to produce clothes washers covered by the standard and might also cease to market commercial clothes washers. These values can be found in Chapter 11 in Table 11.39 of the TSD.

The Department concludes that the burdens of Trial Standard Level 4 outweigh the benefits. Consequently, the Department concludes Trial Standard Level 4 is not economically justified.

4. Trial Standard Level 3—MEF 1.04/1.26

Next, we considered the two step 1.04/1.26 MEF efficiency level, which was proposed in the Joint Comment. (Joint Comment, No. 204). This trial standard level, Trial Standard Level 3, has energy savings of 5.52 quads through 2030, a significant amount. The cumulative water savings through 2030 would equal 11.59 trillion gallons. The emissions reductions through 2030 would total 95.1 Mt of carbon equivalent, 253.5 kt of NO_X, and 28.11 kt of SO_2.[8] At the 1.04 MEF level, consumers would experience a savings in LCC of $103, while they would

[3] Alliance Laundry Systems LLC, Amana Appliances, Frigidaire Home Products, General Electric Appliances (GEA), Maytag Corporation, and Whirlpool Corporation.

[4] The standard deviation is a measure of how widely individual companies' percentage NPV changes are dispersed from the industry percentage change in value. Refer to Chapter 11 of the TSD for a description of the calculation method.

[5] Alliance Laundry Systems LLC and Amana Appliances.

[6] Alliance Laundry Systems LLC and Amana Appliances.

[7] Alliance Laundry Systems LLC and Amana Appliances.

[8] The Department recognizes that the Environmental Protection Agency is considering regulations which could affect the amount of sulfur in home heating oil.

experience a mean LCC savings of $260 at the 1.26 MEF level that would go into effect in 2007. The median payback for the 1.04 MEF level is 3.5 years, and 5.0 years for the 1.26 MEF. The clothes washer industry would experience a cumulative NPV loss of between $421.1–528.4 million representing between 29.2 and 36.7 percent of base case industry value.

Compared to a single step standard level of a 1.26 MEF implemented in 2004, the Joint Comment proposal reduces the impacts of the standards on manufacturers by delaying the effective date three years for the 1.26 MEF level. This allows clothes washer manufacturers more time to depreciate their current assets and plan a more orderly transition of their production facilities. Delaying the standard implementation date for the higher efficiency level gives manufacturers more time to research and develop lower-cost solutions to achieve higher standards.

Since the MIA shows that small manufacturers suffer the greatest impact, the Department takes into consideration that the consensus proposal was developed in consultation with, and supported by small manufacturers.

Furthermore, we consider that the Joint Comment specifically states that the proposal is not expected to eliminate any competitors. (Joint Comment, No. 204).

Based on the manufacturers' statement in the Joint Comment, we believe that these impacts from the proposal are mitigated and conclude that, given the benefits, the standards submitted in the Joint Comment are economically justified. (Joint Comment, No. 204).

The Energy Policy and Conservation Act, as amended, directs the Department to consider the impact of any lessening of competition that is likely to result from the standards, as determined by the Attorney General. In a letter responding to the NOPR, the Attorney General concluded ''that the proposed clothes washer standard would not adversely affect competition.'' (Department of Justice, No. 233 at 2). See Department of Justice letter, dated December 4, 2000, which is printed as the appendix to this rule.

After carefully considering the analysis and comments, the Department amends the energy conservation standards for clothes washers as proposed by the Joint Comment. (Joint Comment, No. 204). The Department concludes this standard saves a significant amount of energy and is technologically feasible and economically justified. In determining economic justification, the Department finds that the benefits of energy and water savings, consumer LCC savings, national net present value increase, job creation and emission reductions resulting from the standard outweigh the burdens of the loss of manufacturer net present value, and consumer LCC increases for some users of clothes washers covered by today's notice. Therefore, the Department today is amending the energy conservation standards for clothes washers at Trial Standard Level 3. The clothes washer energy efficiency standards for Top-Loading, Standard (1.6 ft.^{3} or greater capacity) and Front-Loading class clothes washers shall be 1.04 MEF on January 1, 2004 and 1.26 MEF on January 1, 2007.

VI. Procedural Issues and Regulatory Review

A. Review Under the National Environmental Policy Act

The Department prepared an Environmental Assessment (EA) (DOE/EA–1344) which is available from: U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Forrestal Building, Mail Station EE–41, 1000 Independence Avenue, SW, Washington, DC 20585–0121, (202) 586–0371. We found the environmental effects associated with various standard efficiency levels for clothes washers to be not significant, and therefore we are publishing, elsewhere in this issue of the **Federal Register**, a Finding of No Significant Impact (FONSI) pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the regulations of the Council on Environmental Quality (40 CFR Parts 1500–1508), and the Department's regulations for compliance with NEPA (10 CFR Part 1021).

B. Review Under Executive Order 12866, ''Regulatory Planning and Review''

Today's regulatory action has been determined to be an ''economically significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review.'' (58 FR 51735, October 4, 1993). Accordingly, today's action was subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget.

The draft submitted to OIRA and other documents submitted to OIRA for review have been made a part of the rulemaking record and are available for public review in the Department's Freedom of Information Reading Room, 1000 Independence Avenue, SW, Washington, DC 20585, between the hours of 9 a.m. and 4 p.m., Monday through Friday, telephone (202) 586–3142.

The proposed rule contained a summary of the Regulatory Impact Analysis which focused on the major alternatives considered in arriving at the approach to improving the energy efficiency of consumer products (65 FR 59582–83). The reader is referred to the complete ''Regulatory Impact Analysis,'' which is contained in the TSD, available as indicated at the beginning of this rulemaking. It consists of: (1) A statement of the problem addressed by this regulation, and the mandate for government action; (2) a description and analysis of the feasible policy alternatives to this regulation; (3) a quantitative comparison of the impacts of the alternatives; and (4) the national economic impacts of the proposed standard.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, requires an assessment of the impact of regulations on small businesses. Small businesses are defined as those firms within an industry that are privately owned and less dominant in the market.

To be categorized as a ''small'' clothes washer manufacturer, a firm must employ no more than 1,000 employees. The clothes washer industry is characterized by six firms accounting for nearly 99 percent of sales. By the above definition none of the six major U.S. manufacturers of clothes washers are considered ''small.'' The Department is aware of one small domestic manufacturer of clothes washer, Staber Industries, that produces a top-loading horizontal-axis clothes washer. The energy efficiency of this product already exceeds the 2007 standard level.

The Department prepared a manufacturing impact analysis which was made public and available to all the clothes washer manufacturers. This analysis considered the effects on small manufacturers with a minimum annual production of 165,000 units (representing a 2.1 percent market share for Alliance Laundry Systems LLC). The Department did not receive any information or comments indicating that even smaller manufacturers of clothes washers would be impacted differentially from those included in the small manufacturer analysis performed. Furthermore, the small manufacturer is a signer of the Joint Comment.

In view of the foregoing, the Department has determined and hereby

certifies pursuant to section 605(b) of the Regulatory Flexibility Act that, for this particular industry, the standard levels in today's final rule will not ''have a significant economic impact on a substantial number of small entities,'' and it is not necessary to prepare a regulatory flexibility analysis.

D. Review Under the Paperwork Reduction Act

No new information or record keeping requirements are imposed by this rulemaking. Accordingly, no Office of Management and Budget clearance is required under the Paperwork Reduction Act. 44 U.S.C. 3501 *et seq.*

E. Review Under Executive Order 12988, ''Civil Justice Reform''

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

F. Review Under Executive Order 12630, ''Takings'' Assessment Review

DOE has determined pursuant to Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 52 FR 8859 (March 18, 1988), that this regulation would not result in any takings that might require compensation under the Fifth Amendment to the United States Constitution.

G. Review Under Executive Order 13132, ''Federalism''

Executive Order 13132 (64 FR 43255, August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policy making discretion of the States and carefully assess the necessity for such actions. Agencies also must have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. DOE published its intergovernmental consultation policy on March 14, 2000. (65 FR 13735). DOE has examined today's final rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. State regulations that may have existed on the products that are the subject of today's final rule were preempted by the Federal standards established in the NAECA Amendments of 1987. States can petition the Department for exemption from such preemption based on criteria set forth in EPCA, as amended.

H. Review Under the Unfunded Mandates Reform Act

With respect to a proposed regulatory action that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector of $100 million or more (adjusted annually for inflation), section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires a Federal agency to publish estimates of the resulting costs, benefits and other effects on the national economy. 2 U.S.C. 1532(a), (b). UMRA also requires each Federal agency to develop an effective process to permit timely input by state, local, and tribal governments on a proposed significant intergovernmental mandate. The Department's consultation process is described in a notice published in the **Federal Register** on March 18, 1997 (62 FR 12820). Today's final rule may impose expenditures of $100 million or more on the private sector. It does not contain a Federal intergovernmental mandate.

Section 202 of UMRA authorizes an agency to respond to the content requirements of UMRA in any other statement or analysis that accompanies the proposed rule. 2 U.S.C. 1532(c). The content requirements of section 202(b) of UMRA relevant to a private sector mandate substantially overlap the economic analysis requirements that apply under section 325(o) of EPCA and Executive Order 12866. The **SUPPLEMENTARY INFORMATION** section of the Notice of Final Rulemaking and ''Regulatory Impact Analysis'' section of the TSD for this final rule responds to those requirements.

Under section 205 of UMRA, the Department is obligated to identify and consider a reasonable number of regulatory alternatives before promulgating a rule for which a written statement under section 202 is required. DOE is required to select from those alternatives the most cost-effective and least burdensome alternative that achieves the objectives of the rule unless DOE publishes an explanation for doing otherwise or the selection of such an alternative is inconsistent with law. As required by section 325(o) of the Energy Policy and Conservation Act (42 U.S.C. 6295(o)), today's final rule establishes energy conservation standards for clothes washers that are designed to achieve the maximum improvement in energy efficiency that DOE has determined to be both technologically feasible and economically justified. A full discussion of the alternatives considered by DOE is presented in the ''Regulatory Impact Analysis'' section of the TSD for today's final rule.

I. Review Under the Treasury and General Government Appropriations Act of 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. No. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule or policy that may affect family well-being. Today's final rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

J. Review Under the Plain Language Directives

Section 1(b)(12) of Executive Order 12866 requires that each agency draft its regulations to be simple and easy to understand, with the goal of minimizing

the potential for uncertainty and litigation arising from such uncertainty. Similarly, the Presidential memorandum of June 1, 1998 (63 FR 31883) directs the heads of executive departments and agencies to use plain language in all proposed and final rulemaking documents published in the **Federal Register**.

Today's rule uses the following general techniques to abide by Section 1(b)(12) of Executive Order 12866 and the Presidential memorandum of June 1, 1998:

- Organization of the material to serve the needs of the readers (stakeholders).
- Use of common, everyday words in short sentences.
- Shorter sentences and sections.

K. Congressional Notification

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of today's final rule prior to the effective date set forth at the outset of this notice. DOE also will submit the supporting analyses to the Comptroller General (GAO) and make them available to each House of Congress. The report will state that it has been determined that the rule is a ''major rule'' as defined by 5 U.S.C. 804(2).

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

The test procedure amendments finalized today incorporate the American Association of Textile Chemists and Colorists (AATCC) Test Methods 118—1997, ''Oil Repellency: Hydrocarbon Resistance Test'' (reaffirmed 1997), and 79—2000, ''Absorbency of Bleached Textiles'' (reaffirmed 2000), to determine whether a stain resistant or water repellent finish is present in a test cloth used to measure remaining moisture content and therefore the energy consumption of a clothes washer.

The findings required of DOE by section 32 of the Federal Energy Administration Act serve to alert the public and DOE regarding the use and background of commercial standards in the rulemaking process. DOE has evaluated the promulgation of AATCC Test Methods 118–1997 (reaffirmed 1997), and 79–2000 (reaffirmed 2000), in light of the public participation criteria of section 32(b). The Department is unable to conclude whether development of these standards fully complied with section 32(b) regarding the manner of public participation.

As required by section 32(c), DOE has consulted with the Attorney General and the Chairman of the Federal Trade Commission concerning the impact of these standards on competition, prior to prescribing final test procedures.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Energy conservation, Household appliances, Incorporation by Reference.

Issued in Washington, D.C., on January 3, 2001.

Dan W. Reicher,

Assistant Secretary, Energy Efficiency and Renewable Energy.

For the reasons set forth in the preamble, part 430 of chapter II of title 10, Code of Federal Regulations is amended, as set forth below.

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

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

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

Appendix J [Amended]

2. Appendix J to subpart B of part 430 is amended:

a. By adding a new sentence at the beginning of the introductory paragraph of this appendix.

b. In section 2, by adding paragraphs 2.3.1 and 2.3.2, and by revising paragraphs 2.6.1.3, 2.6.2, 2.10, 2.11, and 2.11.1.

c. In section 3, by revising paragraph 3.3.1.

d. By adding a new section 8.

The additions and revisions read as follows:

Appendix J to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Automatic and Semi-Automatic Clothes Washers

The provisions of this appendix J shall apply to products manufactured after February 12, 2001. * * *

* * * * *

2. * * *

2.3. * * *

2.3.1 *Supply water requirements for water and energy consumption testing.* For nonwater-heating clothes washers not equipped with thermostatically controlled water valves, the temperature of the hot and cold water supply shall be maintained at 100° ± 10°F (37.8°C ± 5.5°C). For nonwater-heating clothes washers equipped with thermostatically controlled water valves, the temperature of the hot water supply shall be maintained at 140°F ± 5°F (60.0°C ± 2.8 °C) and the cold water supply shall be maintained at 60°F ± 5F° (15.6°C ± 2.8°C). For water-heating clothes washers, the temperature of the hot water supply shall be maintained at 140°F ± 5°F (60.0°C ± 2.8°C) and the cold water supply shall not exceed 60°F (15.6°C). Water meters shall be installed in both the hot and cold water lines to measure water consumption.

2.3.2 *Supply water requirements for remaining moisture content testing.* For nonwater-heating clothes washers not equipped with thermostatically controlled water valves, the temperature of the hot water supply shall be maintained at 140°F ± 5°F and the cold water supply shall be maintained at 60°F ± 5°F. All other clothes washers shall be connected to water supply temperatures as stated in 2.3.1 of this appendix.

* * * * *

2.6.1.3 The number of test runs on the same energy test cloth shall not exceed 60 test runs. All energy test cloth must be permanently marked identifying the lot number of the material. Mixed lots of material shall not be used for testing the clothes washers.

2.6.2 *Energy Stuffer Cloth.* The energy stuffer cloths shall be made from energy test cloth material and shall consist of pieces of material that are 12 inches by 12 inches (30.5 cm by 30.5 cm) and have been hemmed to 10 inches by 10 inches (25.4 cm by 25.4 cm) before washing. The maximum shrinkage after five washes shall not be more than four percent on the length and width. The number of test runs on the same energy suffer cloth shall not exceed 60 test runs. All energy stuffer cloth must be permanently marked identifying the lot number of the material. Mixed lots of material shall not be used for testing the clothes washers.

* * * * *

2.10 *Wash time (period of agitation or tumble) setting.* If the maximum available wash time in the normal cycle is greater than 9.75 minutes, the wash time shall be not less than 9.75 minutes. If the maximum available wash time in the normal cycle is less than 9.75 minutes, the wash time shall be the maximum available wash time.

2.11 *Agitation speed and spin speed settings.* Where controls are provided for agitation speed and spin speed selections, set them as follows:

2.11.1 For energy and water consumption tests, set at the normal cycle settings. If settings at the normal cycle are not offered, set the control settings to the maximum speed permitted on the clothes washer.

3. * * *

3.3. * * *

3.3.1 The wash temperature shall be the same as the rinse temperature for all testing. Cold rinse is the coldest rinse temperature available on the machine. Warm rinse is the hottest rinse temperature available on the machine.

* * * * *

8. Sunset

The provisions of this appendix J expire on December 31, 2003.

Appendix J1 [Amended]

3. Appendix J1 to subpart B of part 430 is amended:

a. By removing the Note after the heading and adding a new paragraph.

b. In section 1, by adding paragraphs 1.22 and 1.23.

c. In section 2, by revising paragraphs 2.6.1 and 2.6.2, and adding paragraphs 2.6.3 through 2.6.7.2.

d. In section 4, by revising the definition of ''ER_x, ER_a, and ER_n'' in paragraph 4.1.5.

The additions and revisions read as follows:

Appendix J1 to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Automatic and Semi-Automatic Clothes Washers

The provisions of this appendix J1 shall apply to products manufactured beginning January 1, 2004.

1. * * *

1.22 *Cold rinse* means the coldest rinse temperature available on the machine (and should be the same rinse temperature selection tested in 3.7 of this appendix).

1.23 *Warm rinse* means the hottest rinse temperature available on the machine (and should be the same rinse temperature selection tested in 3.7 of this appendix).

2. * * *

2.6. * * *

2.6.1 *Energy Test Cloth.* The energy test cloth shall be made from energy test cloth material, as specified in 2.6.4, that is 24 inches by 36 inches (61.0 cm by 91.4 cm) and has been hemmed to 22 inches by 34 inches (55.9 cm by 86.4 cm) before washing. The energy test cloth shall be clean and shall not be used for more than 60 test runs (after preconditioning as specified in 2.6.3 of this appendix). All energy test cloth must be permanently marked identifying the lot number of the material. Mixed lots of material shall not be used for testing the clothes washers.

* * * * *

2.6.2 *Energy Stuffer Cloth.* The energy stuffer cloth shall be made from energy test cloth material, as specified in 2.6.4, and shall consist of pieces of material that are 12 inches by 12 inches (30.5 cm by 30.5 cm) and have been hemmed to 10 inches by 10 inches (25.4 cm by 25.4 cm) before washing. The energy stuffer cloth shall be clean and shall not be used for more than 60 test runs (after preconditioning as specified in 2.6.3 of this appendix). All energy stuffer cloth must be permanently marked identifying the lot number of the material. Mixed lots of material shall not be used for testing the clothes washers.

2.6.3 *Preconditioning of Test Cloths.* The new test cloths, including energy test cloths and energy stuffer cloths, shall be pre-conditioned in a clothes washer in the following manner:

2.6.3.1 Perform 5 complete normal wash-rinse-spin cycles, the first two with AHAM Standard detergent 2A and the last three without detergent. Place the test cloth in a clothes washer set at the maximum water level. Wash the load for ten minutes in soft water (17 ppm hardness or less) using 6.0 grams per gallon of water of AHAM Standard detergent 2A. The wash temperature is to be controlled to 135°F ± 5°F (57.2°C ± 2.8°C) and the rinse temperature is to be controlled to 60°F ± 5°F (15.6°C ± 2.8°C). Repeat the cycle with detergent and then repeat the cycle three additional times without detergent, bone drying the load between cycles (total of five wash and rinse cycles).

2.6.4 *Energy test cloth material.* The energy test cloths and energy stuffer cloths shall be made from fabric meeting the following specifications. The material should come from a roll of material with a width of approximately 63 inches and approximately 500 yards per roll, however, other sizes maybe used if they fall within the specifications.

2.6.4.1 *Nominal fabric type.* Pure finished bleached cloth, made with a momie or granite weave, which is nominally 50 percent cotton and 50 percent polyester.

2.6.4.2 The fabric weight shall be 5.60 ounces per square yard (190.0 g/m^2), ±5 percent.

2.6.4.3 The thread count shall be 61 × 54 per inch (warp × fill), ±2 percent.

2.6.4.4 The warp yarn and filling yarn shall each have fiber content of 50 percent ±4 percent cotton, with the balance being polyester, and be open end spun, 15/1 ±5 percent cotton count blended yarn.

2.6.4.5 Water repellent finishes, such as fluoropolymer stain resistant finishes shall not be applied to the test cloth. The absence of such finishes shall be verified by:

2.6.4.5.1 American Association of Textile Chemists and Colorists (AATCC) Test Method 118—1997, *Oil Repellency: Hydrocarbon Resistance Test* (reaffirmed 1997), of each new lot of test cloth (when purchased from the mill) to confirm the absence of Scotchguard™ or other water repellent finish (required scores of ''D'' across the board).

2.6.4.5.2 American Association of Textile Chemists and Colorists (AATCC) Test Method 79–2000, *Absorbency of Bleached Textiles* (reaffirmed 2000), of each new lot of test cloth (when purchased from the mill) to confirm the absence of Scotchguard™ or other water repellent finish (time to absorb one drop should be on the order of 1 second).

2.6.4.5.3 The standards listed in 2.6.4.5.1 and 2.6.4.5.2 of this appendix which are not otherwise set forth in this part 430 are incorporated by reference. The material listed in this paragraph has been approved for incorporation by reference by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Any subsequent amendment to a standard by the standard-setting organization will not affect the DOE test procedures unless and until amended by DOE. Material is incorporated as it exists on the date of the approval and notice of any change in the material will be published in the **Federal Register**. The standards incorporated by reference are the American Association of Textile Chemists and Colorists Test Method 118–1997, *Oil Repellency: Hydrocarbon Resistance Test* (reaffirmed 1997) and Test Method 79–2000, *Absorbency of Bleached Textiles* (reaffirmed 2000).

(a) The above standards incorporated by reference are available for inspection at:

(i) Office of the Federal Register, Information Center, 800 North Capitol Street, NW, Suite 700, Washington, DC;

(ii) U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Hearings and Dockets, ''Energy Conservation Program for Consumer Products: Clothes Washer Energy Conservation Standards,'' Docket No. EE—RM–94–403, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC.

(b) Copies of the above standards incorporated by reference can be obtained from the American Association of Textile Chemists and Colorists, P.O. Box 1215, Research Triangle Park, NC 27709, telephone (919) 549–8141, telefax (919) 549–8933, or electronic mail: *orders@aatcc.org*

2.6.4.6 The moisture absorption and retention shall be evaluated for each new lot of test cloth by the Standard Extractor Remaining Moisture Content (RMC) Test specified in 2.6.5 of this appendix.

2.6.4.6.1 Repeat the Standard Extractor RMC Test in 2.6.5 of this appendix three times.

2.6.4.6.2 An RMC correction curve shall be calculated as specified in 2.6.6 of this appendix.

2.6.5 *Standard Extractor RMC Test Procedure.* The following procedure is used to evaluate the moisture absorption and retention characteristics of a lot of test cloth by measuring the RMC in a standard extractor at a specified set of conditions. Table 2.6.5 of this appendix is the matrix of test conditions. The 500g requirement will only be used if a clothes washer design can achieve spin speeds in the 500g range. When this matrix is repeated 3 times, a total of 48 extractor RMC test runs are required. For the purpose of the extractor RMC test, the test cloths may be used for up to 60 test runs (after preconditioning as specified in 2.6.3 of this appendix).

TABLE 2.6.5.—MATRIX OF EXTRACTOR RMC TEST CONDITIONS

''g'' Force	Warm soak		Cold soak	
	15 min. spin	4 min. spin	15 min. spin	14 min. spin
50				
200				
350				

TABLE 2.6.5.—MATRIX OF EXTRACTOR RMC TEST CONDITIONS—Continued

"g" Force	Warm soak		Cold soak	
	15 min. spin	4 min. spin	15 min. spin	14 min. spin
500				

2.6.5.1 The standard extractor RMC tests shall be run in a Bock Model 215 extractor (having a basket diameter of 19.5 inches, length of 12 inches, and volume of 2.1 ft^3), with a variable speed drive (Bock Engineered Products, P.O. Box 5127, Toledo, OH 43611) or an equivalent extractor with same basket design (*i.e.* diameter, length, volume, and hole configuration) and variable speed drive.

2.6.5.2 *Test Load.* Test cloths shall be preconditioned in accordance with 2.6.3 of this appendix. The load size shall be 8.4 lbs., consistent with 3.8.1 of this appendix.

2.6.5.3 *Procedure.*

2.6.5.3.1 Record the "bone-dry" weight of the test load (WI).

2.6.5.3.2 Soak the test load for 20 minutes in 10 gallons of soft (<17 ppm) water. The entire test load shall be submerged. The water temperature shall be 100°F ± 5°F.

2.6.5.3.3 Remove the test load and allow water to gravity drain off of the test cloths. Then manually place the test cloths in the basket of the extractor, distributing them evenly by eye. Spin the load at a fixed speed corresponding to the intended centripetal acceleration level (measured in units of the acceleration of gravity, g) ±1 g for the intended time period ±5 seconds.

2.6.5.3.4 Record the weight of the test load immediately after the completion of the extractor spin cycle (WC).

2.6.5.3.5 Calculate the RMC as (WC–WI)/WI.

2.6.5.3.6 The RMC of the test load shall be measured at three (3) g levels: 50g; 200g; and 350g, using two different spin times at each g level: 4 minutes; and 15 minutes. If a clothes washer design can achieve spin speeds in the 500g range than the RMC of the test load shall be measured at four (4) g levels: 50g; 200g; 350g; and 500g, using two different spin times at each g level: 4 minutes; and 15 minutes.

2.6.5.4 Repeat 2.6.5.3 of this appendix using soft (<17 ppm) water at 60°F ± 5°F.

2.6.6 *Calculation of RMC correction curve.*

2.6.6.1 Average the values of 3 test runs and fill in table 2.6.5 of this appendix. Perform a linear least-squares fit to relate the standard RMC ($RMC_{standard}$) values (shown in table 2.6.6.1 of this appendix) to the values measured in 2.6.5 of this appendix:

(RMC_{cloth}): $RMC_{standard} \sim A * RMC_{cloth} + B$

Where A and B are coefficients of the linear least-squares fit.

TABLE 2.6.6.1.—STANDARD RMC VALUES ($RMC_{standard}$)

G	RMC percent	Warm soak		Cold soak
		15 min. spin	4 min. spin	15 min. spin
50	50.4	55.7	52.8	59.0
200	35.6	40.4	37.9	43.1
350	29.6	33.1	30.6	35.8
500	24.2	28.7	25.5	30.0

2.6.6.2 Check accuracy of linear least-squares fit using the following method:

The root mean square value of

$$\left(\sum_{i=1}^{12}\frac{\left(RMC_{standard_i} - RMC_{corr_i}\right)^2}{10}\right)^{1/2}$$

shall be less than 2 percent, where a sum is taken over all of the different tests, where $RMC_{standard—i}$ is the RMC standard value measured for the I-th test, and $RMC_{corr—i}$ is the corrected RMC value for the I-th cloth test. This equation is valid only for the use with three (3) g force values therefore when using the 500g requirement; replace the 500g value instead of the 350g value.

2.6.7 *Application of RMC correction curve.*

2.6.7.1 Using the coefficients A and B calculated in 2.6.6.1 of this appendix:

$RMC_{corr} = A * RMC + B$

2.6.7.2 Substitute RMC_{corr} values in calculations in 3.8 of this appendix.

* * * * *

4. * * *

4. 1 * * *

4.1.5 * * *

ER_x, ER_a, ER_n, are reported electrical energy consumption values, in kilowatt-hours per cycle, at maximum, average, and minimum test loads, respectively, for the warm rinse cycle per definitions in 3.7.2 of this appendix.

* * * * *

§ 430.32 [Amended]

4. Section 430.32 is amended by revising paragraph (g) to read as follows:

§ 430.32 Energy and water conservation standards and effective dates.

* * * * *

(g) *Clothes washers.*

(1) Clothes washers manufactured before January 1, 2004, shall have an energy factor no less than:

Product Class	Energy factor (cu.ft./kWh/cycle)
i. Top-Loading, Compact (less than 1.6 $ft.^3$ capacity).	0.9.
ii. Top-Loading, Standard (1.6 $ft.^3$ or greater capacity).	1.18.
iii. Top-Loading, Semi-Automatic.	[1] Not Applicable.
iv. Front-Loading	[1] Not Applicable.
v. Suds-saving	[1] Not Applicable.

[1] Must have an unheated rinse water option.

(2) Clothes washers manufactured on or after January 1, 2004, and before January 1, 2007, shall have a modified energy factor no less than:

Product Class	Modified energy factor (cu.ft./kWh/cycle)
i. Top-Loading, Compact (less than 1.6 ft.^{3} capacity).	0.65.
ii. Top-Loading, Standard (1.6 ft.^{3} or greater capacity).	1.04.
iii. Top-Loading, Semi-Automatic.	[1] Not Applicable.
iv. Front-Loading	1.04.
v. Suds-saving	[1] Not Applicable.

[1] Must have an unheated rinse water option.

(3) Clothes washers manufactured on or after January 1, 2007, shall have a modified energy factor no less than:

Product Class	Modified energy factor (cu.ft./kWh/cycle)
i. Top-Loading, Compact (less than 1.6 ft.^{3} capacity).	0.65.
ii. Top-Loading, Standard (1.6 ft.^{3} or greater capacity).	1.26.
iii. Top-Loading, Semi-Automatic.	[1] Not Applicable.
iv. Front-Loading	1.26.
v. Suds-saving	[1] Not Applicable.

[1] Must have an unheated rinse water option.

* * * * *

Appendix

[The following letter from the Department of Justice will not appear in the Code of Federal Regulations.]

DEPARTMENT OF JUSTICE

Antitrust Division

Main Justice Building, 950 Pennsylvania Avenue, NW., Washington, DC 20530–0001, (202)514–2401/(202) 696–2645 (i), *Antitrust@justic.usdoj.gov* internet, *Http://www.usdoj.gov* (World Wide Web).

December 4, 2000.

Mary Anne Sullivan, General Counsel, Department of Energy, Washington, DC 20585.

Dear General Counsel Sullivan: I am responding to your October 16, 2000 letter seeking the views of the Attorney General about the potential impact on competition of two proposed energy efficiency standards: one for clothes washers and the other for residential central air conditioners and heat pumps. Your request was submitted pursuant to Section 325 (o)(2)(B)(i) of the Energy Policy and Conservation Act, 42 U.S.C. 6291 (''EPCA''), which requires the Attorney General to make a determination of the impact of any lessening of competition that is likely to result from the imposition of proposed energy efficiency standards. The Attorney General's responsibility for responding to requests from other departments about the effect of a program on competition has been delegated to the Assistant Attorney General for the Antitrust Division in 28 CFR 0.40 (g).

We have reviewed the proposed standards and the supplementary information published in the **Federal Register** notices and submitted to the Attorney General, which include information provided to the Department of Energy by manufacturers. We have additionally conducted interviews with members of the industries.

We have concluded that the proposed clothes washer standard would not adversely affect competition. In reaching this conclusion, we note that the proposed standard is based on a joint recommendation submitted to the Department of Energy by manufacturers and energy conservation advocates. That recommendation states that virtually all manufacturers of clothes washers who sell in the United States participated in arriving at the recommendation through their trade association, that the recommendation was developed in consultation with small manufacturers, and that the manufacturers believe the new standard would not likely reduce competition. We note further that, as the industry recommended, the proposed standard will be phased in over six years, which will allow companies that do not already have products that meet the proposed standard sufficient time to redesign their product lines.

* * * * *

Sincerely,

A. Douglas Melamed,

Acting Assistant Attorney General.

[FR Doc. 01–611 Filed 1–11–01; 8:45 am]

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DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Finding of No Significant Impact; Energy Conservation Program for Consumer Products

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

ACTION: Finding of no significant impact (FONSI) for amended energy conservation standard for clothes washers.

SUMMARY: The Energy Policy and Conservation Act, as amended by the National Energy Conservation Policy Act and the National Appliance Energy Conservation Act, and the National Appliance Energy Conservation Amendments, prescribes energy conservation standards for certain major household appliances, and requires the Department of Energy (DOE) to administer an energy conservation program for these products. Based on an Environmental Assessment (EA), DOE/EA–1344, DOE has determined that the adoption of the negotiated energy efficiency Trial Standard Level (TSL) 3 for clothes washers, as adopted by the Final Rule entitled the ''Energy Conservation Program for Consumer Products: Clothes Washer Energy Conservation Standards,'' would not be a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (NEPA). Therefore, an environmental impact statement (EIS) is not required, and the Department is issuing this finding of no significant impact (FONSI).

ADDRESSES: Copies of the EA are available from: U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Forrestal Building, Mail Station EE–41, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–9127.

FOR FURTHER INFORMATION CONTACT: Bryan Berringer, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Forrestal Building, Mail Station EE–41, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–0371. For information regarding the DOE NEPA process, contact: Carol Borgstrom, Director, Office of NEPA Policy and Assistance (EH–42), 1000 Independence Avenue, SW., Washington, DC 20585–0119, (202) 586–4600.

SUPPLEMENTARY INFORMATION: Description of the proposed action: The proposed action is the establishment of a revised energy conservation standard (TSL 3) for clothes washers.

Environmental Impacts: The EA evaluates the environmental impacts of a range of new energy conservation standards for clothes washers. The results are presented for each potential trial standard level. Each potential trial standard level is an alternative action, and the environmental impacts of each alternative are compared to what would be expected to happen if no new standard were adopted, *i.e.,* the ''no action'' alternative.

The main environmental impact is decreased emissions from fossil-fueled electricity generation. All of the minimum efficiency levels considered for this appliance product category would result in decreased electricity use and, therefore, a reduction in power plant emissions. The proposed efficiency standard would generally decrease air pollution by decreasing future energy demand. The environmental analysis considers only two pollutants, nitrogen oxides (NO_X) and sulfur dioxide (SO_2), and one emission, carbon. Cumulative power sector and household emissions reductions through 2020 for the proposed standards range from 2.5–65 Mt for carbon and 8.4–210 kt for NO_X. Through 2030, the cumulative emissions reductions range from 5.1–135 Mt for carbon and 14.4–364 kt of NO_X. The reduction in SO_2 emissions ranges from 0.6–15.5 kt through 2020 and from 1.2–31.4 kt through 2030. Because emissions of SO_2 from power plants are capped by clean air legislation, physical emissions of this pollutant from electricity generation will be only minimally affected by possible clothes washer standards through changes in allowance prices. Therefore, the EA did not consider changes in power sector SO_2 emissions because they will be negligible.

Determination: Based upon the EA, DOE has determined that the adoption of the proposed energy efficiency standard for clothes washers would not constitute a major Federal action significantly affecting the quality of the human environment, within the meaning of NEPA. Therefore, an EIS is not required, and the Department is issuing this FONSI.

Issued in Washington, DC, on January 3, 2001.

Dan W. Reicher,

Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. 01–612 Filed 1–11–01; 8:45 am]

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Federal Register

Friday,
January 12, 2001

Part X

Department of Energy

Office of Energy Efficiency and Renewable Energy

10 CFR Part 431

Energy Efficiency Program for Commercial and Industrial Equipment: Efficiency Standards for Commercial Heating, Air Conditioning and Water Heating Equipment; Final Rule

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

10 CFR Part 431

[Docket No. EE–RM/STD–00–100]

RIN 1904–AB06

Energy Efficiency Program for Commercial and Industrial Equipment: Efficiency Standards for Commercial Heating, Air Conditioning and Water Heating Equipment

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

ACTION: Final rule.

SUMMARY: The Energy Policy and Conservation Act (EPCA), as amended, establishes energy efficiency standards for certain commercial heating, air conditioning and water heating products. For some of these products, the Department of Energy (DOE, Department or we) is adopting efficiency standards contained in the new American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc. (ASHRAE) and Illuminating Engineering Society of North America (IESNA) Standard 90.1, as revised in October 1999, as uniform national standards. This final rule also identifies other products covered by the recently revised ASHRAE/IESNA Standard 90.1–1999 that DOE will analyze further to determine whether more stringent standards are warranted.

DATES: *Effective date:* This rule is effective February 12, 2001.

Compliance Dates: The compliance date of standards adopted in this rule for central water-cooled air conditioners, water source heat pumps, and evaporatively-cooled air conditioning products with cooling capacities rated at or above 135,000 Btu/h and below 240,000 Btu/h is October 29, 2004. For all other standards adopted in this rule, the compliance date is October 29, 2003.

ADDRESSES: You can read the transcript of the public workshop regarding this rulemaking, the public comments received, and the Screening Analysis report referred to in this notice in the Freedom of Information Reading Room (Room No. 1E–190) at the U.S. Department of Energy, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, between the hours of 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays. You can also obtain the Screening Analysis report electronically from the Office of Building Research and Standards world wide web site at the following URL address: [*http://www.eren.doe.gov/buildings/codes_standards/index.htm*].

This final rule also refers to certain industry standards established by ASHRAE and IESNA. These industry standards are referenced by the single comprehensive title ''ASHRAE/IESNA Standard 90.1.'' The revision of ASHRAE/IESNA Standard 90.1 published in 1999 is referenced by the title ''ASHRAE/IESNA Standard 90.1—1999.'' You can view this standard at the Department's Information Reading Room at the address stated above. You can also obtain copies by mail from the American Society of Heating, Refrigerating, and Air-Conditioning Engineers, Inc., 1971 Tullie Circle, NE, Atlanta, GA 30329, or electronically from ASHRAE's web site, *[http://www.ashrae.org/book/bookshop.htm].*

FOR FURTHER INFORMATION CONTACT: Cyrus H. Nasseri, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Mail Station, EE–41, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–9138, FAX (202) 586–4617, e-mail: Cyrus.Nasseri@ee.doe.gov, or Edward Levy, Esq., U.S. Department of Energy, Office of General Counsel, Mail Station, GC–72, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–9507, e-mail: *Edward.Levy@hq.doe.gov.*

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I. Introduction

A. Consumer Overview

This rule adopts amended ASHRAE/IESNA Standard 90.1–1999 energy efficiency standards for 18 product categories of commercial air conditioners, heat pumps, furnaces, water heaters, and hot water storage tanks. The effect is to replace standards specified in EPCA for these product categories for equipment manufactured after October 29, 2003, or October 29, 2004, in the case of large packaged air conditioners and heat pumps. DOE expects the imposition of these new standards to save in excess of 1.1 quadrillion Btu (Quads) of energy nationwide between 2004 and 2030.

The commercial air conditioners, heat pumps, furnaces, water heaters and hot water storage tanks subject to the standards adopted today apply to equipment generally found in commercial buildings. Today's standards do not apply to consumer products. EPCA established the efficiency standards for consumer appliances, and the Department is considering amendments for residential central air conditioners and heat pumps, clothes washers and water heaters under separate proceedings. The new commercial standards apply to products manufactured after the dates specified, to products installed in new construction as well as existing buildings.

DOE expects the energy costs for space heating and cooling and water heating in commercial buildings to be reduced as a result of today's standards. In addition to reducing building cost-of-operation, the standards will result in lower emissions due to less fuel being used for heating and for generating electricity.

In addition, the Department is considering more stringent standards than those adopted by ASHRAE for 11 categories of commercial products. The Department believes more stringent standards than those found in ASHRAE/IESNA Standard 90.1–1999 may save

significant additional amounts of energy and be technologically feasible and economically justified. DOE also plans to recommend to ASHRAE that it consider new, amended standards for four categories of commercial central air conditioners and heat pumps not considered in the update of ASHRAE/IESNA Standard 90.1–1999. Finally, the Department is rejecting a standard for electric water heaters that will increase energy use over the level specified in EPCA and leaving the EPCA level in place. A summary of the actions taken by the Department is presented in Table 1.

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Table 1. Summary of DOE Actions

Action	Product Category
Adopt the ASHRAE/IESNA Standard 90.1-1999 efficiency level.	Central Water Source HP <17 kBtu/h Central Water Source HP 17 - 65 kBtu/h Central Water Source HP 65 - 135 kBtu/h Central Water Source HP 135 - 240 kBtu/h Central Water Cooled AC <65 kBtu/h Central Water Cooled AC 65 - 135 kBtu/h Central Water Cooled AC 135 - 240 kBtu/h Evaporatively Cooled AC Products Gas-Fired Warm Air Furnaces ≥ 225 kBtu/h Oil-Fired Warm Air Furnaces, ≥ 225 kBtu/h Gas Storage Water Heaters ≤ 155 kBtu/h Oil-Fired Storage Water Heaters ≤ 155 kBtu/h Gas Storage Water Heaters >155 kBtu/h Oil-Fired Storage Water Heaters >155 kBtu/h Gas-Fired Instantaneous Water Heaters with Tanks Oil-Fired Instantaneous Water Heaters with Tanks Tankless Oil-Fired Instantaneous Water Heaters Unfired Hot Water Storage Tanks
Propose consideration of an addendum to ASHRAE/IESNA Standard 90.1-1999.	3-Phase Single Package Air Source AC <65 kBtu/h 3-Phase Split Air Source AC <65 kBtu/h 3-Phase Single Package Air Source HP <65 kBtu/h 3-Phase Split Air Source HP <65 kBtu/h
Propose consideration of an addendum to ASHRAE/IESNA Standard 90.1-1999 and evaluate whether a higher standard is justified.	Central Air Source AC 65 - 135 kBtu/h Central Air Source HP 65 - 135 kBtu/h Central Air Source AC 135 - 240 kBtu/h Central Air Source HP 135 - 240 kBtu/h Packaged Terminal Air Conditioners Packaged Terminal Heat Pumps Large Gas-Fired Boilers >2.5 MMBtu/h Large Oil-Fired Boilers >2.5 MMBtu/h Small Gas-Fired Boilers 0.3 - 2.5 MMBtu/h Small Oil-Fired Boilers 0.3 - 2.5 MMBtu/h Tankless Gas-Fired Instantaneous Water Heaters
Reject the ASHRAE/IESNA Standard 90.1-1999 efficiency level.	Electric Water Heaters

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B. Authority

Part B of Title III of the Energy Policy and Conservation Act (EPCA) of 1975, Pub. L. 94–163, as amended, by the National Energy Conservation Policy Act of 1978 (NECPA), Pub. L. 95–619, the National Appliance Energy Conservation Act of 1987 (NAECA), Pub. L. 100–12, the National Appliance Energy Conservation Amendments of 1988 (NAECA 1988), Pub. L. 100–357, and the Energy Policy Act of 1992 (EPACT), Pub. L. 102–486, established the Energy Conservation Program for Consumer Products other than Automobiles. Part 3 of Title IV of NECPA amended EPCA to add ''Energy Efficiency of Industrial Equipment,'' which included air conditioners, furnaces, and other types of equipment.

EPACT also amended EPCA with respect to industrial equipment, providing definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. EPCA sections 340–345, 42 U.S.C. 6311–6316. For example, EPCA specifies explicit minimum energy efficiency levels for certain commercial packaged air conditioning and heating products, packaged terminal air conditioners and heat pumps, warm air furnaces, packaged boilers, water heaters and unfired hot water storage tanks. EPCA section 342(a)(1)–(5), 42 U.S.C. 6313(a)(1)–(5). The efficiency requirements in the statute correspond to the levels in ASHRAE/IESNA Standard 90.1 as in effect on October 24, 1992. The statute further provides that if the efficiency levels in ASHRAE/IESNA Standard 90.1 are amended after that date for any of the covered products, the Secretary of Energy (Secretary) must establish an amended uniform national standard at the new minimum level for each effective date specified in ASHRAE/IESNA Standard 90.1, unless (s)he determines, through a rulemaking supported by clear and convincing evidence, that a more stringent standard is technologically feasible and economically justified and would result in significant additional energy conservation. EPCA section 342(a)(6)(A), 42 U.S.C. 6313(a)(6)(A).

If the Secretary elects to publish such a rule, it must contain the amended standard, and the determination must consider, to the greatest extent practicable: the economic impact on the manufacturers and consumers of the affected products; savings in operating cost throughout the life of the product, compared to any increases in initial cost or maintenance expense; the total projected amount of energy savings likely to result directly from the imposition of the standard; any lessening of the utility or performance of the affected products; the impact of any lessening of competition; the need for national energy conservation; and other factors the Secretary considers relevant. The Secretary may not prescribe such an amended standard if (s)he finds (and publishes the finding) that interested persons have established by a preponderance of evidence that the amended standard is likely to result in unavailability in the United States of products with performance characteristics (including reliability), features, sizes, capacities and volumes that are substantially the same as those generally available in the United States at the time of the Secretary's finding. EPCA section 342(a)(6)(B), 42 U.S.C. 6313(a)(6)(B).

Finally, the Secretary may not prescribe any amended standard which increases maximum allowable energy use or decreases minimum required energy efficiency. EPCA section 342(a)(6)(B)(ii), 42 U.S.C. 6313(a)(6)(B)(ii).

C. Background

1. General

Pursuant to the EPACT amendments to EPCA in 1992, DOE extended its energy conservation program for consumer products to certain commercial and industrial equipment, and created a new Part 431 in Title 10 of the Code of Federal Regulations, entitled, ''Energy Conservation Program for Commercial and Industrial Equipment.'' This part includes commercial heating, air conditioning and water heating products, as well as large electric motors. The new program consists of: test procedures, Federal energy conservation standards, labeling, certification and enforcement procedures.

2. ASHRAE Action

ASHRAE's Board of Directors gave final approval to certain revisions to ASHRAE/IESNA Standard 90.1 on October 29, 1999. The revised Standard indicates that the amended commercial HVAC and water heater equipment efficiencies will become effective as part of the Standard two years after final ASHRAE approval (i.e., on October 29, 2001).

ASHRAE changed the efficiency standards only for some products covered by the ASHRAE/IESNA Standard 90.1. For the remaining products, ASHRAE considered some efficiency levels in the course of revising Standard 90.1 but left them at their preexisting values, and it deferred consideration of other products. The standard levels prescribed in EPCA and ASHRAE/IESNA Standard 90.1–1999 appear in Tables 2 and 3.

II. Discussion

A. The Screening Analysis and Results

1. Content and Results of the Screening Analysis

To decide whether to adopt efficiency standards contained in ASHRAE/IESNA Standard 90.1–1999 or to initiate the process of developing and analyzing more stringent standards for particular product categories, DOE performed a simplified Screening Analysis and evaluated other information. This process was designed to identify products covered by EPCA for which it was unlikely that a more detailed analysis would reveal evidence sufficient to justify more stringent requirements, and also to identify products for which it was reasonably possible such evidence would be revealed by further analysis. Screening products in this way allows DOE to adopt several ASHRAE/IESNA Standard 90.1–1999 standards expeditiously without hindering appropriate consideration of the remaining products.

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Table 2. Standard Levels for Air Conditioners and Heat Pumps

Product Category	Product Subcategory	Efficiency Level[a]	
		EPCA	ASHRAE 90.1-1999
Small Commercial Packaged Air Conditioning and Heating Equipment	<65 kBtu/h, Air-Cooled, 3 Phase, Central Split System AC, HP	SEER: 10.0, HSPF: 6.8	SEER: 10.0, HSPF: 6.8
	<65 kBtu/h, Air-Cooled, 3 Phase, Central Single Package AC, HP	SEER: 9.7, HSPF: 6.6	SEER: 9.7, HSPF: 6.6
	≥ 65 kBtu/h and <135 kBtu/h, Air-Cooled, Central AC, HP	EER[b]: 8.9, COP[c]: 3	EER[b]: 10.3, COP[c]: 3.2
	<65 kBtu/h, Evaporatively-Cooled, Central AC	EER[b]: 9.3	EER[b]: 12.1
	<65 kBtu/h, Water-Cooled, Central AC	EER[d]: 9.3	EER[d]: 12.1
	<17 kBtu/h, Water-Source, Central HP	EER[d]: 9.3	EER[e]: 11.2
	≥ 17 kBtu/h and <65 kBtu/h, Water-Source, Central HP	EER[d]: 9.3	EER[e]: 12.0
	≥ 65 kBtu/h and <135 kBtu/h, Evaporatively-Cooled, Central AC	EER[b]: 10.5	EER[b]: 11.5
	≥ 65 kBtu/h and <135 kBtu/h, Water-Cooled, Central AC	EER[d]: 10.5	EER[d]: 11.5
	≥ 65 kBtu/h and <135 kBtu/h, Water-Source, Central HP	EER[d]: 10.5	EER[e]: 12.0
	<135 kBtu/h, Water-Source, Central HP	COP[f]: 3.8	COP[g]: 4.2
Large Commercial Packaged Air Conditioning and Heating Equipment	≥ 135 kBtu/h and <240 kBtu/h, Air-Cooled, Central AC	EER[b]: 8.5	EER[b]: 9.7
	≥ 135 kBtu/h and <240 kBtu/h, Air-Cooled, Central HP	EER[b]: 8.5, COP[c]: 2.9	EER[b]: 9.3, COP[c]: 3.1
	≥ 135 kBtu/h and <240 kBtu/h, Water cooled, Evaporatively-Cooled, Central AC	EER[h]: 9.6	EER[h]: 11.0
Packaged Terminal Air Conditioners and Heat Pumps	Air-Cooled	EER, COP vary by capacity (different formulas)	EER, COP vary by capacity (different formulas)

[a] Heating efficiency levels do not apply to cooling only air conditioners.
[b] At 95°F dry-bulb temperature.
[c] At 47°F dry-bulb temperature.
[d] At 85°F entering water temperature.
[e] At 86°F entering water temperature.
[f] At 70°F entering water temperature.
[g] At 68°F entering water temperature.
[h] According to ARI Standard 360.

Table 3. Standard Levels for Furnaces, Boilers, Water Heaters, and Unfired Hot Water Storage Tanks

Product Category	Product Subcategory	Efficiency Level	
		EPCA	ASHRAE 90.1-1999
Warm Air Furnaces	≥ 225,000 Btu/h	Thermal Efficiency[a]: 80% Gas, 81% Oil	Thermal Efficiency[a]: 80% Gas, 81% Oil
Packaged Boilers	≥ 300,000 Btu/h	Combustion Efficiency[a]: 80% Gas, 83% Oil	Thermal Efficiency[a]: 75% Gas, 78% Oil
Storage Water Heaters	Electric	Standby Loss[b]: $0.3 + 27/V_a$ (%/h) (V_a=Measured Storage Volume in Gals.)	Standby Loss[c]: $20 + 35\sqrt{V}$ (Btu/h) (V=Rated Storage Volume in Gals.)
	Gas	Thermal Efficiency: 78%, Standby Loss[b]: Varies by Volume	Thermal Efficiency: 80%, Standby Loss[c]: Varies by Volume
	Oil	Thermal Efficiency: 78%, Standby Loss[b]: Varies by Volume	Thermal Efficiency: 78%, Standby Loss[c]: Varies by Volume
Instantaneous Water Heaters	V<10 gal	Thermal Efficiency: 80%	Thermal Efficiency: 80%
	V ≥ 10 gal, Gas-fired	Thermal Efficiency: 77%, Standby Loss[b]: Varies by Volume	Thermal Efficiency: 80%, Standby Loss[c]: Varies by Volume
	V ≥ 10 gal, Oil-fired	Thermal Efficiency: 77%, Standby Loss[b]: Varies by Volume	Thermal Efficiency: 78%, Standby Loss[c]: Varies by Volume
Unfired Hot Water Storage Tanks	All	Heat Loss[b]: ≤ 6.5 Btu/hr/ft^2	R-12.5 Insulation

[a] At the maximum rated capacity.

[b] Storage water heaters and hot water storage tanks having more than 140 gallons of storage capacity need not meet the standby loss or heat loss requirement if the tank surface area is thermally insulated to R-12.5 and if a standing pilot light is not used.

[c] Water heaters having more than 140 gallons of storage capacity are not required to meet the standby loss requirement if the tank surface is thermally insulated to R-12.5, if a standing pilot light is not installed, and gas- or oil-fired storage water heaters have a flue damper or fan-assisted combustion.

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In conducting the Screening Analysis, the Department used existing data from industry and other sources, including the analysis used by ASHRAE in support of its deliberations over the new ASHRAE/IESNA Standard 90.1–1999 efficiency levels. For each product category, we estimated the likely cost of achieving several higher technologically feasible efficiency levels and then calculated for each such level the corresponding rate of energy consumption required to fulfill the product's function. Applying appropriate climate data, typical building design characteristics, inventories of buildings in different regions of the country, equipment sales volumes, economic discount rates, and energy prices, we computed cost/benefit measures corresponding to the higher efficiency levels and also estimated the nationwide energy and net cost savings, if any, that would result from setting more stringent standards than the levels in ASHRAE/IESNA Standard 90.1–1999. While the conclusions of the Screening Analysis by themselves do not constitute clear and convincing evidence to justify more stringent standards, they do serve to differentiate those products for which such evidence is unlikely to emerge from further analysis from those for which a reasonable likelihood exists.

The Department examined a range of efficiency levels for each product analyzed. The range included the levels specified in EPCA and ASHRAE/IESNA Standard 90.1–1999, as well as more efficient levels characteristic of the most efficient products now available in the market and those associated with the lowest life-cycle cost. For each level above the EPCA standard, DOE estimated: (1) The incremental national energy and carbon emission savings, and (2) the net nationwide direct economic benefit, represented by the national net present value (NPV), that would result from setting a standard at that level, compared to the corresponding levels now in ASHRAE/IESNA Standard 90.1–1999 and EPCA.

Table 4 lists the 24 product categories studied in the Screening Analysis. It shows for each one the efficiency level that the Screening Analysis indicates would correspond to the lowest average life-cycle cost, taking into account both the costs of efficiency improvements and the savings from reduced energy consumption. In addition, where that efficiency level lies above the level specified in ASHRAE/IESNA Standard 90.1–1999, Table 4 shows the following potential benefits that the Screening Analysis suggests would result over the period from 2004 to 2030 from setting a standard at the higher level:

1. The estimated nationwide energy savings, expressed in trillions of Btu (TBtu);

2. The estimated net nationwide direct economic benefit, represented by the net present value (NPV); and

3. The estimated reductions in atmospheric carbon emissions, in millions of tons.

When Table 4 shows a zero for a product in all three of these categories, the Screening Analysis indicates that the efficiency level that corresponds with the product's lowest average life cycle cost is the same as the level specified in ASHRAE/IESNA Standard 90.1–1999.

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Table 4. Energy Savings, Net Present Value and Carbon Emission Reductions from 2004 to 2030 at Energy Efficiency Levels corresponding to Lowest Life-Cycle Cost

Product Category	Efficiency Level at Minimum Life-Cycle Cost	Relative to ASHRAE 90.1-1999		
		National Energy Savings (TBtu)	National Total NPV (Millions of 1998 $'s)	National Carbon Emission Reductions (Million Tons)
3-Phase Single Package Air Source AC <65 kBtu/h	12.0	1,412.7	897.7	21
Central Air Source AC 135 - 240 kBtu/h	10.4	428.8	417.9	6
Packaged Terminal Air Conditioners	10.5	311.7	274.7	5
3-Phase Split Air Source AC <65 kBtu/h	11.0	278.6	109.1	4
Packaged Terminal Heat Pumps	9.9	249.0	241.9	4
Small Gas-Fired Boilers ≤ 2.5 MMBtu/h	78.7%	200.0	146.0	3
3-Phase Single Package Air Source HP <65 kBtu/h	12.0	183.6	91.3	3
Tankless Gas Instantaneous Water Heaters	81.5%	102.0	45.3	2
Large Gas-Fired Boilers >2.5 MMBtu/h	85.3%*	79.0	86.6	1
3-Phase Split Air Source HP <65 kBtu/h	12.0	66.4	47.0	1
Central, Water Source HP 17 - 65 kBtu/h	12.5	65.0	23.0	1
Central Air Source HP 135 - 240 kBtu/h	10.4	31.4	3.2	1
Electric Water Heater (120 gal)	1.0	6.6	1.1	0
Central Water Cooled AC 65 - 135 kBtu/h	12.4	2.7	0.8	0
Central Water Cooled AC 135 - 240 kBtu/h	11.5	2.5	3.0	0
Central Air Source AC 65 - 135 kBtu/h	10.3	0.0	0.0	0
Central Air Source HP 65 - 135 kBtu/h	10.1	0.0	0.0	0
Central Water Cooled AC <65 kBtu/h	12.1	0.0	0.0	0
Central Water Source HP <17 kBtu/h	11.2	0.0	0.0	0
Central Water Source HP 65 - 135 kBtu/h	12.0	0.0	0.0	0
Gas-Fired Warm Air Furnaces ≥ 225 kBtu/h	77.5%	0.0	0.0	0
Gas Storage Water Heaters ≤ 155 kBtu/h	80.0%	0.0	0.0	0
Gas Storage Water Heaters >155 kBtu/h	80.4%	0.0	0.0	0
Instantaneous Gas Water Heaters with Tanks	80.0%	0.0	0.0	0

* Efficiency shown is shipment-averaged value of Large Steam Boilers (76% - 81%), and Large Hot Water Boilers (78% - 88%)

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December 26, 2000

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On May 15, 2000, the Department published a Notice of Document Availability and Public Workshop (Workshop Notice), in which we described the Screening Analysis, announced the public availability of the Screening Analysis report, and published our preliminary inclinations with respect to the commercial heating, air conditioning, and water heating products covered by EPCA, including several product categories not included in the Screening Analysis. 65 FR 30929. We also invited comments and conducted a public workshop on July 11, 2000.

2. Discussion of Issues Raised Concerning the Screening Analysis

Several comments took issue with different aspects of the Screening Analysis. These views are listed below, along with DOE's responses. In general, many of the comments will be useful in more detailed evaluations of ASHRAE/IESNA 90.1–1999 efficiency levels which are not adopted as national standards in today's rule. On the other hand, none of the comments on the analysis itself indicates that clear and convincing evidence exists to justify more stringent standards than those adopted today.

Comment: DOE relied too heavily on equipment cost and efficiency relationships initially developed in 1994 for ASHRAE's deliberations in amending ASHRAE/IESNA Standard 90.1. These relationships are out of date and contain errors. (No. 8, Rheem Manufacturing Company, p. 1; No. 11, Air-Conditioning and Refrigeration Institute, p. 6; No. 16, California Energy Commission, p. 2; No. 19, American Council for an Energy-Efficient Economy, p. 3; No. 22, Lennox Industries, Inc., p. 3).

Response: DOE updated baseline cost data in the Screening Analysis through interviews with manufacturers, distributors and contractors and by application of appropriate price indices. However, the relative costs of alternative efficiency levels are assumed not to have changed since 1994. DOE did not expect that these costs had changed sufficiently to warrant collecting new independent data as part of an analysis to provide a framework for deciding which efficiency levels in ASHRAE/IESNA Standard 90.1–1999 to adopt, and which required further study. Notwithstanding, we did invite and receive public comments related to cost and efficiency relationships, and these are reflected in today's rule. The analysis in support of a future rulemaking for any product will entail collection of current cost and efficiency data, which will be subjected to public comment.

Comment: The Screening Analysis should have included copies of all referenced material from non-published sources. (No. 15, GARD Analytics/Gas Research Institute, p. 2).

Response: Although DOE attempts to make all referenced material available to interested parties, including copies of this material in reports is not always practical due to its volume.

Comment: The seven percent discount rate, taken from OMB Circular A–94 to reflect the time value of money in DOE's economic analysis, is too low. (No. 2, Air Conditioning and Refrigeration Institute, p. 10; No. 11, Air-Conditioning and Refrigeration Institute, p. 7), or too high. (No. 12, American Gas Association, p. 3).

Response: DOE believes that the OMB guidance is appropriate, reflecting the approximate marginal pretax rate of return on average investments, expressed in real terms (net of inflation), for evaluating the economic impact of Federal actions on the economy. In pursuing further evaluation of products for which amended efficiency levels are not adopted in today's rule, DOE will account for differing opinions concerning discount rates through sensitivity analyses in evaluating the economic impact of standards on consumers and manufacturers. For example, in past rulemakings, DOE has evaluated the impact on consumer life-cycle-cost by considering alternative discount rates varying from two percent to fifteen percent.

Comment: DOE's level gas price projections underestimate the effect of gas industry restructuring and technological innovation. The Gas Research Institute projects a 1.5% annual decline in gas prices between 2000 and 2015. (No. 12, American Gas Association, p. 3).

Response: DOE considers the projections, taken from the Energy Information Administration's Annual Energy Outlook 2000, to be authoritative and reasonable for the purposes of the Screening Analysis. In addition, concerning products for which DOE is adopting ASHRAE/IESNA Standard 90.1–1999 levels, any decline in gas prices that does occur would likely make higher efficiencies less cost-effective for gas-fueled equipment and thus diminish the likelihood of uncovering clear and convincing evidence that more stringent standards are technically feasible and economically justified. For all covered gas-fueled products, except gas-fired boilers, DOE has decided to adopt the ASHRAE/IESNA Standard 90.1–1999 levels as they are, so any diminished likelihood of finding evidence to support more stringent standards for these products would serve to reinforce DOE's decision with respect to them. In evaluating the potential impacts of more stringent standards for gas-fired boilers, DOE will assess the impact of alternative fuel price scenarios on the life-cycle costs of achieving higher efficiency levels as well as the impacts of standards on the Net Present Value (NPV).

Comment: It is unclear whether the energy conversion factor in the Screening Analysis for electricity includes losses of fuel delivered to the powerplant. (No. 15, GARD Analytics/Gas Research Institute, p. 2).

Response: Losses of fuel delivered to the powerplant prior to combustion are not included in the conversion factors, but DOE considers these losses to be small in relation to the fuel actually consumed and thus to have little impact on national aggregate energy savings and greenhouse gas emissions reduction estimates.

Comment: The 15-zone prototype building model does not represent individual building types adequately, use of historical CBECS building data does not account for newer buildings built to 1989 and 1999 ASHRAE standards, not treating health care buildings as a separate category creates inaccuracy, and window-to-wall ratios seem too low. (No. 15, GARD Analytics/Gas Research Institute, p. 2).

Response: The 15-zone model provides estimates of building energy consumption which, DOE believes, are representative of most building types, and from which we can infer the effects of standards on products used in most building types with sufficient precision. We recognize that individual buildings may have different energy uses, depending on building location, operation, age and other building-specific factors. However, we believe this modeling approach is valid for the purpose of reaching a decision on whether the potential exists for additional energy savings, beyond those resulting from the adoption of the ASHRAE/IESNA Standard 90.1–1999 levels, that warrant consideration of higher standards.

Comment: Air conditioners and heat pumps often exceed the minimum energy efficiency level specified in EPCA, leading DOE to overestimate the energy savings impacts of more stringent standards. (No. 2, Air Conditioning and Refrigeration Institute, p.6; No. 4, Carrier Corporation, p. 4–5; No. 11, Air-Conditioning and Refrigeration Institute, p. 6; No. 13,

Carrier Corporation, p. 2; No. 22, Lennox Industries, Inc., p. 3). ARI believes the current shipment-weighted efficiencies for PTAC's and PTHP's exceed current minimum efficiency levels by about 10 percent. (No. 11, Air-Conditioning and Refrigeration Institute, p. 4).

Response: To the extent DOE, in computing the base case, *i.e.,* no adoption of a further standard, used an average efficiency lower than what actually occurs, ARI may have a valid point because a more stringent standard would result in lower energy savings than what was estimated. But ARI has provided no data to indicate the amount of the possible overstatement of energy savings. Morever, to some extent, any such overstatement would be offset because, for the purpose of this analysis, we also assumed that under new standards the average efficiency would be equal to the new standard. We expect the shipment-weighted efficiency to be higher than the standard, however, and this would have the effect of modestly underestimating the energy savings due to standards. Aside from these considerations, given the amount of energy that could potentially be saved by more stringent standards on these products, even if it is less than estimated, we believe they warrant further consideration as candidates for more stringent standards. In evaluating the impacts of more stringent standards, DOE will attempt to capture the effect of the market demand for more efficient products than required by a minimum efficiency standard.

Comment: Use of Full Load Equivalent Operating Hours (FLEOH's) overstates energy consumption by air conditioning equipment, since part-load operation is more efficient than at full load for this equipment. (No. 2, Air Conditioning and Refrigeration Institute, p. 8; No. 4, Carrier Corporation, p. 4; No. 11, Air-Conditioning and Refrigeration Institute, p. 4; No. 13, Carrier Corporation, p. 2–3; No. 15, GARD Analytics/Gas Research Institute, p. 1; No. 22, Lennox Industries, Inc., p. 3).

Response: DOE agrees that FLEOH's do not capture the part load performance of products. The Department used FLEOH's for the Screening Analysis because of a limited amount of part load efficiency data and because the standard under investigation is expressed in terms of full load operation. DOE believes that any discrepancies introduced by use of FLEOH's would not materially alter the likelihood that clear and convincing evidence supporting stricter standards will ultimately be found, because efficiencies at full and part load are correlated. Nonetheless, the Department welcomes suggestions concerning better ways to account for performance under part-load conditions as it conducts further analysis of air-conditioning products.

Comment: DOE understated energy costs for air conditioners by failing to account adequately for seasonal electric rate variation and demand charges. (No. 15, GARD Analytics/Gas Research Institute, p. 1, 2; No. 19, American Council for an Energy-Efficient Economy, p. 5–6).

Response: The Screening Analysis includes calculations of energy savings and life-cycle costs for specific products at regional and national levels, and DOE believes that it handled electric costs appropriately, based on surveys of actual rate data, and that its conclusions reflect existing market conditions today. DOE recognizes, however, that rate levels and structures could change in the future in unpredictable ways with utility industry restructuring, but we believe that this uncertainty does not remove the reasonable likelihood that more stringent standards may be justified in the case of products DOE plans to analyze further, nor does uncertainty by itself make finding such a justification appreciably more likely in the case of products for which DOE is adopting standards in today's rule. Any seasonal rates and demand charges that increase the cost of energy consumed by air conditioners will serve to make more stringent efficiency requirements cost-effective, thus reinforcing DOE's decision to study air-cooled air conditioners further before adopting the levels contained in ASHRAE/IESNA Standard 90.1–1999. For water-cooled air-conditioners, DOE is adopting ASHRAE/IESNA Standard 901.–1999 efficiency requirements today, because these products are less common and for this reason do not appear to afford opportunities for significant energy savings. This determination does not depend on the cost of electric power. In conducting further investigation of electric product efficiencies, we may also apply appropriate sensitivity analysis to capture prevailing ranges of opinion concerning the various rate scenarios. We welcome suggestions from stakeholders regarding better methodologies to account for seasonal rates and demand charges within any detailed rulemaking, including suggestions on how to address their wide variety in the commercial sector (e.g., specific utility service territory, type of building, end-use application, hours of usage, prior usage patterns, and correlations with kWh consumption).

Comment: Heating operation should be included along with cooling in analyzing heat-pumps, since cooling efficiency improvements can reduce energy costs for heating as well. (No. 15, GARD Analytics/Gas Research Institute, p. 1).

Response: DOE agrees with this point and will include heating and cooling operations together in the detailed analysis of efficiency levels for air-source heat pumps. Higher efficiencies in cooling mode are likely to result in improved heating performance as well, increasing the likelihood that higher standards for these products are economically justified and will lead to significant additional conservation of energy. This consideration therefore reinforces DOE's decision to conduct further analysis of air-source heat pumps along with corresponding air-source air-conditioners. For water-source heat pumps, DOE is adopting ASHRAE/IESNA Standard 90.1–1999 efficiency requirements, because these products are less common and for this reason do not appear to afford opportunities for significant energy savings. This determination does not depend on the combined cost or efficiency of heating and cooling.

Comment: Cost and efficiency relationships used by ASHRAE and subsequently in the Screening Analysis reflect use of R–22 refrigerant, which must be replaced by 2010. (No. 2, Air Conditioning and Refrigeration Institute, p. 9–10; No. 8, Rheem Manufacturing Company, p. 1; No. 11, Air-Conditioning and Refrigeration Institute, p. 6).

Response: DOE recognizes the possibility that alternatives to R–22 may alter the cost effectiveness of achieving higher efficiency levels for equipment sold after 2010 and will take this factor into account in conducting further analysis of air-source heat pumps and air-cooled air-conditioners. Since the effect of as yet undetermined alternative refrigerants on the cost of achieving higher efficiency levels is unknown at this point and the subject of debate, DOE does not believe that the refrigerant requirement eradicates the reasonable likelihood of uncovering evidence supporting higher standards for air-cooled products. As indicated above, the decision to adopt ASHRAE 90.1–1999 efficiency requirements for water-source, water-cooled, and evaporatively cooled equipment stems from low aggregate energy consumption and not cost-effective efficiency considerations.

Comment: DOE's analysis of packaged terminal air conditioners and heat pumps does not accurately reflect the life and usage characteristics of these products, thereby incorrectly estimating

the energy savings and life-cycle-cost effects of more stringent standards. Packaged terminal air conditioners and heat pumps have a useful life of 10 years or less, not 15 as assumed in the Screening Analysis. The shorter lifetime is due to application in hotels and motels, which undergo more frequent renovations, and to corrosion from salt near the seacoast. (No. 2, Air Conditioning and Refrigeration Institute, p. 6; No. 4, Carrier Corporation, p. 3; No. 11, Air-Conditioning and Refrigeration Institute, p. 4; No. 13, Carrier Corporation, p. 2; No. 14, EnviroMaster International Corporation, p. 2). The ''generic building'' approach to estimating heating and cooling loads fails to reflect the unique design characteristics of hotels and motels, where PTAC's and PTHP's are most commonly used. (No. 11, Air-Conditioning and Refrigeration Institute, p. 4). These products are used less during hours of peak electric demand than other air-conditioning equipment, since the rooms are frequently vacant during the day. (No. 14, EnviroMaster International Corporation, p. 1).

Response: DOE accepts the possibility that the lifetime assumed for these products in the Screening Analysis may not reflect the likelihood of the units being replaced earlier during routine renovations. A more frequent replacement would increase the cost associated with these products. It is also possible that these products are used less during hours of peak electric demand than other air-conditioning products and thus do not conform to a ''generic building'' operating schedule, and that a different operating schedule may be warranted for them during analyses. Although shorter working life and fewer hours of operation under peak conditions would reduce the estimated energy and cost savings associated with more stringent standards, the potential saving identified by the Screening Analysis for these products is so large, in DOE's view, as to compensate for the simplifying assumptions involved in calculating them. Potential national energy savings of over 500 trillion Btu for packaged terminal heat pumps leaves considerable room for error in determining that a reasonable likelihood exists that evidence would support more stringent standards. However, we welcome additional independent data on equipment life and operating schedules for these products, so we can improve the precision of the detailed analysis we will be undertaking for these products.

Comment: DOE overestimated the feasibility and underestimated the cost of improving efficiencies of PTAC's and PTHP's by failing to take into account the small wall openings (16″ by 42″) into which they must fit, especially for retrofit applications. (No. 2, Air Conditioning and Refrigeration Institute, p. 7–8; No. 4, Carrier Corporation, p. 3; No. 9, First Company, p. 2; No. 11, Air-Conditioning and Refrigeration Institute, p. 5; No. 13, Carrier Corporation, p. 2; No. 14, EnviroMaster International Corporation, p. 1). Also, DOE failed to account for recently introduced ''vertical'' PTAC's, which have different design constraints from traditional units covered by the analysis. (No. 14, EnviroMaster International Corporation, p. 1).

Response: DOE will model PTAC's and PTHP's performance in simulated environments that match their actual applications as closely as possible. However, the comments contain no conclusions bearing on the impact of these two sets of considerations on DOE's decision to continue its evaluation of these products before adopting uniform national efficiency standards for them, and DOE does not believe that the considerations eliminate the reasonable likelihood of uncovering evidence supporting more stringent standards under the terms of EPCA.

Comment: The Screening Analysis may not have correctly reflected the preponderance of commercial boiler shipments to the Northeast and North Central regions of the country, greatly overstated shipments of copper tube or coil-type commercial gas water heaters, and overestimated potential energy savings for these products. (No. 20, Gas Appliance Manufacturers Association, p. 1–3). Fluctuations in the GAMA shipment data for gas water heaters need further explanation, and the projected one percent annual growth rate for water heaters until 2030 is overly optimistic. (No. 12, American Gas Association, p. 3, 4). The shipment figures for oil-fired boilers appear too high, possibly because they include dual-fuel boilers, and the analysis does not adequately account for differences in boiler installation costs at higher efficiencies. (No. 15, GARD Analytics/Gas Research Institute, p. 2).

Response: DOE will verify shipment data during its further analysis of boilers and tankless water heaters, and we will account for differences in installation costs at higher efficiencies. However, DOE does not believe that these considerations remove the reasonable likelihood of discovering adequate evidence to support more stringent standards for these products according to EPCA criteria. Installation is only a small component of the total cost of acquisition, and alternative shipping patterns and growth rates could effect energy savings and economic justification either way. Greater predominance of shipments to states with colder climates, for example, increases the likelihood that more stringent standards would be cost effective, while slower growth in shipments diminishes the energy savings likely to result from higher efficiencies in the future.

Comment: The Screening Analysis did not handle jacket and standby losses properly. (No. 20, Gas Appliance Manufacturers Association, p. 1–3).

Response: With regard to jacket and standby loss, we believe that the Standby Loss Correction for boilers is in fact needed to estimate the energy use of these devices correctly. The difference between thermal and combustion efficiency is primarily reflected in the shell loss of the boiler, and during operating hours, the thermal efficiency of the boiler accounts for these losses. However for much of the year, the boiler is maintained on a hot standby status. The amount of time on hot standby is assumed in the Screening Analysis to be the total number of hours the boiler is available for use minus the full load operating hours for the year. Values for the hot standby periods were taken from the 1997 ASHRAE Handbook of Fundamentals, as shown in Appendix A (A.9) of the Screening Analysis. During these hot standby periods, we have assumed the boiler standby loss to be 5% for the base boiler (the assumed difference between combustion and thermal efficiency). To capture the energy used during the hot standby period, the Screening Analysis applied an adjustment factor for the FLEOH, calculated as:

$$\text{AdjustmentFactor} = \frac{\text{FLEOH} + (\text{AvailableHours} - \text{FLEOH}) \times \%\text{ShellLoss}}{\text{FLEOH}}$$

Variation in boiler design or setback of system temperature through the year will have some effect on this adjustment factor, however for purposes of the Screening Analysis, we believe the methodology outlined above to be a fair assessment of the contribution of hot standby to energy consumption.

Comment: In the amended ASHRAE/IESNA Standard 90.1–1999, ASHRAE changed the definition of ''storage volume'' for electric storage water heaters from ''measured volume'' to ''rated volume.'' (No. 16, California Energy Commission, p. 3; No. 17, Oregon Office of Energy, p. 3).

Response: DOE recognized this change and accounted for it in the Screening Analysis.

B. Treatment of Specific Products

1. DOE Views Expressed in the Workshop Notice

In the Workshop Notice, DOE stated its inclination to adopt as national standards, without further study, the efficiency levels in ASHRAE/IESNA Standard 90.1–1999 for 12 of the 24 products included in the Screening Analysis. 65 FR at 30933, 30935. The 12 products comprise several categories of air conditioners and heat pumps, warm air furnaces, and certain water heating products. DOE stated that the Analysis estimated that most of these efficiency levels have the lowest life-cycle cost (LCC) for the product, and for the remainder a slightly higher efficiency would have the lowest LCC but would save relatively little additional energy.

For four categories of 3-phase air conditioners and heat pumps with capacities under 65,000 Btu per hour, DOE stated its inclination to take no action to adopt standards at this time but to encourage ASHRAE to consider an addendum to ASHRAE/IESNA Standard 90.1–1999. 65 FR at 30933–34, 30935. DOE noted that ASHRAE did not address these products in revising Standard 90.1, although the Screening Analysis indicates that higher efficiency standards for them may well have benefits.

For seven of the eight remaining categories analyzed in the Screening Analysis, DOE stated its inclination to propose consideration of an addendum to ASHRAE/IESNA Standard 90.1–1999, and to further study whether more stringent efficiency levels than those adopted by ASHRAE are warranted. 65 FR at 30934, 30935. DOE stated that it appears such levels would result in significant, cost-effective energy savings. The products involved are certain types of air conditioners and heat pumps, as well as boilers and tankless instantaneous gas water heaters. Electric water heaters was the other product included in the Analysis, and DOE tentatively decided to leave the EPCA standard in force based on its view that the efficiency level in ASHRAE/IESNA Standard 90.1–1999 would increase energy use relative to that standard. 65 FR at 30934, 30935.

DOE excluded certain commercial air conditioning, heating and water heating products from the Screening Analysis for reasons such as insufficient data, small sales volumes, and difficulty in assessing efficiency performance. 65 FR at 30934. For several of these products, DOE stated its intent to adopt ASHRAE/IESNA Standard 90.1–1999 standards because the products have small markets and higher standards are unlikely to result in significant energy savings. For the heating COP of several heat pump categories, and the efficiency level for oil-fired boilers, DOE indicated it did not plan to adopt the levels in ASHRAE/IESNA Standard 90.1–1999 because they should be considered either as part of other evaluations that would be undertaken or subsequent to such other evaluations. 65 FR at 30934–35. For all other heat pumps covered by EPCA, DOE stated its intention to adopt the amended ASHRAE/IESNA Standard 90.1–1999 COP levels as uniform national standards.

2. Discussion of Comments on General Issues Surrounding Adoption of Efficiency Standards in ASHRAE/IESNA Standard 90.1–1999

Comment: Stakeholders were divided on DOE's discretion to impose more stringent standards than those in ASHRAE/IESNA Standard 90.1–1999 and on the Department's duty to scrutinize each efficiency level strictly. Some emphasized the limitations on DOE's authority to set more stringent standards than those contained in ASHRAE 90.1–1999 in the absence of certain clear and convincing evidence, and they encouraged adoption of ASHRAE's amended standards in their entirety. (No. 2, Air Conditioning and Refrigeration Institute, pp. 4–5; No. 3, Gas Appliance Manufacturers Association, pp. 1–2; No. 10, Edison Electric Institute, pp. 1–2; No. 11, Air-Conditioning and Refrigeration Institute, p. 3). Others emphasized what they felt was DOE's duty to seek such evidence more exhaustively before adopting any of the ASHRAE standards. (No. 16, California Energy Commission, pp. 1–2; No. 17, Oregon Office of Energy, pp. 1–2; No. 19, American Council for an Energy-Efficient Economy, pp. 1, 10–11)

Response: DOE believes it has struck an appropriate balance, consistent with EPCA, between the requirement to adopt the efficiency standards contained in ASHRAE/IESNA Standard 90.1–1999 and the discretion to adopt more stringent standards if they are warranted by clear and convincing evidence. Specifically, DOE performed a Screening Analysis of the amended standards in ASHRAE/IESNA Standard 90.1–1999, and invited public comments on the Analysis, in order to assess the likelihood of uncovering such clear and convincing evidence. Based on those steps, DOE is adopting in today's rule over half of the amended standards in ASHRAE Standard 90.1–1999, and is undertaking further analysis of virtually all of the remaining ASHRAE standards. The Department believes it is exercising due care in performing the role defined in the statute for the Secretary.

Comment: Numerous comments addressed ASHRAE's process in arriving at ASHRAE/IESNA Standard 90.1–1999. Several comments commended ASHRAE for its analytical and procedural integrity and recommended adopting the resulting standards on the strength of ASHRAE's process. (No. 1, ASHRAE, p. 1; No. 2, Air Conditioning and Refrigeration Institute, pp. 2–3; No. 4, Carrier Corporation, p. 1; No. 10, Edison Electric Institute, p. 1; No. 11, Air-Conditioning and Refrigeration Institute, pp. 2–3; No. 13, Carrier Corporation, p. 1; No. 18, National Rural Electric Cooperative Association, p. 1; No. 22, Lennox Industries, Inc., p. 2). Others criticized ASHRAE's process for analytical and procedural shortcomings and recommended strict scrutiny of the standards. (No. 5, California Energy Commission, pp. 1–2; No. 16, California Energy Commission, pp. 2–3; No. 17, Oregon Office of Energy, pp. 1–4; No. 19, American Council for an Energy-Efficient Economy, pp. 1–3).

Response: DOE recognizes that opinions differ on the strengths and weaknesses of ASHRAE's process in arriving at the requirements in Standard 90.1–1999. Nevertheless, EPCA stipulates that DOE must adopt the amended ASHRAE standards unless certain conditions are met, and, for the reasons stated in our response to the previous comment, we believe our actions here properly reflect the status that EPCA affords to Standard 90.1–1999.

Comment: Subjecting standards to further DOE analysis would delay the realization of energy savings that might occur sooner if amended ASHRAE standards were adopted immediately. (No. 8, Rheem Manufacturing Company, p. 1). On the other hand, voluntary adherence to the amended standards

and state adoption of the updated ASHRAE/IESNA Standard 90.1–1999 in building codes will serve to offset the effect of any delay at the Federal level. (No. 16, California Energy Commission, pp. 4–5; No. 17, Oregon Office of Energy, p. 4). In addition, DOE's further analysis could create a situation in which manufacturers would have to redesign their products twice in rapid succession: Once to comply with ASHRAE/IESNA Standard 90.1–1999 and shortly afterward, to comply with standards resulting from a possible DOE rulemaking. (No. 4, Carrier Corporation, p. 2; No. 11, Air-Conditioning and Refrigeration Institute, p. 7; No. 13, Carrier Corporation, p. 3; No. 14, EnviroMaster International Corporation, p. 2; No. 22, Lennox Industries, Inc., p. 3–4).

Response: Any future rulemaking by DOE will take into account the impacts of more stringent standards on affected manufacturers, including the effect of timing on product development cycles, and it will analyze the influence of effective dates on energy savings resulting from the standards. DOE notes also that the process it envisions can be terminated for any product whenever DOE concludes that the EPCA criteria for a more stringent standard are not likely to be satisfied. This could occur either as a result of further analysis by DOE during a rulemaking process or by ASHRAE adopting a new Addendum to ASHRAE/IESNA Standard 90.1–1999 for which a more stringent alternative is not justified.

Comment: DOE has no authority to propose that ASHRAE consider addenda to Standard 90.1 in cases where it feels that the requirements in ASHRAE/IESNA Standard 90.1–1999 are not sufficiently stringent. In these cases, the Department must proceed with a rulemaking if higher efficiencies meet the requirements of EPCA. (No. 12, American Gas Association, pp. 1–2).

Response: While EPCA does not specifically authorize the Department to propose addenda to ASHRAE standards, DOE can find no statutory prohibition against doing so and indeed has traditionally provided technical support to ASHRAE's standard-setting processes in the interest of encouraging and taking advantage of open, consensus-based approaches. In addition, section 307(b) of the Energy Conservation and Production Act, 42. U.S.C. 6836, seems to contemplate that DOE would provide such support to ASHRAE, and even that it would propose addenda to ASHRAE.

3. Discussion of DOE Views Regarding Specific Products

Comment: Industry data used in ASHRAE's standard setting process and DOE's Screening Analysis overstated the cost of efficiency improvements for central air-source air-conditioners between 65,000 Btu per hour and 135,000 Btu per hour. (No. 19, American Council for an Energy-Efficient Economy, pp. 3–5). Some industry comments opposed this view. (No. 11, Air-Conditioning and Refrigeration Institute, p. 5; No. 13, Carrier Corporation, p. 3).

Response: Since the American Council for an Energy-Efficient Economy (ACEEE) supported its contention regarding air-source air-conditioners with price survey data, and the potential savings from efficiency improvements for this product category are potentially large on account of its widespread use, DOE has decided that clear and convincing evidence may exist to justify more stringent standards for air-source air-conditioners in the 65,000 Btu/h to 135,000 Btu/h range. The Department has therefore added this product category to those that will be subjected to further study and will review the cost-efficiency data.

Comment: Industry data used in ASHRAE's standard setting process and DOE's Screening Analysis also overstated the cost of efficiency improvements for 3-ton water-source heat pumps. (No. 19, American Council for an Energy-Efficient Economy, pp. 3–5).

Response: For water-source heat pumps, the data to support the ACEEE comment is considered proprietary and has not been submitted to DOE, so the Department is unable to verify the comment. In any case, the nation-wide energy use for this product appears to be so small that the Department considers it unlikely that more stringent standards for this product would satisfy EPCA criteria. Accordingly, the Department is adopting the ASHRAE/IESNA Standard 90.1–1999 efficiency level for this product category in today's rule.

Comment: Industry data used in ASHRAE's standard setting process and DOE's Screening Analysis also overstated the cost of efficiency improvements for gas-fired boilers. (No. 19, American Council for an Energy-Efficient Economy, pp. 3–5).

Response: Since the gas-fired boilers are proposed to be analyzed further, based on the Screening Analysis, ACEEE's comment would not affect the decision embodied in today's rule.

Comment: DOE should include Integrated Part-Load Values in standards governing air conditioning equipment. (No. 16, California Energy Commission, p. 5; No. 17, Oregon Office of Energy, p. 3).

Response: DOE recognizes that Integrated Part-Load Value is increasingly common as a rating metric and believes that it has the authority to establish minimum requirements using this metric if ASHRAE has amended the standard corresponding to the air-conditioning equipment in question, and EPCA's requirements for a more stringent standard are met. DOE is also aware that Integrated Part Load Value only applies to the performance of equipment with modulated capacity and thus will not capture part-load efficiencies for most single-stage air-conditioners. DOE will therefore consider including Integrated Part-Load Values in any prospective rulemaking for air conditioning equipment. However the Department has reached no conclusions on their appropriateness as part of a future standard and will seek public comment before proceeding.

Comment: Standards for 3-phase air-conditioners and heat pumps under 65,000 Btu per hour should be the same as those for single phase models, which are used in residential applications and are more numerous. (No. 8, Rheem Manufacturing Company, p. 2; No. 11, Air-Conditioning and Refrigeration Institute, pp. 3–4; No. 13, Carrier Corporation, p. 3; No. 22, Lennox Industries, Inc., p. 2–3).

Response: DOE agrees that the products are closely related, and that standard-setting for them should be coordinated. There may be valid reasons, however, for the standards themselves to differ. Once ASHRAE/IESNA Standard 90.1–1999 is amended with respect to these products, DOE will evaluate the new standards to determine if they should be adopted or if a more stringent standard is likely to save a significant amount of energy, and be technologically feasible and economically justified.

Comment: More stringent standards for gas space heating and water heating equipment will serve to shift customers to electric equipment, with a detrimental effect on gas equipment sales and energy consumption. (No. 12, American Gas Association, p. 2). Further changes in efficiency levels for PTAC's and PTHP's will particularly hurt small manufacturers. (No. 9, First Company, p. 3).

Response: Under EPCA, if DOE adopts a more stringent standard, it must consider, to the greatest extent practicable, the economic impact on the manufacturers and consumers of the affected products, savings in operating

cost throughout the life of the product compared to any increases in initial cost or maintenance expense, and the total projected amount of energy savings likely to result directly from the imposition of the standard. EPCA section 342(a)(6)(B)(i), 42 U.S.C. 6313(a)(6)(B)(i). DOE will therefore carefully consider possible effects due to fuel switching as well as impacts on small businesses as it proceeds with any further analysis of these products that might lead to more stringent standards.

Comment: More stringent standards could affect the availability of types of boilers that have no cost-effective substitute for certain building applications. (No. 3, Gas Appliance Manufacturers Association, pp. 2–5). They could also affect the availability of PTAC's and PTHP's that will fit in existing limited spaces. (No. 9, First Company, pp. 1–2).

Response: DOE recognizes that EPCA prohibits an amended standard that is likely to result in unavailability in the United States of products with performance characteristics (including reliability), features, sizes, capacities and volumes that are substantially the same as those generally available beforehand. EPCA section 342(a)(6)(B)(ii), 42 U.S.C. 6313(a)(6)(B)(ii). This prohibition would govern any future rulemaking with respect to these products.

Comment: Since ASHRAE amended the standard for electric water heaters, DOE has the authority to evaluate and consider more stringent standards than those in EPCA for these products and should do so. (No. 15, GARD Analytics/ Gas Research Institute, p. 2; No. 16, California Energy Commission, p. 3). Heat pump water heaters should be considered among the technological alternatives. (No. 15, GARD Analytics/ Gas Research Institute, p. 2)

Response: DOE agrees with the comment regarding DOE's authority. However, in rejecting the ASHRAE/ IESNA Standard 90.1–1999 provision, which allows for increased energy consumption, the Department does not intend to subject electric water heaters to further evaluation or consideration of more stringent standards. The standard for electric water heaters will remain as originally stipulated in EPCA. This decision is based on the low likelihood of finding sufficient evidence to support a more stringent standard for them. The heat pump water heater is the most promising (but significantly more complex) technology to significantly improve the heating efficiency of electric water heaters above current levels. However, when DOE considered this technology for our residential water heater rulemaking, we concluded that it was not economically justified due to the cost of manufacturing, installing, servicing, and sometimes a potential loss of product utility. These concerns might also apply to commercial heat pump water heaters. Furthermore, currently there is no suitable test procedure for these products to measure the efficiency in commercial applications, so a standard predicated on heat pump technology would be difficult to enforce.

C. Final Rule and Other DOE Actions

EPCA requires DOE to adopt ASHRAE's amended efficiency standards for certain commercial heating, air conditioning and water heating products unless the Secretary determines, supported by clear and convincing evidence, that adoption of a more stringent uniform national standard is technologically feasible and economically justified and would result in significant additional energy conservation. DOE believes that this language places a burden on DOE not to initiate a standards development process unless there is at least a reasonable possibility that strong evidence exists to show that significant additional energy savings could be achieved through more stringent efficiency standards that would be both technologically feasible and economically justified.

To decide whether to adopt efficiency standards contained in ASHRAE/IES Standard 90.1–1999, or to initiate the process of developing and analyzing more stringent standards for particular product categories, DOE performed a simplified Screening Analysis and evaluated other information. This process was designed to identify products covered by EPCA for which it was reasonable to expect that more detailed and sophisticated analysis was unlikely to reveal evidence sufficient to justify more stringent requirements, and also to identify other products for which such evidence was reasonably likely to be revealed by further analysis. Screening products in this way allows DOE to adopt several ASHRAE 90.1–1999 standards expeditiously and thereby to:

- Minimize any possible adverse effects on energy savings of delaying the imposition of more stringent national efficiency standards;
- Minimize uncertainty faced by manufacturers as they design products to meet future standards; and
- Manage the resources within DOE efficiently, concentrating comprehensive analyses of the cost-effectiveness and energy savings of alternatives to ASHRAE standards where the clear and convincing evidence required by EPCA for more stringent standards is most likely to be found.

As further discussed below, based on evaluation of the results of the Screening Analysis, other information for products not included in the analysis, and the comments received in response to the Workshop Notice, the Department has decided to pursue, for each product category, one of four courses of action:

- Adopt immediately the ASHRAE/ IES Standard 90.1–1999 efficiency level as a uniform national standard;
- Propose consideration of an addendum to ASHRAE/IES Standard 90.1–1999 where ASHRAE did not consider a more efficient level, and a more efficient level appears warranted;
- Propose consideration of an addendum to ASHRAE/IES Standard 90.1–1999 and undertake a more thorough evaluation to determine whether a higher standard is justified, where ASHRAE considered amending or amended the standard, and a more efficient level appears warranted than is contained in ASHRAE/IES Standard 90.1–1999; or
- Reject the ASHRAE/IES Standard 90.1–1999 efficiency level if it increases maximum allowable energy use or decreases minimum required efficiency.

As to the ASHRAE 90.1–1999 efficiency levels that DOE is immediately adopting, these standards are being adopted because (a) significant improvements in energy efficiency beyond the level recommended by ASHRAE appear unlikely to be technically feasible or economically justified, (b) the national energy savings that would result from any cost-effective efficiency improvements appear unlikely to be significant, or (c) the additional energy savings resulting from a more stringent standard are not likely to offset the loss in energy savings likely to result from the delay that would be caused by the DOE analytical and rulemaking process.

As to efficiency levels in the third category above—where DOE is proposing further consideration by ASHRAE and undertaking further analysis—DOE selected these products for further analysis, because the findings of the Screening Analysis suggested at least a reasonable possibility, and in several instances a high likelihood, of uncovering clear and convincing evidence that more stringent standards would be technologically feasible and economically justified and would result in significant additional energy conservation. Implicit in DOE's

selection is the judgment that additional energy savings resulting from more stringent standards are likely to offset the loss in energy savings likely to result from the delay in the imposition of a new standard due to DOE's analytical and rulemaking process.

Based on our consideration of the Screening Analysis, DOE has identified the ten products listed below as not warranting further consideration of standards that are more stringent than those in ASHRAE/IESNA Standard 90.1–1999 and is consequently adopting the ASHRAE/IESNA Standard 90.1–1999 efficiency levels for these products today as uniform national standards.

- Central Water Source Heat Pumps, 17 kBtu/h–65 kBtu/h
- Central Water Cooled Air Conditioners, 65 kBtu/h–135 kBtu/h
- Central Water Cooled Air Conditioners, 135 kBtu/h–240 kBtu/h
- Central Water Cooled Air Conditioners, <65 kBtu/h
- Central Water Source Heat Pumps, <17 kBtu/h
- Central Water Source Heat Pumps, 65 kBtu/h–135 kBtu/h
- Gas-Fired Warm Air Furnaces, ≥225 kBtu/h
- Gas Storage Water Heaters, ≤155 kBtu/h
- Gas Storage Water Heaters, >155 kBtu/h
- Gas Instantaneous Water Heaters with Tanks

In all except the first three of the ten product categories listed above, the ASHRAE/IESNA Standard 90.1–1999 efficiency levels are the same as those identified in the Screening Analysis as achieving the lowest life-cycle costs. Therefore, the Department considers it unlikely that further analysis would reveal clear and convincing evidence that more stringent standards would be economically justified for these products. For the central water-source heat pumps between 17 and 65 thousand Btu/hour, and the two sizes of central water-cooled air conditioners between 65 and 240 thousand Btu/hour, the Screening Analysis estimates that the efficiency levels corresponding to minimum life-cycle cost are slightly higher than ASHRAE's, but the total cumulative energy savings that could be achieved cost-effectively by adopting the three higher levels would amount to only 70 trillion Btu between 2004 and 2030. In the case of these products, for which potential energy savings appear to be relatively small, the Department considers it unlikely that further analysis would reveal clear and convincing evidence that a more stringent standard would result in significant energy conservation.

Of the remaining products studied in the Screening Analysis, the Analysis suggests that efficiency standards higher than those in ASHRAE/IESNA Standard 90.1–1999 for four categories of 3-phase air conditioners and heat pumps with capacities under 65,000 Btu per hour may well have significant energy savings potential and economic benefits. According to the Screening Analysis, adopting the efficiency levels corresponding to the lowest average life-cycle cost for all four of these product categories would result in estimated cost-effective nationwide cumulative energy savings of as much as 1.9 quadrillion Btu between 2004 and 2030, leading the Department to believe that further evaluation could reasonably be expected to uncover clear and convincing evidence supporting a more stringent standard. However, these products were not addressed by ASHRAE in revising ASHRAE/IESNA Standard 90.1, so DOE has decided not to take any action at this time to adopt a standard with respect to them. Based on the results of the Screening Analysis, DOE encourages ASHRAE to consider adopting an addendum to ASHRAE/IESNA Standard 90.1–1999 and will support ASHRAE in its future deliberations concerning these products in conjunction with ongoing development of NAECA standards for similar, but single phase, residential equipment. Should ASHRAE amend the efficiency standards for these air conditioners or heat pumps in the future, DOE will then act on such amendments as required by EPCA. The four categories of 3-phase air conditioners and heat pumps with capacities under 65,000 Btu per hour are:

- 3-phase Single Package Air Source Air Conditioners, <65 kBtu/h;
- 3-phase Split Air Source Air Conditioners, <65 kBtu/h;
- 3-phase Single Package Air Source Heat Pumps, <65 kBtu/h; and
- 3-phase Split Air Source Heat Pumps, <65 kBtu/h.

For seven of the eight remaining product categories analyzed, ASHRAE amended the efficiency standards contained in ASHRAE/IESNA Standard 90.1, but the Screening Analysis indicates that it is at least reasonably likely that significant, cost-effective energy savings would result from even more stringent standards. Therefore, DOE believes that the clear and convincing evidence required by EPCA may well be revealed by further analysis. These products are the following:

- Central air-source air conditioners, 135 kBtu/h–240 kBtu/h;
- Central air-source heat pumps, 135 kBtu/h–240 kBtu/h;
- Packaged terminal air conditioners;
- Packaged terminal heat pumps;
- Small gas-fired steam and hot water boilers, 0.3 MMBtu/h–2.5 MMBtu/h;
- Large gas-fired steam and hot water boilers, >2.5 MMBtu/h; and
- Tankless Gas Instantaneous Water Heaters.

Although the Screening Analysis did not identify a potential for cost-effective energy savings for central air-cooled air conditioners and air-source heat pumps between 65 kBtu/h and 135 kBtu/h, the Department received public comments that included data, derived from sale price surveys, supporting the contention that higher efficiencies could be achieved at lower cost than indicated in the Screening Analysis for these products. Based on the data we received, the Department believes that evidence to support more stringent standards is sufficiently likely to be uncovered by further study to warrant a more thorough evaluation, with resources allocated within the Department's priority-setting framework, to determine whether higher standards are justified under the terms of EPCA for these products. DOE also intends to propose consideration of an addendum to ASHRAE/IESNA Standard 90.1–1999.

For one product category, electric water heaters, the new efficiency level in ASHRAE/IESNA Standard 90.1–1999 would increase energy consumption relative to the standard in EPCA. Under these circumstances, DOE cannot adopt the new level, since EPCA stipulates that the standards it contains cannot be relaxed. Therefore, DOE is not adopting the requirement in ASHRAE/IESNA Standard 90.1–1999 for this product, and the original standard remains in force.

Eighteen commercial products covered by Section 342(a) of EPCA were not analyzed in the Screening Analysis. These products, for which performance characteristics were not analyzed in detail, fall into groups as follows:

- Heating coefficients of performance (COP) and heating seasonal performance factors (HSPF) for all heat pump product categories;
- Efficiencies of water-cooled air conditioners and water-source heat pumps with capacities between 135 kBtu/h and 240 kBtu/h;
- Evaporatively cooled air-conditioning products;
- Oil-fired warm air furnaces, storage and instantaneous water heaters, and packaged boilers; and
- Unfired hot water storage tanks

DOE believes that the water-cooled and evaporatively cooled air-conditioning products, oil-fired warm air furnaces and water heaters, and unfired hot water storage tanks have small markets and are therefore unlikely to represent significant energy savings as required to justify more stringent standards under EPCA, so we are adopting ASHRAE/IESNA Standard 90.1–1999 standards for these products in today's rule. Since the heating COP is closely related to the cooling efficiency for heat pumps, DOE is not adopting at this point the heating COP levels contained in ASHRAE/IESNA Standard 90.1–1999 for: (1) Three-phase heat pumps with capacities under 65 thousand Btu per hour, which ASHRAE did not address in formulating Standard 90.1–1999; (2) central air-source heat pumps with capacities between 65 thousand and 240 thousand Btu per hour, which would be the subject of further analysis with respect to cooling as a result of the Screening Analysis and public comments; and (3) packaged terminal heat pumps, which also would be the subject of further analysis of their cooling performance.

DOE recognizes that ASHRAE did not evaluate the efficiency levels for oil-fired packaged boilers explicitly, and the published values in ASHRAE/IESNA Standard 90.1–1999 were tied to the corresponding efficiencies for gas-fired packaged boilers. Since DOE intends to evaluate gas-fired packaged boilers as a result of the Screening Analysis, we plan to wait for that evaluation to be complete before adopting efficiency standards for the equivalent oil-fired products. Finally, ASHRAE/IESNA Standard 90.1–1999 provides, in effect, that its boiler efficiency standards apply only to low pressure boilers. In another rulemaking, DOE is addressing the question of whether EPCA efficiency requirements apply also to high pressure boilers. (See 65 FR 48838, 48843, Aug. 9, 2000). We intend to address in that proceeding the impact, if any, of ASHRAE/IESNA Standard 90.1–1999 on efficiency standards under EPCA for high pressure boilers.

In sum, today's rule adopts ASHRAE/IESNA Standard 90.1–1999 standard levels as uniform national standards for 18 product categories. These product categories appear in Table 5, along with the Department's intentions with respect to an additional 16 products, for which DOE is not adopting new efficiency levels at the present time. For the latter products, the levels prescribed in EPCA remain unaltered at present.

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Table 5. DOE Actions

Product Category	Action
Central Air Source AC 135 - 240 kBtu/h	Evaluate Further/Encourage ASHRAE/IESNA Addendum
Central Air Source HP 135 - 240 kBtu/h	
Central Air Source AC 65 - 135 kBtu/h	
Central Air Source HP 65 - 135 kBtu/h	
Central Water Cooled AC 135 - 240 kBtu/h	Adopt ASHRAE/IESNA Standard 90.1-1999
Central Water Source HP 135 - 240 kBtu/h	
Central Water Cooled AC 65 - 135 kBtu/h	
Central Water Source HP 65 - 135 kBtu/h	
Central Water Cooled AC <65 kBtu/h	
Central, Water Source HP 17 - 65 kBtu/h	
Central Water Source HP <17 kBtu/h	
Packaged Terminal Air Conditioners	Evaluate Further/Encourage ASHRAE/IESNA Addendum
Packaged Terminal Heat Pumps	
3-Phase Single Package Air Source AC <65 kBtu/h	Encourage ASHRAE/IESNA Addendum
3-Phase Split Air Source AC <65 kBtu/h	
3-Phase Single Package Air Source HP <65 kBtu/h	
3-Phase Split Air Source HP <65 kBtu/h	
Evaporatively Cooled AC Products	Adopt ASHRAE/IESNA Standard 90.1-1999
Gas-Fired Warm Air Furnaces ≥ 225 kBtu/h	
Oil-Fired Warm Air Furnaces ≥ 225 kBtu/h	
Large Gas-Fired Boilers >2.5 MMBtu/h	Evaluate Further/Encourage ASHRAE/IESNA Addendum
Large Oil-Fired Boilers >2.5 MMBtu/h	Evaluate Further (with Gas-Fired Boilers)
Small Gas-Fired Boilers 0.3 - 2.5 MMBtu/h	Evaluate Further/Encourage ASHRAE/IESNA Addendum
Small Oil-Fired Boilers, 0.3 - 2.5 MMBtu/h	Evaluate Further (with Gas-Fired Boilers)
Gas Storage Water Heaters >155 kBtu/h	Adopt ASHRAE/IESNA Standard 90.1-1999
Oil-Fired Storage Water Heaters >155 kBtu/h	
Gas Storage Water Heaters ≤ 155 kBtu/h	
Oil-Fired Storage Water Heaters ≤ 155 kBtu/h	
Tankless Gas-Fired Instantaneous Water Heaters	Evaluate Further/Encourage ASHRAE/IESNA Addendum
Tankless Oil-Fired Instantaneous Water Heaters	Adopt ASHRAE/IESNA Standard 90.1-1999
Gas-Fired Instantaneous Water Heaters with Tanks	
Oil-Fired Instantaneous Water Heaters with Tanks	
Unfired Hot Water Storage Tanks	
Electric Water Heaters	Reject ASHRAE/IESNA Standard 90.1-1999

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III. Procedural Requirements

A. Review Under the National Environmental Policy Act of 1969

EPCA prescribes energy efficiency standards for certain commercial products and stipulates that if ASHRAE/IESNA Standard 90.1 is amended, the Secretary must adopt new efficiency requirements in ASHRAE/IESNA Standard 90.1 for covered products, unless (s)he determines that certain conditions for requiring more stringent standards are met. Where these conditions are not met, the Secretary has no discretion to adopt a higher standard. In today's rule, we are adopting standards for a variety of commercial products included in ASHRAE/IESNA Standard 90.1–1999, as published in October of 1999, as uniform national standards. Under the terms of EPCA, these standards are at the lowest levels permitted by law.

We have reviewed today's rule under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the regulations of the Council on Environmental Quality, 40 CFR parts 1500–1508, the Department's regulations for compliance with NEPA, 10 CFR Part 1021, and the Secretarial Policy on the National Environmental Policy Act (June 1994). Implementation of today's rule would not result in negative environmental impacts. We have therefore determined that today's rule is covered under the Categorical Exclusion found at paragraph A6 of appendix A to subpart D of the Department's NEPA Regulations, which applies to rulemakings that are strictly procedural. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

B. Review Under Executive Order 12866, ''Regulatory Planning and Review''

Today's rule has been determined not to be a ''significant regulatory action,'' as defined in section 3(f) of Executive Order 12866, ''Regulatory Planning and Review'' 58 FR 51735 (October 4, 1993). Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, 5 U.S.C. 603, requires the preparation of an initial regulatory flexibility analysis for every rule which the agency must propose for public comment, by law, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. A regulatory flexibility analysis examines the impact of the rule on small entities and considers alternative ways of reducing negative impacts.

The Regulatory Flexibility Act does not apply in this case. First, today's rule need not have been proposed for comment. Second, even if the rule were required to be proposed for comment, no less stringent standard is permitted under the statute, so any impact on small business is due to EPCA and not to today's rule.

D. Review Under Executive Order 13132, ''Federalism''

Executive Order 13132 (64 FR 43255, August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. The rule published today will primarily codify energy efficiency standards at the minimum levels allowed by EPCA and will not regulate the states. We have determined that today's rule does 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. No further action is required by Executive Order 13132.

E. Review Under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights''

We have determined under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 52 FR 8859 (March 18, 1988), that this regulation would not result in any takings which might require compensation under the Fifth Amendment to the United States Constitution.

F. Review Under the Paperwork Reduction Act

Today's rule will codify energy efficiency standards for certain commercial products and will not require any additional reports or record-keeping. Accordingly, this action was not subject to review under the Paperwork Reduction Act.

G. Review Under Executive Order 12988, ''Civil Justice Reform''

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

We reviewed today's rule under the standards of Section 3 of the Executive Order and determined that, to the extent permitted by law, it meets the requirements of those standards.

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

Under Section 301 of the Department of Energy Organization Act (Pub. L. 95–91), the Department of Energy must comply with Section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977 (FEAA). 15 U.S.C. 788. Section 32(c) provides that the Secretary may not incorporate commercial standards within any rule nor prescribe any rule specifically authorizing or requiring commercial standards, unless (s)he has consulted with the Attorney General and the Chairman of the Federal Trade Commission concerning the impact of the standards on competition, and neither official recommends against incorporating or using them.

This rule incorporates efficiency levels specified by a commercial standard, ASHRAE/IESNA Standard 90.1–1999, for certain commercial products. However, since EPCA specifically directs the adoption of these

levels at a minimum, Section 32 of the FEAA does not apply to the incorporation of these commercial standards in today's rule.

I. Review Under Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 requires each Federal agency, unless otherwise prohibited by law, to assess the effects of Federal regulatory actions on state, local and tribal governments and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law). 2 U.S.C. 1531. The statute also requires a written statement, before promulgating any general notice of proposed rulemaking or any final rule for which a general notice of proposed rulemaking was published, if the rule in question contains a mandate that may result in aggregate expenditures of over $100,000,000 by state, local and tribal governments and the private sector. 2 U.S.C. 1532 (a).

In adopting the efficiency standards in today's rule, DOE is incorporating requirements specifically set forth in EPCA. Furthermore, no notice of proposed rulemaking was required, nor has one been published. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act do not apply to this action.

J. Review Under the Plain Language Directives

The President's Memorandum, ''Plain Language in Government Writing,'' 63 FR 31885 (June 10, 1998) directs each Federal agency to write all published rulemaking documents in plain language. The Memorandum includes general guidance on what constitutes ''plain language.'' Plain language requirements will vary from one document to another, depending on the intended audience, but all plain language documents should be logically organized and clearly written.

We have written this final rule to be easy to understand by organizing it to suit the needs of stakeholders better, by avoiding unnecessary technical jargon, and by following Departmental instructions and guidelines related to plain language. We conclude that, to the extent practicable, the language of this final rule is consistent with the President's Memorandum on ''Plain Language in Government Writing.''

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

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule or policy that may affect family well-being. Today's rule is not a proposed rule, nor will the rule have any impact on the autonomy or the integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

L. Review Under the Small Business and Regulatory Enforcement Fairness Act

Consistent with Subtitle E of the Small Business and Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801–808, DOE will submit to Congress a report regarding the issuance of today's final rule before the effective date set forth at the outset of this notice. The report will state that it has been determined that this rule is not a ''major rule'' as defined by 5 U.S.C. 804 (2).

List of Subjects in 10 CFR Part 431

Administrative practice and procedure, Commercial and Industrial Equipment, Energy conservation,

Issued in Washington, DC, on January 4, 2001.

Dan J. Leiter,

Principal Deputy Assistant Secretary, Energy Efficiency and Renewable Energy.

For the reasons set forth in the preamble, Title 10, Part 431 of the Code of Federal Regulations is amended as set forth below:

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

1. The authority citation for Part 431 continues to read as follows:

Authority: 42 U.S.C. 6311–6316.

2. Subpart Q is added to read as follows:

Subpart Q—Amended Energy Conservation Standards for Certain Commercial Equipment, and Effective Dates

Sec.
431.701 Purpose and scope.
431.702 Commercial warm air furnaces.
431.703 Small and large commercial package air conditioning and heating equipment.
431.704 Commercial water heaters and unfired hot water storage tanks.

Subpart Q—Amended Energy Conservation Standards for Certain Commercial Equipment, and Effective Dates

§ 431.701 Purpose and scope.

This subpart sets forth the minimum efficiency levels for commercial equipment, contained in ASHRAE/IES Standard 90.1–1999, that the Department of Energy has adopted as national standards, effective in 2003 or 2004 as specified in §§ 431.701 through 431.704. On their effective dates, these levels will amend and replace some of the efficiency levels required for certain commercial equipment by Section 342(a) of EPCA. The Department has not adopted the efficiency levels specified in ASHRAE/IES Standard 90.1–1999 for products not identified in this subpart, and the levels specified in Section 342(a) of EPCA for those products will remain in force unless and until they are amended. The Department adopted the efficiency levels in this subpart pursuant to Section 342(a)(6) of EPCA, which addresses the establishment of national standards at minimum levels specified in amendments to ASHRAE/IES Standard 90.1, in place of the efficiency levels required in Section 342(a) of EPCA.

§ 431.702 Commercial warm air furnaces.

Each commercial warm air furnace manufactured after October 29, 2003 must meet the following energy efficiency standard levels:

(a) For a gas-fired commercial warm air furnace with capacity of 225,000 Btu per hour or more, the thermal efficiency at the maximum rated capacity must be not less than 80 percent.

(b) For an oil-fired commercial warm air furnace with capacity of 225,000 Btu per hour or more, the thermal efficiency at the maximum rated capacity must be not less than 81 percent.

§ 431.703 Small and large commercial package air conditioning and heating equipment.

Each commercial water- or evaporatively-cooled air conditioner and water-source heat pump manufactured after October 29, 2003 (except for large commercial package air-conditioning and heating equipment, for which the effective date is October 29, 2004) must meet the applicable minimum energy efficiency standard level(s) for heating and cooling set forth in Tables 1 and 2 of this section.

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Table 1 - Minimum Cooling Efficiency Levels

Product	Category	Cooling capacity	Subcategory	Required Minimum Efficiency Level [1]	Effective Date
Small Commercial Packaged Air Conditioning and Heating Equipment	Water-Cooled, Evaporatively Cooled, and Water-Source	<17,000 Btu/h	Air Conditioners	EER: 12.1	10/29/2003
			Heat Pumps	EER: 11.2	10/29/2003
		≥ 17,000 Btu/h and <65,000 Btu/h	Air Conditioners	EER: 12.1	10/29/2003
			Heat Pumps	EER: 12.0	10/29/2003
		≥ 65,000 Btu/h and <135,000 Btu/h	Air Conditioners	EER: 11.5[2]	10/29/2003
			Heat Pumps	EER: 12.0	10/29/2003
Large Commercial Packaged Air Conditioning and Heating Equipment	Water-Cooled, and Evaporatively Cooled	≥ 135,000 Btu/h and <240,000 Btu/h	All	EER: 11.0	10/29/2004

Table 2 - Minimum Heating Efficiency Levels

Product	Category	Cooling Capacity	Subcategory	Required Minimum Efficiency Level[3]	Effective Date
Small Commercial Packaged Air Conditioning and Heating Equipment	Water-Source	<135,000 Btu/h	All	COP: 4.2	10/29/2003

[1] All EER values must be rated at 95°F outdoor dry-bulb temperature for air-cooled products and evaporatively-cooled products and at 85°F entering water temperature for water-source and water-cooled products.

[2] Deduct 0.2 from the required EER for units with heating sections other than electric resistance heat.

[3] All COP values must be rated at 70°F entering water temperature for water-source products.

§431.704 Commercial water heaters and unfired hot water storage tanks.

Each commercial storage water heater, instantaneous water heater, and hot water supply boiler manufactured after October 29, 2003 must meet the applicable energy conservation standard level(s) as follows:

Equipment Type	Category	Size or Rating	Energy Efficiency Descriptor	Required Energy Efficiency Level[1]	Effective Date
Gas Storage Water Heaters	< 4,000 Btu/hr/gal	≤ 155,000 Btu/hr	Min. Thermal Efficiency	80%	10/29/2003
			Max. Standby Loss[2]	$Q/800 + 110\sqrt{V_r}$ (Btu/hr)	10/29/2003
		> 155,000 Btu/hr	Min. Thermal Efficiency	80%	10/29/2003
			Max. Standby Loss[2]	$Q/800 + 110\sqrt{V_r}$ (Btu/hr)	10/29/2003
Gas Instantaneous Water Heaters	≥ 4,000 Btu/hr/gal	≥ 10 gal	Min. Thermal Efficiency	80%	10/29/2003
			Max. Standby Loss[2]	$Q/800 + 110\sqrt{V_r}$ (Btu/hr)	10/29/2003
Oil Storage Water Heaters	< 4,000 Btu/hr/gal	≤ 155,000 Btu/hr	Min. Thermal Efficiency	78%	10/29/2003
			Max. Standby Loss[2]	$Q/800 + 110\sqrt{V_r}$ (Btu/hr)	10/29/2003
		> 155,000 Btu/hr	Min. Thermal Efficiency	78%	10/29/2003
			Max. Standby Loss[2]	$Q/800 + 110\sqrt{V_r}$ (Btu/hr)	10/29/2003
Oil Instantaneous Water Heaters	≥ 4,000 Btu/hr/gal	< 10 gal	Min. Thermal Efficiency	80%	10/29/2003
		≥ 10 gal	Min. Thermal Efficiency	78%	10/29/2003
			Max. Standby Loss[2]	$Q/800 + 110\sqrt{V_r}$ (Btu/hr)	10/29/2003
Gas Hot Water Supply Boilers	≥ 4,000 Btu/hr/gal	≥ 10 gal	Min. Thermal Efficiency	80%	10/29/2003
			Max. Standby Loss[2]	$Q/800 + 110\sqrt{V_r}$ (Btu/hr)	10/29/2003
Oil Hot Water Supply Boilers	≥ 4,000 Btu/hr/gal	≥ 10 gal	Min. Thermal Efficiency	78%	10/29/2003
			Max. Standby Loss[2]	$Q/800 + 110\sqrt{V_r}$ (Btu/hr)	10/29/2003
Unfired Hot Water Storage Tanks	All	All	Minimum Insulation Requirement	R-12.5	10/29/2003

[1] Standby loss is based on a 70° temperature difference between stored water and ambient requirements. In the Standby Loss equations, V_r is the rated volume in gallons, and Q is the nameplate input rate in Btu/h.

[2] Water heaters and hot water supply boilers having more than 140 gallons of storage capacity are not required meet the standby loss requirement if the tank surface is thermally insulated to R-12.5, if a standing pilot light is not installed, and gas- or oil-fired storage water heaters have a flue damper or fan-assisted combustion.

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December 26, 2000

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January 12, 2001

Part XI

Department of Health and Human Services

Health Care Financing Administration

42 CFR Parts 413 and 422

Medicare Program; Payment for Nursing and Allied Health Education; Final Rule

Medicare Program; Payment for Clinical Psychology Training Programs; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Parts 413 and 422

[HCFA–1685–F, previously BPD–685–F]

RIN 0938–AE79

Medicare Program; Payment for Nursing and Allied Health Education

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final rule.

SUMMARY: This final rule sets forth in regulations Medicare policy for the payment of costs of approved nursing and allied health education programs. In addition, the rule clarifies the payment methodology for certified registered nurse anesthetist education programs.

In general, the final rule clarifies and restates payment policies previously established in the Provider Reimbursement Manual and other documents, but never specifically addressed in regulations. The final rule carries out a directive made in the Omnibus Budget Reconciliation Act of 1989 and addresses changes required by the Omnibus Budget Reconciliation Act of 1990.

DATES: These regulations are effective on March 13, 2001.

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FOR FURTHER INFORMATION CONTACT: Rebecca Hirshorn, (410) 786–3411.

SUPPLEMENTARY INFORMATION: The sections contained within this document have been constructed according to the framework outlined in the table of contents that follows. We have summarized pertinent material from our proposed rule followed by public comments and our responses, along with explanations of the provisions of the final rule. Other tools to assist the reader in navigating the document include a crosswalk of reorganized text for § 413.85 and a list of frequently used acronyms.

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Alphabetical List of Acronyms Appearing in the Final Rule

AMA American Medical Association
APTA American Physical Therapy Association
CAHEA Committee on Allied Health Education and Accreditation
CAAHEP Commission on Accreditation of Allied Health Education Programs
CRNA Certified Registered Nurse Anesthetist
EMT–P Emergency Medical Technician and Paramedic Programs
GME Graduate Medical Education
HHA Home Health Agency
MSA Metropolitan Statistical Area
NAACLS National Accrediting Agency for Clinical Laboratory Sciences
SNF Skilled Nursing Facility
OBRA Omnibus Budget Reconciliation Act
OMB Office of Management and Budget
RFA Regulatory Flexibility Act
WAIS Wide Area Information Server

I. Background

In 1992, we issued a proposed rule in the **Federal Register** (57 FR 43659) that addressed Medicare payment for costs of approved nursing and allied health education programs, including the requirements imposed by the provisions of the Omnibus Budget Reconciliation Act of 1989 (Public Law 101–239) and the Omnibus Budget Reconciliation Act of 1990 (Public Law 101–508).

- Since the inception of Medicare in 1965, we have recognized an obligation to share in the costs of educational activities sponsored by participating providers until the community at large chose to bear them in some other manner. Medicare has historically reimbursed providers for the program's share of costs associated with approved educational activities. The activities may be broken down into three general categories, each with distinct payment policies:
- Approved graduate medical education (GME) programs in medicine, osteopathy, dentistry, and podiatry. Medicare makes direct and indirect GME payment to hospitals for the training of interns and residents. The existing rules for direct GME payment policy are found at 42 CFR 413.86; the rules for indirect GME payment policy are found at 42 CFR 412.105.
- Approved nursing and allied health (paramedical) education programs operated by the provider. (In this document, we use the term ''allied health'' rather than ''paramedical,'' since Medicare currently allows the costs of approved training programs for medical records librarians, medical technologists, and other disciplines for which the term ''allied health'' is more appropriate. ''Allied health'' is the term most commonly used to refer to these health care profession specialties.) Costs for these programs are excluded from inpatient operating cost definitions, payment rate calculations under the prospective payment system, and target amount calculations subject to rate-of-increase ceilings for hospitals and hospital units excluded from the prospective payment system. These costs are separately identified and ''passed through'' (that is, paid separately on a reasonable cost basis).
- Other educational programs and activities. All other costs that can be categorized as educational programs and activities are considered to be part of normal operating costs and are covered on a per-case basis for hospitals subject to the inpatient prospective payment system, or on a reasonable cost basis

subject to the rate-of-increase limits for hospitals and hospital units excluded from the prospective payment system.

A. Legislative Summary

The following milestones offer a brief historical perspective of the regulations, Congressional actions, court decisions, and manual revisions that have led to our current policy concerning the costs of nursing and allied health education:

• The first regulation to address HCFA's obligation to share in the costs of nursing and allied health education was published in the **Federal Register** on November 22, 1966 (31 FR 14814) at 20 CFR 405.421 (redesignated as 42 CFR 405.421 on September 30, 1977, and further redesignated as 42 CFR 413.85 on September 30, 1986). In that regulation, the net cost of approved educational programs was defined as ''the cost of approved educational activities (including stipends of trainees, compensation of teachers, and other costs), less any reimbursement from grants, tuition, and specific donations.'' The regulation also defined approved educational activities as ''formally organized or planned programs of study usually engaged in by providers in order to enhance the quality of patient care in an institution'' (20 CFR 405.421(b)(1)).

• The types of costs that were allowable as costs of approved educational activities were set forth in both the regulations and the Provider Reimbursement Manual (Chapter 4). Both the regulations and the manual repeated the Congressional Committee Report language from the Social Security Amendments of 1965 (Public Law 89–97) that Medicare would share in the costs of educational activities until communities bore them in some other way (S. Rep. No. 404, 89th Cong., 1st Sess., 36 (1965) and H.R. Rept. No. 213, 89th Cong., 1st Sess., 32 (1965)). In addition, both sources clearly stated that it was not intended that Medicare should pay for increased costs resulting from a redistribution of costs from educational institutions to providers (20 CFR 405.421(c) and section 404.2 of the manual).

• The Social Security Amendments of 1972 (Public Law 92–603) authorized the Secretary to set prospective limits on the costs reimbursed by Medicare. At that time, the costs of approved educational activities were not excluded from costs subject to the limits. Instead, the regulations allowed a provider to apply for an exception to the limits for costs attributable to the operation of an approved medical education program (20 CFR 405.460(f)(2)).

• Section 404.2 of the Provider Reimbursement Manual was revised in November 1975 to specify that in order for costs to be allowable for approved educational activities, an approved nursing or allied health education program had to be operated by a provider.

• Over the next several years, attempts by intermediaries to apply this policy were consistently overruled by the Provider Reimbursement Review Board. These Board decisions were consistently reversed by the Administrator of HCFA. Several of these cases were then litigated in the Federal courts, and in each case that went to a decision on the merits, the courts upheld the Board.

• The most significant of these cases was generally considered to be *St. John's Hickey Memorial Hospital, Inc.* v. *Califano,* 599 F.2d 803 (7th Cir. 1979). In that case, the U.S. Court of Appeals for the Seventh Circuit sustained the decision of the Provider Reimbursement Review Board that § 405.421(c), as it existed at that time, did not require the provider to be the operator of the associate degree nursing program, but only required the provider to engage in such activity. On October 1, 1979, Medicare policy was amended to correspond with the ruling of the court in the HCFA Administrator's decision on Provider Reimbursement Review Board Decision No. 79–D50.

• A final **Federal Register** notice (44 FR 31806) issued on June 1, 1979, established the schedule of limits on hospital inpatient general routine operating costs, effective for cost reporting periods beginning on or after July 1, 1979. In that notice, the costs of ''approved medical education programs'' were excluded from the costs subject to the limits.

• The Tax Equity and Fiscal Responsibility Act of 1982 (Public Law 97–248) was enacted on September 3, 1982. Section 101 of that law replaced the existing cost limits with an expanded overall limit on hospital inpatient operating costs and a limit on the rate of increase of these costs for cost reporting periods beginning on or after October 1, 1982. Section 1886(a)(2)(A) of the Social Security Act (the Act), as added by section 101 of Public Law 97–248, requires the Secretary to provide for such exemptions from, and exceptions and adjustments to, the hospital cost limits as the Secretary deems appropriate to take into account ''medical and paramedical education costs'' in implementing these limits.

• HCFA revised Chapter 4 of the Provider Reimbursement Manual in January 1983 to reflect policy changes resulting from the *St. John's Hickey* decision. Revised § 404.2 specified that provider costs incurred for clinical training associated with an approved program operated by an entity other than a provider could be allowable. Further, it specified that costs incurred by a provider associated with the classroom portion of the program could be allowable if they did not constitute a redistribution of nonprovider costs to the provider, the provider received a benefit for the support furnished, and the cost of the provider's support was less than the cost the provider would incur in operating its own program.

• The Social Security Amendments of 1983 (Public Law 98–21) provided for Medicare payment for the operating costs of hospital inpatient services under a prospective payment system rather than on a reasonable cost basis. Section 601(a)(2) of that law amended section 1886(a)(4) of the Act to specify that costs of approved educational activities were excluded from the definition of inpatient hospital operating costs under the prospective payment system and the target amount for hospitals excluded from that system. Instead, these costs were to be separately identified and ''passed through.''

• In the September 1, 1983 interim final rule that implemented the prospective payment system (48 FR 39752), § 405.421(d) was amended to provide that costs relating to six types of activities were outside the scope of the pass-through provision. Included among those costs were those related to ''other activities which do not involve the actual operation or support (except through tuition or similar payments) of an approved education program.'' Thus, effective with cost reporting periods beginning on or after October 1, 1983, the costs of only those programs operated directly by the hospital were excluded from the prospective payment system and the target amount for excluded hospitals and paid on a reasonable cost basis.

• The January 3, 1984 prospective payment system final rule (49 FR 234) clarified that only the costs of programs operated directly by providers were excluded from the prospective payment system and eligible for payment on a pass-through basis and that the cost of clinical training for students enrolled in programs operated outside the provider were normal operating costs.

B. The Omnibus Budget Reconciliation Act of 1989

The Omnibus Budget Reconciliation Act of 1989 (Public Law 101–239)

contained three provisions concerning nursing and allied health education. Section 6205(a) created a temporary category of ''hospital-based nursing schools.'' Costs incurred by hospitals for training nursing students in these schools are to be paid on the basis of reasonable cost as though the hospital met the criteria set forth at § 413.85, ''Cost of educational activities.'' This provision was effective for cost reporting periods beginning on or after December 19, 1989, and before the issuance of a final rule as required by section 6205(b)(2) of Public Law 101–239. We implemented this provision in a final rule with comment period published in the **Federal Register** on April 20, 1990 (55 FR 15159) and made further revisions in the final rule that implemented changes to the hospital inpatient prospective payment system for fiscal year 1991, which was published on September 4, 1990 (55 FR 35998).

Under this provision, a hospital may claim as pass-through costs the costs incurred in training students from a nursing school if all of the following criteria are met:

- The hospital incurs at least 50 percent of the net costs, that is, the costs after deduction of tuition revenues incurred for classroom and clinical training provided to students enrolled in an approved nursing education program at the hospital-based nursing school.
- At least 50 percent of the board of directors of either the hospital or the nursing school, whichever board has the fewer members, are also members of the board of the other entity. If application of this criterion requires either board to have more than four common board members, the hospital will meet this criterion by having at least four common board members.
- All instruction is provided at the hospital, or on the immediate grounds.
- The preceding three criteria were met on June 15, 1989, and have been met continuously since that date.

Section 6205(b)(1) of Public Law 101–239 imposed a moratorium for the period on or after December 19, 1989, and before October 1, 1990, on the recoupment of overpayments attributable to a determination by a provider's intermediary that costs claimed by a provider for the operation of a school of nursing or allied health are not eligible for payment on a reasonable cost basis. The basis for this determination is generally that a neighboring or related college or university, not the hospital, is the operator of the program. We announced the provisions of the moratorium in a program memorandum issued to our fiscal intermediaries (Transmittal No. A–90–9, June 1990).

Section 6205(b)(2) of Public Law 101–239 directed the Secretary to publish regulations clarifying the rules governing which costs of approved educational activities are allowable and when those costs are eligible for pass-through under the prospective payment system, including—

- The relationship required between an approved nursing or allied health education program and a hospital in order for the program's costs to be attributed to the hospital;
- The types of costs related to nursing or allied health education programs that are allowable by Medicare;
- The distinction between costs of approved educational activities as recognized under section 1886(a)(4) of the Act and educational costs treated as operating costs of inpatient hospital services; and
- The treatment of other funding sources for the program.

C. The Omnibus Budget Reconciliation Act of 1990

On November 5, 1990, before the issuance of the proposed regulations required by section 6205(b)(2) of Public Law 101–239, Congress enacted the Omnibus Budget Reconciliation Act of 1990 (Public Law 101–508). Section 4004(b) of Public Law 101–508 contained several provisions addressing Medicare payment for nursing and allied health education costs on a reasonable cost basis under Medicare Part A. Section 4159(b) of Public Law 101–508 set forth parallel provisions concerning payment on a reasonable cost basis under Medicare Part B for these costs. (The language in section 4159(b) is identical to the language in section 4004(b), except that section 4004(b) applies to Part A and section 4159(b) applies to Part B. For ease of reference in this document, we refer solely to the provisions of section 4004(b); however, each of these references is deemed to be a reference to the corresponding provision of section 4159(b)).

Section 4004(b)(1) provides that, effective with cost reporting periods beginning on or after October 1, 1990, if certain conditions are met, the costs incurred by a hospital (or by an educational institution related to the hospital by common ownership or control) for clinical training (as defined by the Secretary) conducted on the premises of the hospital under an approved nursing or allied health education program that is not operated by the hospital are treated as pass-through costs and paid on the basis of reasonable cost. Section 4004(b)(2) sets forth the following conditions that a hospital must meet to receive payment on a reasonable cost basis under this provision:

- The hospital must have claimed and have been paid for clinical training costs as described in section 4004(b)(1) during its latest cost reporting period that ended on or before October 1, 1989.
- The proportion of the hospital's total allowable costs attributable to the clinical training costs of the approved program and allowable under section 4004(b)(1) during a cost reporting period does not exceed the proportion of total allowable costs that were attributable to the clinical training costs during the hospital's latest cost reporting period that ended on or before October 1, 1989.
- The hospital receives a benefit for the support it furnishes to the education program through the provision of clinical services by nursing and allied health students participating in the program.
- The costs incurred by the hospital for the program do not exceed the costs that would have been incurred by the hospital if it had operated the program.

We published a proposed rule in the **Federal Register** on September 22, 1992, which set forth proposed regulations to satisfy the requirements of section 6205(b)(2) of Public Law 101–239, as well as the provisions of sections 4004(b)(1) and (2) of Public Law 101–508 (57 FR 43659).

In addition to the new payment provision under sections 4004(b)(1) and (b)(2) of Public Law 101–508, section 4004(b)(3) prohibited recoupment of Medicare overpayments made to hospitals for pass-through costs related to approved nursing and allied health education programs for cost reporting periods beginning on or after October 1, 1983 and before October 1, 1990. This section also required us to refund previously recouped overpayments for these costs. We issued a program memorandum (Transmittal No. A–91–3, May 1991) and amended section 404.2 of the Provider Reimbursement Manual (Transmittal No. 368, September 1992) to instruct our fiscal intermediaries on implementing the provisions of section 4004(b)(3) of Public Law 101–508.

II. Provisions of the Proposed Rule and Responses to Public Comments

In accordance with the mandate of section 6205(b)(2) of Public Law 101–239, the September 22, 1992 proposed rule addressed the Medicare rules governing which costs of nursing and allied health educational programs are allowable and when these costs are

eligible for the pass-through payment to a hospital paid under the prospective payment system.

In general, we proposed to continue our existing policies with respect to payment to providers for provider-operated approved nursing and allied health education programs on a reasonable cost basis. That is, we proposed to retain the provisions in existing regulations under § 413.85 that Medicare payments be determined on a reasonable cost basis for a provider's net costs of approved nursing and allied health educational programs and proposed the conditions under which we would make these payments. We proposed to amend § 413.85 to explicitly set forth criteria that define approved nursing and allied health educational programs considered provider-operated, and rules for determining the net costs of provider-operated nursing and allied health educational programs. We also proposed to allow reasonable cost payment for the clinical training costs of certain nonprovider-operated programs to comply with the requirements of section 4004(b) of Public Law 101–508, and addressed the conditions for payment for the net costs of approved certified registered nurse anesthetist (CRNA) educational programs. Finally, we proposed to clarify our policy on the nursing and allied health educational activities we consider as normal operating costs.

We received 31 timely items of correspondence from the public and other interested parties in response to the proposed rule. The specific comments and our responses are set forth below following each section describing the specific provisions of the proposed rule.

A. Determining Provider-Operated Programs

We proposed to revise § 413.85 (''Cost of educational activities.'') to clarify our policies on paying providers for the costs incurred for nursing and allied health education activities. We proposed to retain the general rule specified under existing § 413.85 that payment for a provider's net cost of approved educational activities is made on a reasonable cost basis. We also proposed to set forth at § 413.85(e) criteria we would use to identify programs operated by a provider. The proposed regulations reflected that, except as provided in section 4004(b) of Public Law 101–508, the key factor to be considered in determining whether the classroom instruction and clinical training costs of approved nursing and allied health educational programs are eligible to be passed through is the degree to which the provider controls all aspects of the program. For example, we proposed that if a clear separation of function exists, such as when a college or university directs and operates the classroom portion of the program and the provider furnishes only the setting for clinical training, then the educational program costs would not be eligible to be paid on a pass-through basis. In these cases, clinical training would flow from the part of the program conducted by the institution other than the provider. Thus, the majority of the training costs would be borne by the college or university and not by the provider. While the provider may incur some costs associated with its provision of clinical training to students enrolled in a nearby institution, the provider would also gain in return. For example, it would obtain the services of the trainee, often at no direct cost to itself.

In addition to the value of the services of students in an approved program, providers would receive a number of other benefits from participation in a nursing and allied health educational program operated by another entity. One benefit is the fact that a significant percentage of the graduates of these programs become employees of the provider at which they trained. This would allow the provider to avoid costs it would otherwise have to incur for recruitment.

We proposed that, for purposes of determining the operator of an approved nursing or allied health education program, the fact that a provider and a college or university are considered related organizations under § 413.17 (''Cost to related organizations.'') would *not* be sufficient to allow a university-operated program to be considered provider operated. As we explain in section II.C. of this preamble, our policy concerning related organizations was established to avoid program recognition of costs of a provider for goods or services furnished by a related organization in excess of the costs incurred by the related organization.

We proposed that all of the following criteria must be met to be considered the operator of a nursing or allied health education program:

- The provider must incur the costs associated with both the clinical training and classroom instruction portions of the programs, where the classroom instruction is a requirement for completion of the program. For example, the provider must incur the costs for books, supplies, and faculty salaries, where such costs are applicable.
- The provider must directly control the program curriculum, that is, the provider must determine the requirements to be met for graduation. In meeting this requirement, a provider may enter into an agreement with a college or university to provide the basic academic course requirements leading to a degree, diploma, or other certificate, while the provider is directly responsible for providing the courses relating to the theory and practice of the nursing or allied health profession that are required for the degree, diploma, or certificate awarded at completion of the program.
- The provider must control the administrative duties relating to the program. These duties include the collection of tuition (where applicable), maintaining payroll records of the teaching staff or students, or both (where applicable), and being responsible for the day-to-day operation of the entire training program.
- The provider must employ the faculty.
- The provider must provide and control both classroom instruction and clinical training, (where the classroom instruction is a requirement for the completion of the program), subject to the provision in the second criterion of provider-operated programs above that a provider may enter into an agreement with a college or university to provide the basic academic course requirements leading to a degree, diploma, or other certificate, while the provider is directly responsible for providing the courses relating to the theory and practice of the nursing or allied health profession that are required for the degree, diploma, or certificate awarded at completion of the program.

We note that proposed § 413.85(e)(2) (§ 413.85(f)(2) in this final rule) reflected a special rule that a provider that is licensed or accredited to (1) operate the program and (2) issue degrees, diplomas, or certificates to its students upon graduation is assumed, absent evidence to the contrary, to meet the criteria listed above and to be the operator of the program.

In certain situations, providers are entering into arrangements with colleges and universities that, in many cases, have involved provider representation on a joint committee with certain oversight responsibilities. Under these provider/college educational arrangements the provider might not have direct responsibility for the curriculum and control of day-to-day operation of the training programs. We proposed that unless the provider can demonstrate that it meets the requirements enumerated above, the

costs incurred by the provider in connection with such joint programs would not be paid as separate pass-through costs.

There are other situations, however, that involve sequential operation of a program by an educational institution and a provider. These situations frequently involve providers that are changing from offering a certificate or diploma program to offering an associate or baccalaureate degree. The provider may create a program leading to a degree in which instruction in general academic requirements is provided by a college or university and subsequent specialized classroom instruction and clinical training are given by the provider. We proposed that if the provider establishes and controls the curriculum and requirements for graduation, the provider would be considered to be the operator of the program for purposes of receiving pass-through payment under § 413.85. However, no costs incurred by the college may be claimed as provider costs.

As stated above, we proposed that a provider must provide and control both clinical training and classroom instruction in order to meet the criteria of provider-operated under proposed § 413.85(e). Since publication of the proposed rule, it has come to our attention that some nursing and allied health education specialties do not have classroom instruction components. We are therefore clarifying in this final rule that, in such instances, the provider must only provide and control the clinical training, subject to the other conditions specified in redesignated § 413.85(d)(1). Thus, the language at § 413.85(f)(1) of this final rule accounts for situations where the nursing and allied health program does not have a classroom instruction as part of the program. For example, at § 413.85(f)(1)(v), instead of indicating that the provider is required to provide both clinical training and classroom instruction as we had specified in the proposed rule, we now state that the provider must ''provide and control both classroom instruction and clinical training (where the classroom instruction is a requirement for the completion of the program).'' Where the nursing and allied health program has a classroom instruction component in addition to a clinical training component, the provider must provide and control both components in order to receive pass-through payment. In addition, as discussed below, we note that we are further clarifying in this final rule proposed § 413.85(e)(1)(v) in order to address a public comment on sequentially operated nursing and allied health education programs by specifying at § 413.85(f)(1)(v) of this final rule that this paragraph is subject to the parenthetical sentence in the second criterion of the provider-operated criteria (§ 413.85(f)(1)(ii) of this final rule) which states that a provider may enter into an agreement with a college or university to provide the basic academic course requirements leading to a degree, diploma, or other certificate, while the provider is directly responsible for providing all of the courses relating to the theory and practice of the nursing or allied health profession that are required for the degree, diploma, or certificate awarded at completion of the program.

In proposed § 413.85(c)(3) and (4), we proposed separate specific definitions of clinical training and classroom instruction costs to allow providers and intermediaries to differentiate between clinical training and classroom instruction. These definitions (as modified slightly for purely editorial changes in this final rule) are as follows:

- *Clinical training costs* involves costs associated with the acquisition and use of the skills of a nursing or allied health profession or trade in the actual environment in which these skills will be used by the student upon graduation. While clinical training may involve occasional or periodic meetings to discuss or analyze cases, critique performance, or discuss specific skills or techniques, it involves no classroom instruction.
- *Classroom instruction costs* are costs associated with the formal, didactic instruction on a specific topic or subject provided in a class that meets at regular, scheduled intervals over a specific time period (for example, semester or quarter) and for which a student receives a grade.

We received many comments on our proposed criteria for provider-operated programs. The majority of the commenters believed the criteria are too restrictive and would result in the exclusion of many nursing and allied health education programs from receiving pass-through payment.

Comment: The majority of those who commented on this provision were concerned that the criteria do not appear to allow reasonable cost payment to programs operated by both a provider and an educational institution. These arrangements, which have become common as the industry moves away from provider-operated education programs to those based at colleges and universities, would not meet the proposed criteria. The commenters indicated that providers have often been forced to create these arrangements because accrediting agencies would not approve programs operated solely under the control of the provider. They believed that, in some cases, HCFA has been providing payment under the pass-through for these programs based at educational institutions under the theory that the provider controls and wholly owns the subsidiary college. In other cases, hospitals have entered into joint programs with already established educational institutions. The commenters requested that the final rule clearly delineate which of these programs would be considered to be operated by the provider and, thus, eligible for the pass-through, and which would not be eligible.

One commenter stated that, although the proposed rule is intended to be a codification in regulations of current policy, we did not include a current list of hospital-based nursing programs that meet the criteria set forth in section 6205(b)(2) of Public Law 101–239. The commenter believed that, to be consistent, the final regulations need to provide that these programs meet the definition of provider-operated.

Response: Except as provided in OBRA 1990, we do not make pass-through payments to a hospital for the costs of a nursing and allied health education program not operated by a hospital because the costs are considered normal operating costs and the hospital receives payment for those costs through the inpatient prospective payment system payments. We believe that, in the case of programs that are not operated by a hospital, the majority of the training costs of the program are incurred by an entity (the college or university) other than the hospital; to the extent that a hospital incurs costs for a nonprovider-operated program, the inpatient PPS payment encompasses payment for those costs.

In addition, as indicated in the proposed rule, the hospital benefits in a number of ways from its participating in a nonprovider-operated educational program: the hospital obtains services of the trainee during the training; the hospital might receive payments from the college or university for the costs incurred by the hospital; and the hospital might save staffing costs, as well as recruiting costs (many of the trainees ultimately become employees of the hospital). Furthermore, the distinction between provider-operated programs and nonprovider-operated programs is consistent with the provisions of OBRA 1989 and OBRA 1990.

In the case where a hospital enters into a joint program with an educational

institution, the distinction between provider-operated and nonprovider-operated programs also reflects the community support principle, because the program has moved away from the provider-operated mode and into the community assumption of costs. The House and Senate Committee reports accompanying Public Law 89–97 reflect that Congress contemplated that Medicare would share the costs of educational activities *until* the community assumed the costs. If the university undertakes the classroom education of the students, including the collection of the tuition, the employment of the faculty, the control of the curriculum, and the awarding of the degree, the community has undertaken the responsibility for training nurses and allied health personnel and relieved the hospital of this cost. Again, to the extent that the hospital incurs costs for the nonprovider-operated program, the hospital receives payment for these costs through the inpatient PPS payments.

Concerning those hospitals that have established their own educational institution to meet accrediting standards, we believe that, in some cases, these providers can be eligible to receive payment for the classroom and clinical training of students in approved programs. If the provider demonstrates that the educational institution it has established is wholly within the provider's control and ownership and that the provider continues to incur the costs of both the classroom and clinical training portions of the program, the costs would continue to be paid on a reasonable cost basis. An independent college would not meet these criteria.

An example of a program that could be considered provider-operated would be one in which the hospital is the sole corporate member of the college, elects the board of trustees, has board members in common, employs the faculty and pays the salaries, controls the administration of the program and the curriculum, and provides the site for the clinical and classroom training on the premises of the hospital. We believe that, in these situations, the community has not undertaken to finance the training of health professionals; the provider has merely restructured its provider-operated program to meet certain State or accrediting requirements. In most cases, providers have aligned themselves with already established educational institutions. We note that a program operated by an educational institution that is related to the provider through common ownership or control would not be considered to meet the criteria for provider operated.

In response to the commenter who was concerned that the proposed regulations did not incorporate those programs receiving reasonable cost payment under the provisions of section 6205(a)(1) of Public Law 101–239, we note that Congress clearly recognized this provision to be temporary. The provision is to expire 30 days after publication of the final rule required by section 6205(b)(2), that is, this final rule.

Comment: One commenter stated that HCFA should not treat provider-operated and nonprovider-operated programs differently. Providers that are providing support to another institution by providing clinical training are incurring costs and these costs should be eligible to be paid under the pass-through payment. The commenter believed that it is highly unlikely that a university would allow a hospital to have sole control of the curriculum or graduation requirements or to employ the faculty. Thus, it would be impossible for these programs to meet the provider-operated criteria. However, HCFA should allow the clinical training costs in all situations.

Response: Please see our response to the previous comment. The proposed criteria set forth in § 413.85(e) (§ 413.85(f)(1) in the final rule) are those to be used in identifying those nursing and allied health programs operated by providers. The commenter appears to be describing programs that are operated by educational institutions for which a provider offers support in clinical training. As discussed in detail above, we believe that Congress intended to support nursing and allied health education programs operated by hospitals only until the community undertakes the costs of the programs itself. Nursing and allied health education programs operated by colleges and universities are considered to be programs in which the costs are borne by the community, since much of the costs of operating the programs are incurred by the colleges and universities. Therefore, we believe it is contrary to Congressional intent for Medicare to provide pass-through payments to providers, in addition to inpatient PPS payments, for the costs of non-provider operated programs (that do not meet the criteria under OBRA 1990).

Comment: One commenter described a CRNA program in which the hospital is allowed to grant a certificate to a student upon completion of the program. This may occur when an affiliated university also grants a degree to the same student. According to the commenter, the Council on Accreditation of Nurse Anesthetist Programs does not prohibit the awarding of an ''anesthesia certificate'' in addition to the award of the master's degree for a hospital-based program. The commenter believed that this could be interpreted as the hospital meeting the criteria to be the operator of the program since the hospital awards a certificate, and requested that we clarify this in the final rule.

Response: The program described above where the hospital awards a certificate and an affiliated university confers a degree upon the same student appears to be a university-controlled nursing or allied health program. The certificate awarded by the hospital seems to be an adjunct to the actual degree awarded by the educational institution. In fact, as indicated by the commenter, the certificate is awarded ''in addition'' to the master's degree awarded by the university. This indicates the program is under the control of the university and the hospital has merely provided support to that program. We note, however, that if the hospital described by the commenter can show that it, in fact, meets the criteria of § 413.85(e) (§ 413.85(f) in this final rule) of operating the program, it may receive pass-through payment.

Comment: One commenter requested that we include the language concerning sequentially conducted education programs in the regulation text. Also, the commenter believed that we need to expand on this discussion. For example, the commenter asked whether a program would be considered provider-operated if a hospital employs only the faculty for the clinical portion of the program.

Response: As noted above, and also in the preamble to the proposed rule, sequential operation of a nursing and allied health education program involves providers that enter into agreements with a college or university in which instruction in general academic requirements leading to a degree is provided by the educational institution, and subsequent specialized didactic and clinical training is given by the provider. The provider may receive pass-through payment for the costs of the program that the provider incurs if the provider meets all of the criteria for operating the program, including the requirement at proposed § 413.85(e)(1)(ii) (§ 413.85(f)(1)(ii) of this final rule) that the provider must directly control the curriculum. We note that under this section of the regulations, there is a provision (also cited at § 413.85(f)(1)(v) of this final

rule) which states that a provider may enter into an agreement with an educational institution to furnish basic academic courses required for completion of the program, but the provider must provide all of the courses related to the theory and practice of the nursing or allied health profession involved that are required for the degree, diploma, or certificate awarded at the completion of the program. No costs incurred by the college or university may be claimed as provider costs.

In regard to the commenter's question about employment of the teaching faculty, providers that employ faculty only for the clinical training portion of the program, where there is a classroom component relating to the theory and practice of the nursing and allied health profession involved, would not be considered as a provider operating the program.

Comment: One commenter argued that, through these regulations, the Federal Government is encouraging the provision of nursing and allied health education through provider-operated programs, which is contrary to the movement of these training programs to academic settings. The commenter believed that Medicare costs would be reduced if hospitals provided only clinical training and allowed educational institutions to provide the classroom instruction. Another commenter stated that very few nurses currently graduate from provider-operated programs and that the proposed regulations do not reflect the current state of nursing and allied health education. Rather than erect barriers to receiving funding, the rules should be revised to allow hospitals to claim clinical training costs as a pass-through regardless of operation. Finally, one commenter stated that the clinical training for all programs should be eligible for the pass-through without a corresponding reduction in the prospective payment system standardized amounts.

Response: Our payment policies are designed to make appropriate payments for provider-operated programs and nonprovider-operated programs, not to encourage one type of program over another. We recognize the impact of the current policy of paying on a pass-through basis only for provider-operated nursing and allied health programs (except the narrowly defined nonprovider-operated programs specified at § 413.85(g) of this final rule) when there is a movement of these training programs towards academic settings. We accept the comments that Medicare will provide pass-through payment to hospitals for the classroom and clinical costs of programs only when the programs are provider-operated, while nursing education has been increasingly occurring in baccalaureate and advanced-level nurse training programs in colleges and universities. However, as explained above, we believe hospitals should only receive pass-through Medicare payments for training students in *provider-operated* programs. We note Congress' implicit acceptance of our longstanding provider-operated policy via its enactment of a narrow exception to the provider-operated policy as set forth by section 4004(b)(2) of Public Law 101–508 of the nonprovider-operated nursing and allied health education programs.

The commenters encouraged HCFA to allow for pass-through payments for the clinical portion of all nursing and allied health education programs, even all of those programs that are nonprovider-operated programs in addition to those that meet the criteria under section 4004(b) of Public Law 101–508. However, under the current inpatient hospital prospective payment system, costs incurred by hospitals for clinical training in nonprovider-operated programs are paid within the prospective payment system per discharge payments. If a legislative change provided for pass-through payment for a hospital's clinical training in all nonprovider-operated programs, we believe an adjustment would be necessary to carve out those costs from the Federal rate.

Comment: Two commenters were concerned that no hospitals control their own curriculum and, therefore, no hospitals could meet the criterion set forth in the proposed regulations. One commenter stated that the accrediting agencies dictate which courses a student must complete in order to obtain a degree or certificate. Another commenter stated that, in today's educational programs, the curriculum is determined by the institution of higher learning.

Response: We understand that a teaching hospital must provide certain required courses and training in order to be accredited. This does not mean that these requirements prohibit a provider from directly controlling the curriculum. Although many courses are required by the accrediting agencies, there are other courses generally provided by the providers. Also, the provider determines in what manner its students will accomplish the course work that will allow them to be accredited. In addition, control of the curriculum also means the provider actually provides all the courses or arranges for an outside organization to provide those academic courses necessary to complete the course work.

Comment: One commenter believed that the definitions of ''clinical training costs'' and ''classroom costs'' are too inflexible and do not account for the classroom time needed to review and discuss clinical assignments and engage in group learning. Classroom activity related to clinical experience should not be separated from clinical training.

Response: We believe that the definitions of classroom instruction and clinical training costs are necessary so that they can be differentiated in relation to the payment policies that apply to them. For example, hospitals that operate nursing or allied health education programs would be eligible to receive pass-through payment for both the clinical training and classroom instruction costs of the program. However, under OBRA 1990, certain nonprovider-operated programs are eligible to receive pass-through payment for only the clinical training costs of the programs. Clinical training does encompass some occasional or periodic meetings that relate to the acquisition of clinical training skills. However, these meetings are not formal, didactic classroom instruction. Classroom instruction consists of classes that meet at regularly scheduled intervals over a specific period of time and the students' participation is graded by the instructor. Costs incurred in meetings or discussions held between students' and clinical trainers are covered costs to the extent they meet the definition of incremental costs incurred because of the provider's participation in the clinical training program.

B. Nursing and Allied Health Education Specialties and Accrediting Bodies

Under existing regulations, one condition that must be met in order for a provider to receive reasonable cost payment for the net costs of its nursing or allied health educational program is that the program must be recognized by a national approving body or State licensing organization. A nursing and allied health education program that wanted to be paid on a reasonable cost basis, in addition to being a provider-operated program, either needed to be included on the list of approved programs under existing § 413.85(e) or needed to qualify to be an approved program under existing § 413.85(f). Recently, it has come to our attention that the list of approved programs contained in existing § 413.85(e) is inaccurate to the extent some of the names of the specialties, as well as their

respective accrediting bodies, have changed. In addition, some specialties listed at existing § 413.85(e), while previously meeting the criteria of programs that are provider operated, may no longer meet these criteria. Because we find that nursing and allied health education is a constantly evolving field, we are clarifying our policy on approved nursing and allied health education programs by removing the current specific list of approved nursing and allied health programs and, instead, framing the issue in general terms by considering a nursing or allied health education program eligible for pass-through payment if the program is recognized by a national approving body or State licensing authority and it meets the other criteria under § 413.85(d) of this final rule. By requiring the nursing and allied health education activity to be recognized by either of these bodies, we ensure that the programs we pay for under Medicare meet at least a minimum standard of accreditation.

We note that this requirement that the nursing and allied health program be accredited by one of these approving bodies is simply *one* of the requirements under the general payment rule under § 413.85(d) of this final rule for a provider to receive reasonable cost payment for the net cost of nursing and allied health education activities. That is, accreditation by a national approving body or State licensing organization for a particular nursing and allied health education activity does not mean that the activity qualifies for pass-through payments; in order to qualify for pass-through payments, the provider must meet the other general payment rule requirements (including the provider-operated criteria). In addition to requiring the program to be recognized by a national approving body or State licensing authority, we also give examples under § 413.85(f) of this final rule of national nursing and allied health approving bodies. The examples we list are: the Commission on Accreditation of Allied Health Education Programs; the National League of Nursing Accrediting Commission; the Association for Clinical Pastoral Education, Inc.; and the American Dietetic Association. In addition, our research has shown that there are currently other national approving bodies of nursing and allied health programs that also meet at least a minimum standard of accreditation. They are: the American Society of Hospital Pharmacists; the National Accrediting Agency for Clinical Laboratory Sciences; the Council on Accreditation of Nurse Anesthesia Educational Programs; the American College of Nurse-Midwives; the Joint Review Committee for Education of Radiologic Technology; the Joint Review Committee on Nuclear Technology; and the American Physical Therapy Association.

In the September 1992 proposed rule, we proposed to update the listing of approved nursing and allied health programs. We solicited and received many comments about additions and deletions to the list. Because in this final rule we are deleting the specific list of programs and replacing it with a general requirement that the program must be recognized by a national or State licensing approving body, our responses to the comments on the specialties note whether or not we consider the specialty as an approved nursing and allied program, and do not address whether we should add the specialty to or delete the specialty from a list of approved programs.

We also proposed that only those nursing and allied health education programs listed in the regulations may be paid as approved educational activities. We proposed to add a redesignated provision to the regulations (proposed § 413.85(d)) that would provide for other national approving bodies or State licensing authorities to apply to HCFA for inclusion on our list of approved programs. Because we are clarifying our policy in § 413.85(e) of this final rule by eliminating the list of accrediting organizations from our regulations, this proposed provision is no longer necessary. In addition, we proposed to revise the list of approved programs to include the specific title or titles used by the appropriate accrediting organization. The Committee on Allied Health Education and Accreditation (CAHEA), now called the Commission on Accreditation of Allied Health Education Programs (CAAHEP), cooperates with many committees and collaborates with academies, associations, boards, and societies in its accreditation process. In the interest of brevity, and for the convenience of those entities seeking approval for those programs accredited by CAAHEP in collaboration with other organizations, we listed only CAAHEP in the proposed regulations.

Some of the programs that had been previously accredited by CAAHEP are now accredited by the National Accrediting Agency for Clinical Laboratory Sciences (NAACLS), the Joint Review Committee for Education of Nuclear Medicine Technology, the Joint Review Committee for Education of Radiologic Technology, and the American Occupational Therapy Association. For the convenience of those programs seeking accreditation, we also note that the name of the accrediting organization, the Commission on Accreditation in Physical Therapy Education (CAPTE), has been changed by the organization to the American Physical Therapy Association (APTA). Lastly, we will acknowledge the American College of Nurse Midwives as a national approving body, for reasons that are explained below.

Comment: We received several comments requesting that we expand our list of approved programs to include nonprovider-operated programs that do not qualify for pass-through payment.

Response: As stated above, we are clarifying our policy of not paying on a pass-through basis for nonprovider-operated programs in this final rule and, to avoid confusion as to which programs are currently being paid for, we have eliminated the specific listing and replaced it with a general requirement for accreditation or State licensure.

Comment: One commenter asserted that the proposed rule clearly allows nonprovider-operated programs to receive payment under the OBRA 1990 pass-through; therefore, restricting the list to programs operated by providers is inconsistent. Another commenter believed that this requirement unnecessarily restricts new programs at nonprovider sites.

Response: As noted above, we have eliminated the specific listing and replaced it with a general requirement for accreditation or State licensure; therefore, comments regarding additions to or the nature of the approved list of programs are no longer relevant. However, as reflected in 42 CFR 413.85(g) of this final rule, any nonprovider-operated programs that meet the requirements under OBRA 1990 and also meet accreditation requirements, may be eligible to receive pass-through payments.

Comment: One commenter stated that the Higher Education Act Amendments of 1992 (Public Law 102–235) require that the American Medical Association (AMA) separate itself from the CAHEA. As a result, that organization may cease to exist. The final regulations should provide for the successor organization. Another commenter stated that since the AMA may withdraw support from the CAHEA, the regulations should list the actual accrediting agencies.

Response: In late October 1992, the AMA announced that the CAHEA would be phased out at the close of 1994 and that it would support the

establishment of a successor agency. By May 1994, the Commission on Accreditation of Allied Health Education Programs (CAAHEP) was established to assume the accreditation programs previously associated with CAHEA. This final rule reflects this change; we list CAAHEP as an example of a national approving body under § 413.85(e). Since an actual successor agency has been established, we do not believe that it is necessary to list the individual agencies that cooperate with this new organization.

Comment: The American College of Nurse-Midwives and the American Academy of Physicians Assistants formally requested that their allied health education programs be included in our list of approved programs.

Response: These comments are no longer applicable because we are clarifying our policy in this final rule by stating a general requirement rather than including a specific listing.

Comment: We received several comments protesting our proposal to exclude emergency medical technician and paramedic programs (EMT–P) from the list of approved education programs. These commenters disagree with our conclusion that there is a tenuous relationship between the care provided by these individuals and the quality of patient care in a hospital. All of the commenters urged that we pay for these programs because the care and services provided by these personnel prior to admission are often vital in determining the patient's condition and prognosis and, thus, there is an essential link between these personnel and inpatient care. One commenter believed that the preadmission services provided by paramedics are crucial to patient outcomes through early intervention and delivery to the appropriate hospital. Another commenter stated that the care provided en route to the hospital has a direct result on the condition of the patient's condition when admitted, which has an impact on the amount and intensity of inpatient services required. Also, hospital emergency room care is a coordinated effort. The emergency medical technicians and paramedics are in communication with and often receive direction from the emergency room physician while en route to the hospital. Several commenters indicated that emergency medical technicians and paramedics often provide services in the emergency room and are used elsewhere in the hospital in areas such as the operating room, the intensive care units, and labor and delivery. Therefore, they do contribute to patient care. Finally, one commenter stated that, since HCFA provides payment for EMT–P under the existing regulations, excluding them from the list as proposed is contrary to the statement in the proposed rule that HCFA is merely codifying existing policy into regulations.

Response: As we indicated earlier, we are deleting the listing of approved programs in the final regulations. However, after consideration of these comments and other information we have learned about EMT–P education programs since publication of the proposed rule, we are persuaded that there is a sufficient relationship between the services of EMT–P education programs and the quality of inpatient care. As the commenters indicated, EMT–P trainees provide essential preadmission services to (potential) hospital inpatients, and the trainees work in several inpatient care areas of the hospital. We note that there may be some EMT–P education programs that might meet the provider-operated criteria and thus would qualify for pass-through payment under the nursing and allied health education provider-operated provisions. We also note that the accrediting organization is the Joint Review Committee on Educational Programs for the EMT–Paramedic in collaboration with the CAAHEP.

Comment: One commenter disagreed with our inclusion of clinical pastoral counseling in the list of approved programs. The commenter believed that this policy violates the separation of church and state. In addition, the commenter asserted that such a major use of the Medicare Trust Fund should occur only after notice and public comment as provided in the Administrative Procedure Act. Finally, the commenter did not believe that pastoral counseling qualifies as direct patient care since these services are not medical services and Medicare does not pay directly for the care provided by pastoral counselors.

Response: The existing regulations at § 413.85(e) list several approved nursing and allied health education programs that are eligible for the pass-through payment. Paragraph (f) of that section states that the fiscal intermediary and HCFA will give appropriate consideration to programs not listed in paragraph (e) that a provider conducts that come within the purview of the principle of the regulations. Thus, the regulation in effect when these programs were approved was subject to appropriate notice and public comment. Over the years, we have approved many types of allied health education programs under the authority of this section.

Although there is no direct payment by Medicare for the services of pastoral counselors, the services they provide to hospital inpatients are included in the hospital's allowable costs under the Medicare program. The costs are included in the administrative and general (A&G) cost center. As early as the mid-1970s, Medicare recognized pastoral care as having a beneficial and therapeutic effect on the medical condition of a patient, and, therefore, the costs a provider incurs to furnish such care to its patients are considered patient care related costs. Therefore, we do not agree with the commenter that these programs should be excluded from receiving education payments.

Comment: We received requests from several commenters to expand our list of approved programs. These programs include: nurse practitioners, nurse-midwives, clinical nurse specialists, physician assistants, phlebotomists, central supply technicians, social workers, and biomedical engineering.

Response: In the proposed regulations, we stated that national approving bodies or State licensing authorities may apply to HCFA for inclusion in the list of approved programs. As discussed above, we are no longer including a list of approved programs in our regulations. We note, however, that hospitals with programs approved by national approving bodies or State licensing organizations may submit a request to receive Medicare payments on a reasonable cost basis, and the fiscal intermediary will determine whether the program meets the definition as an approved program.

Comment: One commenter requested that we add the phrase ''operated by providers'' to proposed § 413.85(d) (§ 413.85(e) in this final rule) to make it clear that we will approve programs only if they are the type operated by providers.

Response: This comment is no longer applicable since we are clarifying our policy under § 413.85(e) in this final rule to provide that a program must be approved by the appropriate accrediting body in order to receive Medicare payment for nursing and allied health education activities on a reasonable cost basis. We note that it is no longer necessary to address the issue of other programs not listed in the regulation (which was previously addressed by proposed § 413.85(d)) because we are now stating that all programs must be recognized, or continue to be recognized by the appropriate accrediting body, in addition to meeting the other general payment requirements listed under § 413.85(d) of this final rule in order to

receive Medicare payment on a reasonable cost basis.

C. Determination of Net Costs

We proposed to revise our policy for determining the net costs of approved nursing and allied health education programs in proposed § 413.85(c)(1) (§ 413.85(d)(2) of this final rule). The formula for determining the net costs at existing § 413.85(g) states that ''Net costs of approved educational activities are determined by deducting, from a provider's total costs of these activities, revenues it receives from tuition.''

When the existing regulation was drafted, we assumed that the tuition paid by students enrolled in approved nursing and allied health educational programs was intended to cover all facilities and services for which a provider would incur costs. It was not our intention to imply that costs for which a provider charges a separate fee, in addition to tuition, were not to be considered as part of the cost of the approved nursing and allied health educational activity. Two examples of these costs are the purchase of textbooks for resale to students and the provision of housing or room and board in exchange for an additional fee.

We clarified in the proposed regulations that the term ''tuition'' includes these additional charges and fees and specified a proposed formula for determining the net costs to indicate that ''total costs'' includes only direct and indirect costs incurred by a provider that are directly attributable to the operation of an approved educational activity. These costs do not include usual patient care costs that would be incurred in the absence of the educational activity, such as the salary costs for nursing supervisors who oversee the floor nurses and student nurses. Moreover, these costs do not include costs incurred by a related organization.

The existing regulation concerning related organizations set forth at § 413.17 was established to avoid program recognition of artificially inflated costs that might be generated from less than arm's length transaction. This policy was not intended to expand the range of items and services for which a provider could claim payment. With respect to educational costs (with the limited exception for certain graduate medical education costs incurred by a related medical school as provided in Intermediary Letter 78–7) our policy has been that the provider, rather than the related organization, must directly incur the costs on its books and records before the costs will be recognized for Medicare payment purposes. Otherwise, the principle that Medicare payment for medical education costs should not result in a redistribution of costs from the educational institution to the provider would be violated.

Whereas providers that operate their own programs may receive reasonable cost reimbursement for both the classroom instruction and the clinical training costs, but no reimbursement for costs incurred by a related educational institution, providers that would qualify under section 4004(b) of Public Law 101–508 may receive reasonable cost reimbursement for the clinical training costs only, and for the clinical training costs incurred by a related educational institution. We believe that the language included in the Committee Report that accompanied Public Law 101–508 supports this distinction between total allowable costs for provider-operated and nonprovider-operated programs. In that report, the conferees noted that—

> ''in the case of hospital-operated nursing and allied health education programs, the Secretary does not recognize costs incurred by a related educational organization as allowable educational costs since such costs are a redistribution of costs from the educational institution to the hospital. Although [section 4004 of Public Law 101–508] provides for recognition of the costs incurred by a related educational organization for clinical training on the hospital's premises in the case of a hospital-supported program, the conferees intend that nothing in [section 4004 of Public Law 101–508] should be construed as requiring the Secretary to modify his current policy in regard to the determination of reasonable costs for a hospital-operated program'' (H.R. Rept. No. 964, 101st Cong., 2d Sess. 719 (1990)).

We note that this clear statement of Congressional intent is also consistent with our policy on provider-operated programs stated above of not recognizing the costs of related organizations in determining a provider's total costs of approved educational programs.

In the January 3, 1984 final rule, the definition of net costs (proposed § 413.85(g)) was revised by eliminating grants and donations from revenues that were to be offset against the cost of approved educational activities. This revision was made in response to a public comment to ensure that the policy on net costs of educational activity would be consistent with the policy that deals with the treatment of grants, gifts, and income from endowments under reasonable cost payment under § 413.5(c)(3). However, in the proposed rule, we stated that we were reconsidering our position on this issue. As a result, we requested public comment on whether the net costs of approved educational activities should be defined as the costs determined by deducting the revenues that a provider receives from tuition, student fees, and the allocable amounts from any donations and grants from the provider's total allowable costs that are directly related to approved educational activities.

Also, in our discussion in the preamble of the September 1992 proposed rule relating to what types of revenues a provider receives that should be deducted from the provider's total allowable costs to determine the net cost of approved educational activities, we inadvertently included ''non-Medicare public funding''. This inclusion erroneously implied that Medicare's policy has been to consider State appropriations as grants or donations that are not offset from a provider's allowable costs. Our response to a comment in a final regulation concerning Medicare GME policy, published on September 22, 1989 (54 FR 40302), also had been mistakenly interpreted as including State appropriations in the definition of grants. In the response to a comment about whether there is a redistribution of GME costs when State appropriations or other funding sources are sufficient to cover the cost of operating, we explained our policy and section 1134 of the Act as it relates to offsets from allowable costs of gifts, grants, and donations. Our response was intended to describe private philanthropy and other grants but not to include State appropriations in the definition of grants. In administrative, legal, and policy matters, we have consistently maintained that State appropriations for the cost of medical education activities constitute community support that is to be offset from a provider's allowable costs.

We note that several courts have upheld Medicare's policy of including State appropriations in the definition of community support. On May 3, 1991, the U.S. District Court for the Southern District of Mississippi ruled that the Secretary's offset of nursing and allied health costs of State appropriations was appropriate. Additionally, the U.S. District Court for the Eastern District of Pennsylvania in *Thomas Jefferson University* (993 F.2d. 879 (1993)) in a decision affirmed by a U.S. Appeals Court stated that the Secretary's definition of community support, which includes ''State-funded support,'' is reasonable. This decision was upheld by the U.S. Supreme Court on the redistribution principle discussed

elsewhere in this preamble (114 S. Ct. 2381 (1994)).

We note that the proposed revisions in the proposed rule inadvertently did not include community support as the basis for an offset from the allowed cost of a GME or nursing and allied health program. In this final rule, we restate our longstanding policy that Medicare will only share in the costs of educational activities of providers where communities have not assumed responsibility for financing these programs. Medicare's policy is to offset from otherwise allowable education costs, community funding for these activities.

Comment: We received all unfavorable comments on our reconsideration of existing policy that excludes grants and donations from the revenues that are used to offset the cost of approved educational activities. One commenter stated that it seeks outside support in the form of grants for the purpose of recruiting students. The commenter indicated that these monies, which are used to help alleviate current shortages of trained professionals, should not be deducted in determining net costs. Another commenter stated that we did not provide any rationale for changing our policy on grants and donations. An additional commenter believed that if we adopted the revised policy, only those grants and donations that are specifically restricted to supporting education programs should be deducted.

Response: We are persuaded by the commenters that, in this time of shrinking revenues, hospitals should not be discouraged from seeking additional support through grants and donations. Therefore, we are not adopting the proposed revision in this final rule. We will retain the existing policy.

Comment: One commenter requested that student fees that are used to cover costs that are not included in Medicare allowable costs should not be deducted from a provider's total costs. Another commenter believed that since the revenues a provider obtains for housing costs and textbook purchase for resale are not used to offset clinical instruction costs, they should not be included in the definition of tuition and used to offset total costs.

Response: We believe that the total amount of payments made to a provider on behalf of a student it is training should be deducted from the allowable costs the provider is claiming. If the provider operates the program, it is claiming the cost of student stipends, student housing, and the purchase of books and materials for student use. If the provider receives revenues in exchange for the provision of these services, those revenues should be deducted from total costs, regardless of the name given to the fee. If the provider collects a fee from students that does not involve any allowable cost, such as monies used for recreational activities for which the provider does not seek Medicare payment, these revenues need not be deducted. However, any general fund for student activities would probably be required to be deducted. A provider that does not operate the nursing or allied health education program and is claiming only clinical costs would not be including housing fees in that cost. Any housing fees should be the responsibility of the educational institution.

Comment: One commenter disagreed with the proposed policy that providers that do not operate their own education programs but receive reasonable cost payments under the provisions of section 4004(b) of Public Law 101–508 may include costs of the educational institution related to the provider. These costs are excluded from the total costs of a provider that operates its own programs. The commenter believed that it is unfair to make this distinction.

Response: As we explained in the proposed rule (57 FR 43668), when Congress included a provision in Public Law 101–508 that the costs of a related educational institution should be allowed as part of total costs for those providers that are eligible to receive reasonable cost payment for education programs they do not operate, specific language in the Conference Report made clear that this provision did not prohibit the Secretary from continuing to consider these costs as redistribution costs and excluding them from allowable costs of provider-operated programs.

D. Payment for Certain Nonprovider-Operated Programs Under Public Law 101–508

In accordance with the provisions of sections 4004(b)(1) and (b)(2) of Public Law 101–508, proposed § 413.85(f) (§ 413.85(g)(1) and (2) of this final rule) provided that the net costs incurred by a provider, or by an educational institution that is related to the provider by common ownership or control (that is, a related organization as defined in § 413.17(b)), for the clinical training of students enrolled in an approved nursing or allied health program that is not operated by the provider would be paid on a reasonable cost basis if the following conditions are met:

- The clinical training must occur on the premises of the provider.
- The provider must have claimed and been *paid* for clinical training costs on a reasonable cost basis during its most recent cost reporting period that ended on or before October 1, 1989. (We proposed that, in this context, we would consider a provider to be ''paid'' for clinical training costs if, for its most recent cost reporting period ending on or before October 1, 1989, the provider's intermediary included the clinical training costs in the allowable costs used to determine the interim payment rate for that cost reporting period, and the provider subsequently claimed the clinical training costs as a pass-through cost on its initially submitted cost report for that period.)
- In any cost reporting period, the percentage of total allowable provider cost attributable to allowable clinical training cost cannot exceed the percentage of total allowable cost attributable to clinical training in the provider's most recent cost reporting period ending on or before October 1, 1989.
- The students in the educational program must provide a benefit to the provider through the provision of clinical services to patients of the provider.
- The clinical training costs must be incurred by the provider or by an educational institution related to the provider by common control on ownership as defined in § 413.17(b). Costs incurred by a third party, regardless of its relationship to either the provider or the educational institution, would not be allowed.
- The costs incurred by a provider do not exceed the costs the provider would incur if it operated the program itself.

Section 4004(b)(1) of Public Law 101–508 also required that we define allowable clinical training costs under this provision for payment for certain nonprovider-operated programs. At 57 FR 43667 in the September 22, 1992 proposed rule, we proposed to define these costs as the incremental costs that, in the absence of the students, would not be incurred by the provider. These incremental costs would include the costs of clinical instructors and administrative and clerical support staff whose function is to coordinate rotations with a nursing school and to schedule clinical rotation for each student nurse. They would not, however, include the costs of a charge or floor supervisor nurse who may spend a portion of his or her time supervising student nurses but who, in the absence of the students, would still have to be employed by the provider. In general, these costs are payroll and related salary costs. Although some

provider-incurred overhead costs directly related to the cost of the students would be allowable, overhead costs incurred by the related organization generally would not be considered allowable.

In the proposed rule, we stated that, if, after implementation of the provisions of sections 4004(b)(1) and (b)(2) of Public Law 101–508, we found a wide variation in the clinical cost per student among different hospitals' nursing and allied health programs, we would consider methods to narrow that variation under the definition of reasonable cost as set forth in section 1861(v)(1) of the Act. We specifically requested public comment on how we could best evaluate the reasonable cost of these programs. We received the following comments on our proposed implementation of the provisions of Public Law 101–508.

Comment: Many commenters objected to the retroactive nature of the special exception for providers to receive pass-through payment for the clinical training they provide in support of nonprovider-operated programs. These commenters believed that allowing ongoing payment only for those programs for which providers claimed and were paid costs for cost reporting periods that ended on or before October 1, 1989, discriminates against newer programs. They believed this criterion unjustly penalizes those providers that did not claim pass-through costs in the past due to lack of clear guidelines or because they were following the direction provided by HCFA in the preamble of the January 3, 1984 final rule. One commenter requested that the rule should be based on cost reports filed after the effective date of the final rule or allow providers to reopen their fiscal year 1989 cost reports to include nursing and allied health education costs. Another commenter suggested that hospitals be allowed to claim clinical training costs in future years if they had claimed them in their capital base year cost report.

Response: The October 1, 1989 cost reporting period date set forth in the proposed rule was mandated by section 4004(b)(2)(A) of Public Law 101–508. The practical effect of this provision is that providers may receive payment on a reasonable cost basis under this provision for the clinical training of students enrolled in a nonprovider-operated program only if they had claimed and received payment for periods prior to the enactment of the statute. This protects those providers that were relying on the payments.

Comment: Other commenters disagreed with the requirement that, for cost reporting periods ending after October 1, 1989, the percentage of allowable clinical training costs is limited to the percentage allowable for the provider's previous cost reporting period. Again, commenters view this provision as a limitation on the development of new programs and as a disincentive to hospitals' participation as clinical training sites.

Response: The proposed regulations incorporated the provisions of section 4004(b)(2)(A) of Public Law 101–508 concerning which providers can claim pass-through payment for clinical training and how much they may claim. The commenters are correct in their assessment that, under these rules, providers that expand the magnitude of the support they provide to educational institutions would not receive a corresponding increase in Medicare pass-through payment. However, the rules merely limit the percentage of the costs, so if a provider expands some programs and decreases others, then there might be no adverse Medicare payment impact. Again, we believe that the Congressional intent was to protect providers who had come to rely on Medicare payments for nonprovider-operated education programs without increasing Medicare expenditures.

Comment: One commenter believed that the language at proposed § 413.85(f)(1) (§ 413.85(g)(2)(i) of this final rule) implies that in order for clinical training to be eligible for the pass-through, all training must take place at the provider. The commenter believed that providers should be limited to claiming the costs for training that takes place solely on the premises of the provider, but that the students should be allowed to spend time in training in other settings as long as the costs are not claimed by the provider.

Response: The language set forth at proposed paragraph (f)(1) is intended to limit providers to claiming as clinical training pass-through costs only those costs associated with training that takes place on the premises of the provider. It is not our intention to prevent students enrolled in educational institutions from obtaining clinical training at more than one provider setting. However, if that off-site training is part of the education program, it would be subject to the rules specified earlier defining a provider-operated program.

Comment: Several commenters objected to our proposal that clinical training costs would be allowable only if they were costs that the provider would not have incurred in the absence of the students. That is, only incremental costs would be recognized under the pass through. The commenters believed this to be inequitable. For example, even if the floor charge nurse directs the training of the students as part of the nurse's usual duties, it may be necessary for the hospital to hire additional support personnel to perform duties previously provided by the floor nurse or there may be an increase in overtime to compensate for time devoted to students. One commenter believed that this restriction will encourage providers to increase their allowable costs through the hiring of additional staff dedicated to clinical training instead of allocating a portion of existing staff time. The commenters recommended that the final rule allow providers to claim the portion of the employee's salary or related costs associated with the time devoted to clinical training.

Response: We believe that allowable clinical training costs should be limited to those incremental costs that the provider actually incurs in the course of training nursing or allied health students. If a provider must hire additional staff or increase the salaried hours of existing staff to accomplish the clinical training, the costs of the staff time for providing the training would be considered allowable costs. These staff could include clinical training instructors and administrative and clerical support. However, if the provider merely adds the supervision of students to a floor nurse's list of duties and this is accomplished without the provider incurring additional costs, there is no incremental cost to be claimed.

Comment: Several commenters objected to our statement in the preamble to the proposed rule that, in the future, we might consider methods to narrow variation in the clinical cost per student among hospital programs. The commenters stated that the complexity of care in different programs and the mandates imposed by States may contribute to a great deal of variation. Thus, they believed that it would be extremely difficult to determine an appropriate limit on the per student costs. One commenter requested that, before such a limit is imposed, HCFA should define a list of components for cost per student. These elements should be separately assigned a cost and then averaged to create a range of reasonable cost. The commenter encouraged us to include adjustments for type of facility, region, and type of facility ownership to make the range as accurate as possible.

Response: We agree with the commenters that determining an appropriate limit on per student costs

would be a difficult undertaking and it is not a policy that we will pursue at this time. If, in the future, we decide that it is necessary, we will not implement any change in policy without first publishing it under the notice and public comment procedure.

Comment: One commenter was concerned that the proposal does not allow a hospital to claim costs incurred by a third party. The commenter's hospital sends its CRNA students to other hospitals to receive training that the commenter's hospital cannot provide. These other hospitals employ a CRNA clinical coordinator. The commenter requested clarification on whether the other hospitals can claim reasonable cost payment for the coordinator.

Response: The pass-through payment can be made to any provider that trains students in a nursing and allied health program as long as the program is operated by the provider, whether the provider is the originator of the program or whether the provider is one to which the students are rotated. However, the original provider of the program (or any other provider) may not claim the costs of training the students in the program while the students are rotating to another provider—only the provider actually training the students and incurring the clinical training costs may be paid on a reasonable cost basis. That is, a provider may not claim the costs of a third party provider.

Comment: One commenter requested that we clarify our policy that clinical training must be provided on ''the premises of the provider.''

Response: We will consider that the training is on the hospital's premises if it is in the physical area immediately adjacent to the provider's main buildings, other areas and structures that are not strictly contiguous to the main buildings but are located within 250 yards of the main buildings. This clarification would encompass not only institutions that are located in self-contained, well-defined settings, but other locations, such as in central city areas, where there may be a group of buildings that function as a campus but are not strictly contiguous and may even be crossed by public streets. We are clarifying § 413.85(f)(1) (§ 413.85(g)(2)(i) in this final rule) accordingly.

E. Costs of Educational Activities Considered To Be Normal Operating Costs

As we have previously discussed, the final hospital inpatient prospective payment system rule published January 3, 1984, attempted to clarify the Medicare policy on the classification of training costs incurred by providers as costs of approved educational activities paid on a reasonable cost basis. Since that time, questions have arisen about some types of training programs that are neither listed as approved programs under existing § 413.85(e) nor readily identifiable under existing § 413.85(d) as activities not within the scope of approved educational activities.

The programs that had been included in our list of approved programs were generally programs of long duration designed to develop trained practitioners in a nursing or allied health discipline, such as professional nursing or occupational therapy. This is contrasted with a continuing education program of a month to a year in duration in which a practitioner, such as a registered nurse, receives training in a specialized skill, such as enterostomal therapy. While such training is undoubtedly valuable in enabling the nurse to treat patients with special needs and in improving the level of patient care in a provider, the nurse, upon completion of the program, continues to function as a registered nurse, albeit one with special skills. Further distinction can be drawn between this situation and one in which a registered nurse undergoes years of training to become a CRNA. The costs of continuing education training programs are not classified as costs of approved educational activities that are passed through and paid on a reasonable cost basis. Rather, they are classified as normal operating costs covered by the prospective payment rate or, for providers excluded from the prospective payment system, as costs subject to the target rate-of-increase limits. In proposed § 413.85(g)(3) (§ 413.85(h)(3) of this final rule), we proposed to revise the regulations to include continuing educational programs in the same category as ''educational seminars and workshops that increase the quality of medical care or operating efficiency of the provider.''

Proposed § 413.85(g), like existing § 413.85(d), stated that the costs of certain activities are recognized as normal operating costs and are paid in accordance with applicable principles.

Comment: One commenter questioned the language in proposed § 413.85(g)(6) which describes the allowable costs of the clinical training and classroom instruction of students enrolled in an approved educational program that is not operated by the provider. The commenter requested clarification as to whether these costs are allowable as normal operating costs or as pass-through costs.

Response: The title of proposed paragraph (g) is ''Activities treated as normal operating costs.'' All costs listed in this paragraph (paragraph (h) in this final rule) are costs that are recognized as normal operating costs and, as such, are not eligible to be paid under the pass-through. Although we believe that the language in the proposed rule is clear, we are revising paragraph (h)(6) in this final rule for better comprehension.

Comment: In the existing regulations, the costs of residents in anesthesiology who are employed to replace anesthetists are specifically included in normal operating costs and excluded from the pass-through. One commenter was concerned that this language was deleted from the proposed regulations.

Response: The language concerning residents working in a hospital and not participating in a medical education program was added as a part of the original hospital inpatient prospective payment system regulations in order to ensure that hospitals that hired residents to replace anesthetists in an attempt to circumvent the rebundling provision did not attempt to include the costs of those residents as education costs. Since that time, revised regulations governing Medicare payment for the direct medical education of residents have been published. These regulations are set forth in § 413.86. Those regulations clearly exclude residents not in an approved program from receiving payment under the medical education provisions. We believe that it is no longer necessary to include this language in the regulations governing nursing and allied health education programs, and therefore proposed to delete it from the regulations. We are adopting this deletion in this final rule. We note that this action does not signify a change in our policy.

Comment: One commenter stated that HCFA should consider allowing outpatient, nonacute care clinical training as eligible for the reasonable cost payment. Many of these auxiliary service sites are operated by a Medicare provider or under an agreement with such a provider. The commenter urged HCFA to consider the advantages to Medicare beneficiaries, health system costs, and future health professionals in allowing as reasonable costs the clinical training costs occurring outside the inpatient, acute care facility.

Response: Based on this comment and others we received, we believe that there is a fair amount of confusion surrounding Medicare payment for medical education, which we will attempt to clarify. The following is a brief overview of Medicare payment for

graduate medical education and payment for nursing and allied health education.

• Payment for Graduate Medical Education (GME)

Regulations governing Medicare payment for the direct cost of GME programs are set forth in § 413.86. In general, Medicare payment for the direct costs of GME is based on the hospital's historical per resident costs in a base year (fiscal year 1984), updated for inflation. Payment to the hospital in the current year is determined based on the product of the hospital's updated per resident amount, the actual number of residents (capped by the number of allopathic and osteopathic residents in a hospital's most recent cost reporting period ending on or before December 31, 1996), and Medicare's inpatient utilization in that year.

Under regulations at § 409.26(a), the Medicare Skilled nursing facility (SNF) benefit includes coverage of medical services that are furnished by an intern or resident (who is training in a hospital teaching program approved in accordance with the provisions of § 409.15), if the resident is in a participating hospital with which the SNF has in effect a transfer agreement. Payment for these services is included in the SNF prospective payment system per diem global payment. In addition, under regulations at § 409.45(g), the Medicare home health benefit includes services provided by interns and residents. To the extent that these services were paid on a reasonable cost basis and covered under the home health benefit, there cannot be separate payment for these services under the home health prospective payment system. These services will be subject to the consolidated billing requirements. However, the home health prospective payment system rates and consolidated billing requirements do not affect Medicare payments to hospitals for graduate medical education or physician billing requirements under the fee schedule.

• Payment for Other Medical Education (Nursing and Allied Health Education)

The direct costs of all other medical education in which providers engage are covered by the regulations at § 413.85. Hospitals may receive payment for nursing and allied health education programs they operate on a reasonable cost basis. For hospitals subject to the prospective payment system, these costs are paid on a reasonable cost basis. For hospitals excluded from that system and paid on a reasonable cost basis subject to cost limits, the medical education costs are excluded from application of the limits. Hospitals that participate in a nursing and allied health program that is a nonprovider-operated program may receive pass-through payment if they meet the criteria set forth at § 413.85(g)(2) in this final rule.

• Provider-Operated Requirement for Nursing and Allied Health Education

One of the main distinctions between payment for GME and nursing and allied health education is that, generally, a facility can only receive separate payment for nursing and allied health education if the program is provider-operated. Hospitals, however, can receive payment for residents participating in approved programs regardless of whether the program is operated by a provider. We have consistently applied this policy since the inception of the Medicare program.

The January 3, 1984 prospective payment system final rule (49 FR 267) states that only the costs of provider-operated approved medical education programs are excluded from the prospective payment system and paid on a reasonable cost basis. This language only applied to nursing and allied health education. That final rule states the following:

> ''If a program is operated by another institution, such as a nearby college or university, it must be noted that by far the majority of the costs of that program are borne by that other institution, and not by the hospital. While it is true that the hospital may incur some costs associated with the provision of clinical training to *students* enrolled in a nearby institution, the hospital also gains in return.'' (*Emphasis added.*)

The reference to students and not residents indicates our intention to apply this language only to nursing and allied health education. Furthermore, we believe hospitals do incur significant costs associated with providing a clinical setting for training residents even when they do not operate an approved program. Thus, the statement that the majority of costs are borne by that other institution reflects our views only with respect to nursing and allied health education.

We have always recognized costs associated with GME programs regardless of whether or not they are provider operated. The September 29, 1989 (54 FR 40286) regulations implemented a GME payment system based on per resident amounts, provided that the hospital's per resident amount would be based on its GME costs divided by the number of full-time equivalent residents working in all areas of the hospital complex. We provided a specific example of how to determine the hospital's per resident amount when the approved program is operated by another institution. In addition, we noted that, in accordance with section 1886(h)(5)(A) of the Act, the definition of an approved medical residency program at § 413.86(b) does not provide that the program must be provider-operated. In contrast, § 413.85, which set forth regulations governing payment of nursing and allied health education, included a definition of ''approved educational activities'' which refers to programs that ''can be operated by providers.''

Concerning the commenters' more specific comment that providers be allowed to claim the costs incurred when students receive clinical training in outpatient, nonacute care or nonhospital settings, we believe that the issue regarding allowing pass-through payment for the costs of training nursing and allied health students in these settings does not revolve around whether the hospital operates the program and incurs the costs, but, rather, whether training in these settings enhances the quality of inpatient care. Current nursing and allied health policy at § 413.85(2)(b) defines ''approved educational activities'', in part, as enhancing the quality of patient care in an institution. We have further clarified this definition as a requirement under the general payment rule at § 413.85(d)(1)(i)(C) of this final rule; that is, a program must ''enhance the quality of inpatient care'' to be considered an approved educational activity. This phrase refers only to training while providing care directly to hospital inpatients. Thus, we feel it is inappropriate to allow pass-through payment for the time students train in outpatient departments, nonacute care, or nonhospital settings.

F. Net Costs of Approved Certified Registered Nurse Anesthetist (CRNA) Educational Programs

On January 26, 1989, we published a proposed rule (54 FR 3803) to implement section 9320 of the Omnibus Budget Reconciliation Act of 1986 (Pub. L. 99–509). That rule proposed to change the classification of patient care services of CRNAs to permit payment under the Medicare Part B fee schedule for such services furnished on or after January 1, 1989. This policy created difficulties in distinguishing between the training and patient care activities of teaching CRNAs. To minimize the possibility of duplicate payments, we proposed to modify the regulations at § 413.85(b)(3) (§ 413.85(d)(2)(iii) of this final rule) to recognize the special circumstances that exist with regard to the costs of approved CRNA training programs. While, for the most part, the

costs of these programs would continue to be paid under the generally applicable rules set forth at § 413.85, we proposed to exclude from allowable costs the costs providers incur in connection with compensating teaching CRNAs for the time spent with student anesthetists in clinical training during surgical procedures. These activities involve the provision of patient care services that are payable under Medicare Part B under the CRNA fee schedule.

In developing the proposed rule, we considered requiring that all teaching CRNAs complete allocation agreements, similar to those completed for provider-compensated physicians, detailing how the CRNAs spend their time at the provider. In the interest of administrative simplicity and reducing provider recordkeeping burden, we proposed that it would be sufficient that providers present auditable documentation to intermediaries justifying CRNA faculty compensation costs related to hours spent in classroom instruction or in administrative activities related to the approved program. No other compensation costs for CRNA faculty members would be allowable. Compensation costs for faculty members who are not CRNAs would continue to be allowable since the duplicate payment potential would not exist for these personnel. We specifically sought comments on whether the proposal was an equitable way to deal with the problems arising from the change in the payment method for the services of CRNAs. We received a number of comments regarding this proposal.

Comment: In general, commenters did not believe that it would be equitable to have different rules for CRNA clinical training costs. One commenter stated that CRNAs are providing double service when they supervise students in anesthesia procedures and deserve the additional Part B payment. Other commenters stated that CRNAs are not always allowed to bill under Part B for the services they provide. One commenter pointed out that CRNAs who work under the direction of a physician cannot bill under Part B unless the physician is directing two or more cases. Another commenter noted that CRNAs can bill under Part B only when they are supervising no more than one student. The hospital at which the commenter provides services generally requires CRNAs to supervise two or more students and the CRNA cannot bill under Part B under these circumstances. These latter two commenters, as well as others, indicated support for allowing the clinical costs of CRNAs supervising students to be included in the pass-through payment as long as the CRNA cannot bill under Part B.

Response: Under the provisions of the existing regulation that implemented the CRNA fee schedule, a CRNA who is supervising student anesthetists cannot receive payment under Part B when supervising more than one student because supervision of more than one student is considered to be a teaching activity (42 CFR 414.46). In addition, this regulation also stated that if an anesthesiologist and a CRNA are involved in a single procedure, the procedure is considered to be personally performed by the physician. However, this policy was revised in the December 8, 1995 **Federal Register** (60 FR 63152), (as implemented in § 414.46), effective for services furnished on or after January 1, 1998, to specify that the ''medical direction payment'' rules apply if an anesthesiologist and a CRNA are both involved in a single anesthesia case. The payment for both the CRNA service and the physician medical direction service are paid at 50 percent of the fee otherwise recognized for the anesthesiologist who performs the case alone.

We are revising the regulations at § 413.85(d)(2)(iii) (previously proposed § 413.85(b)(3)) to state that the clinical training costs of a CRNA who is continuously supervising one student anesthetist are not allowable under the pass-through because the CRNA may bill for this service under the Medicare Part B fee schedule. The clinical training costs of a CRNA are also not allowable under the pass-through when the CRNA may bill for fifty percent of a service under the Part B fee schedule. We expect that the fiscal intermediaries will be careful to review the documentation the hospital maintains to support its request for payment under the pass-through for CRNA clinical training. In general, the teaching portion of the pass-through is not allowed in situations where any practitioner (including CRNAs) can bill for the service under the Medicare Part B fee schedule.

Comment: Three commenters stated that CRNAs should be required to complete allocation agreements, like those completed by provider-compensated physicians, that detail the way the physicians spend their time at the provider. This would allow a consistent set of rules under Medicare. Another commenter, who believed that the requirements for physicians are more precise, requested that the final rule present examples of what we would consider to be ''adequate documentation.''

Response: We do not agree with the commenters' suggestion that we impose elaborate recordkeeping requirements on providers concerning the allocation of a CRNA's time spent in the clinical training of students. A provider is free to require that the CRNAs that it employs complete allocation agreements or similar documents that detail the CRNAs services. However, we believe that there are less burdensome ways in which the provider can keep track of a CRNA's time in order to support the costs that the provider is claiming under the Medicare Part A pass-through. Examples of documentation may include operating room assignments, schedules, or any other information indicating the portion of time the CRNA spends in activities which are billable under Medicare Part B. We do not believe we need to include these examples as part of the regulation text.

III. Provisions of the Final Rule

In this final rule, we are adopting the provisions of approved nursing and allied health education activities as proposed with the following changes to § 413.85. For the sake of clarity, we are reorganizing the text of § 413.85. For ease of reference, a crosswalk appears below:

Proposed	Final
Paragraph (a)	Paragraph (d)
Paragraph (b)(1)	Paragraph (b)(2)
Paragraph (b)(2)	Paragraph (b)(3)
Paragraph (b)(3)	Paragraph (d)(2)(iii)
Paragraph (c)(1)	Paragraph (d)(2)(i), (ii) and (iv)
Paragraph (c)(2)	Paragraph (c), definition
Paragraph (c)(3)	Paragraph (c), definition
Paragraph (c)(4)	Paragraph (c), definition
Paragraph (c)(5)	Paragraphs (c) definition, and (e)
Paragraph (d)	Paragraph (e)
Paragraph (e)(1)	Paragraph (f)(1)
Paragraph (e)(2)	Paragraph (f)(2)
Paragraph (f)	Paragraph (g)
Paragraph (g)	Paragraph (h)

All substantive revisions made to the section are summarized below.

- We are renaming § 413.85 to read ''Cost of approved nursing and allied health education activities,'' instead of ''Cost of approved educational activities,'' and generally refer to ''approved educational activities'' as ''approved nursing and allied health education activities'' under this section. We are using the phrase ''nursing and allied health education activities'' in connection with ''approved educational activities'' because it clarifies that this section addresses only nursing and

allied health education activities, and no other types of educational activities, such as graduate medical education.

• We are revising paragraphs (c) and (e) to reflect our clarification in policy that, as part of a provider's requirements for receiving Medicare payment on a reasonable cost basis for the net costs of its nursing and allied health education activities, the activities must be recognized by a national approving body or State licensing organization.

• We are revising and reorganizing proposed § 413.85, and are making editorial revisions where necessary, to clarify our policy on approved nursing and allied health education activities. The reorganized editorial revisions do not reflect a change from the proposed policy on approved nursing and allied health education programs.

• We are redesignating the existing paragraph (h) of § 413.85 as § 422.270 (with appropriate revision of the paragraph codes) because paragraph (h) more properly belongs in the Medicare+Choice sections of the Medicare regulation.

• We are revising paragraph (a) to include the statutory basis for implementing this policy on nursing and allied health education programs.

• We are revising redesignated paragraph (g)(2)(i) to clarify the meaning of ''on the premises of the provider.''

• We are revising redesignated paragraph (d)(2)(iii) to provide that the clinical training costs of CRNAs who are medically directing student anesthetists are not allowable under the pass through if the CRNA may bill for the services under the Part B fee schedule.

• We are revising redesignated paragraph (h) to clarify those costs that are allowable as normal operating costs.

• We are revising one of the criteria for identifying programs operated by a provider to indicate that the provider must provide and control both classroom instruction and clinical training ''where the classroom instruction is a requirement for program completion.'' In addition, we are further revising this criterion that it is subject to the parenthetical sentence in paragraph (f)(1)(ii) of this final rule.

IV. Regulatory Impact Analysis

We have examined the impacts of this rule as required by Executive Order 12866 and the Regulatory Flexibility Act (RFA) (Public Law 96–354). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more annually).

We generally prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612) unless we certify that a final rule will not have a significant impact on a substantial number of small entities. For purposes of the RFA, all providers are treated as small entities.

In general, the provisions that are set forth in this final rule conform the regulations to the statute and to our existing policy as set forth in the Provider Reimbursement Manual and other instructions. These provisions have no impact on those providers that operate their own nursing and allied health education program. We note, however that section 6205(b)(1) of Public Law 101–239 imposed a moratorium for the period on or after December 19, 1989, and before October 1, 1990, on the recoupment of overpayments attributable to a determination by a provider's intermediary that costs claimed by a provider for the operation of a school of nursing or allied health are not eligible for payment on a reasonable cost basis. The basis for this determination is generally that a neighboring or related college or university, not the hospital, is the operator of the program.

As discussed earlier in this preamble, some hospitals that do not operate their own nursing and allied health education programs received overpayments for nursing and allied health education costs for cost reporting periods beginning on or after October 1, 1983 and ending before October 1, 1990. However, we were prohibited from collecting these overpayments and were required to refund previously collected overpayments under section 4004(b)(3) of Public Law 101–508. The statute did not substantially alter payments to hospitals that did not operate their own programs prior to Public Law 101–508. Sections 4004(b)(1) and (2) of Public Law 101–508 required the Secretary to continue making pass-through payments to these hospitals for the clinical training costs of nursing and allied health education programs. Funding for nursing and allied health education for these hospitals has only been affected to the extent that prior overpayments included payment for classroom education which are not provided for under Public Law 101–508. If Medicare had not made pass-through payments hospitals prior to Public Law 101–508 for programs they do not operate, there would have been no subsequent pass-through payment under OBRA 1990 for any of these nursing and allied health programs. Thus, relative to Medicare's policy prior to enactment of Public Law 101–508, Public Law 101–508 substantially benefited a small number of hospitals that do not operate their own programs.

Although we have data on Medicare's expenditures for nursing and allied health education both before and after enactment of Public Law 101–508, we do not have data broken down on the respective shares accounted for by provider and nonprovider-operated programs. For this reason, we cannot make an accurate estimate of the impact of Public Law 101–508 and this final rule on payment for nursing and allied health education. However, we note that this provision only affected a small number of hospitals with existing nonprovider-operated programs.

Section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a final rule will have significant impact on the operations of a substantial number of small rural hospitals. Such an analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area (MSA) and has fewer than 50 beds. We are not preparing a rural impact statement, since we have determined, and certify, that this final rule will not have a significant economic impact on the operations of a substantial number of small rural hospitals.

We have reviewed this final rule under the threshold criteria of Executive Order 13132, Federalism, and have determined that the final rule will not have any negative impact on the rights, roles, and responsibilities of State, local, or tribal governments.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in an expenditure in any one year by State, local or tribal governments, in the aggregate, or by the private sector, of $100 million. This final rule does not mandate any requirements for State, local, or tribal governments.

In accordance with the provisions of Executive Order 12866, this final rule was reviewed by the Office of Management and Budget.

V. Information Collection Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and

solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

In this final rule, § 413.85(e) requires that, in order for an activity to be considered an approved nursing and allied health education activity, the activity must be recognized by a national approving body or State licensing authority (in addition to meeting the other requirements listed in paragraph (d)(1) of this section). For example, such national accrediting bodies include, but are not limited to, the Commission on Accreditation of Allied Health Education Programs, the National League of Nursing Accrediting Commission, the Association for Clinical Pastoral Education, Inc., and the American Dietetic Association. The burden associated with this requirement is the time necessary for the provider to maintain documentation demonstrating that this requirement has been met. We estimate that 1,400 providers will be required to maintain documentation and that it will take each organization 5 minutes on an annual basis to maintain the documentation, for a total burden of 117 hours.

We have submitted a copy of this final rule to OMB for its review of the information collection requirement in § 413.85(e). Compliance with this requirement is not required until it has been approved by OMB.

List of Subjects

42 CFR Part 413

Health facilities, Kidney diseases, Medicare, Reporting and record-keeping requirements.

42 CFR Part 422

Health maintenance organizations (HMO), Medicare+Choice, Provider sponsored organizations (PSO).

42 CFR Chapter IV is amended as set forth below:

PART 413—PRINCIPLES OF REASONABLE COST REIMBURSEMENT; PAYMENT FOR END-STAGE RENAL DISEASE SERVICES; OPTIONAL PROSPECTIVELY DETERMINED PAYMENT RATES FOR SKILLED NURSING FACILITIES

A. Part 413 is amended as follows:

1. The authority citation for part 413 continues to read as follows:

Authority: Secs. 1102, 1812(d), 1814(b), 1815, 1833(a), (i), and (n), 1861(v), 1871, 1881, 1883, and 1886 of the Social Security Act (42 U.S.C. 1302, 1395f(b), 1395g, 1395l, 1395l(a), (i), and (n), 1395x(v), 1395hh, 1395rr, 1395tt, and 1395ww).

2. In § 413.85, the section heading is revised, paragraph (h) is redesignated as a new § 422.270, and the remainder of the section is revised to read as follows:

§ 413.85 Cost of approved nursing and allied health education activities.

(a) *Statutory basis.* This section implements section 1861(v)(1)(A) of the Act and section 4004(b) of the Omnibus Budget Reconciliation Act of 1990 (Public Law 101–508) by establishing the methodology for Medicare payment of the costs of approved nursing and allied health education activities.

(b) *Scope.* (1) This section sets forth the rules for determining Medicare payments to hospitals for the costs of nursing and allied health education activities.

(2) This section does not address Medicare payments for the direct and indirect costs of graduate medical education (that is, approved residency programs in medicine, osteopathy, dentistry, and podiatry). Medicare payment for these costs is determined as provided in § 412.105 of this subchapter and § 413.86.

(3) The rules under this section do not apply to activities that are specified in paragraph (h) of this section and identified as normal operating costs.

(c) *Definitions.* For purposes of this section, the following definitions apply:

Approved educational activities means formally organized or planned programs of study of the type that:

(1) Are operated by providers as specified in paragraph (f) of this section;

(2) Enhance the quality of inpatient care at the provider; and

(3) Meet the requirements of paragraph (e) of this section for State licensure or accreditation.

Classroom instruction costs are those costs associated with formal, didactic instruction on a specific topic or subject in a class that meets at regular, scheduled intervals over a specific time period (for example, semester or quarter), and for which a student receives a grade.

Clinical training costs means costs of training for the acquisition and use of the skills of a nursing or allied health profession or trade in the actual environment in which these skills will be used by the student upon graduation. Clinical training may involve occasional or periodic meetings to discuss or analyze cases, critique performance, or discuss specific skills or techniques; it involves no classroom instruction.

Community support means funding that is provided by the community and generally includes all non-Medicare sources of funding (other than payments made for furnishing services to individual patients), including State and local government appropriations. Community support does not include grants, gifts, and endowments of the kind that are not to be offset in accordance with section 1134 of the Act.

Redistribution of costs means an attempt by a provider to increase the amount, or to expand the types, of the costs of educational activities that are allowed for Medicare payment purposes by claiming costs that previously were not claimed by the provider and were considered costs of an educational institution. For example, costs for a school of nursing or allied health education or a medical school that were incurred by an educational institution and were not allowable to the provider in its prospective payment or rate-of-increase limit base year cost report, or graduate medical education per resident amount calculated under § 413.86, are not allowable costs in subsequent fiscal years.

(d) *General payment rules.* (1) Payment for a provider's net cost of nursing and allied health education activities is determined on a reasonable cost basis, subject to the following conditions and limitations:

(i) An approved educational activity—

(A) Is recognized by a national approving body or State licensing authority as specified in paragraph (e) of this section;

(B) Meets the criteria specified in paragraph (f) of this section for identification as an operator of an approved education program.

(C) Enhances the quality of inpatient care at the provider.

(ii) The cost for certain nonprovider-operated programs are reimbursable on a reasonable cost basis if the programs meet the criteria specified in paragraph (g)(2) of this section.

(2) *Determination of net cost.* (i) Subject to the provisions of paragraph (d)(2)(iii) of this section, the net cost of approved educational activities is

determined by deducting the revenues that a provider receives from tuition and student fees from the provider's total allowable educational costs that are directly related to approved educational activities.

(ii) A provider's total allowable educational costs are those costs incurred by the provider for trainee stipends, compensation of teachers, and other costs of the activities as determined under the Medicare cost-finding principles in § 413.24. These costs do not include patient care costs, costs incurred by a related organization, or costs that constitute a redistribution of costs from an educational institution to a provider or costs that have been or are currently being provided through community support.

(iii) The net costs of approved certified registered nurse anesthetist (CRNA) education programs that are determined on a reasonable cost basis are subject to the additional condition that allowable compensation costs for faculty members who are CRNAs are limited to the compensation costs for administrative activities related to the educational program, the compensation costs directly related to hours spent in classroom instruction, and the costs related to the clinical training of students for which the CRNA may not receive payment under the CRNA fee schedule. No pass-through compensation costs are allowable for the time a CRNA spends in the clinical training of a student anesthetist during a surgical procedure in the operating room for which the CRNA may receive payment under the CRNA fee schedule. As specified at § 414.46 of this chapter, if the CRNA continuously supervises the services of a single student nurse anesthetist, or where the medical direction rules allow a CRNA to bill for the service, payment can be made under the CRNA fee schedule.

(iv) Net costs are subject to apportionment for Medicare utilization as described in § 413.50.

(e) *Approved nursing and allied health education programs.* HCFA will consider an activity an approved nursing and allied health education program if the program is a planned program of study that is licensed by State law, or if licensing is not required, is accredited by the recognized national professional organization for the particular activity. Such national accrediting bodies include, but are not limited to, the Commission on Accreditation of Allied Health Education Programs, the National League of Nursing Accrediting Commission, the Association for Clinical Pastoral Education Inc., and the American Dietetic Association.

(f) *Criteria for identifying programs operated by a provider.* (1) Except as provided in paragraph (f)(2) of this section, for cost reporting periods beginning on or after October 1, 1983, in order to be considered the operator of an approved nursing or allied health education program, a provider must meet all of the following requirements:

(i) Directly incur the training costs.

(ii) Have direct control of the program curriculum. (A provider may enter into an agreement with an educational institution to furnish basic academic courses required for completion of the program, but the provider must provide all of the courses relating to the theory and practice of the nursing or allied health profession involved that are required for the degree, diploma, or certificate awarded at the completion of the program.)

(iii) Control the administration of the program, including collection of tuition (where applicable), control the maintenance of payroll records of teaching staff or students, or both (where applicable), and be responsible for day-to-day program operation. (A provider may contract with another entity to perform some administrative functions, but the provider must maintain control over all aspects of the contracted functions.)

(iv) Employ the teaching staff.

(v) Provide and control both classroom instruction and clinical training (where classroom instruction is a requirement for program completion), subject to the parenthetical sentence in paragraph (f)(1)(ii) of this section.

(2) Absent evidence to the contrary, the provider that issues the degree, diploma, or other certificate upon successful completion of an approved education program is assumed to meet all of the criteria set forth in paragraph (f)(1) of this section and to be the operator of the program.

(g) *Payment for certain nonprovider-operated programs.* (1) *Payment rule.* Costs incurred by a provider, or by an educational institution that is related to the provider by common ownership or control (that is, a related organization as defined in § 413.17(b)), for the clinical training of students enrolled in an approved nursing or allied health education program that is not operated by the provider, are paid on a reasonable cost basis if the conditions specified in paragraph (g)(2) of this section are met.

(2) *Criteria for identification of nonprovider-operated education programs.* Payment for the incurred costs of educational activities identified in paragraph (g)(1) of this section will be made if the following conditions are met:

(i) The clinical training must occur on the premises of the provider, that is, in the hospital itself or in the physical area immediately adjacent to the provider's main buildings, or in other areas and structures that are not strictly contiguous to the main buildings but are located within 250 yards of the main buildings.

(ii) The provider must have claimed and been paid for clinical training costs on a reasonable cost basis during the most recent cost reporting period that ended on or before October 1, 1989. This condition is met if a notice of program reimbursement (NPR) was issued for that cost reporting period by November 5, 1990, and the clinical training costs were included as pass-through costs. If an NPR was not issued by that date, or an NPR was issued but did not treat the clinical training costs as pass-through costs, the condition is met if—

(A) The intermediary included the clinical training costs in the allowable costs used to determine the interim rate for the most recent cost reporting period ending on or before October 1, 1989; or

(B) The provider claimed the clinical training costs as pass-through costs when the cost report for the most recent cost reporting period ending on or before October 1, 1989, was initially submitted.

(iii) In any cost reporting period, the percentage of total allowable provider cost attributable to allowable clinical training cost does not exceed the percentage of total cost for clinical training in the provider's most recent cost reporting period ending on or before October 1, 1989.

(iv) The students in the educational program must provide a benefit to the provider through the provision of clinical services to patients of the provider.

(v) The clinical training costs must be incurred by the provider or by an educational institution related to the provider by common control or ownership as defined in § 413.17(b) (''*Cost to related organizations.*'') Costs incurred by a third-party, regardless of its relationship to either the provider or the educational institution, are not allowed.

(vi) The costs incurred by a provider does not exceed the costs the provider would have incurred if it was the sole operator of the program.

(h) *Cost of educational activities treated as normal operating costs.* The costs of the following educational activities incurred by a provider but not

operated by that provider are recognized only as normal operating costs and paid in accordance with the reimbursement principles specified in Part 412 of this subchapter. They include:

(1) Orientation and on-the-job training.

(2) Part-time education for bona fide full-time employees at properly accredited academic or technical institutions (including other providers) devoted to undergraduate or graduate work.

(3) Educational seminars, workshops, and continuing education programs in which the employees participate that enhance the quality of medical care or operating efficiency of the provider.

(4) Maintenance of a medical library.

(5) Training of a patient or patient's family in the use of medical appliances or other treatments.

(6) Except as provided in paragraph (g) of this section, clinical training and classroom instruction of students enrolled in an educational program that is not operated by the provider. The following are clinical training and classroom instruction costs that are allowable as normal operating costs:

(i) Costs incurred in the clinical training of students, including the clinical training or clerkship of undergraduate medical school students that takes place in a provider.

(ii) Classroom instruction costs incurred by a provider that meet the following criteria:

(A) The provider's support does not constitute a redistribution of nonprovider costs to the provider. The support must be in addition to the costs already being incurred by the nonprovider-operated program. If the nonprovider entity reduces its costs due to receiving provider support, this reduction constitutes a redistribution of costs from an educational institution to a patient care institution and is a nonallowable provider cost.

(B) The provider receives a benefit for the support it furnishes.

(C) The cost of the provider's support is less than the cost the provider would incur were it to operate the program.

(7) Other activities that do not involve the actual operation of an approved educational program.

PART 422—MEDICARE+CHOICE PROGRAM

B. Part 422 is amended as follows:

1. The authority citation for part 422 is revised to read as follows:

Authority: Secs. 1851 and 1855 of the Social Security Act (42 U.S.C. 1395w-21 and 1395w–25).

2. Newly designated § 422.270 is revised to read as follows:

§ 422.270 Payments to M+C organizations for graduate medical education costs.

(a) Effective January 1, 1999, Medicare+Choice organizations may receive direct graduate medical education payments for the time that residents spend in nonhospital provider settings such as freestanding clinics, nursing homes, and physicians' offices in connection with approved programs.

(b) Medicare+Choice organizations may receive direct graduate medical education payments if all of the following conditions are met:

(1) The resident spends his or her time assigned to patient care activities.

(2) The Medicare+Choice organization incurs ''all or substantially all'' of the costs for the training program in the nonhospital setting as defined in § 413.86(b) of this subchapter.

(3) There is a written agreement between the Medicare+Choice organization and the nonhospital site that indicates the Medicare+Choice organization will incur the costs of the resident's salary and fringe benefits and provide reasonable compensation to the nonhospital site for teaching activities.

(c) A Medicare+Choice organization's allowable direct graduate medical education costs, subject to the redistribution and community support principles specified in § 413.85(c) of this subchapter, consist of—

(1) Residents' salaries and fringe benefits (including travel and lodging where applicable); and

(2) Reasonable compensation to the nonhospital site for teaching activities related to the training of medical residents.

(d) The direct graduate medical education payment is equal to the product of—

(1) The lower of—

(i) The Medicare+Choice organization's allowable costs per resident as defined in paragraph (c) of this section; or

(ii) The national average per resident amount; and

(2) Medicare's share, which is equal to the ratio of the number of Medicare beneficiaries enrolled to the total number of individuals enrolled in the Medicare+Choice organization.

(e) Direct graduate medical education payments made to Medicare+Choice organizations under this section are made from the Federal Supplementary Medical Insurance Trust Fund.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance and Program No. 93.774, Medicare—Supplementary Medical Insurance)

Dated: January 5, 2001.

Robert A. Berenson,

Acting Deputy Administrator,, Health Care Financing Administration.

Dated: January 5, 2001.

Donna E. Shalala,

Secretary.

[FR Doc. 01–909 Filed 1–9–01; 10:21 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Part 413

[HCFA–1089–P]

RIN 0938–AK15

Medicare Program; Payment for Clinical Psychology Training Programs

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Proposed rule.

SUMMARY: This proposed rule would revise our policy on Medicare payment for approved nursing and allied health education programs to permit payment for the costs incurred by a provider for the clinical training of students enrolled in a clinical psychology training program. Consistent with the Conference Agreement language in the Conference Report accompanying the Balanced Budget Act of 1997 (Public Law 105–33), these clinical training costs would be paid separately on a reasonable cost basis in accordance with sections 1861(v) and 1886(a)(4) of the Social Security Act.

DATES: Written comments will be considered if we receive them at the appropriate address, as provided below, no later than 5 p.m. March 13, 2001.

ADDRESSES: Mail written comments (an original and three copies) to the following address only: Health Care Financing Administration, Department of Health and Human Services, Attention: HCFA 1089–P, P.O. Box 8010, Baltimore, MD 21244–1850.

If you prefer, you may deliver by courier your written comments (an original and three copies) to one of the following addresses:

Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or

Room C5–14–03, Central Building, 7500 Security Boulevard, Baltimore, MD 21244–1850.

Comments mailed to these addresses may be delayed and could be considered late.

FOR FURTHER INFORMATION CONTACT: Tzvi Hefter (410) 786–4487.

SUPPLEMENTARY INFORMATION:

Comments, Procedures, Availability of Copies and Electronic Access

Because of staffing and resource limitations, we cannot accept comments by facsimile (FAX) transmission. In commenting, please refer to file code HCFA–1089P. Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, in Room 443–G of the Department's office at 200 Independence Avenue, SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (phone: (202) 690–7890).

For comments that relate to information collection requirements, mail a copy of comments to: Health Care Financing Administration, Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards, Room N2–14–26, 7500 Security Boulevard, Baltimore, Maryland 21244–1850. Attn: John Burke HCFA–1089–P; and Office of Information and Regulatory Affairs, Office of Management and Budget, Room 3001, New Executive Office Building, Washington, DC 20503, Attn: Allison Herron Eydt, HCFA Desk Officer HCFA–1089–P.

Copies: To order copies of the **Federal Register** containing this document, send your request to: New Orders, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250–7954. Specify the date of the issue requested and enclose a check or money order payable to the Superintendent of Documents, or enclose your Visa or Master Card number and expiration date. Credit card orders can also be placed by calling the order desk at (202) 512–1800 or by faxing to (202) 512–2250. The cost for each copy is $8. As an alternative, you can view and photocopy the **Federal Register** document at most libraries designated as Federal Depository Libraries and at many other public and academic libraries throughout the country that receive the **Federal Register**.

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I. Background

Medicare has historically paid providers for its share of the costs that providers incur in connection with approved educational activities. The activities may be broken down into the following three general categories to which different payment policies apply:

- Approved graduate medical education (GME) programs in medicine, osteopathy, dentistry, and podiatry. Medicare makes direct and indirect medical education payments to hospitals operating these programs. Existing policy on direct GME payment is found at 42 CFR 413.86, and for indirect GME payment at 42 CFR 412.105.
- Approved nursing and allied health education programs operated by the provider. The costs of these programs are excluded from the definition of inpatient hospital operating costs and are not included in the calculation of payment rates under the Medicare hospital inpatient prospective payment system or in the calculation of the target amount subject to the rate-of-increase ceiling for hospitals and hospital units excluded from the hospital inpatient prospective payment system. These costs are separately identified and ''passed through'' (that is, paid separately on a reasonable cost basis).
- All other costs that can be categorized as educational programs and activities are considered to be part of normal operating costs and are covered on a per-case basis for hospitals subject to the hospital inpatient prospective payment system, or on a reasonable cost basis subject to the rate-of-increase limits for hospitals and hospital units excluded from the hospital inpatient prospective payment system.

This proposed rule describes how Medicare payments for the costs associated with approved nursing and allied health education programs are made, and sets forth proposed changes in payment policy for the costs incurred by a provider for the clinical training of students enrolled in a clinical psychology training program.

Under regulations at 42 CFR 413.85 (''Cost of approved nursing and allied health educational activities''), Medicare makes reasonable cost payment to hospitals for hospital-operated nursing and allied health education programs. In general, a hospital may receive reasonable cost payment if the provider directly incurs the training costs, controls the curriculum and the administration of the program, employs the teaching staff, and provides and controls both clinical training and classroom instruction (where applicable) of a nursing or allied health education program.

Elsewhere in this issue of the **Federal Register**, we published a final regulation that clarified the policy for payments for

approved nursing and allied health education activities to implement section 6205(b)(2) of the Omnibus Budget Reconciliation Act of 1989 (Public Law 101–239) and sections 4004(b)(1) and (2) of the Omnibus Budget Reconciliation Act of 1990 (Public Law 101–508).

Section 6205(b)(2) of Public Law 101–239 directed the Secretary to publish regulations clarifying the rules governing allowable costs of approved educational activities and when those costs are eligible for pass-through (that is, paid separately from other payments) under the hospital inpatient prospective payment system, including the relationship required between an approved nursing or allied health education program and a hospital for the program's costs to be eligible for pass-through. Section 4004(b)(1) of Public Law 101–508 provides that, effective for cost reporting periods beginning on or after October 1, 1990, if certain conditions are met, the costs incurred by a hospital (or by an educational institution related to the hospital by common ownership or control) for clinical training (as defined by the Secretary) conducted on the premises of the hospital under an approved nursing or allied health education program that is not operated by the hospital are treated as pass-through costs and paid on the basis of reasonable cost. Section 4004(b)(2) of Public Law 101–508 sets forth the conditions that a hospital must meet to receive payment on a reasonable cost basis under section 4004(b)(1).

While we were drafting the final rule relating to nursing and allied health education activities to implement the Congressional mandates under Public Laws 101–239 and 101–508, we received questions from representatives of various entities as to whether we would be revising our policies to address the language in the Conference Agreement in the Conference Report accompanying Public Law 105–33 that the "* * * Conferees also note that the Secretary reimburses for the training of certain allied health professionals, and urges the Secretary to include * * * psychologists under such authority." (H.R. Rep. No. 105–217, 105th Cong., 1st Sess., 822 (1997).) Many clinical psychology training programs currently do not meet the general criteria stated at § 413.85(f) of the regulations to be considered provider-operated programs because they do not operate both the classroom instruction and clinical training portions. We understand that in clinical psychology training programs, providers are operating only the clinical training portions of the programs.

II. Provisions of the Proposed Rule

We are proposing to amend § 413.85 to allow a provider to receive pass-through reasonable cost payment if it is operating the clinical training portion of a clinical psychology training program.

For purposes of determining whether a hospital operates the clinical training portion of a clinical psychology training program, we propose to use criteria that correspond to the generally applicable criteria for determining whether a hospital operates a program. Therefore, we are proposing at new § 413.85(g) that a provider must meet the following criteria in order to be considered the operator of the clinical training portion of a clinical psychology training program:

(1) Directly incur the clinical training costs.

(2) Have direct control of the clinical training curriculum.

(3) Control the administration of the clinical training portion, including collection of tuition of the clinical training portion (where applicable), control the maintenance of payroll records of teaching staff of the clinical training portion or students or both (where applicable), and be responsible for day-to-day clinical training operation. (A provider may contract with another entity to perform some administrative functions, but the provider must maintain control over all aspects of the contracted functions.)

(4) Employ the teaching staff of the clinical training portion.

We welcome public comment on these proposed criteria. If a provider meets all of these proposed criteria for operating the clinical training portion of a clinical psychology training program, as well as the other requirements for payment listed under § 413.85(d)(1)(i), we propose that the provider may receive pass-through reasonable cost payment for the net costs of the clinical training portion of the program.

We believe it is critical to expand existing policy to include payment for the hospital-based training of this allied health specialty because it plays an essential role in providing quality health care to Medicare beneficiaries. We believe it is important to pay for hospital-based clinical psychology training in order to:

• *Fulfill the Secretary's commitment to improve mental health services for Medicare beneficiaries.*

The Secretary has made a strong commitment to improve the treatment of mental health problems experienced by Medicare beneficiaries—most notably through the Surgeon General's Report, "Mental Health: Report of the Surgeon General," U.S. Department of Health and Human Services, National Institutes of Health, National Institute of Mental Health, Substance Abuse and Mental Health Services Administration, Rockville, Maryland (1999). In making this commitment, the Secretary noted that depression, which affects about one in six people and is often higher among individuals in nursing homes, is a widely underrecognized and undertreated medical condition. We believe that providing funds to help train additional persons in the field of clinical psychology may greatly assist in both the detection and the adequate treatment of depression in this vulnerable group.

Psychologists are exceptionally well qualified to recognize symptoms of depression and provide early intervention services to address mental health problems. For example, unlike other groups of mental health providers, in some cases clinical psychologists have hospital admitting privileges, which could potentially increase the accessibility of hospital services to beneficiaries who may need such care.

• *Provide a more comprehensive approach to care.*

By helping to train more clinical psychologists, we will continue to move towards achieving our goal of providing a comprehensive, multi-disciplinary approach to treating Medicare beneficiaries. In addition, it is important that beneficiaries have access to care and treatment for both their physical and mental illness.

In addition, we note that allowing a provider to receive pass-through reasonable cost payment if it is operating the clinical training portion of a clinical psychology training program is also consistent with the Conference Report accompanying Public Law 105–33 cited earlier.

III. Regulatory Impact Statement

We have examined the impacts of this proposed rule as required by Executive Order 12866 and the Regulatory Flexibility Act (RFA) (Public Law 96–354). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more annually). We do not consider this

proposed rule as meeting the criteria as a major rule.

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations and government agencies. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $5 million or less annually. For purposes of the RFA, all providers are treated as small entities. Individuals and States are not included in the definition of a small entity.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a proposed rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 50 beds.

Our actuarial estimates indicate that the minimal annual cost to the Medicare program associated with payment for the clinical training portion of clinical psychology training programs would be approximately $30 million the first year after payments begin and may grow to $50 million by the 5th year. Costs are expected to increase because we believe that Medicare's support through its education regulations will encourage hospitals to report more costs for clinical psychology training programs than are reported today. This estimate is based on assumptions as to how much Medicare could pay for additional educational programs and how quickly other providers with clinical training portions would begin seeking those payments.

The following chart shows projected costs to the Medicare program for the next 5 years:

Fiscal year	Medicare program costs*
2001	$30
2002	40
2003	40
2004	40
2005	50

*In millions.

We are not preparing analyses for either the RFA or section 1102(b) of the Act because we have determined, and we certify, that this proposed rule would not have a significant economic impact on a substantial number of small entities and would not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in any one year expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million. This proposed rule does not mandate any requirements for State, local, or tribal governments.

We have examined this proposed rule in accordance with Executive Order 13132, Federalism, and have determined that this proposed rule will not impact on the rights, roles and responsibilities of the State, local or tribal governments.

In accordance with the provisions of Executive Order 12866, this proposed rule was reviewed by the Office of Management and Budget.

IV. Information Collection Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of an information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

The proposed regulation at § 413.85(g)(2)(ii) contains an information collection and recordkeeping requirement that is subject to review by OMB under the Paperwork Reduction Act of 1995. Under this information collection requirement a provider would need to maintain documentation of a separate licensure if required by State law, or, if licensing is not required, accreditation by the recognized national professional organization, for the clinical psychology training program. We believe that this information is already maintained for those clinical psychology training programs and no additional time will be required to satisfy this requirement. Therefore, the burden associated with this requirement is exempt from the PRA as defined in 5 CFR 1320.3(b)(2) and (b)(3).

Comments on the information collection and record-keeping requirement should be mailed to the following addresses:

Health Care Financing Administration, Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards, Room N2–14–26, 7500 Security Boulevard, Baltimore, Maryland 21244–1850. Attn: John Burke HCFA–1089–P;

and

Office of Information and Regulatory Affairs, Office of Management and Budget, Room 3001, New Executive Office Building, Washington, DC 20503, Attn: Allison Herron Eydt, HCFA Desk Officer HCFA 1089–P.

V. Response to Public Comments

Because of the large number of items of correspondence we normally receive on a proposed rule, we are not able to acknowledge or respond to them individually. However, we will consider all comments that we receive by the date and time specified in the **DATES** section of this preamble, and, if we proceed with a final rule, we will respond to the comments in the preamble to that rule.

List of Subjects in 42 CFR Part 413

Health facilities, Kidney diseases, Medicare, Reporting and recordkeeping requirements.

42 CFR Chapter IV Part 413 is amended as set forth below:

PART 413—PRINCIPLES OF REASONABLE COST REIMBURSEMENT; PAYMENT FOR END-STAGE RENAL DISEASE SERVICES; OPTIONAL PROSPECTIVELY DETERMINED PAYMENT RATES FOR SKILLED NURSING FACILITIES

1. The authority citation for part 413 continues to read as follows:

Authority: Secs. 1102, 1812(d), 1814(b), 1815, 1833(a), (i), and (n), 1871, 1881, 1883, and 1886 of the Social Security Act (42 U.S.C. 1302, 1395d(d), 1395f(b), 1395g, 1395l(a), (i), and (n), 1395hh, 1395rr, 1395tt, and 1395ww).

2. Section 413.85 is amended by:

A. Revising paragraph (d)(1);

B. Revising the introductory text of paragraph (f)(1);

C. Redesignating paragraphs (g) and (h) as paragraphs (h) and (i), respectively;

D. Adding new paragraph (g); and

E. Revising newly designated paragraph (h)(1) and the introductory text of newly designated paragraph (h)(2).

§ 413.85 Cost of approved nursing and allied health education activities.

* * * * *

(d) *General payment rules.* (1) Payment for a provider's net cost of nursing and allied health education activities is determined on a reasonable cost basis, subject to the following conditions and limitations:

(i) An approved educational activity must—

(A) Be recognized by a national approving body or State licensing authority as specified in paragraph (e) of this section;

(B) Meet the criteria specified in paragraph (f) of this section for identification as an operator of an approved education program; or the criteria specified in paragraph (g) of this section for identification as an operator of the clinical training portion of a clinical psychology training program.

(C) Enhance the quality of inpatient care at the provider.

(ii) The costs for certain nonprovider-operated activities or programs are reimbursed on a reasonable cost basis if the activities or programs meet the criteria specified in paragraph (h)(2) of this section.

(f) *Criteria for identifying programs operated by a provider.* (1) Except as provided in paragraphs (f)(2) and (g) of this section, for cost reporting periods beginning on or after October 1, 1983, in order to be considered the operator of an approved nursing or allied health education program, a provider must meet all of the following requirements:

* * * * *

(g) *Criteria for identifying provider-operated clinical training portions of clinical psychology training programs.* Effective with cost reporting periods beginning on or after [FR: insert 60 days after date of publication of final regulation], in order to be considered the operator of the clinical training portion of a clinical psychology training program, a provider must meet all of the following requirements:

(1) Directly incur the clinical training costs.

(2) Have direct control of the clinical training curriculum.

(3) Control the administration of the clinical training portion, including collection of tuition of the clinical training portion (where applicable), control the maintenance of payroll records of teaching staff or students of the clinical training portion, or both (where applicable), and be responsible for day-to-day clinical training operation. (A provider may contract with another entity to perform some administrative functions, but the provider must maintain control over all aspects of the contracted functions.)

(4) Employ the teaching staff of the clinical training portion.

* * * * *

(h) *Payment for certain nonprovider-operated programs.* (1) *Payment rule.* Costs incurred by a provider, or by an educational institution that is related to the provider by common ownership or control (that is, a related organization as defined in § 413.17(b)), for the clinical training of students enrolled in an approved nursing or allied health education program that is not operated by the provider, are paid on a reasonable cost basis if the conditions specified in paragraph (h)(2) of this section are met.

(2) *Criteria for identification of approved nonprovider-operated education programs.* Payment for the incurred costs of educational activities identified in paragraph (h)(1) of this section will be made if the following conditions are met:

* * * * *

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance)

Dated: January 4, 2001.

Robert A. Berenson,

Acting Deputy Administrator, Health Care Financing Administration.

Dated: January 4, 2001.

Donna E. Shalala,

Secretary.

[FR Doc. 01–910 Filed 1–9–01; 10:21 am]

BILLING CODE 4120–01–P

Federal Register

Friday,
January 12, 2001

Part XII

Department of Transportation

Federal Aviation Administration

14 CFR Part 39
Airworthiness Directives; Proposed Rules

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2000–8460; Notice No. 00–15]

RIN 2120–AA64

Airworthiness Directives

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The FAA proposes to move several standard provisions currently found in every airworthiness directive into its regulations pertaining to airworthiness directives. The FAA will no longer include these provisions in individual airworthiness directives. This will shorten individual airworthiness directives, making them easier for readers to use.

DATES: Submit your comments by February 12, 2001.

ADDRESSES: Address your comments to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the docket number FAA–2000–8460 at the beginning of your comments, and you should submit two copies of your comments. If you wish to receive confirmation that FAA received your comments, include a self-addressed, stamped postcard.

You may also submit comments through the Internet to http://dms.dot.gov . You may review the public docket containing comments to these proposed regulations in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. The Dockets Office is on the plaza level of the NASSIF Building at the Department of Transportation at the above address. Also, you may review public dockets on the Internet at http://dms.dot.gov.

FOR FURTHER INFORMATION CONTACT: Donald Byrne, Assistant Chief Counsel, Regulations Division, AGC–200, Federal Aviation Administration, 800 Independence Ave. SW., Washington, DC 20591; telephone: (202) 267–3073.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed action by submitting such written data, views, or arguments as they may desire. Comments relating to the environmental, energy, federalism, or economic impact that might result from adopting the proposals in this document also are invited. Substantive comments should be accompanied by cost estimates. Comments must identify the regulatory docket or notice number and be submitted in duplicate to the DOT Rules Docket address specified above.

All comments received, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking, will be filed in the docket. The docket is available for public inspection before and after the comment closing date.

All comments received on or before the closing date will be considered by the Administrator before taking action on this proposed rulemaking. Comments filed late will be considered as far as possible without incurring expense or delay. The proposals in this document may be changed in light of the comments received.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this document must include a pre-addressed, stamped postcard with those comments on which the following statement is made: ''Comments to Docket No. FAA–2000–8460.'' The postcard will be date stamped and mailed to the commenter.

Availability of Rulemaking Documents

You can get an electronic copy using the Internet by taking the following steps:

(1) Go to the search function of the Department of Transportation's electronic Docket Management System (DMS) web page (http://dms.dot.gov/search).

(2) On the search page type in the last four digits of the Docket number shown at the beginning of this notice. Click on ''search.''

(3) On the next page, which contains the Docket summary information for the Docket you selected, click on the document number of the item you wish to view.

You can also get an electronic copy using the Internet through FAA's web page at http://www.faa.gov/avr/arm/nprm/nprm.htm or the **Federal Register**'s web page at *http://www.access.gpo.gov/su_docs/aces/aces140.html.*

You can also get a copy by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the docket number, notice number, or amendment number of this rulemaking.

Background

1. Proposed Substantive Changes

The FAA proposes to revise part 39 of Title 14, Code of Federal Regulations by adding several provisions currently found in many airworthiness directives to part 39 and omitting this language from most individual airworthiness directives. Removing this language from airworthiness directives will place the focus on the unsafe condition which created the need for regulatory action. A number of users have suggested to FAA that this boilerplate language imposed a burden on the reader without contributing to aviation safety. The standard provisions made it harder for the reader to focus on the safety aspects of the airworthiness directive. The FAA proposes to move the following provisions currently found in airworthiness directives to part 39:

1. Airworthiness directives apply even if products have been modified, altered, or repaired in the area addressed by the directive;

2. The FAA may issue a special flight permit if you can't move your product to a repair facility within the time limits imposed by the airworthiness directive; and

3. Specify procedures for asking FAA to approve other methods for complying with the airworthiness directive.

2. Clearer Regulatory Format

Besides the specific provisions discussed above, FAA is proposing this regulation in plain language. Plain language helps readers find requirements quickly and understand them easily. To do that, we have reorganized and reworded the regulation using plain language techniques. Plain language elements in the proposal include the following:

1. Our section headings are in the form of questions to help direct the readers to specific material they need.

2. We have used personal pronouns to reduce passive voice and draw readers into the writing.

3. We have used active verbs to make clear who is responsible for what actions.

We are interested in your comments on this format, and on the clarity of the proposal.

3. Section-by-Section Discussion of the Proposals

Section 39.1 What is the purpose of this regulation?

This section would explain that the purpose of the regulation is to set up FAA's system of airworthiness directives. This would replace similar material found currently in part 39.

Section 39.3 What are airworthiness directives?

This section would explain that airworthiness directives are legally enforceable rules that apply to aircraft products. Further, it would define what products are addressed by airworthiness directives. This material is all similar to that in current § 39.1 and 39.3.

Also, this section would state the conditions under which FAA will issue an airworthiness directive. This material is similar to that found in current § 39.1

Section 39.5 Who must comply with airworthiness directives?

This section would clarify that anyone operating a product listed in an airworthiness directive must comply with the airworthiness directive, and that each flight you take without complying is a separate violation. This material is similar to that in current § 39.3.

Section 39.7 What actions do airworthiness directives require?

This section would identify what actions airworthiness directives can require. This material is similar to that in current § 39.11. As under current part 39, FAA intends to retain broad authority to require whatever types of corrective actions we determine to be most effective in addressing identified unsafe conditions. This includes inspections, repairs, modifications, operating limitations, airworthiness limitations, and maintenance program requirements.

Section 39.13 Are airworthiness directives part of the Code of Federal Regulations?

This section would specify that airworthiness directives are amendments to § 39.13; however they are not codified in the annual edition of the Code of Federal Regulations. Airworthiness Directives are published in full in the **Federal Register**.

Also, we no longer need the reference currently found in § 39.13 to airworthiness directives that were formerly in § 507.10. Current § 39.19 transferred these directives to this section and they are still covered by § 39.19.

Section 39.15 Does an airworthiness directive apply if the product has been changed?

This section would specify that a product is covered even if it has been modified, altered, or repaired in the area addressed by the airworthiness directive. Further, it would specify that if the change prevents you from complying with the airworthiness directive, you must ask FAA's permission to use another means of complying, and that your request must include specific actions you propose. Although this material is new to part 39, it currently appears as a note in most individual airworthiness directives.

Section 39.17 May I address the unsafe condition in any way other than that set out in the airworthiness directive?

This section would allow anyone to propose to FAA an alternative method of compliance or a change in the time to comply with an airworthiness directive, as long as the proposal provides an acceptable level of safety. It explains how to ask FAA to approve your proposed alternative. This material is new to part 39 but currently appears in most individual airworthiness directives.

Section 39.19 Where can I get information about any other approved alternative means of compliance that FAA might have approved?

This section would tell you where you can get information about alternative methods of complying with airworthiness directives that FAA has already approved for other certificate holders. This material is new to part 39 but currently appears in most individual airworthiness directives.

Section 39.21 What if I can't get my aircraft to a repair facility within the limits specified in an airworthiness directive?

This section would explain that FAA may issue you a special flight permit, often referred to as a ''ferry permit,'' allowing you to fly your aircraft to a place where you can comply with the airworthiness directive if you cannot do so within the time limits in the airworthiness directive. This material is new to part 39 but currently appears in most individual airworthiness directives.

To ensure aviation safety, this section also would provide that FAA may add special requirements for operating a specific piece of equipment to a repair facility. Furthermore, FAA may specify in particular airworthiness directives that we will not issue special flight permits for products covered by that particular directive. The FAA would take this position when the safety issue addressed by the airworthiness directive was so serious that moving an aircraft to a repair facility would create an unacceptable safety risk. You should also note that even for airworthiness directives for which FAA will generally issue special flight permits, we may decline to do so in individual cases because of the condition of a specific aircraft.

Section 39.25 What do I do if the airworthiness directive conflicts with the Service Bulletin on which it is based?

This section would clarify that in the case of conflicts between an airworthiness directive and a service bulletin, the airworthiness directive prevails. This material is new to part 39 but currently appears in some individual airworthiness directives.

Paperwork Reduction Act

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

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA determined that there are no ICAO Standards and Recommended Practices that correspond to these proposed regulations.

Executive Order 12866 and DOT Regulatory Policies and Procedures

Executive Order 12866, Regulatory Planning and Review, directs the FAA to assess both the costs and benefits of a regulatory change. We are not allowed to propose or adopt a regulation unless we make a reasoned determination that the benefits of the intended regulation justify the costs. Our assessment of this proposal indicates that it's economic impact is minimal. Since its costs and benefits do not make it a ''significant regulatory action'' as defined in the Order, we have not prepared a ''regulatory impact analysis.'' Similarly, we have not prepared a ''regulatory evaluation,'' which is the written cost/benefit analysis ordinarily required for all rulemaking proposals under the DOT Regulatory Policies and Procedures. We do not need to do the latter analysis where the economic impact of a proposal is minimal.

Economic Evaluation, Regulatory Flexibility Determination, International Trade Impact Assessment, and Unfunded Mandates Assessment

Proposed changes to Federal regulations must undergo several economic analyses. First, Executive

Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. section 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. And fourth, the Unfunded Mandates Reform Act of 1995 requires agencies to prepare a written assessment of the costs, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of $100 million or more, in any one year (adjusted for inflation.)

However, for regulations with an expected minimal impact the above-specified analyses are not required. The Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If it is determined that the expected impact is so minimal that the proposal does not warrant a full Evaluation, a statement to that effect and the basis for it is included in proposed regulation. Since this proposed rule revises part 39 by moving several provisions currently found in many airworthiness directives to part 39, the expected outcome is one of minimal impact. The FAA requests comments with supporting justification regarding the FAA determination of minimal impact.

Regulatory Flexibility Act

The Regulatory Flexibility Act of l 980 (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation.'' To achieve that principle, the Act requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The Act covers a wide-range of small entities, including small businesses, not-for-profit organizations and small governmental jurisdictions.

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

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the l 980 act provides that the head of the agency may so certify and an regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

This proposed action simply moves existing provisions from individual airworthiness directives into part 39. As a result, the cost is expected to be minimal. Consequently, the FAA certifies that the rule will not have a significant economic impact on a substantial number of small entities. The FAA requests comments with supporting justification regarding the FAA small business impact determination.

Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards. In addition, consistent with the Administration's belief in the general superiority and desirability of free trade, it is the policy of the Administration to remove or diminish to the extent feasible, barriers to international trade, including both barriers affecting the export of American goods and services to foreign countries and barriers affecting the import of foreign goods and services into the United States.

In accordance with the above statute and policy, the FAA has assessed the potential effect of this final rule to be minimal and therefore has determined that this rule will not result in an impact on international trade by companies doing business in or with the United States.

Unfunded Mandates Assessment

The Unfunded Mandates Reform Act of 1995 (the Act), enacted as Public Law 104–4 on March 22, 1995, is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' This final rule does not contain such a mandate. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

Executive Order 13132, Federalism

The FAA has analyzed this proposed rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, we determined that this notice of proposed rulemaking would not have federalism implications.

Plain Language

In response to the June 1, 1998 Presidential memorandum regarding the use of plain language, the FAA re-examined the writing style currently used in the development of regulations. The memorandum requires federal agencies to communicate clearly with the public. We are interested in your comments on whether the style of this document is clear, and in any other suggestions you might have to improve the clarity of FAA communications that affect you. You can get more information about the Presidential memorandum and the plain language initiative at http://www.plainlanguage.gov.

Environmental Analysis

FAA Order 1050.1D defines FAA actions that may be categorically excluded from preparation of a National Environmental Policy Act (NEPA) environmental impact statement. In accordance with FAA Order 1050.1D, appendix 4, paragraph 4(j), this proposed rulemaking action qualifies for a categorical exclusion.

Energy Impact

The energy impact of the proposed rule has been assessed in accordance with the Energy Policy and

Conservation Act (EPCA) Public Law 94–163, as amended (42 U.S.C. 6362) and FAA Order 1053.1. It has been determined that the proposed rule is not a major regulatory action under the provisions of the EPCA.

List of Subjects in 14 CFR Part 39

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to revise part 39 of Title 14, Code of Federal Regulations, to read as follows:

PART 39—AIRWORTHINESS DIRECTIVES

Sec.

39.1 What is the purpose of this regulation?
39.3 What are airworthiness directives?
39.5 Who must comply with airworthiness directives?
39.7 What actions do airworthiness directives require?
39.13 Are airworthiness directives part of the Code of Federal Regulations?
39.15 Does an airworthiness directive apply if the product has been changed?
39.17 May I address the unsafe condition in any way other than that set out in the airworthiness directive?
39.19 Where can I get information about any other means of complying approved by FAA?
39.21 How can I get a special flight permit to operate my aircraft to a repair facility to do the work required by an airworthiness directive?
39.25 What do I do if the airworthiness directive conflicts with the Service Bulletin on which it is based?

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

§ 39.1 What is the purpose of this regulation?

The regulations in this part set up FAA's system of Airworthiness Directives.

§ 39.3 What are airworthiness directives?

The FAA's airworthiness directives are legally enforceable rules that apply to all aircraft products; that is, aircraft, engines, propellers, and appliances. We issue an airworthiness directive addressing a product when we find that:

(a) An unsafe condition exists in the product; and

(b) The condition is likely to exist or develop in other products of the same type design.

§ 39.5 Who must comply with airworthiness directives?

Anyone who operates a product covered by an airworthiness directive must comply with the airworthiness directive. If you do not meet the requirements of an airworthiness directive, each flight you make is a separate violation of that airworthiness directive.

§ 39.7 What actions do airworthiness directives require?

Airworthiness directives specify inspections you must carry out, conditions and limitations you must comply with, and any actions you must take to resolve an unsafe condition.

§ 39.13 Are airworthiness directives part of the Code of Federal Regulations?

Yes, airworthiness directives are part of the Code of Federal Regulations, but they are not codified in the annual edition. The FAA publishes airworthiness directives in full in the **Federal Register** as amendments to § 39.13.

§ 39.15 Does an airworthiness directive apply if the product has been changed?

Yes, an airworthiness directive applies to each product identified in the airworthiness directive, so the affected products aren't listed in the airworthiness directive. We may also just specify a model without listing individual aircraft, even if an individual product has been changed by modifying, altering, or repairing it in the area addressed by the airworthiness directive. If that change affects in any way your ability to accomplish the actions required by the airworthiness directive, you must request FAA approval for another means of complying. Unless you can show that the change eliminated the unsafe condition, your request should include specific actions you propose to address the unsafe condition. Submit your request in the manner described in § 39.17.

§ 39.17 May I address the unsafe condition in a way other than that set out in the airworthiness directive?

Yes, anyone may propose to FAA another means of complying or a change in the compliance time, as long as the proposal provides an acceptable level of safety. Send your proposal to the FAA manager identified in the directive. At the same time, if you are an operator, provide a copy to your assigned FAA Principal or Aviation Safety Inspector. Include the specific actions you are proposing to address the unsafe condition. The Inspector may add comments and send them to the FAA Manager. You may use the alternative you propose only if the Manager approves it.

§ 39.19 Where can I get information about any other means of complying approved by FAA?

The office identified in an airworthiness directive as responsible for approving alternative means of complying can provide information about the existence of any alternatives FAA already has approved.

§ 39.21 How can I get a special flight permit to operate my aircraft to a repair facility to do the work required by an airworthiness directive?

Unless the airworthiness directive states otherwise, FAA may issue you a special flight permit to fly your aircraft to a place where you can meet the airworthiness directive's requirements. To ensure aviation safety, the FAA may add special requirements for operating your aircraft to a place where the repairs or modifications can be accomplished. The FAA may also decline to issue a special flight permit in particular cases if we determine you cannot move the aircraft safely.

§ 39.25 What do I do if the airworthiness directive conflicts with the Service Bulletin on which it is based?

In some cases an airworthiness directive incorporates by reference a manufacturer's service bulletin. In these cases, the service bulletin becomes part of the airworthiness directive. In some cases the directions in the service bulletin may be modified by the airworthiness directive. If there is a conflict between the service bulletin and the airworthiness directive, you must follow the requirements of the directive.

Issued in Washington, DC, on November 29, 2000.

Ronald T. Wojnar,

Acting Director, Aircraft Certification Service.

[FR Doc. 01–420 Filed 1–11–01; 8:45 am]

BILLING CODE 4910–13–P

Federal Register

Friday,
January 12, 2001

Part XIII

Department of Transportation

National Highway Traffic Safety Administration

49 CFR Part 575

Consumer Information Regulations; Federal Motor Vehicle Safety Standards; Rollover Resistance; Final Rule

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 575

[Docket No. NHTSA–2000–8298]

Consumer Information Regulations; Federal Motor Vehicle Safety Standards; Rollover Resistance

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Response to Comments, Notice of Final Decision.

SUMMARY: The agency has concluded that consumer information on the rollover risk of passenger cars and light multipurpose passenger vehicles and trucks will reduce the number of rollover crashes and the number of injuries and fatalities from rollover crashes. This information will enable prospective purchasers to make choices about new vehicles based on differences in rollover risk and serve as a market incentive to manufacturers in striving to design their vehicles with greater rollover resistance. The consumer information program will also inform drivers, especially those who choose vehicles with poorer rollover resistance, that their risk of harm can be greatly reduced with seat belt use to avoid ejection.

The agency has decided to use the Static Stability Factor to indicate rollover risk in single-vehicle crashes and to incorporate the new rating into NHTSA's New Car Assessment Program (NCAP). As part of these ratings, the agency also has decided to note vehicles that are equipped with ''electronic stability control'' technology, which may reduce the risk of a vehicle getting into an incipient rollover situation. This notice summarizes the comments received in response to the agency's June 1, 2000 Request for Comment regarding the addition of rollover ratings based on SSF to NCAP, our response to those comments, and the procedures and protocol we will use to implement a new rollover consumer information program.

FOR FURTHER INFORMATION CONTACT: For the most up to date vehicle star ratings call the Auto Safety Hotline at 888–327–4236 or refer to NHTSA's website at *www.nhtsa.dot.gov.* For technical questions you may contact Gayle Dalrymple, NPS–23, Office of Safety Performance Standards, National Highway Traffic Safety Administration, 400 Seventh Street, SW, Washington, DC 20590. Ms. Dalrymple can be reached by phone at (202) 366–5559 or by facsimile at (202) 493–2739. For public comments and other information related to previous notices on this subject, please refer to:

DOT Docket No. NHTSA–2000–6859, Docket Management, Room PL–401, 400 Seventh Street, SW, Washington, D.C. 20590 (hours 10:00 a.m. to 5:00 p.m. Monday through Friday) or on the internet at *www.dms.gov/search*, and Docket No. 91–68; Notice 3, NHTSA Docket, Room 5111, 400 Seventh Street, SW, Washington, DC 20590. NHTSA Docket hours are from 9:30 am to 4:00 pm Monday through Friday.

SUPPLEMENTARY INFORMATION:

I. Introduction
II. Background
III. Discussion of Commenters' Issues
A. SSF as a Measure of Rollover Risk
B. NHTSA's Statistical Analysis Linking SSF to Rollover Rates
C. Comments on Practical Problems with SSF Ratings
D. Consumer's Ability to Understand SSF as a Measure of Rollover Risk in the Event of a Single-vehicle Crash
E. The Question of Electronic Stability Control
F. Alternative Programs Suggested by Commenters
G. Commenters' Desire for a Minimum Standard Based on a Dynamic Test
IV. Rollover Information Dissemination using SSF in NCAP
V. Rulemaking Analyses and Notices
Appendix I Statistical Analysis in Response to Comments
Appendix II Proposed List of Test Vehicles for MY2001

I. Introduction

This notice outlines the plan the National Highway Traffic Safety Administration (NHTSA) will use to incorporate a new rollover rating of new cars and light trucks into its existing New Car Assessment Program (NCAP). NCAP currently gives consumers crashworthiness ratings for new light vehicles in frontal and side crashes. The ratings are based on vehicle performance with respect to occupant injury criteria gathered in crash tests and are presented using one to five stars, one star for the highest risk and five for the lowest. We intend to use the same star rating system to present the risk of rollover in the event of a single-vehicle crash. One star would represent a Static Stability Factor (SSF) corresponding to a 40 percent or greater risk of a single-vehicle crash resulting in rollover, while five stars would represent an SSF corresponding to a risk of less than 10 percent. Static Stability Factor is one-half the track width of a vehicle divided by the height of its center of gravity. As part of the rating based on SSF, the agency also has to note vehicles that are equipped with ''electronic stability control'' technology, which may reduce the risk of a vehicle getting into an incipient rollover situation.

The agency requested comments on its tentative decision to implement such a program on June 1, 2000.[1] The closing date for comments was August 30, 2000. Twenty-five commenters responded. This notice addresses the major issues presented by the commenters, our response to those comments, and the procedures and protocol we will use to implement a rollover consumer information program based on SSF. For complete background and rationale for the program, please see the June 1, 2000 notice.

II. Background

Rollover crashes are complex events that reflect the interaction of driver, road, vehicle, and environmental factors. We can describe the relationship between these factors and the risk of rollover using information from the agency's crash data programs. We limit our discussion here to light vehicles, which consist of (1) passenger cars and (2) multipurpose passenger vehicles and trucks under 4,536 kilograms (10,000 pounds) gross vehicle weight rating (collectively, ''light trucks'').[2]

According to the 1999 Fatality Analysis Reporting System (FARS), 10,142 people were killed as occupants in light vehicle rollovers, including 8,345 killed in single-vehicle rollovers. Eighty percent of the people who died in single-vehicle rollovers were not using a seat belt, and 64 percent were ejected from the vehicle (including 53 percent who were completely ejected). FARS shows that 55 percent of light vehicle occupant fatalities in single-vehicle crashes involved rollover. The proportion differs greatly by vehicle type: 46 percent of passenger car occupant fatalities in single-vehicle crashes involved rollover, compared to 63 percent for pickup trucks, 60 percent for vans, and 78 percent for sport utility vehicles (SUVs).

Using data from the 1995–1999 National Automotive Sampling System (NASS) we estimate that 253,000 light vehicles were towed from a rollover crash each year (on average), and that 27,000 occupants of these vehicles were seriously injured (defined as an Abbreviated Injury Scale (AIS) rating of at least 3).[3] This includes 205,000

[1] 65 FR 34999 (June 1, 2000).

[2] Light trucks include vans, minivans, sport utility vehicles (SUVs), and pickup trucks under 4,536 kilograms (10, 000 pounds) gross vehicle weight rating.

[3] A broken hip is an example of an AIS 3 injury.

single-vehicle tow-away rollovers with 19,000 serious injuries. Sixty-five percent of those people who suffered a serious injury in single-vehicle tow-away rollovers were not using a seat belt, and 50 percent were ejected (including 41 percent who were completely ejected). Estimates from NASS are that 81 percent of tow-away rollovers occurred in single-vehicle crashes, and 87 percent (178,000) of the single-vehicle rollover crashes occurred after the vehicle left the roadway.

Based on the 1995–1999 General Estimates System (GES) data we estimate that 241,000 light vehicles rolled over each year (on average) in police-reported crashes, and that 57,000 occupants in rollover crashes received injuries rated as K or A on the police injury scale. (The police KABCO scale calls these injuries ''incapacitating,'' but their actual severity depends on local practice. ''Incapacitating'' injury may mean that the injury was visible to the reporting officer or that the officer called for medical assistance.) This includes 205,000 single-vehicle rollovers with 46,000 K or A injuries. Fifty-four percent of those with K or A injury in single-vehicle rollovers were not using a seat belt, and 20 percent were ejected from the vehicle (including 18 percent who were completely ejected). Estimates from GES are that 16 percent of light vehicles in police-reported single-vehicle crashes rolled over. The estimated risk of rollover differs by vehicle type: 13 percent of cars and 14 percent of vans in police-reported single-vehicle crashes rolled over, compared to 24 percent of pickup trucks and 32 percent of SUVs.

The data presented above demonstrate that rollover crashes create a serious safety problem and that a reduction in the number of rollovers can make a significant contribution to motor vehicle safety.

III. Discussion of Commenters' Issues

The Request for Comment (RFC) was published June 1, 2000. The comment period closed August 30, 2000. Twenty-five commenters replied. The respondents were vehicle manufacturers and their associations, testing laboratories, independent researchers, consumer safety groups, an insurance association, a trial attorney, and two consumers. Two commenters agreed with the inclusion of rollover rating in NCAP as it was presented in the RFC. The other commenters were divided among those who opposed the plan (manufacturers, dealers, testing labs) and those who thought it did not go far enough that a minimum standard, based on a dynamic test, is needed for rollover (trial attorney, consumer groups). The commenters raised issues in four areas:

The suitability of SSF as a measure of rollover risk,

- Whether NHTSA's statistical analysis linking SSF to single-vehicle rollover rates was correct,
- Whether consumers are capable of understanding the concept of single-vehicle crash as exposure to rollover, and
- The need for a minimum standard, or consumer information, for rollover based on a dynamic test.

Alternative consumer information programs for rollover prevention were also offered by some commenters. Those four issues and the alternative programs are discussed in this section.

A. SSF as a Measure of Rollover Risk

Many respondents to the RFC believe that SSF is not a good measure of rollover risk for various reasons. Comments and the parties that made them were the following:

- NHTSA has exaggerated the importance of SSF in rollover crashes. Vehicles have little to do with rollover; the driver and road conditions bear so much of the blame that the vehicles should not be rated for rollover.—The Alliance of Automobile Manufacturers (Alliance), Association of Import Automobile Manufacturers (AIAM)
- Isuzu SSF is too simplistic. SSF ignores tire properties, suspension compliance, handling characteristics, antilock brakes, electronic stability control, vehicle shape and structure (post-impact rollover), and tripping factors (tires).—Alliance, University of Michigan Transportation Research Institute, JCW Consulting, SiSan, Automotive Testing Inc., Toyota, Isuzu, Honda

1. Origin of Static Stability Factor

Static Stability Factor is not a measure of rollover resistance invented by the agency. It was introduced to the agency in 1973 by vehicle manufacturers as a scientifically valid potential substitute for the dynamic maneuver tests the agency wanted to develop regarding untripped on-road rollover.[4] The Motor Vehicle Manufacturers Association (which has evolved into the present Alliance of Automobile Manufacturers) stated the following about SSF, ''Although this method does not embrace all vehicle factors relating to rollover resistance, it does involve the basic parameters of [sic] influencing resistance.''

In 1973, all of the manufacturers opposed NHTSA's plans for a standard regarding rollover prevention in extreme accident avoidance maneuvers because of their expectation of negligible benefits, concern about banning vehicle types, degradation of vehicle capabilities including braking traction and handling performance, and unresolved problems with maneuver testing. General Motors presented a very detailed set of comments that remain relevant today. For example, its observations on the effect of restraint use on rollover fatality rates and on the breakdown of the rollover problem between multi-vehicle and single-vehicle crashes and on-road and off-road incidences are largely supported by present data. Likewise, its discussion of the problems of maintaining consistent pavement surface and tire traction properties, the use of automatic controls and outriggers, the types of maneuvers and their relationship to real crashes is still meaningful. We also think its comments regarding SSF (which it called geometric stability measurement) are still accurate. General Motors said:

> Resistance to rollover is mainly influenced by the following factors:
> 1. Height of the center of gravity.
> 2. Horizontal distance from center of gravity to wheel track.
> 3. Capability for generating large forces in the lateral direction of the tire contacts due to high tire friction.
>
> Lateral forces sufficient for rollover can result from severe maneuvers under high tire-road friction conditions; from collisions with other vehicles, curbs, or road furniture (signs, lamp posts, guard rails), and from maneuvers in roadside soil capable of sustaining high lateral forces.

General Motors qualified the discussion as pertaining to relatively simple maneuvers, but cautioned against the use of ''special'' braking and steering inputs for rollover maneuver tests as unrepresentative of vehicle operation. It also discussed the relative importance of secondary vehicle characteristics other than those above which are the components of SSF.

> It was noted in a previous section that the dominant factors in flat road rollover resistance are the center of gravity height, track width, and the ability of the tire-road interface to generate high levels of lateral force. Suspension geometry, component stiffness factors, allowable ride travel, and tire stiffness factors also exert a measurable influence on rollover performance. But, these latter factors are considered to be of secondary importance. It should be noted that in many cases, very careful laboratory tests are required to establish the influence of suspension modifications on rollover resistance.

[4] In 1973, NHTSA published an Advance Notice of Proposed Rulemaking on Rollover Prevention (38 FR 9598, April 18, 1973). The comments cited here can be found in NHTSA Docket No. 73–10; Notice 1, comments 11 (MVMA) and 14 (GM).

In its conclusions, General Motors maintained that there was no safety need for the on-road rollover resistance standard the agency intended to propose and that, if the agency decided to act at all, it should pursue consumer information based on SSF.

If any regulation is required, some benefit may be derived at minimal cost by better informing the customer of relative product rollover performance, so he can assess this vehicle performance factor in making his selection in a free market. This information could be based on geometric stability measurements for the full range of highway vehicles.

This comment was made before the NCAP program was established to provide consumer information on safety performance and before the consumer was faced with such a large range of geometric stability (SSF) in non-commercial passenger vehicles. Also, most of the practical difficulties in seeking objective, relevant and repeatable driving maneuver tests discussed by General Motors in 1973 remain unsolved. Note that GM suggested the static laboratory measurement as a substitute for maneuver tests when *only* on-road untripped rollover was under consideration. This is an even stronger endorsement of static measurements than that represented by NHTSA's reasons for using SSF for consumer information on all single-vehicle rollovers, tripped and untripped.[5]

We view the rollover safety problem as 95 percent a problem of tripped rollover and five percent a problem of on-road untripped rollover.[6] Maneuver tests do not represent tripped rollover. Once the vehicle is in a tripping situation (e.g., has left the road), tire traction is largely irrelevant to tripped rollover. Center of gravity height and track width (and to a much lesser extent roll moment of inertia) are the only vehicle properties with general applicability to tripped rollover situations. So, in 95 percent of rollovers, these vehicle properties would be the most relevant vehicle influences on the likelihood of rollover. In the five percent of the problem involving untripped rollover, a choice exists between using static measurements and performance in maneuver tests. To get data to make an informed choice between the two, NHTSA conducted a maneuver test program using 12 vehicles in 1998. That testing confirmed General Motors' opinion of 25 years earlier that the static measurements correspond well to dynamic maneuver tests.[7] It also confirmed that the problems with maneuver testing identified by GM in 1973 are still largely unresolved today. Accordingly, we concluded in our June 2000 notice that there were no practical improvements in rating overall rollover resistance to be gained at this time by using something other than static measurements.

2. The Importance of the Effect of SSF on Rollover Rate

When the agency first sought public comment on rollover issues in 1973, the industry's position was that the frequency of untripped on-road rollovers was too low to justify significant vehicle modifications and constraints on future vehicle design. The vehicle manufacturers questioned the benefit/cost relationship and practicability of a minimum standard on rollover resistance, but they did not deny the relationship between SSF and rollover crashes. The agency's June 2000 plan for consumer information on rollover resistance expressed considerable agreement with the 1973 industry position on rollover and offered a statistical study of modern crash data in order to quantify the relationship between SSF and the incidence of rollovers occurring in single-vehicle crashes. The Alliance responded in August 2000 with the position that vehicle characteristics are now deemed largely irrelevant to the occurrence of rollover crashes and consumer information on vehicle rollover resistance is inherently misleading. The Alliance provided a statistical study purporting to demonstrate that the influence of SSF was limited to three to eight percent of the variability between vehicles in rollover crashes.

While the laws of physics prove beyond question that vehicles with low SSF roll over at lower lateral accelerations than vehicles with high SSF, the effect of SSF must be shown to have a significant influence on the outcome of actual crashes (rollover vs. no rollover) to be worth using for consumer information. It is a fact that types of vehicles with SSFs lower than passenger cars, as a group, have greater numbers of rollover crashes than passenger cars, either as a percentage of all crashes (passenger cars, 1.6 percent; vans, 2.0 percent; pickup trucks, 3.7 percent; SUVs, 5.1 percent) or as a percentage of single-vehicle crashes (passenger cars, 13 percent; vans, 14 percent, pickup trucks, 24 percent; SUVs, 32 percent). The Alliance attributes these differences primarily to differences in the driver and road conditions associated with the various vehicle types, rather than to the characteristics of the vehicles. For example, if young males using alcohol and driving on rural roads with high speed limits are over-represented as drivers of four-wheel drive pickup trucks in crashes, could these road-use variables outweigh the vehicle property to the point of insignificance? According to the current industry view, the correlation between the SSF of a vehicle and its ability to attract risky drivers who operate vehicles under adverse road conditions is the fundamental reason vehicles with low SSF are involved in a higher proportion of rollover crashes.

The agency agrees that driver behavior and road conditions are significant factors in understanding why single-vehicle crashes of any type occur, and that they have a strong influence on whether single-vehicle crashes result in rollover. However, we think that the rollover resistance of the vehicle represented by SSF also exerts a strong influence on whether single-vehicle crashes result in rollover. The statistical study in our previous notice attempted to address the important question of whether road-use differences between vehicles relegate their difference in

[5] Untripped rollover is a rollover induced by tire friction with the driving surface alone, resulting from a driving maneuver and usually occurring on the roadway. Tripped rollovers usually occur when a vehicle runs off the roadway and the tires and wheels contact a tripping mechanism (curb, soft soil, pavement drop off) which causes the vehicle to roll. A much smaller number of tripped rollovers occur on the road as a result of the wheel rim digging into the pavement during an extreme maneuver. Whether or not a vehicle rolls when it encounters a tripping mechanism is highly dependent on the geometric properties represented by SSF. In an untripped rollover, SSF is still very important, but other factors come into play (such as tire properties). Therefore, GM's suggestion to use SSF to characterize a vehicle's tendency for untripped rollover was a very strong endorsement of the relationship between SSF and vehicle rollover.

[6] In 1998, the agency was performing research on driving maneuvers to see if we could develop a way to ameliorate the incidence of onroad, untripped rollover, which we estimated at the time to be less than 10 percent of rollover crashes. The American Automobile Manufacturers Association (one of the predecessors of the Alliance) contracted with Calspan Corporation to review all the cases in NHTSA's Crashworthiness Data System coded as untripped to try to demonstrate that we were misplacing our research funds on a very small problem. Consequently our National Automotive Sampling System team did its own audit of the 1992–96 rollover data and concluded that some tripped rollovers were miscoded as untripped rollovers (typically these were onroad rollovers in which the vehicle was sliding sideways and tripped on its own wheel rim). Using corrected 1992–96 data, our National Center for Statistics and Analysis estimated that 3.7 percent of rollovers are untripped and 3.5 percent are both untripped and onroad, while 4.4 percent of single-vehicle rollovers are untripped. (Research Note, ''Passenger Vehicles in Untripped Rollovers,'' September 1999.)

[7] See the June 1, 2000 Request for Comments for a summary of that research.

rollover resistance to insignificance in actual crash experiences. We analyzed state accident reports in six states (1994–1997) on 184,726 single-vehicle crashes with 36,575 rollovers involving 100 vehicle make/models. The road-use variables available in all six states identified male drivers, young drivers, alcohol involvement, darkness, wet or icy surface, speed limit 55 mph or greater, storm, hill, and curve. We used multiple linear regression because its ''R-squared statistic'' provided an intuitive method of comparing the explanatory power of individual variables and because we could control the effect of the large differences in the number of crash samples for the various vehicles. Each vehicle was represented by its SSF and the average of each road-use variable over the number of crashes in each state. Systematic differences between states in rollover rate due to factors such as accident reporting thresholds were accommodated by the inclusion of a dummy variable for each state. The ''R-squared statistic'' for the complete model was 0.88, indicating that the model explained 88 percent of the observed differences in rollover rate per single-vehicle crash between the vehicle make/models.

The linear regression that used only the SSF and the state dummy variables as predictor variables had an ''R-squared'' of 0.73, which means that almost three-quarters of the variability in rollover risk between vehicle models is explained by the SSF plus the adjustments for state-to-state differences in crash reporting. This is greater than the ''R-squared'' for the best model that used only the road-use variables plus the state dummy variables (0.58). Thus, the SSF appears to have greater explanatory value than the combination of the road-use variables. We conclude that the SSF is not relegated to insignificance by the road-use variables in describing rollover risk.

The Alliance comment criticized the agency's use of linear regression because it operates on averages of road-use variables and cannot consider the possible interaction among variables. For example, the linear regression model would consider that the crashes of a particular make/model may involve 30 percent young drivers, 20 percent with alcohol involvement and 15 percent on curves, but it cannot distinguish crashes in which all of the factors were present simultaneously. The Alliance used logistic regression rather than linear regression in its analysis. Logistic regression operates on every individual crash circumstance sampled, rather than on averages of the road-use variables for crashes of each make/model, and thus can consider interactions among variables. It is a popular statistical tool in the health sciences. The Alliance also introduced the concept of scenario risk in its logistic regression model. In this technique, each combination of road-use variables (with some states providing as many as 14 variables) is a scenario. Scenario risk becomes a continuous variable.

Appendix I of this notice presents a new statistical study which adds another year of state crash data to the database of our previous notice and contrasts analyses of the crash data using logistic regression of individual variables and risk scenarios to the linear regression method used in the previous notice. We found that it made very little difference to the logistic regression models whether the road-use variables were used as individual variables or combined to form risk scenarios, but that the curve estimating rollovers per single-vehicle crash produced by the logistic regression was slightly different from that previously reported for linear regression.

The estimated risk of rollovers per single-vehicle crash is six times as high for a vehicle with an SSF of 1.00 as for a vehicle with an SSF of 1.53 (the range of the observed data) based on the linear regression model. The average slope of the rollover risk versus SSF curve for the linear regression model (Figure 1) in the range of observed data was -0.713. The slope of the corresponding curve of the logistic models is -0.598 or -0.580, depending on whether we use the individual variables or the scenario-risk variable. Both the linear and logistic approaches produced models that fit the data well, and both estimated a coefficient for the SSF term that was very important (in terms of statistical significance and the magnitude of the effect).

The linear regression is judged by the ''R-squared'', a measure of fit that is familiar to many people. The logistic regression is less well known, but it also has a standard measure of fit, the association of predicted probabilities and observed responses. The percentage of concordant pairs for our logistic models was very high (for example, it was 71.4 percent for the six-state combined model).

We can also measure the ''Chi-square'' value for the coefficient of the SSF term in each model to describe the significance of that term. Logistic regression models were calculated for the original six states, plus Ohio and New Mexico, which report rollover only if it is the first harmful event. In seven of the eight states, the ''Chi-square'' statistic for SSF is greater than for any of the other variables in the logistic model using individual variables. In the logistic model using scenario risk to combine all the variables except SSF, the ''Chi-square'' statistic for SSF is greater than that of the scenario risk variable in three of the eight states. This result also contradicts the Alliance's assertion that SSF is relegated to insignificance by the importance of road-use variables on the rollover experience of vehicles in use.

The Alliance's assertion that the effect of SSF on rollover is negligible was not a consequence of the possible superiority of logistic regression over linear, nor of the use of scenario risk rather than individual variables. Instead, the Alliance assertion depends upon a subtle change in the definition of the variables which serve as alternatives to SSF in explaining rollovers.

NHTSA used the number of police-reported single-vehicle crashes as a measure of each make/model's exposure to rollover risk. We did not include collisions with pedestrians or animals in the roadway in our definition of single-vehicle crashes because, while those crashes generate a police report, the collision itself poses no risk of rollover of the vehicle. Our sample size was large enough that we did not need to further investigate pedestrian and animal crashes for relevance. We did include collisions with parked vehicles because they represented a type of roadway departure and a collision with a fixed object, although these collisions offer the least exposure to typical tripping mechanisms.

Our analysis examined the effects of road-use variables because their correlations with SSF were the basis of an alternative theory of rollover causation. It is plausible that the greater rate of rollover of vehicles with low SSF is not caused by low SSF but rather by characteristics of drivers and roads which happen to be correlated with low SSF vehicles. The example of young males being the predominant driver population of particularly low SSF pickup trucks shows that this alternative has plausibility.

However, the Alliance departed from the road-use variables as alternative causes of rollover. The Alliance analysis was not an explanation of alternative theories of rollover causation but rather an attempt to show that there is little, if any, effect of SSF on rollover causation. To do this, the Alliance created a category of ''non-vehicle'' variables. This category allowed the addition of one variable whose effect overwhelmed the effects of all other

variables. That variable was ''first harmful event, collision with a traffic unit.'' It separated crashes which were collisions with pedestrians, animals or parked vehicles from other single-vehicle crashes. In essence, the extra variable separates crashes with minimum exposure to tripping mechanisms from all other single-vehicle crashes. This would seem to be a meaningless addition because there is no reason to expect a significant correlation between SSF and collisions with pedestrians, animals and parked vehicles. However, it sets up what the Alliance calls its ''low risk scenario'' which serves as a basis for comparison of rollover risk factors.

The Alliance then compared the effect on rollover risk of increased SSF to the effect on rollover risk made by moving from the scenarios of actual crashes to the ''low risk scenario''. The effect on rollover risk of moving actual crash scenarios to the ''low risk scenario'' is essentially the effect on rollover risk of eliminating tripping mechanisms. The effect is huge. In simplified terms, the Alliance has argued that the effect on tripped rollover gained by an increase of SSF is minimal compared to the effect on tripped rollover of removing tripping mechanisms. The statistical study in Appendix I includes a discussion of how this type of analysis, in which characteristics of the crash itself are used to define the risk scenarios, is equally useful for ''demonstrating'' that seat belts have negligible safety benefit.

We do not find the Alliance analysis persuasive. It may well be true that changing a single-vehicle run-off-the-road crash (where there is a high risk of rollover) into a crash in which the vehicle, for example, hits an animal in the road (where there is no risk of rollover) virtually eliminates the risk of rollover, and may do far more to minimize rollover risk than changing any single vehicle or driver factor. However, the point of this is unclear. One could also show that if vehicles could fly, there would be far fewer rollover crashes, based on the experience of actual aircraft. Since vehicles can not fly, and run-off-the-road crashes can not be changed into different types of crashes, positing these impossibilities as a means of analyzing, or addressing, the real world problem of more than 10,000 Americans dying each year in rollover crashes does not seem either helpful or insightful.

NHTSA seeks ways to address real world safety problems constructively. In the real world, driver and roadway factors are certainly important factors in all crashes, including rollovers. That is why NHTSA spends so much effort to increase belt use, reduce speeding, eliminate impaired driving, and so forth. However, the vehicle is also a significant factor in crash safety. If we take the driver and roadway conditions as givens (for example, a young male driver in a rural area), the physical attributes of different vehicles determine different outcomes when, for example, the vehicle drops two wheels off the road, and the driver responds incorrectly. Some vehicles will roll over much more often than others in these situations. Such vehicle differences have been shown to strongly correlate with rollover resistance expressed by SSF. We believe the American public should have this information available to consider when making purchase decisions.

B. NHTSA's Statistical Analysis Linking SSF to Rollover Rates

The Alliance commented that the method NHTSA used to analyze the statistical relationship between state crash data and SSF used in the RFC failed to take into account possible interactions between the various non-vehicle variables, and therefore underestimated the role of the non-vehicle factors in rollover risk. The possible interaction between alcohol involvement and the crash occurring on a curve in a particular crash was given as an example. The commenter suggested using logistic regression to resolve the problem of variable interaction.

As introduced in the previous section, Appendix I of this notice presents a new statistical study which adds another year of state crash data to the database relied on in our previous notice and contrasts analyses of the crash data using logistic regression of individual variables and risk scenarios to the linear regression method used in the previous notice. The model curves estimating rollovers per single-vehicle crash using logistic regression were nearly identical regardless of whether the road-use variables were entered individually or as combinations in risk scenarios. However, logistic regression does produce a slightly different curve estimating rollovers per single-vehicle crash from that previously reported for linear regression.

Figure 1 shows the comparison between the updated linear regression analysis of the summarized data and the two logistic models (the six-state models using either the individual variables or the scenario-risk variable). The linear regression curve of the previous notice was essentially unchanged by the addition of another year of state crash data (for a total of 226,117 single-vehicle crashes with 45,574 rollovers). The logistic models are very similar to each other, and all the models indicate that the SSF is very important in understanding rollover risk. As noted previously, the average slope of the rollover risk vs. SSF curve estimated by the linear regression model in the range of observed data was -0.713, and the average slope of the corresponding curve of the logistic models is -0.598 or -0.580, depending on whether we use the individual variables or the scenario-risk variable. Also, logistic regression estimates a greater risk of rollover than does linear regression for vehicles with SSFs higher than 1.10.

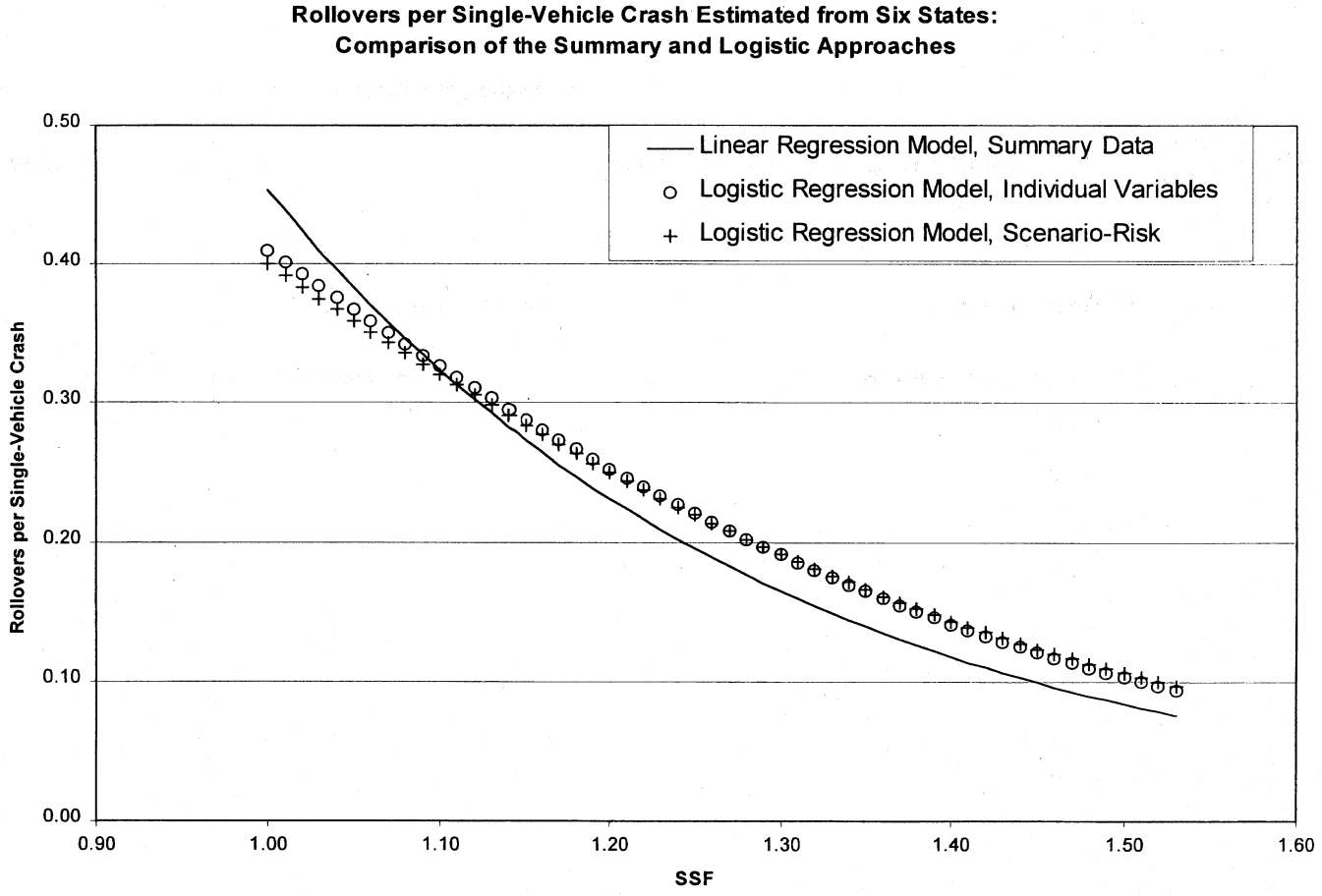

Figure 1 National rollover rate estimated from six states, linear and logistic models

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The logistic regression and linear regression separate the effects of vehicle rollover resistance and those of road-use variables by different processes, and the logistic regression predicts a curve with a lower average slope. The Alliance commented that logistic regression considers the potential effect of variables in combination which may intensify or dilute their individual effects, but that linear regression would neglect combination effects. With this possibility in mind, we considered whether the use of the curve corresponding to logistic regression on individual variables would serve as a better basis of rollover risk for the vehicle star ratings than the linear regression curve proposed in our June 1, 2000 notice.

The proposed rating system was based on equal intervals of risk and positioned the five-star level at a value of SSF achievable by favorably designed family sedans. It also positioned the one-star range where it captured some popular SUVs and pickup trucks of the recent past. The manufacturers of the one-star vehicles generally have improved the current versions of the equivalent vehicles to the two-star level, but we believe the one-star rating ceiling would be stringent enough to discourage companies from returning to old design practices or from importing less advanced vehicles. A fortuitous feature of the ratings based on the linear regression curve was that reasonable one-star and five-star SSF boundaries occurred at predicted levels of rollover risk of 10 percent and 40 percent, permitting three equal intervals of risk between them divisible by ten for the two-star, three-star and four-star boundaries. Having the star rating intervals bounded at 10, 20, 30 and 40 percent rollover risk levels would make the meaning of the ratings easier to explain to consumers. Figure 2 presents the proposed rating system in graphical form. The updated linear regression curve in Figure 1 is nearly identical to the linear regression curve in Figure 2, except that it would set the one star boundary for 40 percent rollover risk at 1.03 instead of 1.04.

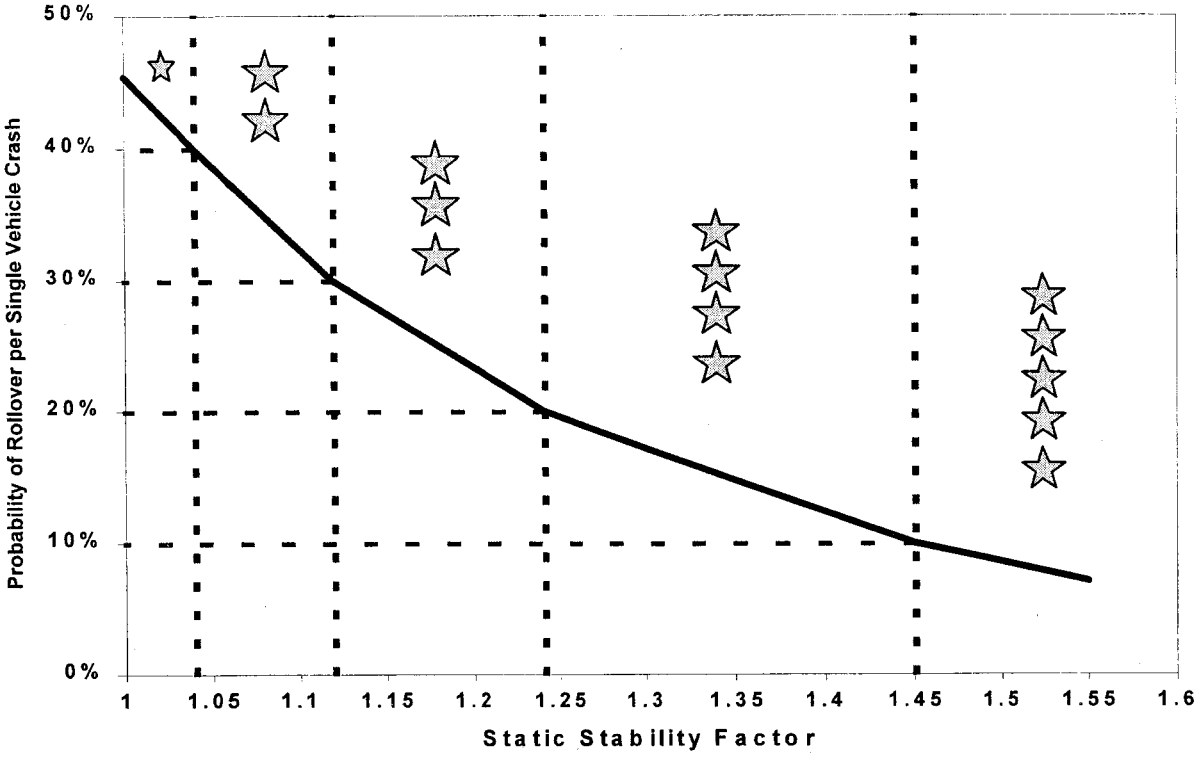

Figure 2 Star rating intervals presented in June 2000 notice, based on linear regression

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We considered the merits of the various ways in which the rollover risk versus SSF curve produced by logistic regression (Figure 1, Individual Variables) could be used to replace that produced by linear regression (also in Figure 1) as the basis for defining rollover risk in the rating system. If the proposed rating intervals in terms of SSF (1.04, 1.12, 1.24, 1.45) were maintained, they would no longer satisfy their rationale of representing equal increments of rollover risk in a single-vehicle crash. Conversely, if the risk intervals at 10, 20, 30 and 40 percent are maintained, the one-star SSF level would become 1.01 and the five-star level would become 1.51. A one-star level of 1.01 is so low that we know of only one vehicle (not in current production) that it would describe. Similarly, a five-star level of 1.51 appears to be out of reach for even the most stable family sedans which have demonstrated very good performance in resisting rollover. We believe that maintaining the 10, 20, 30 and 40 percent star boundaries with the logistic regression curve would have the practical effect of replacing the five-star rating system with a three-star rating system. At the low end of the SSF scale, the distinction between some historically poor performing vehicles and their improved replacements would be lost. At the higher end of the SSF scale, the distinction between some very good performing mid-sized and large sedans and some clearly poorer performing sub-compacts would be lost.

It would appear that the best way to incorporate the rollover risk levels estimated by logistic regression while maintaining the usefulness of the rating system to the consumer is to maintain the proposed one-star and five-star boundaries as closely as possible. This approach would require adjustment of the equal risk intervals between the one- and five-star boundaries to reflect the difference in average slope between the linear regression curve and the logistic regression curve. A five-star boundary of 1.46 corresponds to a rollover risk of less than 12 percent on the logistic regression curve. (The previous boundary of 1.45 would require a statement of risk of 12.1 percent which would not be desirable for consumer information). Similarly, a one-star boundary of 1.05 would correspond to a rollover risk greater than 36 percent. These one-star and five-star boundaries would allow for equal risk intervals of eight percentage points between the other star boundaries. A change from 10 percent risk intervals to eight percent risk intervals would be proportional to the difference in average slope between the linear regression curve and the logistic regression curve. Figure 3 illustrates this idea for using the logistic curve in a revised rating system in a graphical form comparable to Figure 2.

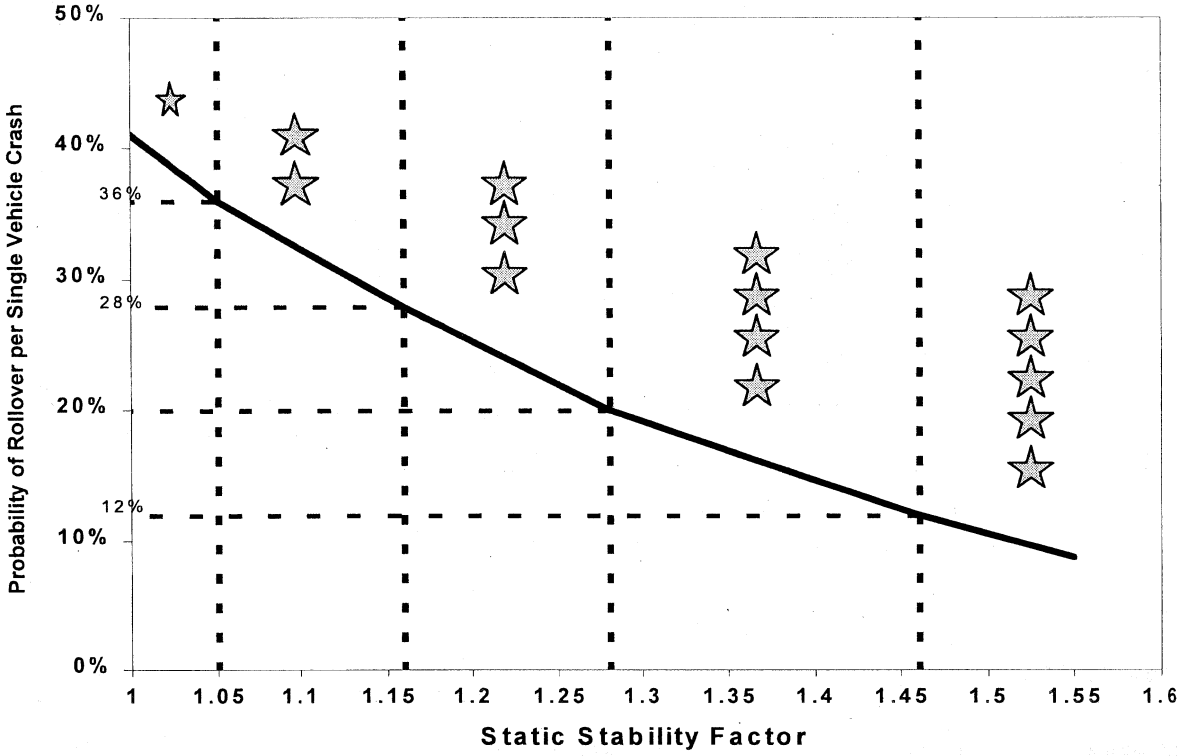

Figure 3 Possible star rating intervals based on logistic regression

However, this idea also has serious drawbacks. It would move the three star level from 1.13 SSF to 1.17 and the four star level from 1.25 to 1.29 because the logistic regression shows less of the asymptotic shape of the raw data (Figure 1 of Appendix 1) than does the linear regression (of the log of SSF) curve previously proposed. This is troubling for two reasons. The shape of the original linear regression curve conforms better than does the logistic regression curve to the expectation that a given increase in SSF produces a substantially greater benefit for a vehicle with a low SSF than for one with a high SSF. Also, NHTSA believes that the proposed star rating levels may have become design goals for manufacturers seeking to improve rollover resistance. A change in star rating levels at this time may have the counterproductive effect of denying manufacturers recognition for substantial improvements in rollover resistance of vehicle designs.

While we do not deny the theoretical advantages of logistic regression cited by the Alliance regarding interactions between road use variables, the similarity in curves describing rollover risk as a function of SSF in the linear and logistic regression approaches suggests that such interactions do not exert a great influence on the effect of SSF. Therefore, we do not believe that the difference in risk analysis methods is great enough to compel a change in the proposed star rating levels to the detriment of manufacturers who are trying to achieve them and to the detriment of consumers who we believe will find the proposed rating system simpler. We also note that the linear regression curve presents a more conservative estimate of rollover risk for vehicles with SSF greater than 1.10, and we anticipate vehicles with SSF lower than 1.10 becoming rare in light of manufacturers' reported efforts at improving rollover resistance.

The rating system that NHTSA will use to define rollover risk and assign star rating is based on the updated linear regression curve in Figure 1 of this section. It would be described verbally as follows:

One Star ★: Risk of Rollover 40 percent or greater in a single-vehicle crash is associated with SSF 1.03 or less.

Two Stars ★★: Risk of Rollover 30 percent or greater but less than 40 percent is associated with SSF 1.04 to 1.12.

Three Stars ★★★: Risk of Rollover 20 percent or greater but less than 30 percent is associated with SSF 1.13 to 1.24.

Four Stars ★★★★: Risk of Rollover 10 percent or greater but less than 20 percent is associated with SSF 1.25 to 1.44.

Five Stars ★★★★★: Risk of Rollover less than 10 percent is associated with SSF 1.45 or more.

C. Comments on Practical Problems with SSF Ratings

1. Difficulty of Improving Vehicles

The Alliance and the import manufacturers' organization, AIAM, asserted that improvements in a vehicle's SSF are not practicable since SSF is largely determined by its vehicle type. That is, the track widths and c.g. heights of pickups, SUVs, vans, and passenger cars are more or less fixed within certain limits. Significant changes to those measurements would simply eliminate the vehicle attributes which are common to the category and which are presumably desirable to consumers. These comments noted, for example, that significantly lowering the c.g. (thus raising the SSF) of an SUV could be accomplished by decreasing ground clearance, but doing so might make it unappealing compared to other vehicles in the SUV category. Conversely, the comments contended that marginal changes to track width and c.g. height small enough to maintain attributes in a vehicle category would not improve rollover risk. They conclude that SSF is not a useful design

criterion, and it lacks the potential to reduce rollover rates if current vehicle types are to be preserved.

We disagree that significant improvement in SSF will necessarily eliminate desirable attributes within a class of vehicles. We are aware of a recent redesign of a production SUV[8] in the U.S. that achieved a decrease in c.g. height of approximately 2.0 inches (along with a significant increase in track width) while actually increasing the ground clearance. We estimate those changes represent an improvement in SSF equivalent to at least one star rating interval, and we would expect a significant decrease in rollover risk in single-vehicle crashes.

We also would note that passenger car-based SUV's with significantly better SSFs than traditional, truck-based SUVs have been gaining popularity in the absence of any consumer information program for rollover. The range of SSF among ten SUVs in our 1998 SSF measurements of a group of 32 then-new vehicles was equivalent to a rollover risk reduction of approximately 14 percent using the predictive curve from the linear regression analysis explained in this notice. So-called ''crossover'' vehicles promise even greater improvement. While these vehicles may offer less of some attributes of traditional SUVs, like overall ride height, the increasing popularity of crossover vehicles indicates that those attributes may be less important to consumers than the ones which they maintain in common with traditional SUVs, such as cargo room and traction on snowy roads. Thus, the suggestion that no changes to current vehicle designs are possible without significant customer resistance appears to be an assertion unsupported by what has happened recently in the market.

On the other hand, one of the models that scored highest among the ten SUVs in the 1998 measurements was a more or less traditional design, i.e., it was not passenger car-based.[9] This gives evidence that more stable light truck design is not incompatible with traditional design attributes.

The fact that SUVs are seldom used off-road indicates that not all SUV buyers really want off-road capability. Buyers who are aware of the tradeoff in risk of rollover that such off-road capability usually entails, may decide they can obtain the attributes they want or need in a more rollover-resistant vehicle. As a contrasting example, buyers who desire passenger and cargo capacity may choose a van or minivan over a conventional station wagon after deciding that their priorities outweigh the increase in rollover risk associated with that choice.

We believe that vehicle modifications to improve rollover resistance ratings are both achievable and beneficial. Press accounts suggest that manufacturers are, in fact, making such modifications as they redesign their light trucks. However, the ratings do not force manufacturers to modify vehicles, nor do they force consumers to accept only certain vehicle alternatives. The ratings will have a positive effect on the light vehicle rollover problem by making consumers more aware of trade offs in rollover stability, allowing consumers to make more informed purchase decisions, and influencing their awareness of the need to wear seat belts to prevent ejection in rollover crashes. This improvement will accrue even if the manufacturers make no changes to vehicles whatsoever in response to the program.

2. Possible Consequences of Improving SSF

Honda and the Alliance also suggested that, with a design criterion like a rollover rating based on SSF, manufacturers may be inclined to ''design for the test.'' The manufacturer of a vehicle whose score falls just below a rating cutoff point might be able to make design adjustments that shift the vehicle's score into the next higher category. We believe there is no reason to discourage manufacturers from taking such actions because an improvement in SSF will result in a corresponding improvement in rollover risk. In fact, we believe that a major advantage of SSF, one that distinguishes it from other measures of rollover resistance, is that it ''does no harm.'' Since SSF is a fundamental measure of inherent vehicle stability, there is no realistic risk that increasing SSF will degrade actual rollover rate or have other unintended, negative consequences. In contrast, improvement in other metrics can result in trade-offs that compromise overall safety. For example, maximizing a vehicle's Tilt Table Ratio can be accomplished by trading off some vehicle directional control (oversteer/understeer) characteristics. As another example, it is apparent that the Stability Margin metric can be improved by reducing tire grip, which could decrease driver control of the vehicle.[10] Furthermore, SSF is relevant to stability under virtually any circumstance, whether it be a run-off-the-road crash, an obstacle avoidance scenario, or even collisions with objects or other vehicles, though it is obviously more significant in some of those events, i.e., single-vehicle crashes, than in others, i.e., collisions, where impact forces can overwhelm other factors.

It was suggested in the comments that vehicle characteristics which an SSF-based rating ignores, like body shape and tire profile, influence rollover rate because they determine how a vehicle interacts with roadside objects and terrain during a crash event. As an example, Honda suggested that lowering a vehicle's c.g., thus improving its SSF, by equipping it with low-profile tires could increase the risk of tripped rollover by making sideward wheel contact with tripping mechanisms more likely. This is speculative and not persuasive. Each single-vehicle crash is, more or less, a unique event, because of the variety and complexity of circumstances involved. Although we agree that tripping usually initiates through interaction of a vehicle's wheels (i.e., tires and/or rims) with the roadway environment, generalizations about the influence of low-profile tires, or differences in body shape, on tripping frequency are extremely difficult to substantiate, given the limitless combinations of terrain, pavement condition, shoulder design, barriers, soil, vegetation, etc. A vehicle feature like taller, more flexible tire sidewalls may help avoid tripping in a few crashes, but is likely to be ineffective in the vast majority of others, and may be counterproductive in some cases. Even if it were possible for a manufacturer to identify tires and rims that were supposedly more resistant to tripping, safe handling and road holding considerations should certainly weigh more heavily in tire and rim selection.

A notable exception to this involves the problem of tire debeading. Clearly, a wheel rim that becomes exposed when a tire debeads either as a precursor to a single-vehicle crash or in the course of one, can become a primary tripping mechanism. We believe that tire and rim combinations that are more resistant to debeading may indeed lessen the risk of rollover in a single-vehicle crash. The agency is already planning to improve debeading requirements in FMVSS No. 109.

A further difficulty in identifying vehicle features that might improve tripping resistance is that crash data is limited. The minute level of detail required to thoroughly analyze the interaction of a vehicle's wheels,

[8] Mitsubishi Montero redesign from model year (MY) 1991–99 design to MY 2000 version of the same nameplate.

[9] Isuzu Rodeo.

[10] These metrics are explained in detail in the June 1, 2000 notice.

undercarriage, body components, etc., with the roadway environment in a run-off-the-road event is generally unavailable in state or national crash databases. NHTSA's NASS–CDS database does contain a high level of detail, but it focuses on a relatively small sampling of crashes. In contrast, the SSF of vehicles in crashes can be determined as long as the data contain a few details about the vehicle, like make and model. Availability of extensive crash data is important for analyses like NHTSA's statistical analysis of crashes in six U.S. states as reported in the RFC and in Appendix I here.

Honda also suggested that problematic suspension behavior such as ''suspension-jacking'' can lead to a higher risk of rollover regardless of SSF, and that this exemplifies why SSF alone is not an adequate indicator of rollover resistance. Although vehicles with particular suspensions, most notably ''swing-axle'' designs, historically may have been associated with rollover, we believe those represent relatively few cases out of a very large population of rollover crashes and that such examples of suspension design are uncommon in current vehicles. Furthermore, suspension behavior is less important than SSF once a vehicle has left the roadway, where factors like shoulder condition and terrain interact with the basic stability characteristics of the vehicle to determine crash outcome.

3. SSF Measurement Accuracy

Honda stated in response to the RFC that the Vehicle Inertia Measurement Facility(VIMF) that NHTSA will use to ascertain SSF is not accurate enough to repeatably give useful vehicle ratings. Honda suggested that for c.g. height measurement the measurement error is the sum of 0.5 percent ''repeatability'' error and 0.5 percent ''accuracy'' error, giving a total measurement error of ±1.0 percent of the measured value. Honda believes an error of that magnitude is significant, compared to the small differences between vehicles being compared, and that a vehicle could be assigned an incorrect number of stars due to measurement error.

Honda appears to have misinterpreted the published reports available on the VIMF. The document cited in Footnote 19 of the RFC does indicate, in Table 1, ''error bounds'' for c.g. height of ±0.5 percent of the measured value.[11] Other documents,[12, 13, 14] describing the design of the VIMF give the same value for ''repeatability'' or ''two standard deviation error'' for c.g. height measurements.

Basically, ''repeatability,'' as used in the referenced documents in regard to the VIMF, is not separate from the ''accuracy'' of the system. It is incorrect to assume that the total VIMF system error in c.g. height measurements is the sum of the 0.5 percent repeatability and 0.5 percent accuracy, for a total system error of one percent in c.g. height measurements. The total system error of the VIMF for c.g. height measurement is 0.5 percent or less, as explained below.

When the VIMF was under development, an error analysis was conducted based on experience with NHTSA's Inertial Parameter Measurement Device (IPMD), a precursor to the VIMF. Over the course of several years, the IPMD underwent successive updates and improvements, culminating in a fifth and final version of the machine that ultimately served as a model for the VIMF. The error analysis accounted for all the known sources of error arising from each system component, for example, platform deflection and vehicle restraint rigidity, as experience with the IPMD had indicated. By mathematical modeling, the contribution of each component to the whole system error was determined. The final design specifications for the VIMF were set by that analysis. Each component was selected or fabricated so as to limit the combined error from all the known contributions to 0.5 percent of the measured value for c.g. height. The details of the error analysis are discussed in the referenced documents.

Since it was designed and constructed, the accuracy of the VIMF has been evaluated using a custom-built calibration fixture with a known c.g. location. This fixture is a heavy weldment made from stock steel plates and box section beams whose individual c.g. locations are easily determined by geometry. Because it is a very rigid body and is fabricated from such geometrically simple components, the calibration fixture's c.g. location, as well as its mass moments of inertia, are known theoretically, and it is thus a benchmark for reckoning the accuracy of the VIMF. The calibration fixture can be set up in either a light or heavy configuration, the latter achieved by adding weight in precise locations to increase the c.g. height by a known amount. In the light configuration, the fixture is representative of the mass and c.g. height of a mid-size passenger car. In the heavy configuration, it is representative of a light truck.

In calibration tests using this fixture, the VIMF consistently measures the c.g. location to within 0.5 percent of the known value. Tables 6 and 7 of the 1995 Heydinger paper cited here indicate that the VIMF was able to measure the c.g. height of the fixture to within 0.46 percent (2.6 mm in 561.2 mm) and 0.32 percent (2.6 mm in 809.2 mm) of its theoretically known values in the light and heavy configurations, respectively. Those results correspond well with the VIMF error analysis which predicts that the degree of accuracy should be somewhat higher when measuring heavier, higher c.g. vehicles. That is, the measurement accuracy for vehicles which are likely to fall into the lower SSF categories is significantly better than 0.5 percent.

While we believe the NHTSA measurements will be sufficiently accurate, no degree of measurement accuracy can prevent borderline cases. There is always a possibility of a vehicle score falling so close to a cutoff point between star ranges that applying even a small amount of measurement uncertainty to the score results in ambiguity about the category to which the vehicle belongs. This situation is characteristic of any rating scheme and is no different from what currently exists in the NHTSA frontal and side NCAP. We plan to use conventional rounding methodology to determine the SSF of each test vehicle to two decimal places and assign stars based on that result.

If a manufacturer determined that one of its models was on the border between star levels, the manufacturer could, if it wished, make changes to the vehicle to improve its SSF to the point where it falls comfortably in the higher category. If the vehicle was indeed on the border, the changes necessary would probably be very minor, and it would be voluntary, not mandatory.

D. Consumers' Ability to Understand SSF as a Measure of Rollover Risk in the Event of a Single-vehicle Crash

Some commenters had misgivings about consumers' abilities to understand and use the new rollover rating information in three areas. They believe:

• Consumers are not capable of understanding that the star rating

[11] Heydinger, G.J., *et al*; ''Measured Vehicle Inertial Parameters—NHTSA's Data through November 1998''; Society of Automotive Engineers 1999–01–1336; March, 1999.

[12] Heydinger, G.J., *et al*; ''The Design of Vehicle Inertia Measurement Facility''; SAE Paper 950309; February 1995.

[13] Bixel, R.A., *et al*; ''Developments in Vehicle Center of Gravity and Inertial Parameter Estimation and Measurement''; SAE Paper 950356; February 1995.

[14] Heydinger, G.J., *et al*; ''An Overview of a Vehicle Inertia Measurement Facility''; Intl. Symposium on Automotive Technology; Paper 94SF034; October 1994.

describes the risk of rollover in the event that the vehicle is involved in a single-vehicle crash.

• Consumers will not find the information useful in making a vehicle choice.

• Even if consumers use the information, the new program will not lead to a decrease in rollover crashes. Each of these areas are discussed and responded to below.

1. Are Consumers Capable of Understanding That the Star Rating Describes the Risk of Rollover in the Event That the Vehicle Is Involved in a Single-vehicle Crash?

Auto manufacturers and the National Automobile Dealers' Association (NADA) believe that consumers are not capable of understanding that the star rating describes the risk of rollover in the event that the vehicle is involved in a single-vehicle crash. The following is a list of comments and the commenters who made them:

• Consumers will be confused because the rollover ratings are not in terms of injury risk like other NCAP ratings—Alliance

• Consumers will not understand that the rollover ratings do not include crashworthiness attributes—AIAM

• Consumers will think the rollover risk is the life-time rollover risk from driving the vehicle or the risk of rollover each time they drive the vehicle—Alliance, Suzuki, Toyota, Honda

• Consumers will think risk is the same for all drivers in all conditions and have the false impression that the vehicle design is the principal cause of rollover—Suzuki, NADA

The language that will be used in consumer information products concerning this rollover rating (see Section IV) was developed using the outcome of focus group testing. As discussed in the June 2000 notice, in April 1999 NHTSA conducted a series of six focus groups to examine ways of presenting comparative rollover information. As a result of the comments to our June 2000 notice, NHTSA conducted another series of focus groups in November 2000. Two versions of explanatory language were presented to a total of 12 groups of nine consumers each in two different cities. NHTSA asked the focus groups to evaluate a short version of rollover rating explanatory language that read as follows:

Description of Rollover Resistance Rating

Most rollover crashes occur when a vehicle runs off the road and is tripped by a ditch, soft soil, a curb or other object causing it to roll over. These are called single-vehicle crashes because the crash did not involve a crash with another vehicle. The Rollover Rating is an estimate of your risk of rolling over if you have a single-vehicle crash. The Rollover Rating essentially measures how ''top-heavy'' a vehicle is. The more ''top-heavy'' the vehicle, the more likely it is to roll over. The lowest rated vehicles (1-star) are at least 4 times more likely to roll over than the highest rated vehicles (5-stars).

• Here are the Rollover Ratings:

In A Single-vehicle Crash, a vehicle with a rating of:

Five Stars ★★★★★
Has a risk of rollover of less than 10%
Four Stars ★★★★
Has a risk of rollover greater than 10% but less than 20%
Three Stars ★★★
Has a risk of rollover greater than 20% but less than 30%
Two Stars ★★
Has a risk of rollover greater than 30% but less than 40%
One Star ★
Has a risk of rollover greater than 40%

We also asked the focus groups to evaluate the following longer version:

Description of Rollover Resistance Rating

• Thousands of crashes occur each year when a driver loses control of his/her vehicle and runs off the road. These are called single-vehicle crashes because the crash did not involve a collision with another vehicle. Once the vehicle leaves the road it can hit an object (pole, tree, guardrail, etc.), or the wheels can contact a ditch, soft soil, a curb or other object, tripping the vehicle and causing it to roll over. Single-vehicle rollovers can also occur on the road, but most rollover crashes occur when a vehicle runs off the road, usually sliding sideways.

• The National Highway Traffic Safety Administration (NHTSA) has provided consumers with frontal and side impact crash test ratings for several years. Because more than 10,000 people die each year in rollover crashes, NHTSA has added a Rollover Rating to provide consumers with better overall safety information on new vehicles.

• The Rollover Rating is an estimate of your risk of rolling over if you have a single-vehicle crash. If that happens, the risk of rollover for the highest rated vehicles (5-star) is less than 10%, but that risk factor increases by a factor of 3 to 4 for the lowest rated vehicles (1-star).

• The Rollover Rating essentially measures how ''top-heavy'' a vehicle is. The more ''top-heavy'' the vehicle, the more likely it is to roll over. Based on a study of 185,000 single-vehicle crashes, this measurement has been shown to relate very closely to the real-world rollover experience of vehicles.

• NHTSA's Front and Side Crash Test Ratings predict a vehicle occupant's chance of serious injury if the vehicle is involved in that type of crash. The Rollover Rating predicts the risk of a rollover if your vehicle is involved in a single-vehicle crash. (It does not, however, predict the likelihood of that crash.)

• While the Rollover Rating does not directly predict the risk of injury or death, keep in mind that rollovers have a higher fatality rate than other kinds of crashes. Even the highest rated vehicle can roll over, but you can reduce your chance of being killed in a rollover by about 75% just by wearing your seat belt.

• Here are the Rollover Ratings:

In A Single-vehicle Crash, a vehicle with a rating of:

Five Stars ★★★★★
Has a risk of rollover of less than 10%
Four Stars ★★★★
Has a risk of rollover greater than 10% but less than 20%
Three Stars ★★★
Has a risk of rollover greater than 20% but less than 30%
Two Stars ★★
Has a risk of rollover greater than 30% but less than 40%
One Star ★
Has a risk of rollover greater than 40%

The focus group testing pointed out areas of difficulty in comprehension that were addressed in writing the final language.

Focus group participants felt that while the shorter explanation was too short to fully comprehend the rating, the longer version was overwhelming and included unnecessary information. Based on the focus group inputs, we have developed the following language:

Description of Rollover Resistance Rating

• Most rollover crashes occur when a vehicle runs off the road and is tripped by a ditch, curb, soft soil, or other object causing it to roll over. These crashes are usually caused by driver behavior such as speeding or inattention. These are called single-vehicle crashes because the crash did not involve a collision with another vehicle. More than 10,000 people die each year in all rollover crashes.

• The Rollover Resistance Rating is an estimate of your risk of rolling over if you have a single-vehicle crash. It

does not predict the likelihood of that crash. The Rollover Resistance Rating essentially measures vehicle characteristics of center of gravity and track width to determine how ''top-heavy'' a vehicle is. The more ''top-heavy'' the vehicle, the more likely it is to roll over. The lowest rated vehicles (1-star) are at least 4 times more likely to roll over than the highest rated vehicles (5-stars).

• The Rollover Resistance Ratings of vehicles were compared to 220,000 actual single-vehicle crashes, and the ratings were found to relate very closely to the real-world rollover experience of vehicles.

• While the Rollover Resistance Rating does not directly predict the risk of injury or death, keep in mind that rollovers have a higher fatality rate than other kinds of crashes. Remember: Even the highest rated vehicle can roll over, but you can reduce your chance of being killed in a rollover by about 75% just by wearing your seat belt.

• Here are the Rollover Resistance Ratings:

In A Single-Vehicle Crash, a vehicle with a rating of:

Five Stars ★★★★★
Has a risk of rollover of less than 10%
Four Stars ★★★★★
Has a risk of rollover between 10% and 20%
Three Stars ★★★★★
Has a risk of rollover between 20% and 30%
Two Stars ★★
Has a risk of rollover between 30% and 40%
One Star ★
Has a risk of rollover greater than 40%

The length of the final version is midway between the two versions tested. It adds information not included in the tested short version that participants felt was particularly important in understanding the information and/or particularly compelling to cause them to pay attention to the information. It deletes information in the tested long version that participants felt was unnecessary and/or confusing. In addition, the explanation of the star ratings was simplified because the original format seemed to cause some confusion about whether more stars or less stars was a better rating. Finally, NHTSA has chosen to use the term ''Rollover Resistance Rating'' rather than ''Rollover Rating'' as this seemed to help participants understand the rating.

The potential confusions cited by the commenters did not occur in the focus groups. From the discussions during the focus groups, it is clear that participants are aware that rollover is heavily influenced by driver and road characteristics. In almost all groups the first cause of rollover cited by participants was speed. Participants also mentioned road conditions and driver behavior and/or experience as factors. However, the participants also seemed to understand that the vehicle can also play a part in determining whether or not a rollover occurs, and that this rating was only a measure of that factor.

NHTSA notes that the explanatory language will be used in the Buying a Safer Car brochure, and other places that present the star ratings. This brochure's primary focus is how a person can purchase a safer vehicle. It does not include extensive discussion of driver behaviors that can increase safety, as those types of issues tend to be addressed by other agency programs. NHTSA will include additional information about rollover in the form of Q&A's on the agency's website, and is considering developing additional rollover consumer information, both of which would be more appropriate places for discussion of other factors that can reduce the risk of rollover.

2. Will Consumers Find the Information Useful in Making a Vehicle Choice?

The commenters listed below believe that even if consumers do understand the risk represented by the stars, this information will not be useful to them in choosing a vehicle. They assert the following:

• Consumers pick a vehicle class before they select a particular model. There are not enough differences in star ratings among vehicles in the same class to make the information useful to consumers. The stars reflect only tiny differences on each side of the dividing line.—Alliance, Ford, BMW, CU

• The difference in SSF made by options and configurations available on a single vehicle are too great to allow meaningful ratings—Alliance

While it is true that many consumers limit their vehicle choices early in the purchase-decision process (*e.g.,* must be an SUV), many others are also considering vehicles in more than one class (*e.g.,* a van or an SUV). As the availability of rollover resistance rating information becomes more widely known, consumers will begin to know that certain types of vehicles have better ratings than others. In addition, while we cannot predict the final spread of ratings for the 2001 models that will be tested, in our research there was usually a two- to three-star rating range for each class. Thus, by his or her vehicle choice alone, a consumer could reduce his or her chance of a rollover in a single-vehicle crash by up to 24% in some cases.

In addition, another safety benefit of the NCAP program is the general improvements manufacturers have made to vehicles as the result of publishing such ratings. These improvements benefit all consumers regardless of their choice of vehicle. Over the years, manufacturers have responded to the frontal NCAP program and as a result the number of models achieving a five-star rating today is 2.7 times what it was when the program started in 1979. As for the criticism that star ratings do not indicate the tiny difference among vehicles near the dividing lines, this is also true for the frontal and side NCAP ratings. Just as with these ratings, the actual scores for the vehicles will be available on the NCAP website to anyone who is interested.

Finally, with regard to comments that options can cause wide difference in the rating for a specific model, over the years that we have been researching vehicle inertial parameters, four-wheel drive is the only equipment option for which we have observed a large potential effect on SSF. NHTSA intends to test the most common versions of all vehicles. Where two- and four-wheel drive versions of the same vehicle are available, we will test them both and report them as separate models. We will accurately describe the actual test vehicle in the literature reporting the rating.

Manufacturers who believe there are significant differences in SSF for different vehicle configurations may fund an optional NCAP measurement, just as they may fund optional frontal or side NCAP tests. Then if the difference in equipment or configuration makes a difference in the SSF, that difference will be available to the public.

3. Even If Consumers Use the Information, Will the New Program Lead to a Decrease in Rollover Crashes?

Some commenters believe that even if consumers do use the new ratings, the outcome of that use will be other than what we desire. The following are comments and who made them.

• Rollover ratings will encourage consumers to purchase cars instead of trucks and cars are less safe than trucks.—Alliance

• A system based on RO/SVC may cause the choice of a less-safe vehicle because it doesn't take the make/model's risk of becoming involved in a crash into account.—Suzuki, Tenneco

• Consumers will think that if they drive a vehicle with a high SSF they

will be immune to rollover and this will lead them to drive unsafely—Alliance

• There is no demonstrated safety benefit of rollover rating.—Alliance, BMW

The best indicator of the potential benefits of any new ratings program is the frontal NCAP program. As discussed previously, there are now many more five-star vehicles than when the frontal NCAP program started. Research also indicates that a five-star rating correlates to enhanced real-world safety. Therefore, all consumers benefit from these improvements in the vehicle fleet even if they don't make purchase decisions based on the star ratings. Both of these types of analysis will be possible for side impact and rollover NCAP after an adequate number of years of experience. There is no evidence that consumers have responded to vehicles with high frontal NCAP scores or other safety features by riskier driving behavior, and no reason to believe that they will respond differently to rollover ratings. Similarly, there is no indication that consumers believe they are immune to injury by driving a vehicle with a five-star frontal or side NCAP rating or with additional safety features.

NHTSA disagrees that cars are less safe than light trucks. Occupant fatality rates (average 1991–98, FARS data) across all crash types indicates that large cars have a lower fatality rate than SUV's and small pickup trucks, and the same as the rate for standard pickups. Medium cars have a rate about the same as SUV's and lower than the rate for small pickup trucks. Small cars and small pickup trucks have about the same rate. See Figure 4. If we narrow the picture to rollover crashes, as in Figure 5, we see that SUV's and small pickups have the highest rates, at least 75 percent higher than the rate for small cars. The rates for medium and large cars are below any of the light truck types.

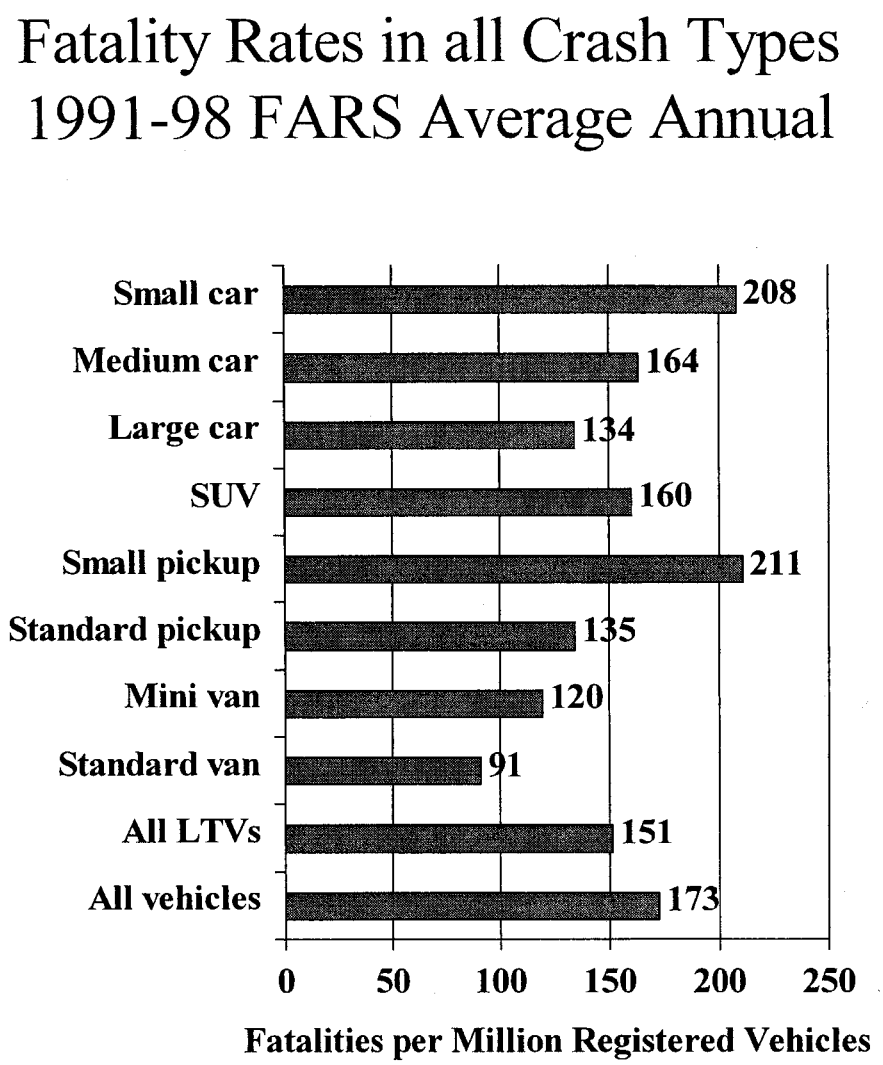

Figure 4 Fatality Rates in all Crashes by Vehicle Type1991-98 annual average

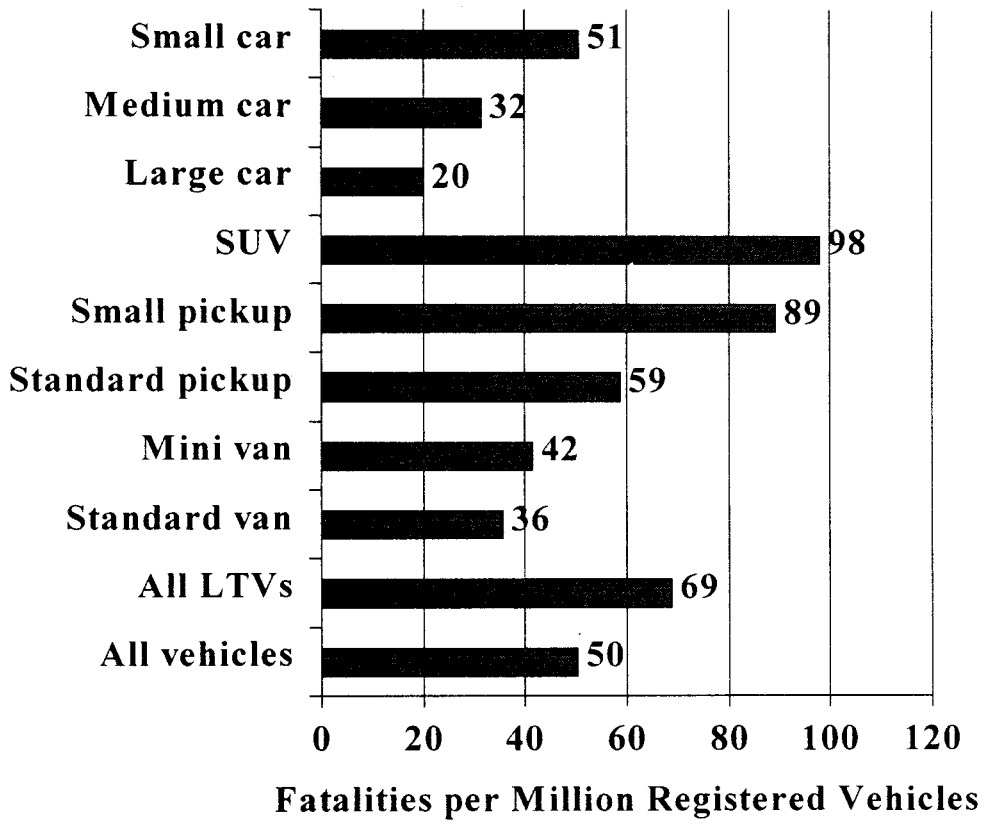

Figure 5 Fatality Rates in Rollover Crashes by Vehicle Types 1991-98 annual average

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However, NHTSA is aware that as we expand the areas in which we provide consumer information ratings, it is becoming more and more important to provide consumers with guidance on how to weigh ratings in different categories. For example, it is quite common for SUVs to receive five-star ratings in side impact NCAP, but our research indicates that these vehicles will have rollover ratings in the one- to three-star range. NHTSA can help consumers understand these differences by providing them with information on the frequency of various crash types, as we have been doing with the front and side impact NCAP ratings, and we plan to do for rollover crashes. In addition, NHTSA has been considering possible ways to provide consumers with a single summary rating of a vehicle's safety.

E. The Question of Electronic Stability Control

Continental Teves objected to the use of SSF to rate rollover resistance because the ratings would not reward manufacturers for equipping vehicles with Electronic Stability Control (ESC). It was also dissatisfied with language in the notice promising consumer information about ESC as part of the rating presentation after there is some evidence of its effectiveness. BMW, Toyota, Isuzu, Tenneco and the Alliance offered similar comments. All expressed confidence that the technology would reduce the number of on-road loss-of-control situations that often result in off-road tripped rollovers. The Alliance suggested that ESC may also reduce the risk of untripped rollover, and Continental believes that it may help drivers regain control after they leave the roadway. Many commented that ratings based on SSF would stifle and undercut advanced vehicle technology. The notice specifically asked commenters to share any data they may

have on the effectiveness of stability control technologies in preventing single-vehicle crashes, but none did so.

The NCAP program rates the risk of rollover in the event of a single-vehicle crash. Most of these single-vehicle crashes involve hitting a curb or running off the road accidently and encountering soft soil, a ditch or something that trips the vehicle. To repeat, 95 percent of rollovers are tripped. Once a vehicle is in this situation and strikes a tripping mechanism, its chances of rolling over depend heavily on its SSF.

The promise of ESC is not that it can change what happens when a vehicle hits a tripping mechanism but that it may help the driver to avoid going off the roadway in the first place. ESC can apply one or more brakes automatically to keep the yaw rate of the vehicle proportional to its speed and lateral acceleration. Essentially, it corrects for vehicle understeer or oversteer, and some systems may override a driver's failure to brake when in fear of losing control. This benefit could minimize the driver's chances of compounding his or her driving errors in a panic situation. However, it cannot keep a vehicle from leaving the roadway if the vehicle is going too fast for the maneuver the driver is attempting.

Like frontal and side NCAP ratings, the Rollover Resistance Rating is concerned with vehicle attributes that affect the outcome of a crash. None of the present ratings attempt to describe the probability of a vehicle's involvement in a crash. For example, the frontal crashworthiness star rating does not reward manufacturers who equip vehicles with advanced braking systems. Also, the agency cannot rely on skid pad demonstrations to determine the effectiveness of a safety device in the hands of the public. Anti-lock brakes were once considered likely to reduce rollover crashes because they had the potential to reduce the number of vehicles exiting the road sideways as a result of rear brake lock-up. This expectation has not been realized in passenger cars according to years of crash statistics. There has actually been an increase in the rollover rate of passenger cars equipped with anti-lock brakes that researchers have not yet been able to explain.

The commenters suggest that NHTSA should abandon SSF as a basis for rollover rating because it does not reward ESC in the star rating and that without such a reward the use of the technology would be in doubt. The importance of SSF to rollover resistance is supported by abundant real-world evidence, while there is no data on the effectiveness of ESC. Based on the relative data available, it would not be appropriate to abandon SSF. We encourage manufacturers to assist us in determining the effectiveness of ESC by identifying optional ESC systems in VIN codes and sharing available data. We will continually monitor data on the real-world effectiveness of ESC and make appropriate changes based on that data. We do not expect that manufacturers will abandon ESC, since they express so much confidence in its ultimate effectiveness.

NHTSA wants to encourage technological applications that enhance vehicle stability, provide drivers with more control of their vehicle, and help prevent rollover and other crashes. For ESC in particular, it is reasonable to assume that it will help some drivers use the available traction to stay on the road in circumstances that would otherwise result in panic-driven errors and roadway departure. We have asked the National Academy of Sciences to recommend ways of combining the effect of ESC on exposure to single-vehicle crashes, with the effect of SSF on rollover resistance in a single-vehicle crash, as part of its Congressionally-mandated study of rollover consumer information. We do not expect that a recommendation can be implemented without some determination of ESC's real-world effectiveness, but in the meantime we will identify in our Buying a Safer Car brochure the vehicles for which ESC is available and provide an explanation of these systems. The identification of vehicles with ESC will start in the December 2000 issue of Buying a Safer Car. The April 2001 issue of Buying a Safer Car will also present Rollover Resistance Ratings.

The first presentation of Rollover Resistance Ratings will be on the NHTSA website. The website will also present Questions and Answers regarding rollover crashes including one discussing the effect of ESC and its relationship to the Rollover Resistance Ratings. Until the Rollover Resistance Ratings are integrated into Buying a Safer Car, the NHTSA website will provide a chart of rated vehicles which will include a column indicating the availability of ESC. The heading of that column will provide a link to the Q&A about ESC.

The Q&A section will include the following discussion:

Question: How does Electronic Stability Control affect rollover, and what is its relationship to the Rollover Resistance Ratings?

Answer: Most rollovers occur when a vehicle runs off the road and strikes a curb, soft shoulder, guard rail or other object that ''trips'' it. The Rollover Resistance Ratings estimate the risk of rollover in event of a single vehicle crash, usually when the vehicle runs off the road. Electronic Stability Control (which is offered under various trade names) is designed to assist drivers in maintaining control of their vehicles during extreme steering maneuvers. It senses when a vehicle is starting to spin out (oversteer) or plow out (understeer), and it turns the vehicle to the appropriate heading by automatically applying the brake at one or more wheels. Some systems also automatically slow the vehicle with further brake and throttle intervention. What makes Electronic Stability Control promising is the possibility that with its aid many drivers will avoid running off the road and having a single vehicle crash in first place. However, ESC cannot keep a vehicle on the road if its speed is simply too great for the available traction and the maneuver the driver is attempting or if road departure is a result of driver inattention. In these cases, a single vehicle crash will happen, and the Rollover Resistance Rating will apply as it does to all vehicles in the event of a single vehicle crash.

A similar discussion will accompany the rollover resistance ratings in the April issue of Buying a Safer Car.

F. Alternative Programs for Rollover Consumer Information Suggested by Commenters

Three commenters to the RFC presented ideas for consumer information programs to be used in place of the agency's proposal to use SSF to rate vehicles. The Alliance had four suggestions:

- Cause drivers to obey the speed limits, be alert and unimpaired, and use proper restraints, and provide driver training in off-road recovery and crash avoidance maneuvering.
- Improve the roadways with paved shoulders to eliminate road edge drop-offs and provide road edge rumble strips to help alert drivers.
- Promote Electronic Stability Control.
- Promote crashworthiness improvements including active restraint systems, tubular and side curtain air bags, new belt reminder systems, structural crashworthiness improvements, FMVSS 201 interior protection, new locks and latches and alternative glazings.

Ford and Suzuki commented that SSF should be used only to rate vehicle classes and should not be used to show distinctions between make/models in the same class. These commenters also believe that the program should not present the risk of rollover quantitatively.

The NADA recommended that NHTSA put more emphasis on the seat belt message in the context of rollover,

including child safety restraints and suggested that manufacturers include in their vehicles' owners manuals material about crash avoidance driving practices. The manufacturers' association, the Alliance, on the other hand, wanted to see seat belt information only in a general sense, not specifically referring to rollover.

The major flaw with all of these suggestions is that they do not deliver what the consumer wants—definitive, comparative, information about the relative risk of rollover in specific vehicles. We have shown, in the previous sections of this notice and the notices that have preceded it, that we can link rollover risk to the SSF of specific make/models. Any rollover-specific consumer information product that NHTSA develops in the future will mention driving habits that contribute to rollover prevention and emphasize the importance of seat belt use. However, the focus of the present action is on allowing consumers to make an informed choice about the safety of the vehicles they purchase, both by class and by model.

G. Commenters Preference for a Minimum Standard Based on a Dynamic Test

Tab Turner, a plantiff's attorney, and Insurance Institute for Highway Safety, Consumers Union, and Advocates for Highway and Auto Safety, stated in their comments that, while they had no objection to using SSF to provide consumer information, an information program was not sufficient to address the rollover problem. They believe a federal motor vehicle safety standard, based on a dynamic track test of vehicles, is needed.

Notwithstanding the recent Transportation Recall Enhancement, Accountability, and Documentation Act (TREAD) [15] which requires the agency to issue ratings based on a dynamic test within two years, we believe that consumer information based on SSF is an appropriate way to proceed at this time to address rollover. Two issues are involved here: the issue of a minimum standard versus consumer information, and the issue of dynamic testing versus a static metric. Both of these issues were addressed at length in the RFC.

We agree that it would be desirable to have a standard to address a safety issue as significant as rollover resistance. However, as explained in the RFC, NHTSA previously decided not to set a vehicle rollover standard at a level that would effectively force nearly all light trucks to be redesigned to be more like passenger cars.[16] NHTSA also previously decided not to set a vehicle rollover standard at a level that would effectively force a redesign even of certain vehicle types like small pickups and small SUVs [17] because it would not be appropriate to prohibit the manufacture and sale of those vehicles without some predictable benefit commensurate with the cost of that action. However, we can still provide accurate and meaningful information about rollover resistance to allow the public to make fully informed choices when selecting a new vehicle.

IV. Rollover Information Dissemination using SSF in NCAP

The agency has decided to go forward with a pilot consumer information program on vehicle rollover resistance, using the SSF as a basis for the rating system. This program will be part of NCAP, which currently gives consumers information on frontal and side-impact crashworthiness. Today we are announcing the 2001 model year vehicles to be tested and how the information will be disseminated to the public.

There are two activities ongoing in NHTSA that may change this pilot program: the study by the National Academy of Science mandated by Congress in the Department's Fiscal Year 2001 appropriations bill [18] and the Congressional requirement contained in the TREAD Act that the agency develop a dynamic test for consumer information on rollover, conduct the tests, and determine how best to disseminate the test results to the public by November 1, 2002. Changes or additions to this program will be developed if necessary to conform to the requirements of these two statutes.

The rollover information program will operate just as the current frontal and side NCAP does. New models are selected for testing before the beginning of the model year. Selection is based primarily on production levels predicted by the manufacturers and submitted to the agency confidentially. Consideration is given also to vehicles scheduled for major changes, or new models with specific features that may affect their SSF's. The vehicles chosen for NCAP testing will be obtained and measured by NHTSA, as the vehicles become available. Vehicles are obtained with popular equipment, typical of a rental fleet, and the equipment with possible influence on SSF will be included in the vehicle description when the rating is reported. Two-wheel drive and four-wheel drive versions of a vehicle are treated as separate models, because a four-wheel drive option can have a significant effect on SSF. As provided for in the frontal and side NCAP, manufacturers can, at their option, pay for tests of vehicles, models, or configurations not included in NHTSA's test plan, if they wish to inform consumers about those vehicles through the program.[19] The SSF will be converted to a star rating according to the curve presented in Section III and Appendix I at the intervals specified in Section III. The rollover rating information will be available on the agency's website, and will be included in all NHTSA publications and press releases which use NCAP data. The brochures and the website presentation will explain the basis of the ratings, present the SSF measurements, and discuss the magnitude of rollover harm prevention provided by seat belt use.

As part of the presentation on rollover the following explanatory text will be used:

Description of Rollover Resistance Rating

- Most rollover crashes occur when a vehicle runs off the road and is tripped by a ditch, curb, soft soil, or other object causing it to roll over. These crashes are usually caused by driver behavior such as speeding or inattention. These are called single-vehicle crashes because the crash did not involve a collision with another vehicle. More than 10,000 people die each year in all rollover crashes.
- The Rollover Resistance Rating is an estimate of your risk of rolling over if you have a single-vehicle crash. It does not predict the likelihood of that crash. The Rollover Resistance Rating essentially measures vehicle characteristics of center of gravity and track width to determine how ''top-heavy'' a vehicle is. The more ''top-heavy'' the vehicle, the more likely it is to roll over. The lowest rated vehicles (1-star) are at least 3 times more likely to roll over than the highest rated vehicles (5-stars).
- The Rollover Resistance Ratings of vehicles were compared to 220,000 actual single-vehicle crashes, and the ratings were found to relate very closely to the real-world rollover experience of vehicles.

[15] P.L. 106–414, November 1, 2000.

[16] Denial of the Wirth petition, 52 FR 49033 (December 29, 1987).

[17] Termination to establish a minimum vehicle standard for rollover resistance based on TTR or CSV, 59 FR 33254 (June 28, 1994.)

[18] P.L. 106–346, October 23, 2000.

[19] The manufacturer pays for the vehicle and the test, however, actual vehicle leasing and testing is done by a testing laboratory under contract to NHTSA.

• While the Rollover Resistance Rating does not directly predict the risk of injury or death, keep in mind that rollovers have a higher fatality rate than other kinds of crashes.

Remember: Even the highest rated vehicle can roll over, but you can reduce your chance of being killed in a rollover by about 75% just by wearing your seat belt.

• Here are the Rollover Resistance Ratings:

In A Single-Vehicle Crash, a vehicle with a rating of:

Five Stars ★★★★★

Has a risk of rollover of less than 10%

Four Stars ★★★★

Has a risk of rollover between 10% and 20%

Three Stars ★★★

Has a risk of rollover between 20% and 30%

Two Stars ★★

Has a risk of rollover between 30% and 40%

One Star ★

Has a risk of rollover greater than 40%

As part of these ratings, the agency also has decided to note vehicles that are equipped with ''electronic stability control'' technology, which may reduce the risk of a vehicle getting into an incipient rollover situation.

Appendix II contains a preliminary list of vehicles we will measure and for which we will report SSF and star ratings. The vehicles will be tested as they become available to the test facility. As of today 24 vehicles have been tested; the results are available from the Auto Safety Hotline (888–327–4236) or on the NHTSA website at www.nhtsa.dot.gov. The remainder of the test results and star ratings for the 2001 model year will be available by April 30, 2001.

V. Rulemaking Analyses and Notices

Executive Order 12866

This notice was not reviewed under Executive Order 12866 (Regulatory Planning and Review). NHTSA has analyzed the impact of this decision and determined that it is not a ''significant regulatory action'' within the meaning of Executive Order 12866. The agency anticipates that providing information on rollover risk under NHTSA's New Car Assessment Program would impose no regulatory costs on the industry.

Authority: 49 U.S.C. 322, 30117, and 32302; delegation of authority is at 49 CFR 1.50 and 49 CFR 501.8.

Issued on: January 8, 2001.

Stephen R. Kratzke,

Associate Administrator for Safety Performance Standards.

Appendix I: Statistical Analysis in Response to Comments

Response to Comments of the Alliance of Automotive Manufacturers based on a Study by Exponent Failure Analysis Associates, Inc. titled: *The Relative Importance of Factors Related to the Risk of Rollover Among Passenger Vehicles*

Background

The agency has proposed expanding the New Car Assessment Program (NCAP), which tests vehicle performance in front and side crashes, to include information on rollover resistance. We proposed a rollover metric for consumer information based on the Static Stability Factor (SSF) and described the approach in a *Request for Comments, Notice for Rollover NCAP* (''the Notice,'' docket NHTSA 2000–6859, item 1, June 1, 2000). The Appendix to the Notice described a statistical analysis of four years of data (1994 to 1997) from six states (Florida, Maryland, Missouri, North Carolina, Pennsylvania, and Utah), and we provided more details of the analysis (definitions, programming statements, and computer output) in another submission to the Rollover NCAP docket (item 4). The Alliance of Automobile Manufacturers (''the Alliance'') reviewed the Notice and the supplemental material and submitted their comments to that docket (item 25).

Appendix 4 of their comments is a paper prepared for the Alliance by Exponent Failure Analysis Associates, Inc. (''the Exponent report'') on *The Relative Importance of Factors Related to the Risk of Rollover Among Passenger Vehicles* (Alan C. Donelson, Farshid Forouhar, and Rose M. Ray, in a paper dated August 30, 2000). The Exponent report critiqued our linear regression analysis of the summarized crash data and suggested an alternative approach based on logistic regression analysis of individual crash events. This paper is a comparison of the two approaches (the linear model from summarized data and the logistic model of individual crash events) in response to those comments.

Overview

The Exponent report listed four goals for their study (page 4 of that report), and we will address their conclusions in our response. The four goals were as follows:

(1) ''To evaluate the statistical study offered by NHTSA as a basis for comparative 'ratings' [emphasis in original] of rollover risk,''

(2) ''To gauge the strength of SSF as a predictor of rollover relative to the influence of non-vehicular factors,''

(3) ''To quantify the relationship between SSF and risk of rollover after adjusting for the influence of non-vehicular factors,'' and

(4) ''To estimate the magnitude and reliability of apparent changes in rollover risk with changes in SSF.''

The Exponent report offered three corrections to our vehicle group definitions, questioned the use of linear models of summarized data, and recommended logistic models of individual crash events as an improvement (their goals 1 and 2). In response, we have made the suggested corrections, used updated VIN-decoded data, added a year of data (the 1998 calendar year data are now available for all six states used in our original analysis), and refit the model. Details on the data definitions are included below in ''Available Data,'' and the results of are described in ''Refitting the Linear Model.'' We have also used our data to fit logistic regression models, and these results are described in ''Fitting Logistic Models.'' A comparison of the two approaches is provided in ''Comparing the Models.''

Our logistic models produced results that were similar to those produced by our linear model of summarized data and to the logistic models described in the Exponent report (which were based on a slightly different group of states, calendar years, and explanatory variables). That is, the choice of model form and data source do not affect our essential conclusion: the SSF is strongly related (both in terms of statistical significance and magnitude of effect) to rollover risk. However, there are some differences among the models in the estimated sensitivity of rollover risk to changes in the SSF.

Where we disagree most with the Exponent report is in the interpretation of the results. The authors of the Exponent report argue that the SSF plays a smaller role in rollover causation than do driver and other road-use factors (their goals 2 and 4). Goal 2 (gauging the relative strength of the SSF and non-vehicle factors) is so important to the authors that they used it as the title of their report. We believe that our analysis indicates that the SSF is very important in describing rollover risk, as measured by the fit of each model, the significance of the coefficient of the SSF term, and the magnitude of the coefficient of the SSF term. We do recognize that driver and other road-use variables are also important. Federal, state, and local education and enforcement programs are all aimed at the vulnerability of road users to human error, and we recognize that the driver plays a large role in causing or avoiding crashes. However, what we set out to address in the Notice is whether the SSF provides information that is useful to consumers—information they can use in selecting a vehicle, deciding whether to use seat belts and child seats, and adapting their driving style to a new vehicle. We describe this point in more detail below, in ''Interpreting the Analytical Results,'' using an example based on the relationship between crash severity, belt use, and injury severity.

In summary, we believe that our statistical models (both the linear model of summarized data and the logistic models of individual crash events) and the statistical models offered in the Exponent report support our conclusion that the SSF is a useful measure of rollover risk that will help the consumer choose a new vehicle and use it wisely.

Available Data

The analysis described in the Notice was based on single-vehicle crashes, which we

defined to exclude crashes with another motor vehicle in transport or with a nonmotorist (such as a pedestrian or pedalcyclist), animal, or train. We eliminated vehicles without a driver and all vehicles that were parked, pulling a trailer, designed for certain special or emergency uses (ambulance, fire, police, or military), or on an emergency run at the time of the crash. Our only criterion for including a vehicle model in the analysis was a reliable measure of the SSF. The 100 vehicle groups we identified were described in the Notice, and the definitions for these groups were included in another submission to the same docket (item 4).

Exponent reviewed this information and pointed out three errors in the specifications of the vehicle groups (page 37). First, vehicle group 65 should have been defined as model years 1990–1995 (not 1988–1996). Second, vehicle group 66 should have been defined as model years 1996–1998 (not 1997–1998). And third, vehicle group 91 should have included model code ''SKI'' (not ''SCI''), as defined by the output from The Polk Company's PC VINA® software (PC VINA® for Windows User's Manual, October 20, 1998). We also found a typographical error in the specification of vehicle group 79: the number of drive wheels should have been specified as ''not equal to 4'' (rather than ''equal to 4''). We corrected these mistakes in the list and computer programs, and the corrected list of vehicles is included here as Tables 1 through 4.

Our understanding of some important differences in state crash reporting are included in Table 5. The Notice described our criteria for including a state in the analysis, which were as follows:

(1) Data availability (the state must participate in the agency's State Data System (SDS) and have provided the 1997 data),

(2) VIN reporting (the vehicle identification number (VIN) must be coded on the electronic file), and

(3) Rollover identification (we must be able to determine whether a rollover occurred, regardless of whether it was a first or subsequent event in the crash).

Six states (Florida, Maryland, Missouri, North Carolina, Pennsylvania, and Utah) met all three criteria. Two states (New Mexico and Ohio) met two of the three criteria; these states participate in the SDS and the VIN is available on the electronic file, but rollovers are identified only if they are reported as the first harmful event in the crash. We have made some use of all eight states in this updated analysis, but most of the analysis is based on the six states with the best rollover reporting. These are the six states that were the basis for the analysis described in the Notice.

For this analysis, we used the SDS data and the VIN-decoded data available on NHTSA's Research and Development Local Area Network (LAN). The National Center for Statistics and Analysis (NCSA, an office in R&D) recently rebuilt the 1997 VIN files for Maryland and Missouri, and the numbers of relevant cases differ slightly from those reported in the Notice. The major changes were a slightly more-conservative approach to dealing with mistakes in VIN transcription and some additional vehicle-make codes. We also expanded somewhat our definition of ''rollover'' in North Carolina (adding information from the four impact-type variables), which increased the number of rollovers in that state over what was reported in the Notice. The number of relevant vehicles identified for each state and calendar year are shown as Table 6. Note that Ohio reported a relatively small percentage of VINs in 1998 (about 29 percent of vehicles had a VIN on the electronic file), so case counts for the vehicles relevant to this study are low. Our analysis is not too sensitive to missing VIN information because it is based on internal comparisons of the crash data (specifically, on rollovers per single-vehicle crash); this would not be the case if we were basing our analysis on comparisons with an external source, such as rollovers per registered vehicle.

We added a calendar year of data (1998) for the six states used in the analysis described in the Notice. However, Pennsylvania no longer includes on the electronic file some environmental variables that we need for this analysis (specifically, CURVE and GRADE), so we could not use the 1998 Pennsylvania data in the analysis. The variables available for this analysis are shown as Table 7. We calculated the SSF to two decimal places (with observed values between 1.00 and 1.53), we defined NUMOCC as the count of occupants in each vehicle, and we defined all the other road-use factors as dichotomous variables (with ''0'' coded for ''no,'' and ''1'' coded for ''yes'').

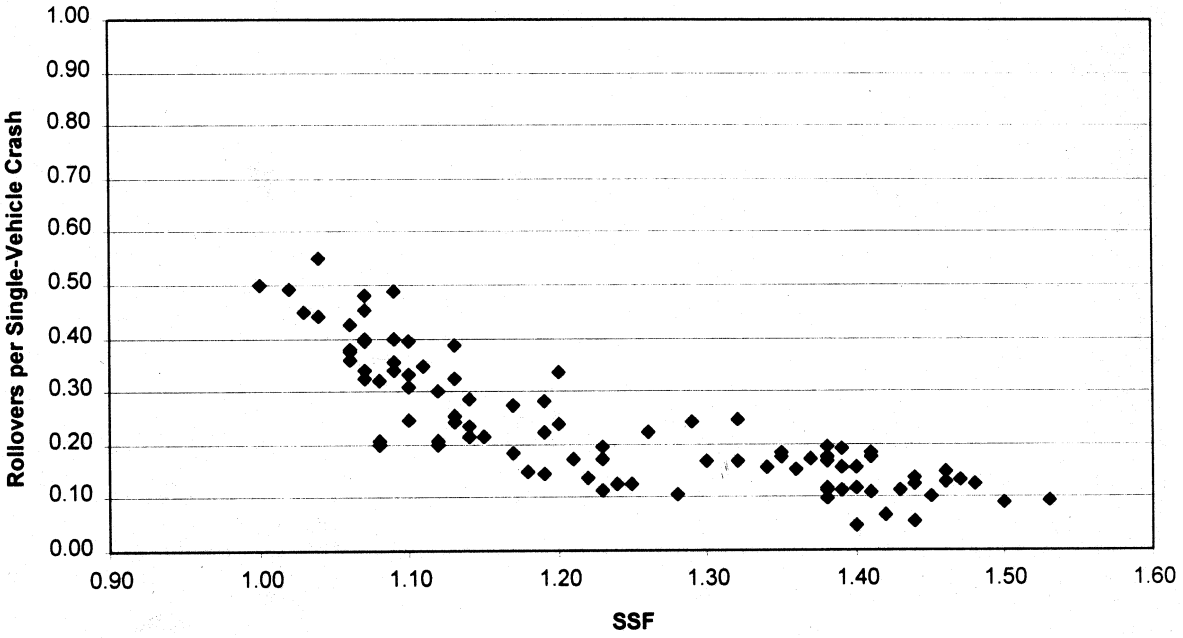
All eight states reported the following data: ROLL, SSF, DARK, STORM, FAST, HILL, CURVE, BADSURF, MALE, YOUNG, OLD, and DRINK. Speed limit is not reported in New Mexico, so we defined FAST based on the roadway function class after reviewing the relationship between these two variables among New Mexico cases in the 1994–1998 Fatality Analysis Reporting System (FARS) data. We assumed, based on our review of the FARS data, that (1) interstate and rural arterial roads had a speed limit of at least 55 mph, (2) local roads and urban arterial roads, collectors, and ramps had a speed limit of no more than 50 mph, and (3) the speed limit was unknown for all other roads. RURAL was unavailable for two states (Maryland and Missouri), BADROAD was unavailable for two states (Missouri and Pennsylvania), NOINSURE was unavailable for three states (Maryland, North Carolina, and Utah), and NUMOCC was unavailable for Missouri (where uninjured passengers need not be reported).

Refitting the Linear Model

We refit the linear model using the approach described in the Notice. There were 241,036 single-vehicle crashes available for this analysis (that is, involving a vehicle in one of the 100 vehicle groups, occurring between 1994 and 1998, and occurring in the six states we studied in preparing the Notice (Florida, Maryland, Missouri, North Carolina, Pennsylvania, and Utah), and 48,996 of these (20.33 percent) involved rollover. We eliminated the 1998 Pennsylvania data because CURVE and GRADE are not available on the electronic file, and this left 227,194 single-vehicle crashes, of which 45,880 (20.19 percent) involved rollover.

We summarized the data for each vehicle group in each state, which produced 599 summary records (there were no reported single-vehicle crashes involving vehicle group 54 in Utah). As with the earlier analysis, we eliminated any summary record that was based on fewer than 25 cases because we thought estimates based on smaller samples were too unreliable. This left us with 518 summary records, representing the experiences of 226,117 single-vehicle crashes, including 45,574 (20.16 percent) rollovers. Figure 1 shows the rollover rate (rollovers per single-vehicle crash) as a function of the SSF plotted for each of the 100 vehicle groups. These data have not been adjusted for differences in vehicle use or state reporting practices, but they do show a strong tendency for lower rollover rates with higher values of the SSF.

Figure 1: Rollovers per Single-Vehicle Crash Estimated from Six States (Not Adjusted for Differences in Road Use or State Reporting)



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We used the 1994–1998 General Estimates System (GES) for a comparison with the six-state rollover rate for the study vehicles as a group. The five years of GES data include 9,910 sampled vehicles that we identified as being in one of the 100 vehicle groups (based on decoding the VIN with the PC VINA® software for those states that include the VIN on their police reports) involved in a single-vehicle crash, and 2,377 of these rolled over. Weighting the GES data to reflect the sample scheme (but not adjusting for missing VIN data) produces estimates of 1,185,474 single-vehicle crashes per year, of which 236,335 (19.94 percent) involved rollover. That is, the six states in our study have a rollover rate for police-reported crashes that is essentially the same as the national estimate produced from the GES data (with the qualification that the GES estimate is based on data from just those states that include the VIN on the police report).

We defined the dependent variable ROLL as the fraction of single-vehicle crashes that involved rollover. The independent (explanatory) variables in the six-state combined model were those available in all six states. They were expressed as the fraction of single-vehicle crashes that involved each of the following ten situations: DARK, STORM, FAST, HILL, CURVE, BADSURF, MALE, YOUNG, OLD, and DRINK. We also defined dummy variables for five states (DUMMY__FL, DUMMY__MD, DUMMY__NC, DUMMY__PA, and DUMMY__UT, with Missouri used as the baseline case) to capture state-to-state differences in reporting thresholds and definitions. These variables have the value "1" if the crash occurred in that state (for example DUMMY__MD = 1 for all Maryland crashes), and they have the value "0" otherwise (for example, DUMMY__MD = 0 for all crashes in Florida, Missouri, North Carolina, Pennsylvania, and Utah). These are the fourteen variables we used in the earlier analysis (described in the Notice), plus the variable OLD.

We ran the stepwise linear regression analysis against these 518 summary records to describe the natural logarithm of rollovers per single-vehicle crash, which we call LOGROLL, as a function of a linear combination of the explanatory variables. (To avoid losing information on vehicle models with a low risk of rollover, we set ROLL to 0.0001 if there were no rollovers represented by the summary record.) We used the option that gives more weight to data points that are based on more observations, so vehicle groups with more crashes count for more in the analysis. Each data point was weighted by the number of single-vehicle crashes it represented, but the weighting was capped at 250. That is, data points based on more than 250 observations were weighted by 250. Our rationale was that we wanted the model to fit well across the full range of SSF values, so we did not want to over-weight the data for the most-common models on the road.

We ran a preliminary model using the SSF and the five state dummies to estimate LOGROLL. The model had an R^2 of 0.73, and the coefficient of the SSF term (−2.8634) was highly significant (the t-statistic indicates that the probability that the coefficient is really zero is less than 0.0001); the details are included as Table 8a. Thus, it appears that the SSF is very useful in understanding rollover risk. We then performed a stepwise linear regression (using forward variable selection and a significance level of 0.15 for entry and removal from the model) on the six-state data; this is the same approach we used for the analysis described in the Notice. The stepwise regression procedure with the SSF chose three variables that describe the driving situation (DARK, FAST, and CURVE), three variables that describe the driver (MALE, YOUNG, and DRINK), and all five state dummy variables. The F-statistic for the model as a whole was 311, and the probability of a value this high by chance alone is less than 0.0001. The model had an R^2 of 0.88 and the coefficient of the SSF term (−3.3760) was highly significant; more details on the fit of the model are included as Table 8b. Note that adding the road-use variables increased both the model R^2 (from 0.73 to 0.88) and the absolute value of the coefficient of the SSF term (from −2.8634 to −3.3760). That is, the effect of the SSF on rollover risk is estimated to be even greater after adjusting for differences in road use.

We used the results of the model to adjust the observed number of rollovers per single-vehicle crash to account for differences among vehicle groups in their road-use characteristics in single-vehicle crashes. For each of the 518 summary records, we used the regression results and the typical road use to estimate what LOGROLL would have been if road use for that vehicle group had been the typical road use observed for all the vehicles in the study. The approach is the one used in the Notice. We used an intermediate step to account for differences in road use and adjust the data towards the average experience for the study vehicles:

$$
\begin{aligned}
ADJ_LOGROLL_i &= LOGROLL_i \\
&\quad - BETA_DARK \times (DARK_i - MEAN_DARK) \\
&\quad - BETA_FAST \times (FAST_i - MEAN_FAST) \\
&\quad - BETA_CURVE \times (CURVE_i - MEAN_CURVE) \\
&\quad - BETA_MALE \times (MALE_i - MEAN_MALE) \\
&\quad - BETA_YOUNG \times (YOUNG_i - MEAN_YOUNG)
\end{aligned}
$$

− BETA__DRINK × (DRINK$_i$ − MEAN__DRINK)
− BETA__DUMMY—FL × DUMMY__FL$_i$
− BETA__DUMMY__MD × DUMMY__MD$_i$
− BETA__DUMMY__NC × DUMMY__NC$_i$
− BETA__DUMMY__PA × DUMMY__PA$_i$
− BETA__DUMMY__UT × DUMMY__UT$_i$
+ MEAN__DUMMIES,

where:

ADJ__LOGROLL$_i$ is the estimate of what LOGROLL would have been for each summary record if all vehicles were used the same way,

LOGROLL$_i$ is the value of LOGROLL observed for each summary record,

BETA__DARK through BETA__DRINK are the coefficients (Beta-values) of the road-use variables, DARK through DRINK, that were produced by the model (as shown in Table 8b),

BETA__DUMMY__FL through BETA__DUMMY__UT are the coefficients of the state dummy variables, DUMMY__FL through DUMMY__UT, that were produced by the model,

DARK$_i$ through DRINK$_i$ are the values of the road-use variables observed for each summary record,

DUMMY__FL$_i$ through DUMMY__UT$_i$ are the values of the state dummy variables for each summary record (with no more than one of these equal to ''1,'' and all the rest equal to ''0''),

MEAN__DARK through MEAN__DRINK are the average values of the road-use variables observed in the study data (with MEAN__DARK=0.4314, MEAN__FAST=0.4807, MEAN__CURVE=0.3315, MEAN__MALE = 0.6276, MEAN__YOUNG=0.3987, and MEAN__DRINK=0.1509), and

MEAN__DUMMIES is the average state adjustment in the study data.

MEAN__DUMMIES was calculated for these 226,117 single-vehicle crashes from the coefficient of the state dummy variables and the number of cases in each state as follows:

(1.2253 × number of Florida cases
+0.6933 × number of Maryland cases
+0.0000 × number of Missouri
+0.6969 × number of North Carolina cases
+1.2449 × number of Pennsylvania cases
+0.8622 × number of Utah cases)
/Total number of cases
=0.8019,

The adjusted rollover rate for each vehicle group is then estimated by:

$$ADJ__ROLL = e^{(ADJ__LOGROLL)}.$$

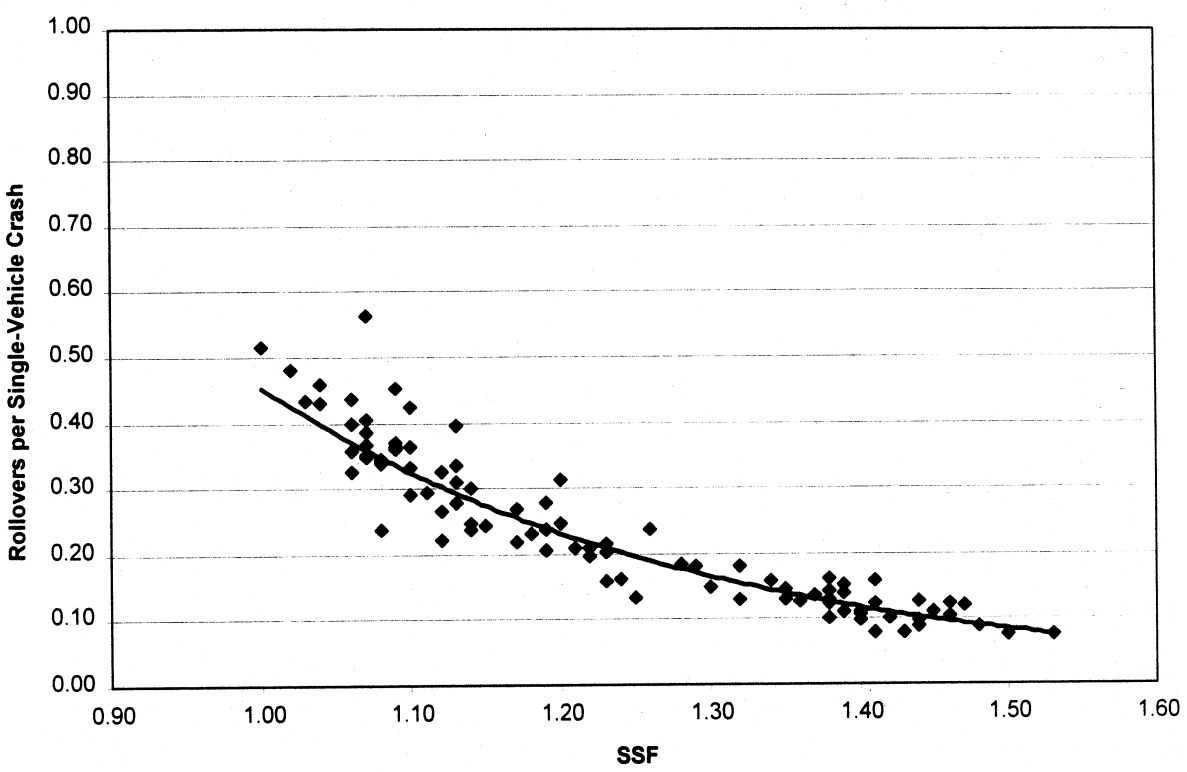
This is our estimate of what the rollover rate would have been if all vehicle groups were used in the same way, and it reflects the average use patterns of all vehicles in the study. The adjusted rollover rates are shown in Figure 2.

The average adjusted number of rollovers per single-vehicle crash for all the study vehicles in the six states is 0.1982, which is essentially the same as the rollover rate in the original study data (0.2016) and the rollover rate estimated from the GES data (0.1994) for these 100 vehicle groups. A linear model fit through the adjusted data is described by the equation:

$$LOGROLL = 2.5861 - 3.3760 \times SSF.$$

The model has an R^2 of 0.85, and the coefficient of the SSF term was highly significant. Details on the fit of the model through the adjusted rollover rates are included as Table 8c.

Figure 2: Rollovers per Single-Vehicle Crash Estimated from Six States (Adjusted to National Average Road Use and for Differences in State Reporting)



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Exponentiating both sides of the equation produces an estimate that the number of rollovers per single-vehicle crash is approximated by the curve:

$$ROLL = 13.28 \times e^{(-3.3760 \times SSF)}.$$

The estimated rollover rates for the SSF values between 0.95 and 1.55 are shown in Table 19 in the column labeled ''Model 1,'' and the estimates for the observed range (SSF values from 1.00 to 1.53) are shown as Figure 2. This model form has very useful properties. The increase in the SSF that is associated with halving the number of rollovers per single-vehicle crash is estimated as 0.21. For example, the number of rollovers per single-vehicle crash under average conditions is estimated as:

0.44 for a SSF of 1.01
0.23 for a SSF of 1.22, and

0.11 for a SSF of 1.43.

Thus, rollover risk drops by a half when the SSF increases from 1.01 to 1.22, and it drops in half again when the SSF increases from 1.22 to 1.43.

The SSF is both highly significant in the model and very important in describing rollover risk (the estimated rollover risk increases by a factor of 6.0 over the observed range of the data, from a SSF of 1.00 to 1.53). This means that changes in the SSF (or changes in how vehicles with low SSF values are used) has the potential for large reductions in rollover risk.

Fitting Logistic Models

The Exponent report questioned the validity of using a linear regression analysis of summarized data, though they noted the advantages of this approach for describing the data. They suggested using a logistic regression analysis with the SSF and road-use variables, and they also suggested (as a way of dealing with potential cross-correlations) an approach that uses crash-risk scenarios in place of the road-use variables. They provided results from the states they used in their analysis, and we did a similar analysis of the eight states available to us. The data for two states, New Mexico and Ohio, were not combined with the data from the other six states because a rollover is reported in New Mexico or Ohio only if it is considered to have been the first harmful event in the crash. However, we did look briefly at these data because we were curious about how the rollover definition affects the analysis. We wanted to see how the risk of a rollover occurring as the first harmful event in a single-vehicle crash varies as a function of the SSF as reported in these two states.

We ran a logistic regression analysis for each state to model rollover as a function of the SSF and the road-use variables. For each state, we used the explanatory variables available for the linear regression analysis plus other variables that were available in each state, as described in Table 7. The fits of the models are summarized in Tables 9a through 16a. Each model seems to fit the data well. The coefficient of the SSF term varies from (−3.0800) in North Carolina to (−4.3908) in Florida. The values for New Mexico (−3.0809) and Ohio (−4.3642) fall in this range, which suggests that the choice between ''all rollovers'' and ''first harmful event rollovers'' may not be critical for a basic understanding of the sensitivity of rollover risk to the SSF (though the choice is important in determining the absolute level of rollover risk). In all cases, the coefficient of the SSF term was highly significant; the probability of a chi-square this large by chance alone (the smallest chi-square values were 209 for New Mexico and 416 for Utah) was estimated as less than 0.0001.

We then combined the data from the six states that have the best rollover reporting (that is, data that were not limited to first-harmful-event rollovers) and used them together in a logistic model, using the explanatory variables they have in common. We used the approach Charles Kahane described in his study of the safety effects of vehicle size. He used dummy variables to capture reporting differences in a logistic model of state data, and the results are included in Relationships between Vehicle Size and Fatality Risk in Model Year 1985–93 Passenger Cars and Light Trucks (Charles J. Kahane, Evaluation Division, Office of Plans and Policy, National Highway Traffic Safety Administration, DOT HS 808 570, January 1997). The results of the six-state combined model are shown as Table 17a. The model fits the data well, and the SSF is highly significant in the model (with a chi-square value of 7,230).

The coefficient of the SSF term in the logistic model for each state and for the six-state combined model describes the relationship between the rollover rates for any two values of the SSF, and we can use this relationship to estimate the rollover rate under average road-use conditions for each value of the SSF. We used the method that Ellen Hertz described in her study of the safety effects of vehicle weight. She estimated injury risk based on a logistic model of state data, and the results are included in A Collection of Recent Analyses of Vehicle Weight and Safety (T.M. Klein, E. Hertz, and S. Borener, Mathematical Analysis Division, National Center for Statistics and Analysis, Research and Development, National Highway Traffic Safety Administration, DOT HS 807 677, May 1991). We defined:

BETASSF = the coefficient of the SSF term in the logistic model for a state,

$ROLL_{SSF}$ = the rollover rate at a specific value of the SSF, and

$ODDS_{SSF}$ = the odds of rollover at a specific value of the SSF.

We choose a SSF of 1.00 as the basis for the calculations. The relationship between $ROLL_{1.00}$ and any other $ROLL_{SSF}$ can be calculated for each state as follows:

$$ROLL_{SSF} = ODDS_{SSF} / (1 + ODDS_{SSF})$$

where

$$ODDS_{SSF} = e^{((SSF - 1.00) \times BETASSF)} \times ROLL_{1.00} / (1 - ROLL_{1.00}).$$

The results of the logistic analysis of the Florida data are shown in Table 9a, including an estimate that:

$$BETASSF = (-4.3908),$$

so all we need for rollover rate estimates across the range of the SSF is an estimate of $ROLL_{1.00}$ in Florida. We estimated ROLL1.00 using the following approach. For each state, we defined:

$ODDS_{ALL}$ = odds of rollover for the study vehicles as a group,

$LOGODDS_{ALL}$ = the natural logarithm of $ODDS_{ALL}$, and

MEANSSF = the average SSF for the study vehicles.

The model says that:

$$LOGODDS = T + (BETASSF \times SSF),$$

where

T = a linear function of the explanatory variables,

and we solved for the ''average'' value of T such that:

$$LOGODDS_{ALL} = T + (BETASSF \times MEANSSF).$$

That is, we assumed that the results of the logistic model apply to the average rollover rate and SSF value for the vehicles as a group, and this means that:

$$T = LOGODDS_{ALL} - (BETASSF \times MEANSSF).$$

The rollover rate for all the vehicles included in the Florida study was 0.2044 and their average SSF was 1.2894, which means that:

$$T = \log_e(0.2044/0.7956) - (-4.3908 \times 1.2894) \text{ and}$$

T = 4.3025 at the average rollover odds and SSF values.

We call this specific value of the function T, ''T0.'' Then, after controlling for other factors, $LOGODDS_{SSF}$ is estimated as:

$$LOGODDS_{SSF} = T0 + (BETASSF \times SSF),$$

and at SSF=1.00 in Florida, this is calculated as:

$$LOGODDS_{1.00} = 4.3025 - (4.3908 \times 1.00),$$

so

$$LOGODDS_{1.00} = (-0.0883).$$

$ROLL_{1.00}$ is estimated from the $LOGODDS_{1.00}$ as:

$$e^x/(1 + e^x),$$

where x is the $LOGODDS_{1.00}$, so the rollover rate at a SSF value of 1.00 is estimated as 0.4778 rollovers per single-vehicle crash. The rollover rate for all other values of the SSF can be estimated using:

$$ODDS_{SSF} = e^{((SSF - 1.00) \times BETASSF)} \times ROLL_{1.00}/(1 - ROLL_{1.00})$$

and

$$ROLL_{SSF} = ODDS_{SSF}/(1 + ODDS_{SSF}).$$

We used this approach for each state and for the six-state combined model. The average rollover rate and SSF for each state and for the six-state combined data are shown in Table 18, along with the estimated rollover rates for a SSF of 1.00. For example, the rollover risk for the six-states combined is estimated as 0.4031 at an SSF of 1.00, and it is shown in the column for the results of the models based on ''individual variables.'' (The results of the models based on ''crash scenarios'' are described below.) The results for each value of the SSF are shown in the column labeled ''Model 2'' in Table 19.

As a check of the six-state combined model, we calculated the average rollover risk for each value of the SSF based on the individual state models. For example, we calculated the average rollover rate for a vehicle with a SSF of 1.00 by taking the average of the estimates for these six states (that is, Florida, Maryland, Missouri, North Carolina, Pennsylvania, and Utah), weighted by the size of each state (as measured by the number of single-vehicle crashes involving any study vehicle in each state). The result is an estimated risk of 0.4101 rollovers per single-vehicle crash for an SSF of 1.00, and the same procedure was applied to each value of the SSF from 0.95 to 1.55. The results are shown as the column labeled ''Model 3'' in Table 19.

The Exponent report also suggested using an approach they called a ''crash scenario analysis'' to address possible interactions among the explanatory variables. This idea is interesting and conceptually simple. The single-vehicle crashes from each state are categorized into cells defined by the possible combinations of the road-use variables. For example, the Florida logistic analysis used 14 road-use variables: DARK, STORM, RURAL, FAST, HILL, CURVE, BADROAD, BADSURF,

MALE, YOUNG, OLD, NOINSURE, DRINK, and NUMOCC. NUMOCC is the count of occupants in each vehicle, and the other 13 variables take on the value ''0'' or ''1'' (indicating ''no'' or ''yes''). This produces a large number of possible combinations of the variable values:

$2^{13} \times$ the number of levels of NUMOCC.

Converting NUMOCC into a dichotomous variable (for example, one that identifies vehicles with at least three occupants) yields 14 dichotomous variables, which means 214 combinations of these variables, or 16,384 cells for the various crash scenarios. In practice, not all combinations will occur (there were 2,034 non-zero cells in the Florida data), and some non-zero cells have very low counts (there were 267 cells in the Florida data with at least 25 observations). The rollover rate for each cell can be calculated from these data, and this is a measure of the risk associated with that scenario. This rate can be used in place of all the road-use explanatory variables (for example, in place of the 14 original road-use variables in the Florida analysis). The Exponent report recommends a refinement to this calculation so that the scenario-risk variable for each specific vehicle reflects the rollover rate for all other vehicles in its cell. For example, in a cell with 100 vehicles and 20 rollovers, the scenario-risk variable (SCENRISK) will be calculated as:

$20/(100 - 1)$ for each nonrollover vehicle

and as

$(20 - 1)/(100 - 1)$ for each rollover vehicle.

Using a crash-scenario variable is an interesting idea, even though the analytical results in the Exponent report seem to show that the individual-variable and crash-scenario logistic models produced very similar results. The standardized estimates for the coefficients of the SSF term produced by the two approaches (and our own results) are shown in Table 20. We attempted to duplicate the crash-scenario analysis based on the description provided in the Exponent report. The concept seems clear and logical, and we made the following decisions in implementing it for this analysis. First, we reviewed the output from the logistic regression on individual variables for each state and selected those for which the probability of a greater chi-square value was less than 0.20. We reasoned that using a large number of variables to define the crash scenarios would tend to produce many cells with small sample sizes, and that the variables with smaller chi-square values would be missed less. A review of Tables 9a through 16a shows that this eliminated only one variable in Florida (DARK), but it eliminated five variables in Utah (STORM, HILL, MALE, YOUNG, and OLD). Second, we converted NUMOCC into MANYOCC (with value ''1'' meaning three or more occupants, and ''0'' meaning one or two occupants). Again, the purpose of this was to reduce the number of cells with small sample counts, while retaining the essential information.

Third, we tabulated the number of single-vehicle crashes (SVACCS) and the number of rollovers (ROLLACCS) for each combination of DARK, STORM, RURAL, FAST, HILL, CURVE, BADROAD, BADSURF, MALE, YOUNG, OLD, NOINSURE, DRINK, and MANYOCC that had been selected for inclusion in each state. We eliminated any combination (that is, any crash scenario) with fewer than 25 observations. The results are summary data describing the experience of all vehicles in each crash scenario. Fourth, we merged the crash-scenario summary data for each state back onto the original data (that is, the data for each individual single-vehicle crash), so that each crash was linked to a count of the total number of single-vehicle crashes and the total number of rollovers that occurred in its crash scenario (its cell). We defined the scenario-risk variable, SCENRISK, as the rollover rate for all other vehicles in that crash scenario in that state. The calculation was as follows:

$$\text{SCENRISK} = (\text{ROLLACCS} - \text{ROLL})/(\text{SVAACCS} - 1).$$

Recall that ROLL is coded as ''1'' if the vehicle rolled over and ''0'' if it did not, so this equation produces an estimate of the rollover rate for all vehicles in the crash scenario except for the one case under study; this was the method recommended by the Exponent report. This scenario-specific rollover rate is calculated for each vehicle on the file and is then available as an explanatory variable for a logistic model.

We ran a logistic regression analysis against the data for each state and for the six-state combined data to model rollover risk as a function of two variables: the SSF and SCENRISK. The fits of the models are summarized in Tables 9b through 17b. Each table shows the number of crash scenarios with at least 25 observations and the total number of crashes in these more-frequent scenarios. Each model seems to fit the data well. The coefficient of the SSF term in the crash-scenario logistic model for each state describes the relationship between any two values of the SSF. We applied the approach we used for the individual-variable logistic model to estimate the rollover risk for each value of the SSF and to combine the values across states. The rollover rates at a SSF of 1.00 are shown in Table 18, and the estimated rollover rates as a function of the SSF are shown in Table 19. The column labeled ''Model 4'' shows the results for the six-state model, and the column labeled ''Model 5'' shows the average of the individual models for the six states. Note that the individual-variable and the crash-scenario approaches produce very similar numbers. This is consistent with the results reported in the Exponent report (and summarized in Table 20, using the standardized estimates of the coefficients).

Comparing the Models

The rollover rates estimated across the range of SSF values for the six states combined are shown in Table 19 for all five statistical models (the linear model of summarized data and the four versions of the logistic model), and the estimates for the observed values of the SSF are plotted in Figure 3. The five models are as follows:

Model 1: Linear model of the summarized data,

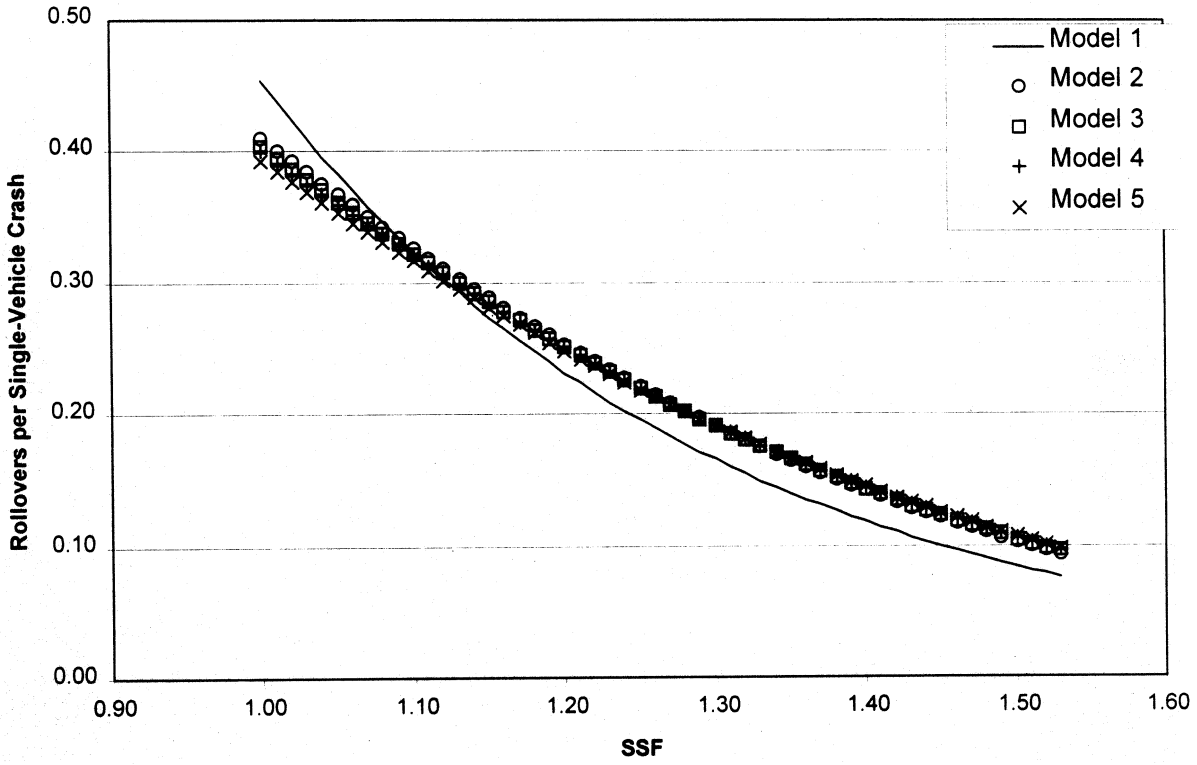
Model 2: Logistic model of the six-state combined data, based on individual variables,

Model 3: Average of the logistic models for the six states, based on individual variables,

Model 4: Logistic model of the six-state combined data, based on crash scenarios, and

Model 5: Average of the logistic models for the six states, based on crash scenarios.

Figure 3: Rollovers per Single-Vehicle Crash Estimated from Six States: Comparison of the Summary and Logistic Approaches



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There are important similarities between the estimates produced by the two approaches: both the linear model of summarized data and the logistic models suggest a strong relationship (in terms of statistical significance and in terms of the magnitude of the effect) between the SSF and rollover risk. The average slope across the range of the observed SSF values (from 1.00 to 1.53) shown in Figure 3 is −0.713 for the linear model; the logistic models produce estimates of a slightly smaller effect, with average slopes between −0.598 and −0.555. Both types of models agree in estimating a large increased risk for vehicles with a low SSF. The four logistic models produce very similar results, and each suggests that rollover risk is very sensitive to the SSF (only slightly less so than estimated from the results of the linear model of the summarized data).

Figure 3 shows that the greatest absolute differences in the rollover rate estimates are at the lowest values of the SSF. The values of the rollover rate estimated for a SSF of 1.00 were as follows:

Model 1 = 0.4551 (linear model of the summarized data),

Model 2 = 0.4101 (logistic model of the six-state combined data with individual variables),

Model 3 = 0.4031 (average of the logistic models for the six states with individual variables),

Model 4 = 0.3999 (logistic model of the six-state combined data with crash scenarios), and

Model 5 = 0.3929 (average of the logistic models for the six states with crash scenarios),

The results of the four logistic models are almost indistinguishable in Figure 3: the crash-scenario approach produces results that are only slightly different from the individual-variable approach (the former are a little lower at a SSF of 1.00 and little higher at an SSF of 1.53), and the average of the logistic models for the six states produces results that are only slightly different from the logistic model of the six-state combined data (the former are a little lower at a SSF of 1.00 and little higher at an SSF of 1.53).

The results of our logistic analyses seem to differ only slightly from those described in the Exponent report, and much of the difference may be the result of our decision to omit wheelbase from the models. We did not include wheelbase as an explanatory variable because we could not identify any physical reason for an effect on rollover risk. However, we reran each analysis with the addition of wheelbase to test the sensitivity of the results to this decision. In every case, adding wheelbase to the model produced a higher estimate of the effect of the SSF on rollover risk and a higher estimate of rollover risk for the lowest values of the SSF. This occurred for all 18 models (those estimated using both the individual-variable and crash-scenario approaches for each of the eight states and for the six-state combined data), despite a negative value for the coefficient of the wheelbase term in each model. That is, the coefficient of the SSF term was negative in each of the original models, it became more negative in the presence of wheelbase, and wheelbase itself had a negative coefficient in each model in which it was included.

Adding wheelbase seemed to produce results closer to those in the Exponent report. That report does not include the estimates of the variable coefficients, but it does include the standardized coefficients. These are shown in our Table 20, along with the corresponding values from our analysis. For example, when we ran the logistic regression analysis on the Florida data and used wheelbase as one of the explanatory variables, we obtained values of (−0.392) and (−0.374) for the standardized coefficients from the individual-variable and crash-scenario models, respectively. These are higher than the values we obtained without wheelbase, (−0.349) and (−0.327), and they are very close to the values in the Exponent report, (−0.383) and (−0.381). Adding wheelbase to our models produced higher estimates of the coefficient for the SSF term and higher estimated rollover rates for vehicles with lower SSF values. For example, the six-state models that included wheelbase produced estimates that the coefficients of the SSF term are (−3.9525) and (−3.7918) and the estimated rollover rates for a SSF of 1.00 are 0.4338 and 0.4228 for the individual-variable and crash-scenario approaches, respectively.

There is also one important difference between the linear analysis of summary data and the logistic analysis of individual crashes. We limited the summary data to those based on at least 25 observations and

we capped the weighting at 250 to avoid over-emphasizing the more-popular vehicles. However, the logistic regression analysis on individual crashes uses all observations equally. When we removed the two thresholds from the linear analysis, we obtained slightly lower estimates of the effect of the SSF on rollover risk, and the relationship between the adjusted rollover rates and the SSF is described by:

$$ROLL = 10.99_{e}^{(-3.2356 \times SSF)}$$

This model produces an estimate of 0.4323 rollovers per single-vehicle crash at an SSF of 1.00, which is closer to the estimates from our logistic models (and essentially the same as the estimates from the logistic models that include wheelbase as an explanatory variable).

Interpreting the Analytical Results

Many of the comments in the Exponent report reflect an interest in evaluating the relative strength of the driver and vehicle contributions to rollover risk. We agree that this is an interesting question, but it is not the one we set out to address. Our perspective is that of a person choosing a new vehicle who wants to know how his choice of vehicle will affect his risk of being involved in a rollover. We are interested in eliminating the confounding effects of road use so we can isolate the effect of the vehicle on rollover risk. The importance of road-use factors does not preclude a role for vehicle-specific information.

Also, a factor can be important without suggesting an easy remedy. Consider two factors that increase the risk of rollover given a single-vehicle crash: driver age (specifically, the effect of young, inexperienced drivers) and curved roads. We do have some influence over their effect on rollover risk: better driver training and better road design can help reduce rollovers even among young drivers on curved roads. However, some additional risk is a given for people who are still gaining on-road experience, and curved roads are a necessity in many places. So, while driver and other road-use factors are important to understanding rollover risk, this is not the same as saying that all rollovers can be prevented by driver and other road-use remedies. Vehicle design plays an important role in understanding and mitigating rollover risk even among young drivers on curved roads by making vehicles more-forgiving of driver and road limitations, and our analysis describes the magnitude of that effect.

Another comparison may help clarify why we believe that the SSF can be useful even though driver and other road-use factors are such valuable predictors of rollover risk. Using the same approach Exponent used for SSF and other factors involved in rollover, one can statistically demonstrate that seat belt use is insignificant in preventing injuries from a crash. The 1998–1999 National Automotive Sampling System (NASS) data include 7,631 investigated unbelted drivers of light passenger vehicles that were towed from a frontal nonrollover crash (Table 22), and weighting these data to reflect the sampling plan produces an annual average estimate of 171,284 drivers involved each year. An estimated 11,569 of these were seriously injured (that is, they died or received an injury rated as three or higher on the Abbreviated Injury Scale). The overall risk of serious injury was 6.75 percent, but the risk varied greatly as a function of the change in vehicle velocity during the impact (that is, the delta V). For delta V less than 10 mph, the risk of serious injury was 0.76 percent.

If all 171,284 drivers in these towaway crashes had been injured at the same rate as those in the lowest delta V range, we would have seen:

$$0.0076 \times 171{,}284 = 1{,}302 \text{ serious injuries}$$

among unbelted drivers in frontal crashes. Half of these (601 serious injuries) could have been prevented if the drivers had used a lap-and-shoulder belt. Thus, we have the following:

171,284 serious injuries among unbelted drivers, of which 1,202 would have occurred if delta V was low, of which 601 would have occurred if belts were used.

According to the logic proposed by Exponent, we would interpret the results as follows:

99.30 percent of serious injuries are attributable to high crash speeds, and 0.35 percent are attributable to neglecting to use belts.

Clearly this is nonsense. Belt use will prevent serious injury even among those in higher-speed crashes (half of the 11,569 serious injuries that did occur among unbelted drivers at any crash speed could have been prevented by belt use, for a reduction of 5,784 serious injuries from belt use). More importantly, belts offer a practical solution, while there is no practical way to reduce all crash speeds to less than 10 mph.

Note that this is comparable to the approach that the Exponent report used in arguing that the value of the SSF in understanding rollover risk was in the range of 3–8 percent. They estimated the relative risk of the lowest-risk scenario, estimated how many rollovers could be prevented if all single-vehicle crashes occurred with the risk of the lowest-risk scenario, and relegated the importance of the SSF to a fraction of the small amount of risk that remained. The lowest-risk scenario that they use as their standard appears to be (based on the table on page 31 of their report) crashes that did not involve a vehicle defect and that did involve a mature driver who had not been drinking or engaged in risky driving, on a straight, urban road with a speed limit of 50 mph or less, and for which the first harmful event was a collision with a traffic unit in a single-vehicle crash; the bulk of these crashes may be collisions with pedestrians and pedalcyclists, which would tend to be reported because of the injuries to the non-motorists.

These are crashes with almost no chance of rollover, and so they are essentially irrelevant to a rollover-prevention program. Also note that some of these factors can be addressed by the driver (driving more carefully and when fully sober), but others are beyond the control of the driver (roads are curved, through rural areas, and with speed limits of 55 mph so traffic can move efficiently through all parts of the country). Young drivers gain experience through driving, and they eventually become mature drivers; in the meantime, they also benefit from more-stable vehicles. It is difficult to see how Exponent's the low-risk scenario could be used as an alternative to the SSF as the basis for a rollover safety program.

The approach described in the Exponent report (comparing the risk associated with the SSF to all the risks associated with road-use factors) would suggest, in our example based on NASS data, that reducing delta V should be a higher safety priority than increasing belt use. (To use an extreme example to make a point, using the approach described in the Exponent report for a study of air crashes would suggest that preventing gravity is more important than regular maintenance of the airplane.) However, belt use programs have been successful because the remedy is simple and cost-effective and because the importance of delta V does not reduce the importance of belt use in preventing injury. We believe a similar argument can be made for focusing on the SSF, while agreeing that driver and other road-use variables may be the basis for other safety improvements.

Conclusion

The Exponent report acknowledged the potential advantages of multiple linear analysis, and their recommendation is relevant here:

Multiple regression analysis can have some value as an explanatory tool for describing factors related to vehicle rollover. Linear regression analysis, however, must only be used in this heuristic way and only when prior research has demonstrated that linear regression produced essentially the same results as did a rigorous and valid statistical analysis. [page 28]

Table 19, Figure 3, and the sensitivity analyses described above suggest that the linear and logistic regression approaches produce essentially the same results. The Exponent report recommended a logistic approach and concluded that the linear approach based on summarized data overstated the value of the SSF in understanding rollover risk. This does not seem to be the case. The linear approach produces estimates of rollover risk that are a little more conservative (in the sense that they are lower) than those from the logistic models for most observed values of the SSF and for most vehicles on the road today. The Exponent report included much lower estimates for rollover risk across the range of SSF values, but this was not a result of the logistic approach. Rather, it was the result of tying the estimates to the low-risk scenario (where rollover is unlikely).

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Table 1: Passenger Cars Used in the Analysis

Vehicle Group	Make / Model	Model Years	SSF
1	Dodge Neon, Plymouth Neon	95-98	1.44
2	Ford Crown Victoria	92-97	1.42
3	Ford Escort	91-96	1.38
4	Ford Escort, Mercury Tracer	97-98	1.37
5	Ford Mustang	88-93	1.38
6	Ford Probe	93-97	1.41
7	Ford Taurus, Mercury Sable	88-95	1.45
8	Lincoln Town Car	90-96	1.44
9	Buick Century, Chevrolet Celebrity, Oldsmobile Cutlass Ciera / Ciera, Pontiac 6000	88-96	1.38
10	Buick Regal, Pontiac Grand Prix	88-96	1.41
11	Chevrolet Lumina	95-98	1.34
12	Buick Lesabre, Pontiac Bonneville	92-96	1.39
13	Buick Park Avenue, Oldsmobile 98	91-96	1.38
14	Buick Skylark / Somerset, Oldsmobile Cutlass Calais / Calais, Pontiac Grand Am	88-91	1.35
15	Buick Skylark, Oldsmobile Achieva, Pontiac Grand Am	92-97	1.38
16	Chevrolet Camaro, Pontiac Firebird	88-92	1.53
17	Chevrolet Camaro, Pontiac Firebird	93-98	1.50
18	Buick Roadmaster, Chevrolet Caprice	91-96	1.40
19	Buick Skyhawk, Chevrolet Cavalier, Pontiac Sunbird	88-94	1.32
20	Chevrolet Corsica	88-96	1.30
21	Chevrolet Geo Metro, Suzuki Swift	89-94	1.32
22	Chevrolet Geo Metro, Suzuki Swift	95-98	1.29
23	Saturn SL	90-95	1.39
24	Saturn SL	96-98	1.35
25	Chevrolet Geo Prizm	89-92	1.38
26	Honda Civic	92-95	1.48
27	Honda Civic	96-98	1.43
28	Honda Accord	90-93	1.47
29	Mazda Protégé	95-98	1.40
30	Nissan Maxima	89-94	1.44
31	Nissan Sentra	91-94	1.46
32	Nissan Sentra	95-98	1.40
33	Toyota Camry	92-96	1.46
34	Toyota Corolla	89-92	1.36
35	Toyota Tercel	91-94	1.41
36	Toyota Tercel	95-98	1.39

Table 2: Sport Utility Vehicles Used in the Analysis

Vehicle Group	Make / Model	Model Years	Drive Wheels	SSF
37	Dodge Ramcharger	88-93	4	1.13
38	Ford Bronco	88-96	4	1.13
39	Ford Bronco II	88-90	2	1.04
40	Ford Bronco II	88-90	4	1.04
41	Ford Explorer	91-94	2	1.07
42	Ford Explorer	91-94	4	1.08
43	Ford Explorer	95-98	2	1.06
44	Ford Explorer	95-98	4	1.06
45	Chevrolet S-10 Blazer, GMC S-1500 Jimmy	88-94	2	1.10
46	Chevrolet S-10 Blazer, GMC S-1500 Jimmy	88-94	4	1.10
47	Chevrolet Blazer, GMC Jimmy	95-98	2	1.09
48	Chevrolet Blazer, GMC Jimmy	95-98	4	1.09
49	Chevrolet V10/K10/K1500 Blazer	88-91	4	1.09
50	Chevrolet K1500 Blazer / Tahoe, GMC Yukon	92-98	4	1.12
51	Chevrolet V1500/V2500 Suburban, GMC V1500/V2500 Suburban	88-91	4	1.10
52	Chevrolet K1500/K2500 Suburban, GMC K1500/K2500 Suburban	92-98	4	1.08
53	Chevrolet Geo Tracker, Suzuki Sidekick	89-98	4	1.13
54	Honda CR-V	97-98	4	1.19
55	Honda Passport, Isuzu Rodeo	91-97	4	1.06
56	Isuzu Trooper	88-91	4	1.02
57	Isuzu Trooper	92-94	4	1.07
58	Jeep Cherokee	88-97	4	1.08
59	Acura SLX, Isuzu Trooper	95-98	4	1.09
60	Jeep Grand Cherokee	93-98	4	1.07
61	Jeep Wrangler	88-96	4	1.20
62	Nissan Pathfinder	88-95	4	1.07
63	Nissan Pathfinder	96-98	4	1.10
64	Suzuki Samurai	88-95	4	1.09
65	Toyota 4Runner	90-95	4	1.00
66	Toyota 4Runner	96-98	4	1.06

Table 3: Passenger Vans Used in the Analysis

Vehicle Group	Make / Model	Model Years	Drive Wheels	SSF
67	Dodge Caravan / Grand Caravan, Plymouth Voyager / Grand Voyager	88-95	2	1.21
68	Chrysler Town & Country, Dodge Caravan / Grand Caravan, Plymouth Voyager / Grand Voyager	96-98	2	1.23
69	Dodge B-150 Ram Wagon	88-98	2	1.09
70	Ford Aerostar	88-98	2	1.10
71	Ford E-150 Clubwagon	88-91	2	1.11
72	Ford E-150 Clubwagon	92-97	2	1.11
73	Ford Windstar	95-98	2	1.24
74	Chevrolet Astro, GMC Safari	88-98	2	1.12
75	Chevrolet Lumina APV, Oldsmobile Silhouette, Pontiac Transport	90-96	2	1.12
76	Chevrolet Venture, Oldsmobile Silhouette, Pontiac Transport	97-98	2	1.18
77	Chevrolet G10/G20 Sportsvan, GMC G1500/G2500 Rally van	88-95	2	1.08
78	Mazda MPV	89-97	2	1.17
79	Toyota Previa	91-97	2	1.23

Table 4: Pickup Trucks Used in the Analysis

Vehicle Group	Make / Model	Model Years	Drive Wheels	SSF
80	Dodge Dakota	97-98	2	1.25
81	Dodge Ram 1500	94-98	2	1.22
82	Dodge D-150 Ram	88-93	2	1.28
83	Ford F-150	88-96	2	1.19
84	Ford F-150	88-96	4	1.15
85	Ford F-150	97-98	2	1.18
86	Ford Ranger	88-92	2	1.13
87	Ford Ranger	88-92	4	1.03
88	Ford Ranger, Mazda B-series	93-97	2	1.17
89	Ford Ranger, Mazda B-series	93-97	4	1.07
90	Chevrolet C-1500, GMC C-1500 / Sierra	88-98	2	1.22
91	Chevrolet K-1500, GMC K-1500 / Sierra	88-98	4	1.14
92	Chevrolet S-10, GMC S-15 / Sonoma	88-93	2	1.19
93	Chevrolet S-10, GMC S-15 / Sonoma	88-93	4	1.19
94	Chevrolet S-10, GMC S-15 / Sonoma, Isuzu Hombre	94-98	2	1.14
95	Chevrolet S-10, GMC S-15 / Sonoma	94-98	4	1.14
96	Nissan Pickup	88-97	2	1.20
97	Nissan Pickup	88-97	4	1.11
98	Toyota Pickup	89-94	2	1.23
99	Toyota Pickup	89-94	4	1.07
100	Toyota Tacoma	95-98	2	1.26

Table 5: State File Characteristics that Affect the Estimated Rollover Rate

STATE and Reporting Threshold	Vehicle Form	Single-Vehicle Crash	Rollover
FLORIDA Threshold is $500 property damage, injury, or fatality	Completed for parked vehicles, phantom vehicles, pedalcycles, and trains	Identified by (1) eliminating vehicle forms for phantom and parked vehicles, (2) selecting crashes with a single vehicle form that meet this criterion, and (3) eliminating crashes for which either the first harmful event or the subsequent event is listed as a collision with a pedestrian, pedalcycle, train, or animal	Identified from the first harmful event in the crash, subsequent event in the crash, and impact point for the vehicle
MARYLAND Threshold is $500 property damage, injury, or fatality	Completed for parked vehicles	Identified by (1) eliminating vehicle forms for parked vehicles, (2) selecting crashes with a single vehicle form that meet this criterion, (3) eliminating crashes for which either the first harmful event or the subsequent event is listed as a collision with a pedestrian, pedalcycle, other nonmotorized conveyance, train, or animal, and (4) eliminating vehicles for which the most harmful event is listed as a collision with a pedestrian, pedalcycle, other nonmotorized conveyance, train, or animal	Identified from the first harmful event in the crash, subsequent event in the crash, most harmful event for the vehicle, initial impact point for the vehicle, and main impact point for the vehicle
MISSOURI Threshold is $500 property damage, injury, or fatality	Completed for parked vehicles, pedalcycles, horses with riders, and other non-motorized transport devices	Identified by (1) eliminating vehicle forms for parked vehicles, (2) selecting crashes with a single vehicle form that meet this criterion, and (3) eliminating crashes for which the accident type is listed as a collision with a pedestrian, pedalcycle, train, or animal	Identified from the accident type for the crash
NEW MEXICO Threshold is $500 property damage, injury, or fatality	Completed for parked vehicles	Identified by (1) eliminating vehicle forms for parked vehicles, (2) selecting crashes with a single vehicle form that meet this criterion, and (3) eliminating crashes for which the first harmful event is listed as a collision with a pedestrian, pedalcycle, train, or animal	Identified from the first harmful event in the crash

Table 5 (continued): State File Characteristics that Affect the Estimated Rollover Rate

STATE and Reporting Threshold	Vehicle Form	Single-Vehicle Crash	Rollover
NORTH CAROLINA Threshold is $500 property damage, injury, or fatality	Completed for parked vehicles, pedalcycles, and pedestrians	Identified by (1) eliminating vehicle forms for parked vehicles, (2) selecting crashes with a single vehicle form that meet this criterion, (3) eliminating crashes for which the first harmful event is listed as a collision with a pedestrian, pedalcycle, train, or animal, and (4) eliminating vehicles for which the most harmful event is listed as a collision with a pedestrian, pedalcycle, train, or animal	Identified from the rollover identifier for the vehicle and from four impact point variables
OHIO Threshold is $150 property damage, injury, or fatality	Completed for parked vehicles, pedalcycles, animals with riders, and animals with buggies	Identified by (1) eliminating vehicle forms for parked vehicles, (2) selecting crashes with a single vehicle form that meet this criterion, and (3) eliminating crashes for which the first harmful event is listed as a collision with a pedestrian, pedalcycle, train, animal, or other non-vehicle	Identified from the first harmful event in the crash
PENNSYLVANIA Threshold is all crashes	Completed for illegally parked vehicles, trains, pedalcycles, trolleys, and horses with buggies	Identified by (1) eliminating vehicle forms for illegally parked vehicles, (2) selecting crashes with a single vehicle form that meet this criterion, and (3) eliminating crashes for which the most harmful event is listed as a collision with a pedestrian or animal	Identified from the most harmful event in the crash and the events file (vehicle-event level)
UTAH Threshold is $750 property damage, injury, or fatality	Completed for parked vehicles	Identified by (1) eliminating vehicle forms for parked vehicles, (2) selecting crashes with a single vehicle form that meet this criterion, and (3) eliminating crashes for which the first, second, or third event is listed as a collision with a pedestrian, pedalcycle, train, or animal	Identified from the first, second, and third events in the crash

Table 6: Single-Vehicle Crashes of Relevant Vehicles

State		Calendar Year of State Data					
		1994	**1995**	**1996**	**1997**	**1998**	**Total**
Florida	FL	6,174	8,295	9,552	10,766	10,832	45,619
Maryland	MD	3,795	4,296	5,079	4,957	4,974	23,101
Missouri	MO	6,001	7,464	8,988	8,957	9,620	41,030
New Mexico	NM	1,591	2,018	2,365	2,454	2,190	10,618
North Carolina	NC	8,555	10,674	12,880	13,609	12,866	58,584
Ohio	OH	11,031	12,333	12,347	13,334	4,990	54,035
Pennsylvania	PA	9,303	11,143	13,530	14,885	13,842	62,703
Utah	UT	1,499	1,731	1,955	2,338	2,476	9,999

Table 7: Data Elements Available for the Analysis

Variable	Definition	Data Elements Available in Each State (X)							
		FL	MD	MO	NM	NC	OH	PA	UT
ROLL	Did the single-vehicle crash involve rollover?	X	X	X	(1)	X	(1)	X	X
SSF	What was the Static Stability Factor?	X	X	X	X	X	X	X	X
DARK	Was it dark when the crash occurred?	X	X	X	X	X	X	X	X
STORM	Was the weather inclement?	X	X	X	X	X	X	X	X
RURAL	Did the crash occur in a rural area?	X			X	X	X	X	X
FAST	Was the speed limit 50 mph or greater?	X	X	X	(2)	X	X	X	X
HILL	Did the crash occur on a grade, dip, or summit?	X	X	X	X	X	X	X	X
CURVE	Did the crash occur on a curve?	X	X	X	X	X	X	X	X
BADROAD	Were there potholes or other bad road conditions?	X	X		X	X	X		X
BADSURF	Was the road wet or icy or have another bad surface condition?	X	X	X	X	X	X	X	X
MALE	Was the driver male?	X	X	X	X	X	X	X	X
YOUNG	Was the driver under 25 years old?	X	X	X	X	X	X	X	X
OLD	Was the driver 70 years or older?	X	X	X	X	X	X	X	X
NOINSURE	Was the driver uninsured?	X		X	X		X	X	
DRINK	Was drinking or illegal drug use noted for the driver?	X	X	X	X	X	X	X	X
NUMOCC	How many occupants were in the vehicle?	X	X		X	X	X	X	X

"(1)" indicates "rollover reported on the file only if it was the first-harmful event in the crash"
"(2)" indicates "roadway function class was used as a proxy for speed limit in the analysis"

Table 8a: Linear Model of the Logarithm of the Rollover Rate as a Function of the SSF and State in Six States

Summary records = 518; R-squared = 0.7278; *F*-statistic = 227.671

Variable	Degrees of Freedom	Parameter Estimate	Standard Error	T for H0: Parameter=0	Probability > |T|
INTERCEPT	1	1.4130	0.1251	11.297	0.0001
SSF	1	-2.8634	0.0959	-29.857	0.0001
DUMMY_FL	1	0.5583	0.0472	11.820	0.0001
DUMMY_MD	1	0.3269	0.0495	6.610	0.0001
DUMMY_NC	1	0.5993	0.0463	12.930	0.0001
DUMMY_PA	1	0.6974	0.0476	14.641	0.0001
DUMMY_UT	1	1.0245	0.0571	17.952	0.0001

Table 8b: Best Linear Model of the Logarithm of the Rollover Rate as a Function of the SSF in Six States

Summary records = 518; R-squared = 0.8809; *F*-statistic = 311.229

Variable	Degrees of Freedom	Parameter Estimate	Standard Error	T for H0: Parameter=0	Probability > |T|
INTERCEPT	1	0.8509	0.1946	4.372	0.0001
SSF	1	-3.3760	0.0756	-44.652	0.0001
DARK	1	-0.4585	0.2057	-2.229	0.0262
FAST	1	1.6119	0.1924	8.378	0.0001
CURVE	1	1.5718	0.2454	6.406	0.0001
MALE	1	-1.2844	0.1064	-12.070	0.0001
YOUNG	1	0.9581	0.0990	9.680	0.0001
DRINK	1	1.7178	0.2814	6.104	0.0001
DUMMY_FL	1	1.2253	0.0713	17.187	0.0001
DUMMY_MD	1	0.6933	0.0885	7.836	0.0001
DUMMY_NC	1	0.6969	0.0364	19.125	0.0001
DUMMY_PA	1	1.2449	0.0639	19.466	0.0001
DUMMY_UT	1	0.8622	0.0508	16.961	0.0001

Table 8c: Best Linear Model of the Logarithm of the Adjusted Rollover Rate as a Function of the SSF in Six States

Observations = 518; R-squared = 0.8478; *F*-statistic = 2873.526

Variable	Degrees of Freedom	Parameter Estimate	Standard Error	T for H0: Parameter=0	Probability > |T|
INTERCEPT	1	2.5861	0.0795	32.515	0.0001
SSF	1	-3.3760	0.0630	-53.605	0.0001

Table 9a: Individual-Variable Logistic Model of Rollover as a Function of the SSF in Florida

Observations = 37,300; Concordant = 75.4%; Discordant = 24.3%; Tied = 0.3%

Variable	Degrees of Freedom	Parameter Estimate	Standard Error	Wald Chi-Square	Probability > Chi-Square	Standardized Estimate	Odds Ratio
INTERCEPT	1	2.9420	0.1331	488.3685	0.0001		
SSF	1	-4.3908	0.0999	1931.1873	0.0001	-0.3491	0.012
DARK	1	-0.0334	0.0297	1.2674	0.2603	-0.0092	0.967
STORM	1	-0.1083	0.0522	4.2950	0.0382	-0.0237	0.897
RURAL	1	0.6207	0.0308	405.0068	0.0001	0.1681	1.860
FAST	1	1.1120	0.0292	1454.0623	0.0001	0.2933	3.040
HILL	1	-0.0562	0.0382	2.1664	0.1411	-0.0110	0.945
CURVE	1	0.6265	0.0321	380.9064	0.0001	0.1420	1.871
BADROAD	1	0.1697	0.0506	11.2535	0.0008	0.0251	1.185
BADSURF	1	-0.1450	0.0471	9.4892	0.0021	-0.0354	0.865
MALE	1	-0.1234	0.0297	17.2843	0.0001	-0.0323	0.884
YOUNG	1	0.3567	0.0285	156.2179	0.0001	0.0960	1.429
OLD	1	-0.4538	0.1004	20.4109	0.0001	-0.0469	0.635
NOINSURE	1	0.2198	0.0319	47.4223	0.0001	0.0510	1.246
DRINK	1	0.1519	0.0351	18.7156	0.0001	0.0357	1.164
NUMOCC	1	0.1612	0.0134	144.7564	0.0001	0.0830	1.175

Table 9b: Crash-Scenario Logistic Model of Rollover as a Function of the SSF in Florida

Observations = 29,370; Scenarios = 267; Concordant = 75.3%; Discordant = 24.3%; Tied = 0.3%

Variable	Degrees of Freedom	Parameter Estimate	Standard Error	Wald Chi-Square	Probability > Chi-Square	Standardized Estimate	Odds Ratio
INTERCEPT	1	2.6144	0.1411	343.4742	0.0001		
SSF	1	-4.1227	0.1125	1343.9588	0.0001	-0.3271	0.016
SCENRISK	1	5.3457	0.1099	2367.7499	0.0001	0.4048	209.714

Table 10a: Individual-Variable Logistic Model of Rollover as a Function of the SSF in Maryland

Observations = 18,874; Concordant = 68.6%; Discordant = 30.8%; Tied = 0.6%

Variable	Degrees of Freedom	Parameter Estimate	Standard Error	Wald Chi-Square	Probability > Chi-Square	Standardized Estimate	Odds Ratio
INTERCEPT	1	2.1597	0.1907	128.2880	0.0001		
SSF	1	-3.7203	0.1441	666.9999	0.0001	-0.2948	0.024
DARK	1	-0.3142	0.0651	23.3129	0.0001	-0.0719	0.730
STORM	1	0.0675	0.0436	2.4004	0.1213	0.0186	1.070
FAST	1	0.7651	0.0430	317.1410	0.0001	0.2005	2.149
HILL	1	0.2328	0.0436	28.5448	0.0001	0.0614	1.262
CURVE	1	0.3927	0.0437	80.7210	0.0001	0.1054	1.481
BADROAD	1	0.3401	0.0828	16.8675	0.0001	0.0426	1.405
BADSURF	1	0.0923	0.0546	2.8613	0.0907	0.0248	1.097
MALE	1	0.0020	0.0443	0.0020	0.9643	0.0005	1.002
YOUNG	1	0.3525	0.0428	67.7455	0.0001	0.0949	1.423
OLD	1	0.0389	0.1325	0.0863	0.7690	0.0037	1.040
DRINK	1	0.1431	0.0568	6.3513	0.0117	0.0295	1.154
NUMOCC	1	0.1392	0.0222	39.2952	0.0001	0.0646	1.149

Table 10b: Crash-Scenario Logistic Model of Rollover as a Function of the SSF in Maryland

Observations = 16,553; Scenarios = 142; Concordant = 67.4%; Discordant = 31.9%; Tied = 0.7%

Variable	Degrees of Freedom	Parameter Estimate	Standard Error	Wald Chi-Square	Probability > Chi-Square	Standardized Estimate	Odds Ratio
INTERCEPT	1	1.9412	0.1956	98.4856	0.0001		
SSF	1	-3.5760	0.1521	552.9069	0.0001	-0.2831	0.028
SCENRISK	1	5.5869	0.3108	323.1908	0.0001	0.2125	266.909

Table 11a: Individual-Variable Logistic Model of Rollover as a Function of the SSF in Missouri

Observations = 34,937; Concordant = 68.0%; Discordant = 31.2%; Tied = 0.7%

Variable	Degrees of Freedom	Parameter Estimate	Standard Error	Wald Chi-Square	Probability > Chi-Square	Standardized Estimate	Odds Ratio
INTERCEPT	1	2.0259	0.1722	138.4234	0.0001		
SSF	1	-3.8283	0.1325	834.5754	0.0001	-0.2879	0.022
DARK	1	0.0377	0.0352	1.1499	0.2836	0.0103	1.038
STORM	1	-0.1178	0.0541	4.7493	0.0293	-0.0284	0.889
FAST	1	0.8503	0.0414	422.6698	0.0001	0.2219	2.340
HILL	1	0.0159	0.0340	0.2194	0.6395	0.0044	1.016
CURVE	1	0.2996	0.0345	75.3110	0.0001	0.0792	1.349
BADSURF	1	-0.0352	0.0486	0.5262	0.4682	-0.0095	0.965
MALE	1	-0.1444	0.0351	16.8717	0.0001	-0.0392	0.866
YOUNG	1	0.2448	0.0344	50.5767	0.0001	0.0666	1.277
OLD	1	-0.3333	0.1253	7.0745	0.0078	-0.0316	0.717
NOINSURE	1	0.2680	0.0385	48.5743	0.0001	0.0607	1.307
DRINK	1	-0.0563	0.0559	1.0162	0.3134	-0.0096	0.945

Table 11b: Crash-Scenario Logistic Model of Rollover as a Function of the SSF in Missouri

Observations = 34,959; Scenarios = 76; Concordant = 67.6%; Discordant = 31.6%; Tied = 0.8%

Variable	Degrees of Freedom	Parameter Estimate	Standard Error	Wald Chi-Square	Probability > Chi-Square	Standardized Estimate	Odds Ratio
INTERCEPT	1	1.4063	0.1653	72.3498	0.0001		
SSF	1	-3.6441	0.1290	798.0744	0.0001	-0.2742	0.026
SCENRISK	1	8.9135	0.3578	620.4768	0.0001	0.2456	999.000

Table 12a: Individual-Variable Logistic Model of Rollover as a Function of the SSF in New Mexico

Observations = 9,154; Concordant = 77.4%; Discordant = 22.4%; Tied = 0.3%

Variable	Degrees of Freedom	Parameter Estimate	Standard Error	Wald Chi-Square	Probability > Chi-Square	Standardized Estimate	Odds Ratio
INTERCEPT	1	0.7299	0.2724	7.1784	0.0074		
SSF	1	-3.0809	0.2133	208.5949	0.0001	-0.2331	0.046
DARK	1	-0.0242	0.0577	0.1762	0.6746	-0.0066	0.976
STORM	1	0.1299	0.0882	2.1693	0.1408	0.0277	1.139
RURAL	1	1.8164	0.0733	614.1228	0.0001	0.4988	6.150
FAST	1	0.3412	0.0597	32.6510	0.0001	0.0911	1.407
HILL	1	0.1229	0.0615	3.9975	0.0456	0.0295	1.131
CURVE	1	0.1793	0.0613	8.5486	0.0035	0.0427	1.196
BADROAD	1	-0.5813	0.5341	1.1847	0.2764	-0.0177	0.559
BADSURF	1	0.0497	0.0795	0.3906	0.5320	0.0120	1.051
MALE	1	-0.0654	0.0570	1.3169	0.2511	-0.0175	0.937
YOUNG	1	0.2841	0.0572	24.6576	0.0001	0.0769	1.329
OLD	1	-0.2411	0.1766	1.8638	0.1722	-0.0251	0.786
NOINSURE	1	0.1633	0.0774	4.4520	0.0349	0.0310	1.177
DRINK	1	0.3537	0.0740	22.8347	0.0001	0.0754	1.424
NUMOCC	1	0.1647	0.0282	34.0232	0.0001	0.0823	1.179

Table 12b: Crash-Scenario Logistic Model of Rollover as a Function of the SSF in New Mexico

Observations = 7,156; Scenarios = 73; Concordant = 77.9%; Discordant = 21.8%; Tied = 0.3%

Variable	Degrees of Freedom	Parameter Estimate	Standard Error	Wald Chi-Square	Probability > Chi-Square	Standardized Estimate	Odds Ratio
INTERCEPT	1	0.8547	0.2980	8.2271	0.0041		
SSF	1	-3.0129	0.2406	156.8274	0.0001	-0.2278	0.049
SCENRISK	1	5.8555	0.1996	860.6319	0.0001	0.5645	349.164

Table 13a: Individual-Variable Logistic Model of Rollover as a Function of the SSF in North Carolina

Observations = 55,434; Concordant = 73.1%; Discordant = 26.5%; Tied = 0.4%

Variable	Degrees of Freedom	Parameter Estimate	Standard Error	Wald Chi-Square	Probability > Chi-Square	Standardized Estimate	Odds Ratio
INTERCEPT	1	1.2711	0.1103	132.8526	0.0001		
SSF	1	-3.0800	0.0813	1435.4357	0.0001	-0.2390	0.046
DARK	1	0.0480	0.0235	4.1522	0.0416	0.0130	1.049
STORM	1	-0.4030	0.0376	114.6765	0.0001	-0.0976	0.668
RURAL	1	0.7457	0.0299	620.7173	0.0001	0.2025	2.108
FAST	1	0.5310	0.0295	324.1840	0.0001	0.1431	1.701
HILL	1	0.0282	0.0233	1.4626	0.2265	0.0075	1.029
CURVE	1	0.6787	0.0230	873.3881	0.0001	0.1817	1.971
BADROAD	1	0.4013	0.0525	58.4725	0.0001	0.0426	1.494
BADSURF	1	0.0159	0.0339	0.2219	0.6376	0.0042	1.016
MALE	1	-0.1018	0.0241	17.8176	0.0001	-0.0273	0.903
YOUNG	1	0.4292	0.0230	348.6563	0.0001	0.1165	1.536
OLD	1	-0.3667	0.0802	20.8821	0.0001	-0.0360	0.693
DRINK	1	0.6928	0.0331	437.7642	0.0001	0.1214	1.999
NUMOCC	1	0.0286	0.0119	5.7343	0.0166	0.0144	1.029

Table 13b: Crash-Scenario Logistic Model of Rollover as a Function of the SSF in North Carolina

Observations = 51,823; Scenarios = 276; Concordant = 72.9%; Discordant = 26.7%; Tied = 0.4%

Variable	Degrees of Freedom	Parameter Estimate	Standard Error	Wald Chi-Square	Probability > Chi-Square	Standardized Estimate	Odds Ratio
INTERCEPT	1	1.1053	0.1045	111.8042	0.0001		
SSF	1	-2.9751	0.0817	1325.3747	0.0001	-0.2309	0.051
SCENRISK	1	5.8457	0.0921	4032.6846	0.0001	0.4086	345.746

Table 14a: Individual-Variable Logistic Model of Rollover as a Function of the SSF in Ohio

Observations = 48,108; Concordant = 68.6%; Discordant = 29.6%; Tied = 1.9%

Variable	Degrees of Freedom	Parameter Estimate	Standard Error	Wald Chi-Square	Probability > Chi-Square	Standardized Estimate	Odds Ratio
INTERCEPT	1	1.4519	0.2621	30.6806	0.0001		
SSF	1	-4.3642	0.2013	469.9953	0.0001	-0.3257	0.013
DARK	1	-0.1452	0.0502	8.3810	0.0038	-0.0399	0.865
STORM	1	-0.2342	0.0658	12.6878	0.0004	-0.0631	0.791
RURAL	1	0.0474	0.0674	0.4954	0.4815	0.0118	1.049
FAST	1	0.8290	0.0661	157.1036	0.0001	0.2202	2.291
HILL	1	-0.0607	0.0507	1.4331	0.2313	-0.0161	0.941
CURVE	1	0.2178	0.0515	17.8613	0.0001	0.0556	1.243
BADROAD	1	-0.7001	0.3838	3.3269	0.0682	-0.0391	0.497
BADSURF	1	0.0430	0.0644	0.4470	0.5038	0.0118	1.044
MALE	1	-0.0036	0.0506	0.0051	0.9432	-0.0010	0.996
YOUNG	1	0.2777	0.0489	32.2650	0.0001	0.0749	1.320
OLD	1	-0.5707	0.2355	5.8740	0.0154	-0.0496	0.565
NOINSURE	1	0.1361	0.1431	0.9034	0.3419	0.0123	1.146
DRINK	1	-0.0091	0.0777	0.0136	0.9073	-0.0017	0.991
NUMOCC	1	0.0546	0.0232	5.5513	0.0185	0.0247	1.056

Table 14b: Crash-Scenario Logistic Model of Rollover as a Function of the SSF in Ohio

Observations = 50,290; Scenarios = 83; Concordant = 68.0%; Discordant = 30.0%; Tied = 2.0%

Variable	Degrees of Freedom	Parameter Estimate	Standard Error	Wald Chi-Square	Probability > Chi-Square	Standardized Estimate	Odds Ratio
INTERCEPT	1	1.1495	0.2357	23.7752	0.0001		
SSF	1	-4.3136	0.1912	509.1057	0.0001	-0.3217	0.013
SCENRISK	1	22.4584	1.2514	322.0866	0.0001	0.2334	999.000

Table 15a: Individual-Variable Logistic Model of Rollover as a Function of the SSF in Pennsylvania

Observations = 39,362; Concordant = 69.7%; Discordant = 29.9%; Tied = 0.4%

Variable	Degrees of Freedom	Parameter Estimate	Standard Error	Wald Chi-Square	Probability > Chi-Square	Standardized Estimate	Odds Ratio
INTERCEPT	1	1.7465	0.1216	206.3426	0.0001		
SSF	1	-3.0793	0.0906	1155.4773	0.0001	-0.2453	0.046
DARK	1	0.0138	0.0264	0.2717	0.6022	0.0038	1.014
STORM	1	-0.2369	0.0340	48.5499	0.0001	-0.0615	0.789
RURAL	1	0.7553	0.0272	772.1106	0.0001	0.2067	2.128
FAST	1	0.4987	0.0262	363.5505	0.0001	0.1285	1.647
HILL	1	0.3054	0.0250	148.9803	0.0001	0.0835	1.357
CURVE	1	0.2721	0.0259	110.4628	0.0001	0.0718	1.313
BADSURF	1	0.2260	0.0329	47.1891	0.0001	0.0623	1.254
MALE	1	-0.0926	0.0265	12.1816	0.0005	-0.0247	0.912
YOUNG	1	0.1955	0.0262	55.7071	0.0001	0.0523	1.216
OLD	1	-0.4441	0.0847	27.5095	0.0001	-0.0461	0.641
NOINSURE	1	0.0055	0.1398	0.0015	0.9689	0.0003	1.005
DRINK	1	0.1015	0.0364	7.7846	0.0053	0.0207	1.107
NUMOCC	1	0.0060	0.0148	0.1649	0.6847	0.0027	1.006

Table 15b: Crash-Scenario Logistic Model of Rollover as a Function of the SSF in Pennsylvania

Observations = 43,092; Scenarios = 264; Concordant = 69.4%; Discordant = 30.2%; Tied = 0.4%

Variable	Degrees of Freedom	Parameter Estimate	Standard Error	Wald Chi-Square	Probability > Chi-Square	Standardized Estimate	Odds Ratio
INTERCEPT	1	1.3045	0.1074	147.4610	0.0001		
SSF	1	-2.9574	0.0824	1287.8470	0.0001	-0.2365	0.052
SCENRISK	1	4.8066	0.1058	2064.5693	0.0001	0.3074	122.311

Table 16a: Individual-Variable Logistic Model of Rollover as a Function of the SSF in Utah

Observations = 6,753; Concordant = 73.7%; Discordant = 26.0%; Tied = 0.2%

Variable	Degrees of Freedom	Parameter Estimate	Standard Error	Wald Chi-Square	Probability > Chi-Square	Standardized Estimate	Odds Ratio
INTERCEPT	1	3.0214	0.2616	133.3965	0.0001		
SSF	1	-4.0534	0.1988	415.8912	0.0001	-0.3297	0.017
DARK	1	0.0795	0.0596	1.7795	0.1822	0.0203	1.083
STORM	1	-0.0149	0.0878	0.0288	0.8651	-0.0038	0.985
RURAL	1	1.1669	0.0744	246.0926	0.0001	0.2832	3.212
FAST	1	0.6116	0.0705	75.2753	0.0001	0.1513	1.843
HILL	1	0.0207	0.0592	0.1219	0.7270	0.0056	1.021
CURVE	1	0.1068	0.0604	3.1263	0.0770	0.0285	1.113
BADROAD	1	-0.1441	0.0935	2.3757	0.1232	-0.0239	0.866
BADSURF	1	-0.4951	0.0840	34.7391	0.0001	-0.1356	0.609
MALE	1	-0.0032	0.0564	0.0032	0.9548	-0.0009	0.997
YOUNG	1	0.0503	0.0569	0.7806	0.3770	0.0138	1.052
OLD	1	-0.0157	0.1698	0.0085	0.9265	-0.0014	0.984
DRINK	1	0.5768	0.1086	28.1849	0.0001	0.0813	1.780
NUMOCC	1	0.1796	0.0236	58.0417	0.0001	0.1161	1.197

Table 16b: Crash-Scenario Logistic Model of Rollover as a Function of the SSF in Utah

Observations = 5,864; Scenarios = 53; Concordant = 73.4%; Discordant = 26.4%; Tied = 0.2%

Variable	Degrees of Freedom	Parameter Estimate	Standard Error	Wald Chi-Square	Probability > Chi-Square	Standardized Estimate	Odds Ratio
INTERCEPT	1	2.6307	0.2557	105.8240	0.0001		
SSF	1	-4.0590	0.2046	393.6800	0.0001	-0.3307	0.017
SCENRISK	1	4.7170	0.2110	499.9490	0.0001	0.4223	111.828

Table 17a: Individual-Variable Logistic Model of Rollover as a Function of the SSF in Six States

Observations = 204,134; Concordant = 71.4%; Discordant = 28.2%; Tied = 0.4%

Variable	Degrees of Freedom	Parameter Estimate	Standard Error	Wald Chi-Square	Probability > Chi-Square	Standardized Estimate	Odds Ratio
INTERCEPT	1	1.5459	0.0569	737.2266	0.0001		
SSF	1	-3.6054	0.0424	7230.1063	0.0001	-0.2837	0.027
DARK	1	-0.0006	0.0124	0.0028	0.9581	-0.0002	0.999
STORM	1	-0.1813	0.0170	114.2240	0.0001	-0.0453	0.834
FAST	1	0.9229	0.0124	5497.0390	0.0001	0.2544	2.517
HILL	1	0.1274	0.0125	104.2731	0.0001	0.0336	1.136
CURVE	1	0.5243	0.0123	1831.8179	0.0001	0.1368	1.689
BADSURF	1	-0.0155	0.0159	0.9484	0.3301	-0.0041	0.985
MALE	1	-0.0924	0.0124	55.3414	0.0001	-0.0247	0.912
YOUNG	1	0.3230	0.0120	724.7098	0.0001	0.0873	1.381
OLD	1	-0.3720	0.0408	83.3029	0.0001	-0.0368	0.689
DRINK	1	0.2604	0.0165	249.7817	0.0001	0.0521	1.298
DUMMY_FL	1	1.1667	0.0214	2965.0082	0.0001	0.2486	3.211
DUMMY_MD	1	0.7735	0.0267	841.2490	0.0001	0.1237	2.167
DUMMY_NC	1	0.7988	0.0192	1728.8262	0.0001	0.1969	2.223
DUMMY_PA	1	1.2124	0.0200	3665.7178	0.0001	0.2783	3.361
DUMMY_UT	1	1.5232	0.0305	2502.1393	0.0001	0.1512	4.587

Table 17b: Crash-Scenario Logistic Model of Rollover as a Function of the SSF in Six States

Observations = 203,816; Scenarios = 654; Concordant = 71.6%; Discordant = 27.9%; Tied = 0.4%

Variable	Degrees of Freedom	Parameter Estimate	Standard Error	Wald Chi-Square	Probability > Chi-Square	Standardized Estimate	Odds Ratio
INTERCEPT	1	1.7339	0.0523	1101.0809	0.0001		
SSF	1	-3.4555	0.0413	7011.2375	0.0001	-0.2722	0.032
SCENRISK	1	5.6540	0.0511	12221.2738	0.0001	0.3435	285.433

Table 18: Baseline Values from the Logistic Models

State	Average of Study Vehicles		Rollover Rate for SSF=1.00	
	Rollover Rate	SSF	Individual Variables	Crash Scenarios
Florida	0.2044	1.2894	0.4778	0.4585
Maryland	0.1601	1.2928	0.3617	0.3520
Missouri	0.1235	1.2715	0.2849	0.2748
New Mexico	0.2475	1.2406	0.4084	0.4044
North Carolina	0.2077	1.2953	0.3943	0.3869
Ohio	0.0395	1.2658	0.1161	0.1147
Pennsylvania	0.2458	1.2648	0.4241	0.4163
Utah	0.3615	1.2331	0.5930	0.5933
Weighted average of six states (FL, MD, MO, NC, PA, UT)	0.2019	1.2803	0.4031	0.3929
Six-state model (FL, MD, MO, NC, PA, UT)	0.2019	1.2803	0.4101	0.3999

Table 19: National Rollover Rates Estimated from the Linear and Logistic Models

SSF	MODEL 1: Linear Model Based on the Summary Data for Six States	Logistic Models Using Individual Variables		Logistic Models Using Crash Scenarios	
		MODEL 2: Six States Combined	MODEL 3: Average of the Six State Models	MODEL 4: Six States Combined	MODEL 5: Average of the Six State Models
0.95	0.5374	0.4543	0.4458	0.4420	0.4334
0.96	0.5195	0.4454	0.4372	0.4335	0.4252
0.97	0.5023	0.4365	0.4286	0.4250	0.4171
0.98	0.4856	0.4277	0.4201	0.4166	0.4090
0.99	0.4695	0.4188	0.4116	0.4082	0.4009
1.00	0.4539	0.4101	0.4031	0.3999	0.3929
1.01	0.4388	0.4014	0.3947	0.3916	0.3849
1.02	0.4243	0.3928	0.3864	0.3834	0.3770
1.03	0.4102	0.3842	0.3781	0.3753	0.3692
1.04	0.3966	0.3757	0.3699	0.3672	0.3614
1.05	0.3834	0.3673	0.3618	0.3592	0.3537
1.06	0.3707	0.3590	0.3537	0.3513	0.3460
1.07	0.3584	0.3507	0.3457	0.3435	0.3385
1.08	0.3465	0.3425	0.3378	0.3357	0.3310
1.09	0.3350	0.3345	0.3300	0.3281	0.3236
1.10	0.3238	0.3265	0.3223	0.3205	0.3163
1.11	0.3131	0.3186	0.3147	0.3130	0.3091
1.12	0.3027	0.3108	0.3071	0.3056	0.3019
1.13	0.2926	0.3032	0.2997	0.2984	0.2949
1.14	0.2829	0.2956	0.2924	0.2912	0.2879
1.15	0.2735	0.2882	0.2852	0.2841	0.2811
1.16	0.2645	0.2808	0.2780	0.2771	0.2743
1.17	0.2557	0.2736	0.2710	0.2703	0.2677
1.18	0.2472	0.2665	0.2641	0.2635	0.2611
1.19	0.2390	0.2595	0.2574	0.2568	0.2547
1.20	0.2311	0.2526	0.2507	0.2503	0.2484
1.21	0.2234	0.2459	0.2441	0.2439	0.2421
1.22	0.2160	0.2393	0.2377	0.2376	0.2360
1.23	0.2088	0.2328	0.2314	0.2314	0.2300
1.24	0.2019	0.2264	0.2252	0.2253	0.2241
1.25	0.1952	0.2201	0.2191	0.2193	0.2183

Table 19 (continued): National Rollover Rates Estimated from the Linear and Logistic Models

SSF	MODEL 1: Linear Model Based on the Summary Data for Six States	Logistic Models Using Individual Variables		Logistic Models Using Crash Scenarios	
		MODEL 2: Six States Combined	MODEL 3: Average of the Six State Models	MODEL 4: Six States Combined	MODEL 5: Average of the Six State Models
1.26	0.1887	0.2140	0.2132	0.2134	0.2126
1.27	0.1824	0.2080	0.2074	0.2077	0.2070
1.28	0.1764	0.2021	0.2016	0.2021	0.2016
1.29	0.1705	0.1964	0.1960	0.1966	0.1962
1.30	0.1649	0.1907	0.1906	0.1912	0.1910
1.31	0.1594	0.1852	0.1852	0.1859	0.1858
1.32	0.1541	0.1799	0.1800	0.1807	0.1808
1.33	0.1490	0.1746	0.1749	0.1756	0.1759
1.34	0.1440	0.1695	0.1699	0.1707	0.1711
1.35	0.1392	0.1645	0.1650	0.1659	0.1663
1.36	0.1346	0.1596	0.1602	0.1611	0.1617
1.37	0.1302	0.1548	0.1556	0.1565	0.1572
1.38	0.1258	0.1501	0.1510	0.1520	0.1528
1.39	0.1217	0.1456	0.1466	0.1476	0.1486
1.40	0.1176	0.1412	0.1423	0.1433	0.1444
1.41	0.1137	0.1368	0.1381	0.1391	0.1403
1.42	0.1099	0.1326	0.1340	0.1350	0.1363
1.43	0.1063	0.1285	0.1300	0.1310	0.1324
1.44	0.1028	0.1246	0.1261	0.1272	0.1286
1.45	0.0994	0.1207	0.1223	0.1234	0.1249
1.46	0.0961	0.1169	0.1186	0.1197	0.1213
1.47	0.0929	0.1132	0.1150	0.1161	0.1178
1.48	0.0898	0.1097	0.1115	0.1126	0.1143
1.49	0.0868	0.1062	0.1081	0.1092	0.1110
1.50	0.0839	0.1028	0.1048	0.1059	0.1078
1.51	0.0811	0.0995	0.1016	0.1026	0.1046
1.52	0.0784	0.0964	0.0985	0.0995	0.1015
1.53	0.0758	0.0933	0.0955	0.0965	0.0985
1.54	0.0733	0.0903	0.0925	0.0935	0.0956
1.55	0.0709	0.0873	0.0896	0.0906	0.0928
Average slope*	-0.713	-0.598	-0.580	-0.572	-0.555

* The Average Slope was calculated for the observed range of SSF values for our vehicles in the state data (1.00 to 1.53), as the difference in the estimated rollover rates divided by the difference in the SSF values.

Table 20: Standardized Estimate for the Coefficients Produced by the Logistic Models of Rollover as a Function of the SSF

State	Exponent: Individual Variables	Exponent: Crash Scenarios	NHTSA: Individual Variables, without Wheelbase	NHTSA: Crash Scenarios, without Wheelbase	NHTSA: Individual Variables, with Wheelbase	NHTSA: Crash Scenarios, with Wheelbase
Alabama	-0.282	-0.282				
Florida	-0.383	-0.381	-0.349	-0.327	-0.392	-0.374
Idaho	-0.308	-0.318				
Maryland	-0.303	-0.310	-0.295	-0.283	-0.320	-0.310
Missouri			-0.288	-0.274	-0.312	-0.304
New Mexico			-0.233	-0.228	-0.239	-0.236
North Carolina	-0.287	-0.292	-0.239	-0.231	-0.269	-0.266
Ohio			-0.326	-0.322	-0.343	-0.342
Pennsylvania	-0.271	-0.284	-0.245	-0.236	-0.266	-0.260
Utah			-0.330	-0.331	-0.368	-0.369

Table 21: Coefficients of the SSF Variable from the Logistic Models

State	Model without Wheelbase		Model with Wheelbase	
	Individual Variables	Crash Scenarios	Individual Variables	Crash Scenarios
Florida	−4.3908	−4.1227	−4.9284	−4.7108
Maryland	−3.7203	−3.5760	−4.0387	−3.9206
Missouri	−3.8283	−3.6441	−4.1553	−4.0384
New Mexico	−3.0809	−3.0129	−3.1559	−3.1185
North Carolina	−3.0800	−2.9751	−3.4710	−3.4260
Ohio	−4.3642	−4.3136	−4.6001	−4.5838
Pennsylvania	−3.0793	−2.9574	−3.3352	−3.2562
Utah	−4.0534	−4.0590	−4.5195	−4.5338
Six-state model (FL, MD, MO, NC, PA, UT)	−3.6054	−3.4555	−3.9525	−3.7918

Table 22: Risk of Serious Injury Among Unbelted Drivers of Towed Light Vehicles in Frontal Nonrollover Crashes (1988-1999 NASS Investigated Cases and Annualized National Estimates)

Delta V (in mph)	Investigated Cases		Annualized Estimates		
	All Involved Drivers	Drivers with Serious Injury	All Involved Drivers	Drivers with Serious Injury	Percent with Serious Injury
00-09	517	8	24,196	183	0.76
10-19	3,758	305	107,038	3,342	3.12
20-29	2,343	623	33,564	4,573	13.63
30-39	718	381	4,822	2,370	49.15
40-49	207	146	1,198	726	60.58
50 +	88	73	465	374	80.46
Total	7,631	1,536	171,284	11,569	6.75

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Appendix II: List of Test Vehicles for MY2001 Rollover Resistance Ratings

NHTSA expects to measure the Static Stability Factor and provide rollover resistance ratings for each of the following model year 2001 vehicles. For pickups and SUVs, the agency plans to measure and report separately on both two-wheel-drive and four-or all-wheel-drive variants of each model, where applicable. In no case will a two-wheel-drive measurement be applied to a four-or all-wheel-drive variant, or vice versa. The agency may need to make substitutions for some of the models listed depending on availability. The list is arranged largely alphabetically within each vehicle category, and passenger cars are sorted by class according to the classifications used in the NHTSA NCAP frontal and side crash test programs. The order in which vehicles will be tested will be determined by the test laboratory and will depend primarily on model availability.

The following class abbreviations are used:

LPC = light passenger car
CPC = compact passenger car
MPC = medium passenger car
HPC = heavy passenger car
SUV = sport utility vehicle
LT = light truck

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MANUFACTURER	MAKE	MODEL	TWINS	CLASS	STYLE
PASSENGER CARS					
Ford	Ford	Focus		LPC	4DR
Hyundai	Hyundai	Accent		LPC	4DR
Toyota	Toyota	Corolla	Prizm	LPC	4DR
Toyota	Toyota	Echo		LPC	4DR
GM	Chevrolet	Cavalier	Sunfire	CPC	4DR
DC	Dodge	Neon	Neon	CPC	4DR
Honda	Honda	Civic		CPC	4DR
VW	Volkswagen	Jetta		CPC	4DR
GM	Chevrolet	Impala		MPC	4DR
DC	Dodge	Stratus	Sebring	MPC	4DR
Ford	Ford	Taurus	Sable	MPC	4DR
Honda	Honda	Accord		MPC	4DR
GM	Pontiac	Grand Am 4dr	Alero	MPC	4DR
Toyota	Toyota	Camry		MPC	4DR
Ford	Ford	Crown Victoria	Grand Marquis	HPC	4DR
Ford	Lincoln	LS		HPC	4DR
VANS					
GM	Chevrolet	Astro	Safari	Van	
GM	Chevrolet	Venture	Silhouette; Montana	Van	ext. whlbs.
DC	Dodge	Caravan	Voyager	Van	
DC	Dodge	Grand Caravan	Town & Country	Van	
DC	Dodge	Ram Van/Wagon		Van	
Ford	Ford	Econoline Club Wagon	Econoline Van	Van	
Ford	Ford	Windstar		Van	
Honda	Honda	Odyssey		Van	
Mazda	Mazda	MPV		Van	
Ford	Nissan	Quest	Villager	Van	
Toyota	Toyota	Sienna		Van	
SUVs *(will include 2WD and 4WD or AWD versions of each model listed, if applicable)*					

MANUFACTURER	MAKE	MODEL	TWINS	CLASS	STYLE
GM	Chevrolet	Blazer	Jimmy/Envoy; Bravada	SUV	4DR
GM	Chevrolet	Suburban	Yukon XL	SUV	
GM	Chevrolet	Tahoe	Yukon	SUV	4DR
GM	Chevrolet	Tracker	Vitara	SUV	4DR
DC	Dodge	Durango		SUV	
DC	Chrysler	PT Cruiser		SUV	
Ford	Ford	Escape	Mazda Tribute	SUV	4DR
Ford	Ford	Expedition	Navigator	SUV	
Ford	Ford	Explorer	Mountaineer	SUV	4DR
Honda	Honda	CR-V		SUV	
Isuzu	Honda	Passport	Rodeo	SUV	
DC	Jeep	Cherokee		SUV	
DC	Jeep	Grand Cherokee		SUV	
DC	Jeep	Wrangler		SUV	4WD only
Toyota	Lexus	RX300		SUV	
Mitsubishi	Mitsubishi	Montero Sport		SUV	
Nissan	Nissan	Pathfinder	Infiniti QX4	SUV	
Nissan	Nissan	Xterra		SUV	
GM	Pontiac	Aztek		SUV	
Subaru	Subaru	Forester		SUV	AWD only
Toyota	Toyota	4Runner		SUV	
Toyota	Toyota	RAV4		SUV	
PICK-UPs *(will include 2WD and 4WD versions of each model listed in most cases)*					
GM	Chevrolet	S-10 ExCab	Sonoma; Hombre	LT	

MANUFACTURER	MAKE	MODEL	TWINS	CLASS	STYLE
GM	Chevrolet	Silverado ExCab	GMC Sierra	LT	
DC	Dodge	Dakota ExCab		LT	
DC	Dodge	Ram ExCab		LT	
Ford	Ford	F-150		LT	
Ford	Ford	Ranger	Mazda B-Series	LT	
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H.R. 4020/P.L. 106–574
To authorize the addition of land to Sequoia National Park, and for other purposes. (Dec. 28, 2000; 114 Stat. 3062)

H.R. 4656/P.L. 106–575
To authorize the Forest Service to convey certain lands in the Lake Tahoe Basin to the Washoe County School District for use as an elementary school site. (Dec. 28, 2000; 114 Stat. 3063)

S. 1761/P.L. 106–576
Lower Rio Grande Valley Water Resources Conservation and Improvement Act of 2000 (Dec. 28, 2000; 114 Stat. 3065)

S. 2749/P.L. 106–577
To establish the California Trail Interpretive Center in Elko, Nevada, to facilitate the interpretation of the history of development and use of trails in the settling of the western portion of the United States, and for other purposes. (Dec. 28, 2000; 114 Stat. 3068)

S. 2924/P.L. 106–578
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