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Title 3—

The President

Executive Order 13256 of February 12, 2002

President's Board of Advisors on Historically Black Colleges and Universities

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to advance the development of the Nation's full human potential and to advance equal opportunity in higher education, to strengthen the capacity of historically black colleges and universities to provide the highest quality education, and to increase opportunities for these institutions to participate in and benefit from Federal programs, as do other colleges and universities, it is hereby ordered as follows:

Section 1. There is established, in the Office of the Secretary of Education, a Presidential advisory committee entitled the ''President's Board of Advisors on Historically Black Colleges and Universities'' (Board). The Board shall prepare and issue an annual report to the President on the results of the participation of historically black colleges and universities in Federal programs. The Board also shall provide advice to the President and to the Secretary of Education (Secretary) regarding the needs of historically black colleges and universities in the areas of infrastructure, academic programs, and faculty and institutional development. In the annual report to the President, the Board shall make recommendations on how to increase the private sector role, including the role of private foundations, in strengthening historically black colleges and universities. Particular emphasis should also be given in the report to enhancing institutional planning and development, strengthening fiscal stability and financial management, and improving institutional infrastructure, including the use of technology, to ensure the long-term viability and enhancement of these institutions.

Sec. 2. The Board shall be appointed by the President. The Board membership shall include sitting presidents of historically black colleges and universities, representatives of other higher education institutions, business and financial leaders, representatives of private foundations, and secondary school administrators. The President shall designate a Chair or Co-Chairs from among the members.

Sec. 3. The White House Initiative on Historically Black Colleges and Universities (Initiative), located in the Office of the Secretary of Education, shall: (1) provide staff, resources, and assistance to the Board; (2) assist the Secretary in performing the liaison function between the executive branch and historically black colleges and universities; and (3) serve the Secretary in carrying out the responsibilities described in section 6 of this order.

Sec. 4. To carry out this order, each executive department and agency identified by the Secretary may, consistent with applicable law and regulations, enter into appropriate grants, contracts, or cooperative agreements with historically black colleges and universities. The head of each department or agency so identified shall establish an annual plan that will establish clear goals for how the department or agency intends to increase the capacity of historically black colleges and universities to compete effectively for grants, contracts, or cooperative agreements and to encourage historically black colleges and universities to participate in Federal programs. The department's or agency's annual goal should be clearly reflected in the department's or agency's annual budget submission to the Office of Management and

Budget. To facilitate the attainment of these goals, the head of each department or agency identified by the Secretary shall provide, as appropriate, technical assistance and information to historically black colleges and universities regarding the program activities of the department or agency and the preparation of applications or proposals for grants, contracts, or cooperative agreements.

Sec. 5. Each executive department and agency identified by the Secretary shall appoint a senior official, who is a full-time officer of the Federal Government, to report directly to the department or agency head with respect to department or agency activity under this order, and to serve as liaison to the Board and to the Initiative. To the extent permitted by law and regulations, each executive department and agency identified by the Secretary shall provide appropriate information requested by the Board and staff pursuant to the order.

Sec. 6. Each executive department and agency identified by the Secretary shall develop an annual plan for, and shall document the agency's effort in, increasing the capacity of historically black colleges and universities to participate in Federal programs. Each department's and agency's plan shall describe new or existing department and agency programs and measurable objectives for proposed department and agency actions, in connection with those programs, to achieve the purposes of this order. These plans shall be submitted at such time and in such form as the Secretary shall require. In consultation with the participating departments and agencies, the Secretary shall review the plans and develop, with the advice of the Board, an integrated Annual Federal Plan for Assistance to Historically Black Colleges and Universities for submission to the President. The Secretary shall provide the president of each historically black college and university with a copy of, and an opportunity to comment on, the proposed Annual Federal Plan prior to its submission to the President. Each participating department and agency shall submit to the Secretary an Annual Performance Report that shall measure each department's and agency's performance against the objectives set forth in the department's or agency's annual plan. The Secretary shall be responsible for monitoring compliance with the Annual Federal Plan after it is approved by the President.

Sec. 7. In developing its annual plan, each executive department and agency identified by the Secretary shall emphasize programs and activities that develop the capacity of historically black colleges and universities to contribute to the development of human capital and to strengthen America's economic and technological base through: (1) infrastructure development and acquisitions for instruction and research; (2) student and faculty doctoral fellowships and faculty development; (3) domestic and international faculty and student exchanges and study-abroad opportunities; (4) undergraduate and graduate student internships; and (5) summer, part-time, and permanent employment opportunities.

Sec. 8. Each year, the Board shall report to the President on the progress achieved in enhancing the capacity of historically black colleges and universities to serve their students, including findings and recommendations for individual departments and agencies in connection with their Annual Performance Reports, as described in section 6 of this order.

Sec. 9. The Board, in consultation with the Department of Education and other executive departments and agencies, shall develop a Private Sector Strategy to assist historically black colleges and universities in: (1) increasing voluntary private-sector contributions to support the enhancement of endowments and the overall financial stability of such institutions; (2) improving and enhancing the quality and number of private-sector partnerships focused on academic program development, student achievement and faculty development, cooperative research and development projects, and faculty exchanges; and (3) improving information management, and facilities, and strengthening academic course offerings.

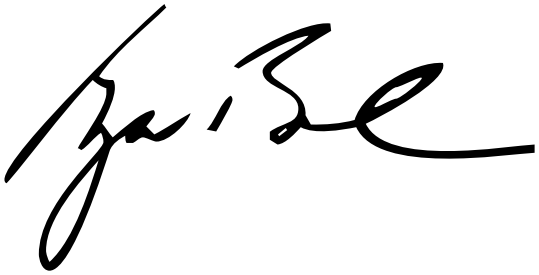
Sec. 10. (a) The provisions in this Executive Order shall be implemented to the fullest extent permitted by law.

(b) The Department of Education shall provide funding and administrative support for the Board and the Initiative.

(c) Members of the Board shall serve without compensation, but shall be reimbursed for all travel expenses, including per diem in lieu of subsistence, as authorized by law;

(d) Insofar as the Federal Advisory Committee Act, as amended, may apply to the Board, any functions of the President under that Act, except for those in section 6 of that Act, shall be performed by the Department of Education, in accordance with the guidelines that have been issued by the Administrator of General Services.

Sec. 11. Executive Order 12876 of November 1, 1993, as amended, is hereby revoked.



THE WHITE HOUSE,
February 12, 2002.

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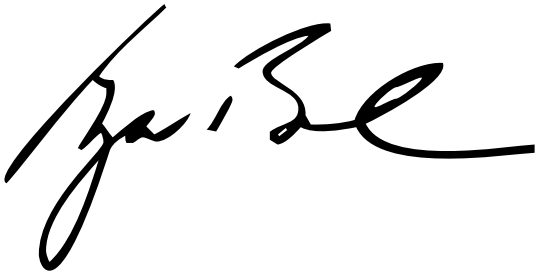
(b) The Department of Education shall provide funding and administrative support for the Board and the Initiative.

(c) Members of the Board shall serve without compensation, but shall be reimbursed for all travel expenses, including per diem in lieu of subsistence, as authorized by law;

(d) Insofar as the Federal Advisory Committee Act, as amended, may apply to the Board, any functions of the President under that Act, except for those in section 6 of that Act, shall be performed by the Department of Education, in accordance with the guidelines that have been issued by the Administrator of General Services.

Sec. 11. Executive Order 12876 of November 1, 1993, as amended, is hereby revoked.



THE WHITE HOUSE,
February 12, 2002.

[FR Doc. 02–3826
Filed 2–13–02; 8:45 am]
Billing code 3195–01–P

Rules and Regulations

Federal Register
Vol. 67, No. 31
Thursday, February 14, 2002

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

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

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 01–054–1]

Phytophthora Ramorum; Quarantine and Regulations

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and notice of public hearings.

SUMMARY: We are quarantining 10 counties in the State of California and a portion of 1 county in the State of Oregon because of the presence of *Phytophthora ramorum* and regulating the interstate movement of regulated and restricted articles from the quarantined area. This action is necessary on an emergency basis to prevent the spread of *P. ramorum* to noninfested areas of the United States.

DATES: This interim rule is effective February 14, 2002. We will consider all comments we receive that are postmarked, delivered, or e-mailed by April 15, 2002. We will also consider comments made at public hearings to be held in Petaluma, CA, on February 27, 2002; and in Riverdale, MD, on March 27, 2002.

ADDRESSES: You may submit comments by postal mail/commercial delivery or electronically. If you use postal mail/commercial delivery, please send four copies (an original and three copies) to: Docket No. 01–054–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 01–054–1. To submit a comment electronically, please visit *http://comments.aphis.usda.gov.*

You may read any comments that we receive on this docket in our reading room, or by visiting http://comments.aphis.usda.gov. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

APHIS documents published in the **Federal Register**, and related information, including the names of organizations and individuals who have commented on APHIS dockets, are available on the Internet at http://www.aphis.usda.gov/ppd/rad/webrepor.html.

Public hearing regarding this rule will be held at the following locations:

1. Petaluma, CA: Petaluma Community Center, 320 N. McDowell Blvd., Petaluma, CA.
2. Riverdale, MD: USDA Center at Riverside, 4700 River Road, Riverdale, MD.

FOR FURTHER INFORMATION CONTACT: Mr. Jonathan Jones, Operations Officer, Invasive Species and Pest Management, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737; (301) 734–8247.

SUPPLEMENTARY INFORMATION:

Public Hearings

We are advising the public that we are hosting two public hearings on this interim rule. The first public hearing will be held in Petaluma, CA, on Wednesday, February 27, 2002. The second public hearing will be held in Riverdale, MD, on Wednesday, March 27, 2002.

A representative of the Animal and Plant Health Inspection Service (APHIS), U.S. Department of Agriculture (USDA or the Department), will preside at the public hearings. Any interested person may appear and be heard in person, by attorney, or by other representative. Written statements may be submitted and will be made part of the hearing record. A transcript of the public hearings will be placed in the rulemaking record and will be available for public inspection.

The purpose of the hearings is to give interested persons an opportunity for oral presentation of data, views, and arguments. Questions about the content of the interim rule may be part of the commenters' oral presentations. However, neither the presiding officer nor any other representative of APHIS will respond to comments at the hearings, except to clarify or explain provisions of the interim rule.

The public hearings will begin at 9 a.m. and are scheduled to end at 4:30 p.m., local time. The presiding officer may limit the time for each presentation so that all interested persons appearing at each hearing have an opportunity to participate. Each hearing may be terminated at any time if all persons desiring to speak have been heard.

Registration for the hearings may be accomplished by registering with the presiding officer between 8:30 a.m. and 9 a.m. on the day of the hearing. Persons who wish to speak at a hearing will be asked to sign in with their name and organization to establish a record for the hearing. We ask that anyone who reads a statement provide two copies to the presiding officer at the hearing. Those who wish to form a panel to present their views will be asked to provide the name of each member of the panel and the organizations the panel members represent.

Persons or panels wishing to speak at one or both of the public hearings may register in advance by phone or e-mail. Persons wishing to register by phone should call the Regulatory Analysis and Development voice mail at (301) 734–4339. Callers must leave a message clearly stating (1) the location of the hearing the registrant wishes to speak at, (2) the registrant's name and organization, and, if registering for a panel, (3) the name of each member of the panel and the organization each panel member represents. Persons wishing to register by e-mail must send an e-mail with the same information described above to ispm@aphis.usda.gov. Please write ''Public Hearing Registration'' in the subject line of your e-mail. Advance registration for the Petaluma, CA, hearing must be received by 3 p.m. on Monday, February 25, 2002. Advance registration for the Riverdale, MD, hearing must be received by 3 p.m. on Tuesday, March 26, 2002.

If you require special accommodations, such as a sign language interpreter, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

Parking and Security Procedures at the USDA Center

Please note that a fee of $2.25 is required to enter the parking lot at the USDA Center. The machine accepts $1 bills and quarters.

Upon entering the building, visitors should inform security personnel that they are attending the *Phytophthora ramorum* quarantine public hearing. Identification is required. Security personnel will direct visitors to the registration tables located outside of Conference Rooms C and D on the first floor. Registration upon arrival is necessary for all participants, including those who have registered to speak in advance. Visitor badges must be worn throughout the day.

Background

Phytophthora ramorum is a harmful fungus that has been found in arrowwood (*Viburnum* x *bodnantense*), big leaf maple (*Acer macrophyllum*), black oak (*Quercus kelloggii*), California bay laurel (*Umbellularia californica*), California buckeye (*Aesculus californhica*), California coffeeberry (*Rhamnus californica*), California honeysuckle (*Lonicera hispidula*), coast live oak (*Quercus agrifolia*), huckleberry (*Vaccinium ovatum*), madrone (*Arbutus menziesii*), manzanita (*Arctostaphylos* spp.), rhododendron (*Rhododendron* spp., including azalea), Shreve's oak (*Quercus parvula* var. *shrevei*), tanoak (*Lithocarpus densiflorus*), and Toyon (*Heteromeles arbutifolia*).

According to available research and observations, similar symptoms of infection with *P. ramorum* have been identified in tanoak, coast live oak, black oak and Shreve's oak. Although symptoms are similar in these species, their appearance, both chronologically and physically, varies somewhat. In tanoak, leaf symptoms are usually the first to appear, as new growth may droop or turn yellow to brown. In coast live oak, black oak, and Shreve's oak, the earliest symptom is the appearance of a bleeding canker; burgundy-red to tar-black thick sap oozes on the bark surface. Similar bleeding, though less viscous, has been observed on tanoak, although tanoak may not show the bleeding symptom at all. This bleeding is a response to infection with *P. ramorum,* and is typically found from the root crown (the area where the trunk fans out to the roots) to a height of 6 feet. Bleeding has occasionally been observed at greater heights. Oaks showing these symptoms typically die within a few months of the appearance of symptoms. Other hosts are not typically killed by *P. ramorum.* Symptoms of infection in other hosts include leaf spotting and stem canker infections.

Since its initial discovery in Marin County, CA, in 1995, *P. ramorum* has been confirmed to exist in nine additional counties along or near the northern California coastline: Alameda, Mendocino, Monterey, Napa, San Mateo, Santa Clara, Santa Cruz, Solano, and Sonoma. *P. ramorum* also has been found in a portion of Curry County, OR. *P. ramorum,* which has been commonly referred to as Sudden Oak Death or Oak Mortality Syndrome, has caused the death of thousands of mature oaks in these counties, and there is presently no known treatment for infected plants that kills the fungus but allows plants to survive.

Infected plants and plant products that move interstate could serve as a pathway for the introduction of *P. ramorum* to other areas of the United States. It is unclear how *P. ramorum* spreads, though available research suggests it is spread by water, soil, and infected plant material. It is also possible that *P. ramorum* spreads by air. Regardless, the movement of infected plants and plant products of the *P. ramorum* hosts listed earlier in this document is believed to provide a pathway for the spread of *P. ramorum.*

As explained below, the States of California and Oregon have restricted the intrastate movement of certain articles from infested areas to prevent the spread of *P. ramorum* within California and Oregon. However, Federal regulations are necessary to restrict the interstate movement of certain articles from the infested area to prevent the spread of *P. ramorum* to noninfested areas of the United States.

We are amending the ''Domestic Quarantine Notices'' in 7 CFR part 301 by adding a new subpart, ''Phytophthora Ramorum'' (§§ 301.92 through 301.92–10, referred to below as the regulations). The regulations, which are described below, quarantine portions of the States of California and Oregon because of *P. ramorum* and restrict the interstate movement of regulated and restricted articles from quarantined areas. The interstate movement of regulated and restricted articles from nonquarantined areas is not restricted under this interim rule.

Section 301.92—Restrictions on the Interstate Movement of Regulated Articles

Section 301.92 prohibits the interstate movement of regulated and restricted articles from quarantined areas except in accordance with the regulations.

Section 301.92–1—Definitions

Section 301.92–1 contains definitions of the following terms: *Administrator, Animal and Plant Health Inspection Service, bark chips, certificate, compliance agreement, departmental permit, duff, firewood, forest stock, inspector, interstate, log, moved (move, movement), mulch, nursery stock, person, Plant Protection and Quarantine, quarantined area, regulated article, restricted article, soil,* and *State.*

Section 301.92–2—Regulated and Restricted Articles

Certain articles present a significant risk of spreading *P. ramorum* if they are moved from quarantined areas without restrictions. We call these articles regulated and restricted articles. Regulated articles may be moved interstate from quarantined areas under certificates issued by an inspector in accordance with § 301.92–5. Restricted articles, however, may only be moved interstate by USDA under departmental permits issued in accordance with § 301.92–4(a)(2).

Paragraph (a) of § 301.92–2 lists soil and nursery stock (except acorns and seeds), unprocessed wood and wood products including firewood, logs, lumber, wreaths, garlands, and greenery of the following species as regulated articles:

- Arrowwood (*Viburnum* x *bodnantense*);
- Big leaf maple (*Acer macrophyllum*);
- Black oak (*Quercus kelloggii*);
- California bay laurel (*Umbellularia californica*);
- California buckeye (*Aesculus californica*);
- California coffeeberry (*Rhamnus californica*);
- California honeysuckle (*Lonicera hispidula*);
- Coast live oak (*Quercus agrifolia*);
- Huckleberry (*Vaccinium ovatum*);[1]
- Madrone (*Arbutus menziesii*);
- Manzanita (*Arctostaphylos manzanita*);
- Rhododendron (*Rhododendron* spp., including azalea);
- Shreve's oak (*Quercus parvula* var. *shrevei*);
- Tanoak (*Lithocarpus densiflorus*); and
- Toyon (*Heteromeles arbutifolia*).

Paragraph (b) of the regulations lists bark chips, forest stock, and mulch of the species of plants listed above as restricted articles. Again, restricted articles may only be moved interstate by USDA under a departmental permit

[1] Fruits of huckleberry are not regulated articles.

issued in accordance with § 301.92–4(a)(2).

The regulations in § 301.92–2 also provide that any other product or article that an inspector determines to present a risk of spreading *P. ramorum* can also be considered a regulated or restricted article if the inspector notifies the person in possession of the product or article that it is subject to the restrictions in the regulations. This provision is necessary to ensure that APHIS is able to regulate the movement of all articles, especially newly identified hosts of *P. ramorum* not listed in the regulations, that pose a risk of spreading *P. ramorum* if moved without restriction.

Section 301.92–3—Quarantined Areas

Paragraph (a) of § 301.92–3 provides the criteria for the inclusion of States, or portions of States, in the list of quarantined areas. Under these criteria, any State or portion of a State in which *P. ramorum* is found by an inspector, or in which the Administrator has reason to believe that *P. ramorum* is present, will be listed as a quarantined area. These criteria also provide that an area will be designated as a quarantined area when the Administrator considers it necessary due to the area's inseparability for quarantine enforcement purposes from localities in which *P. ramorum* has been found.

Paragraph (a) of § 301.92–3 also provides that we will designate less than an entire State as a quarantined area only if we determine that the State has adopted and is enforcing restrictions on the intrastate movement of regulated articles that are equivalent to those imposed on the interstate movement of regulated articles and that the designation of less than the entire State as a quarantined area will prevent the interstate spread of *P. ramorum*. These determinations would indicate that infestations are confined to the quarantined areas and eliminate the need for designating an entire State as a quarantined area.

We have determined that it is not necessary to designate the entire States of California and Oregon as quarantined areas. The State of California has adopted restrictions on the intrastate movement of regulated and restricted articles from the following counties: Alameda, Marin, Mendocino, Monterey, Napa, San Mateo, Santa Clara, Santa Cruz, Solano, and Sonoma.

The State of Oregon has adopted restrictions on the intrastate movement of regulated and restricted articles from a 9-square-mile area near the Brookings area of Curry County.

P. ramorum has not been found in any other areas of California or Oregon besides those listed above, and California and Oregon have adopted and are enforcing restrictions on the intrastate movement of regulated and restricted articles from those areas that are substantially the same as those we are imposing on the interstate movement of regulated and restricted articles.

The State of California is not attempting to eradicate *P. ramorum* from the State, and has quarantined any county where *P. ramorum* has been confirmed to exist, regardless of the distribution of *P. ramorum* within that county. APHIS is also using this criterion in setting the *P. ramorum* quarantine boundaries for the State of California.

Oregon is attempting to eradicate *P. ramorum* from the area in Curry County where it has been detected. The quarantined area covers 9 square miles in the Brookings area of Curry County. All boundaries of the quarantined area are at least ½ to 1 mile from any *P. ramorum* detection site. APHIS believes that this distance is sufficient to ensure that *P. ramorum* is not spread to areas outside the quarantined area. The boundary lines may vary due to factors such as the location of *P. ramorum* host material and the use of clearly identifiable lines for the boundaries. The boundaries themselves are described in the rule portion of this document.

Paragraph (b) of § 301.92–3 provides that we may temporarily designate any nonquarantined area in a State as a quarantined area when we determine that the nonquarantined area meets the criteria for designation as a quarantined area described in § 301.92–3(a). In such cases, we will give the owner or person in possession of the area a copy of the regulations along with written notice of the area's temporary designation as a quarantined area, after which time the interstate movement of any regulated or restricted article from the area will be subject to the regulations. This provision is necessary to prevent the spread of *P. ramorum* during the time between the detection of the disease and the time a document quarantining the area can be made effective and published in the **Federal Register**. In the event that an area's designation as a temporary quarantined area is terminated, we will provide written notice of that termination to the owner or person in possession of the area as soon as is practicable.

Section 301.92–4—Conditions Governing the Interstate Movement of Regulated and Restricted Articles from Quarantined Areas

This section provides that regulated articles may be moved interstate from quarantined areas if they are accompanied by a certificate issued in accordance with §§ 301.92–5 and 301.92–8, and provided that they are moved through the quarantined area without stopping except for refueling, rest stops, emergency repairs, and for traffic conditions, such as traffic lights or stop signs.

Additionally, this section provides that restricted articles may be moved interstate from quarantined areas by APHIS or the Department for experimental or scientific purposes. Such articles must be moved in accordance with a departmental permit issued by the Administrator, under conditions specified on the permit to prevent the spread of *P. ramorum*.

Regulated or restricted articles that are moved from outside quarantined areas and that are accompanied by a waybill that indicates the point of origin may be moved interstate through a quarantined area without a certificate or a departmental permit. The articles must also be moved from outside the quarantined area through the quarantined area without stopping (except for refueling, rest stops, emergency repairs, and for traffic conditions such as traffic lights and stop signs), and the articles must not be unpacked or unloaded in the quarantined area.

Section 301.92–5—Issuance and Cancellation of Certificates

Certificates are issued for regulated articles when an inspector finds that, because of certain conditions, there is no disease risk associated with moving a regulated article from a quarantined area. Regulated articles accompanied by a certificate may be moved interstate without further restrictions. Section 301.92–5(a) provides that a certificate will be issued by an inspector for the movement of regulated articles if the inspector determines that any one of the following conditions have been met:

- The regulated articles have been treated under the direction of an inspector in accordance with § 301.92–10 of this subpart.
- The regulated articles are wood products such as firewood, logs, or lumber that are free of bark.
- The regulated article is soil that has not been in direct physical contact with any article infected with *P. ramorum*,

and from which all duff[2] has been removed.

• The regulated articles are articles of nursery stock that (1) are shipped from a nursery or premises in a quarantined area that is inspected annually by an inspector for *P. ramorum* in accordance with the inspection and sampling protocol described in § 301.92–11(a), and that has been found free of *P. ramorum*; (2) are part of a shipment of nursery stock that has been inspected immediately prior to interstate movement in accordance with § 301.92–11(b), and that has been found free of *P. ramorum*; (3) have been kept separate from regulated articles not inspected between the time of the inspection and the time of interstate movement; and (4) have not been grown in, or moved from, other areas within a quarantined area except nurseries or premises that have been inspected for *P. ramorum* in accordance with this section; and that have been found free of *P. ramorum*.

The regulations in § 301.92–5(a) also require that inspectors may only issue certificates for the interstate movement of regulated articles if the inspector determines that the regulated articles: (1) Are to be moved in compliance with any additional emergency conditions the Administrator may impose under section 414 of the Plant Protection Act (7 U.S.C. 7714)[3] to prevent the spread of *P. ramorum*, and (2) are eligible for unrestricted movement under all other Federal domestic plant quarantines and regulations applicable to the regulated article.

We have included a footnote that provides an address for securing the addresses and telephone numbers of the local Plant Protection and Quarantine offices at which services of inspectors may be requested. We have also included a footnote that explains that the Secretary of Agriculture can, under the Plant Protection Act, take emergency actions to seize, quarantine, treat, destroy, or apply other remedial measures to articles that are, or that he or she has reason to believe are, infested or infected by or contain plant pests.

Paragraph (b) of § 301.92–5 allows any person who has entered into and is operating under a compliance agreement to issue a certificate for the interstate movement of a regulated article after an inspector has determined that the article is eligible for a certificate under § 301.92–5(a).

Also, § 301.92–5(c) contains provisions for the withdrawal of a certificate by an inspector if the inspector determines that the holder of the certificate has not complied with conditions for the use of the document. This section also contains provisions for notifying the holder of the reasons for the withdrawal and for holding a hearing if there is any conflict concerning any material fact in the event that the person wishes to appeal the cancellation.

Section 301.92–6—Compliance Agreements and Cancellation

Section 301.92–6 provides for the issuance and cancellation of compliance agreements. Persons who enter into compliance agreements with APHIS are allowed to self-certify that certain regulated articles meet APHIS requirements for interstate movement. Compliance agreements are provided in order to facilitate the interstate movement of certain regulated articles while still minimizing the risk that *P. ramorum* could spread interstate. A compliance agreement will be issued when an inspector has determined that the person requesting the compliance agreement is knowledgeable regarding the requirements of the regulations and the person has agreed to comply with those requirements. Since movements of nursery stock are dependent on inspection or testing by an inspector, compliance agreements will not be issued to persons interested in moving nursery stock interstate. Inspectors will issue certificates for the interstate movement of regulated articles of nursery stock after they inspect, and if necessary, test regulated articles of nursery stock and determine that they are free of *P. ramorum*.

Section 301.92–6 contains a footnote that explains how compliance agreements may be arranged. Section 301.92–6 also provides that an inspector may cancel the compliance agreement upon finding that a person who has entered into the agreement has failed to comply with any of the provisions of the regulations. The inspector will notify the holder of the compliance agreement of the reasons for cancellation and offer an opportunity for a hearing to resolve any conflicts of material fact in the event that the person wishes to appeal the cancellation.

Section 301.92–7—Assembly and Inspection of Regulated Articles

Section 301.92–7 provides that any person (other than a person authorized to issue certificates under § 301.92–5(b)) who desires a certificate to move regulated articles must request, at least 14 days before the desired interstate movement, that an inspector issue a certificate. The regulated articles must be assembled in a place and manner directed by the inspector. These provisions are necessary to ensure that persons desiring inspection services can obtain them before the intended movement date.

Section 301.92–8—Attachment and Disposition of Certificates

Section 301.92–8 requires the certificate issued for movement of the regulated article to be attached, during the interstate movement, to the regulated article, or to a container carrying the regulated article, or to the accompanying waybill. Further, the section requires that the carrier must furnish the certificate to the consignee listed on the certificate upon arrival at the location provided on the certificate. These provisions are necessary for enforcement purposes.

Section 301.92–9—Costs and Charges

Section 301.92–9 explains the APHIS policy that the services of an inspector that are needed to comply with the regulations are provided without cost between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays, to persons requiring those services, but that we will not be responsible for any other costs or charges (such as overtime costs for inspections conducted at times other than between 8 a.m. to 4:30 p.m., Monday through Friday, except holidays).

Section 301.92–10—Treatments

Section 301.92–10 lists treatments that qualify soil and certain regulated articles for interstate movement with a certificate, as provided in § 301.92–5(a)(1)(i).

Under paragraph (a), soil may be heat-treated to a temperature of at least 180 °F for 30 minutes in the presence of an inspector.[4]

Under paragraph (b), wreaths, garlands, and greenery of arrowwood (*Viburnum × bodnantense*), big leaf maple (*Acer macrophyllum*), black oak (*Quercus kelloggii*), California bay laurel (*Umbellularia californica*), California buckeye (*Aesculus californica*),

[2] Duff is decaying plant material including leaf litter, green waste, stem material, bark, and any other plant material that, upon visual inspection, does not appear to have completely decomposed into soil.

[3] Sections 414, 421, and 434 of the Plant Protection Act (7 U.S.C. 7714, 7731, and 7754) provide that the Secretary of Agriculture may, under certain conditions, hold, seize, quarantine, treat, apply other remedial measures to destroy or otherwise dispose of any plant, plant pest, plant product, article, or means of conveyance that is moving, or has moved into or through the United States or interstate if the Secretary has reason to believe the article is a plant pest or is infested with a plant pest at the time of movement.

[4] Soil may also be moved interstate without heat treatment if it meets the requirements in § 301.92–5(a)(1)(iii) or (iv).

California coffeeberry (*Rhamnus californica*), California honeysuckle (*Lonicera hispidula*), coast live oak (*Quercus agrifolia*), huckleberry (*Vaccinium ovatum*), madrone (*Arbutus menziesii*), manzanita (*Arctostaphylos* spp.), rhododendron (*Rhododendron* spp., including azalea), Shreve's oak (*Quercus parvula* var. *shrevei*), tanoak (*Lithocarpus densiflorus*), and Toyon (*Heteromeles arbutifolia*) may be dipped for 1 hour in water that is held at a temperature of at least 160 °F.

Section 301.92–11—Inspection and Sampling Protocol

Section 301.92–11 describes the inspection and sampling protocol that must be followed by nurseries moving regulated articles of nursery stock interstate from quarantined areas. Under the regulations, regulated articles of nursery stock will be subject to two kinds of inspections: (1) Annual inspection and sampling of regulated articles of nursery stock contained in a nursery, and

(2) inspection of individual interstate shipments of nursery stock and testing of symptomatic plants prior to interstate movement of the shipment from the quarantined area.

Annual Nursery Inspections

For an annual nursery inspection, an inspector must visually inspect regulated articles of nursery stock for symptoms of *P. ramorum*. If the nursery contains 100 or fewer regulated articles, an inspector will inspect each regulated article. If the nursery contains more than 100 regulated articles, an inspector will inspect 100 regulated articles and at least 2 percent of the number of regulated articles contained in the nursery that exceeds 100. The regulated articles to be inspected will be randomly selected from throughout the nursery.

If symptomatic plants are found upon inspection, the inspector will collect at least one sample per symptomatic plant. If fewer than 40 symptomatic plants are found in a nursery during an inspection, the inspector must collect samples from nonsymptomatic regulated articles of nursery stock so that the total number of sampled plants is at least 40. Samples must then be labeled and sent for testing to a laboratory approved by APHIS.

If any regulated articles within a nursery are found to be infected with *P. ramorum*, the nursery will be prohibited from moving regulated articles interstate until such time as an inspector can determine that the nursery is free of *P. ramorum*.

Inspections of Individual Interstate Shipments

For an inspection of a shipment of regulated articles of nursery stock, an inspector must visually inspect the nursery stock for symptoms of *P. ramorum*. If the shipment contains 100 or fewer regulated articles, an inspector will inspect each regulated article. If the shipment contains more than 100 regulated articles, an inspector will inspect 100 regulated articles and at least 2 percent of the number of regulated articles contained in the shipment that exceeds 100. The regulated articles to be inspected will be randomly selected.

If symptomatic plants are found upon inspection, the inspector must collect at least one sample per symptomatic plant, and one sample per regulated article of nursery stock that is in close proximity to, or that has had physical contact with a symptomatic plant. Samples must be labeled and sent for testing to a laboratory approved by APHIS, and must be found free of *P. ramorum* prior to the interstate movement of any regulated articles contained in the shipment.

If any plants intended for interstate movement are found to be infected with *P. ramorum*, the nursery from which they originate will be prohibited from moving regulated articles interstate until such as time as an inspector can determine that the nursery is free of *P. ramorum*.

Request for Information

As stated earlier in this document, there is much that is unknown about *P. ramorum*. In this rule, APHIS has endeavored to regulate the movement of articles that could cause *P. ramorum* to spread to unaffected areas based on the best scientific evidence available to us at this time. We invite the public to submit any information that supports or contradicts our regulatory strategy, including:

- Evidence demonstrating whether contaminated soil provides a viable or likely pathway for the spread of, or infection of natural hosts by, *P. ramorum*.
- Evidence demonstrating whether debarked wood provides a viable or likely pathway for the spread of, or infection of natural hosts by, *P. ramorum*.
- Evidence demonstrating whether acorns, seeds, or fruits of host plants are naturally infected by *P. ramorum* or carry *P. ramorum*, and whether acorns, seeds, or fruits of host plants provide viable or likely pathways for the spread of, or infection of natural hosts by, *P. ramorum*.
- Comments on the inspection and sampling requirements for nurseries, including comments providing a scientific basis for a longer or shorter inspection cycle, or an alternative sampling protocol.
- Data related to the accuracy, specificity, ease of use, and cost effectiveness of tests that can be used to detect *P. ramorum* on nursery stock of host plants.
- Evidence demonstrating whether certain treatments are effective in eliminating *P. ramorum* infection in regulated articles.

Emergency Action

This rulemaking is necessary on an emergency basis to prevent *P. ramorum* from spreading to noninfested areas of the United States. Under these circumstances, the Administrator has determined that prior notice and opportunity for public comment are contrary to the public interest and that there is good cause under 5 U.S.C. 553 for making this rule effective less than 30 days after publication in the **Federal Register**.

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

Executive Order 12866 and Regulatory Flexibility Act

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

In accordance with 5 U.S.C. 603, we have performed an initial regulatory flexibility analysis, which is set out below, regarding the economic effects of this interim rule on small entities. Based on the information we have, there is no basis to conclude that adoption of this interim rule would result in any significant economic effect on a substantial number of small entities. However, we do not currently have all of the data necessary for a comprehensive analysis of the effects of this interim rule on small entities. Therefore, we are inviting comments on potential effects. In particular, we are interested in determining the number and kind of small entities that may incur benefits or costs from the implementation of this interim rule.

The Plant Protection Act (7 U.S.C. 7701–7772) authorizes the Secretary of Agriculture to prohibit or restrict the interstate movement of any plant, plant product, article, or means of conveyance if the Secretary determines that the prohibition or restriction is necessary to prevent the dissemination of a plant pest within the United States.

As stated earlier in this document, *Phytophthora ramorum* is known to infect arrowwood (*Viburnum* × *bodnantense*), big leaf maple (*Acer macrophyllum*), black oak (*Quercus kelloggii*), California bay laurel (*Umbellularia californica*), California buckeye (*Aesculus califorica*), California coffeeberry (*Rhamnus californica*), California honeysuckle (*Lonicera hispidula*), coast live oak (*Quercus agrifolia*), huckleberry (*Vaccinium ovatum*), madrone (*Arbutus menziesii*), manzanita (*Arctostaphylos* spp.), rhododendron (*Rhododendron* spp., including *azalea*), Shreve's oak (*Quercus parvula* var. *shrevei*), tanoak (*Lithocarpus densiflorus*), and Toyon (*Heteromeles arbutifolia*). *P. ramorum* has been confirmed to exist in 10 counties along or near the northern California coastline: Alameda, Marin, Mendocino, Monterey, Napa, San Mateo, Santa Clara, Santa Cruz, Solano, and Sonoma. *P. ramorum* also has been found in a portion of Curry County, OR.

This interim rule is issued to quarantine portions of the States of California and Oregon where *P. ramorum* is confirmed to exist, and regulate the movement of certain host articles to prevent the risk of spread of *P. ramorum* to other noninfested areas in the United States. California is not attempting to eradicate *P. ramorum* from the 10 counties in the State where the disease is confirmed to exist. Oregon is attempting to eradicate the disease from an area in Curry County, the only county where *P. ramorum* is known to exist in the State. Both States have restricted the intrastate movement of certain articles from infested areas to prevent the spread of *P. ramorum* within California and Oregon. A Federal quarantine of the affected counties, comprising approximately 5 percent of the area of the State of California, and a portion of one county in Oregon is necessary to protect oak forests and urban tree resources across the United States.

P. ramorum is apparently capable of killing healthy, mature black oaks (*Quercus kelloggii*), coast live oak (*Quercus agrifolia*), and tanoaks (*Lithocarpus densiflorus*). *Quercus* spp. are considered the most important and widespread of the hardwood trees in the north temperate zone, consisting of about 300 species. The United States has about 58 oak species of tree size and 10 species that are classified as shrubs. If other *Quercus* or *Lithocarpus* spp. in the Eastern deciduous forests prove susceptible to the pathogen under natural environmental conditions, the economic impact could be significant. The commercial hardwood timber production in the United States alone is worth over $30 billion. Should the disease become widespread, some countries would likely place restrictions on U.S. exports of oak and other hardwood products which generated nearly $3 billion in revenue in 2000.

The pathogen has also been isolated from *Rhododendron* spp., arrowwood (*Viburnum* × *bodnantense*), and in huckleberry (*Vaccinium* spp.), the genus of which includes the commercially important blueberries and cranberries. *P. ramorum* causes leaf spotting and twig dieback on these species, and in severe cases in huckleberry, can kill the plant. Nursery stock is a probable route of long distance spread of the disease since spores that give rise to *P. ramorum* can be dispersed by soil, or infected shoots, and foliage. Federal restrictions on nursery stock is necessary as *Rhododendron* spp. and viburnum are important components of the ornamental nursery trade. Additionally, two of the host species of oak are sold as nursery stock and are used as ornamentals in landscaping. The importance of the Federal quarantine and restrictions is further underscored by the fact that there is currently no known treatment for infected plants that kills the fungus but allows plants to survive. Federal action is necessary to protect the U.S. nursery industry whose sales in 1997 was estimated at almost $11 billion.

Impact of the Interim Rule

Under the interim rule, nursery stock moving interstate from the quarantined area must be accompanied by a certificate stating that, among other things, the stock (1) originates from a nursery that has been inspected for *P. ramorum* on an annual basis and that has been found free, and (2) is part of shipment of nursery stock that has been inspected for *P. ramorum* prior to interstate movement and that has been found free. The impact of the restriction on interstate movement of nursery stock would depend on the amount of host products that are to be moved outside the quarantined area. The 1997 Census of Agriculture data show that in that year, there were some 1,214 nurseries in the 10 affected counties in California which accounted for 24 percent of the number of nurseries and 27 percent of the value of nursery sales in California, or 5.5 percent of total U.S. sales of nursery stock in 1997. There were 7 nurseries in Curry County, OR, which comprised less than 0.2 percent of the number of nurseries, and 0.15 percent of sales. Not all of the 1,214 nurseries in the 10 California counties, however, are expected to be affected by this rule. Some indication of the impact may be surmised from the preliminary results of a survey jointly conducted by the California Department of Food and Agriculture and USDA/APHIS, between January and March 2001. The respondents to the survey were 517 wholesale and retail establishments in 6 counties in California (no survey was available for Oregon). These businesses include facilities that sold lumber, firewood cutters and dealers, and nurseries involved in propagation and sale of oaks, rhododendrons, and other host products.

Approximately 234, or 45 percent, of the businesses surveyed had contact with host materials. The total sales value of these businesses amounted to some $7 million. A large amount of the aggregate receipts (nearly 85 percent) were derived from the sale of azaleas and rhododendron. The next largest category of sales is from oak firewood (12.7 percent), followed by oak nursery stock (2.5 percent), and mulch and chips from oak (0.17 percent).

This interim rule may impact some of the wholesale nurseries who move rhododendrons and oak nursery stock to nurseries outside the State. Nurseries that do not meet APHIS's requirements must divert their products to markets within the quarantined area, or if a market cannot be found, lose sales of that commodity. Although some information is available from the survey on the number of businesses who have contact with host materials (234 establishments), and the relatively large amount of receipts earned from sales of *Rhododendron* spp. (including azaleas) is also known, the amount of these hosts that are intended for interstate shipment is unknown. Thus, a conclusive statement cannot be made about the extent of the impact due to the movement restriction. APHIS invites comments from members of the public who may be impacted by the restriction on interstate movement of *Rhododendron* spp.

Besides rhododendrons and azaleas, wholesale nurseries within the affected area that sell oak seedlings and trees to nurseries outside the State would also be affected by the rule. The proportion of the 234 establishments that would be affected by the restrictions on movement of oak seedlings is unknown.

However, trade of seedlings is primarily on one type of host species, the coast live oak, which is not believed to be shipped interstate to a significant degree. We therefore expect that the restriction on the movement of oak nursery stock to be small.

Under this rule, producers in the quarantined counties who wish to sell wreaths, garlands, or greenery outside their counties are required to treat these products with hot water. The cost of hot water treatment is not known, and we invite public comments on treatment costs.

The economic effects that could result from the requirement that unprocessed wood or wood products (including firewood, logs, lumber, and other wood products) be debarked prior to interstate movement are unknown. We invite public comments on any costs to affected entities that may result from the debarking requirements of this rule.

The businesses surveyed that are involved in firewood distribution, from cutters to wholesalers to retailers, are generally small entities who sell primarily intrastate. The economic effects of the rule on entities involved in the firewood business is expected to be small as their sales are believed to be largely to markets within the quarantined area.

The effects of this rule on persons moving soil interstate from quarantined areas, and persons who wish to move forest stock (non-nursery grown trees, shrubs, etc.) interstate is also unknown at this time. We invite public comments on these potential effects.

In general, the economic effects of this rule could be small because many host products are sold primarily within the affected States, often within quarantined areas. Consequently, State regulations on intrastate movement would likely have a larger impact on business within the affected counties than APHIS's quarantine and regulations on interstate movement.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act requires that APHIS specifically consider the economic impact of the interim rule on small entities. The Small Business Administration (SBA) has established size criteria for determining which economic entities meet the definition of a small firm. The small entity size standard for nursery and tree production (NAICS 111421) is $750,000 or less in annual receipts; for forest nurseries and gathering of forest products (NAICS 113210) is $5,000,000 or less in annual receipts. The SBA classifies logging operations (NAICS 113310), as well as sawmills, and wood product manufacturers as small entities if fewer than 500 people are employed.

Based on the above criteria, the majority of nurseries in the affected counties of California and Oregon would likely be classified as small entities. The impact of the rule on businesses handling host materials, whether small or large, would depend on the amount of regulated articles moved in interstate commerce that would have to meet APHIS's requirements as a condition of movement. Some businesses may incur additional costs for hot water treatment or debarking.

Preliminary results from a survey of businesses in 6 of the 10 affected counties in California indicate that host materials worth over $7 million in annual sales may be potentially affected by the interim rule. The actual impact (that is, the number of affected establishments and the amount of additional costs or losses incurred) is not known. The negative impact of this interim rule could be small as a majority of host products is sold primarily within the regulated counties in the States. Consequently, State regulations on intrastate movement would likely have a larger impact on businesses within the affected counties than APHIS's regulations on interstate movement. The public is invited to submit information regarding the percentage of sales of regulated articles that moves intra-county, inter-county, and interstate.

The economic effects of this rule are expected to be offset by large benefits to the public in terms of preventing disease spread and harm to forest and urban resources in unaffected regions across the country.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

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

Paperwork Reduction Act

In accordance with section 3507(j) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection and recordkeeping requirements included in this interim rule have been submitted for emergency approval to the Office of Management and Budget (OMB). OMB has assigned control number 0579–0191 to the information collection and recordkeeping requirements.

We plan to request continuation of that approval for 3 years. Please send written comments on the 3-year approval request to the following addresses: (1) Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503; and (2) Docket No. 01–054–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comments refer to Docket No. 01–054–1 and send your comments within 60 days of publication of this rule.

This interim rule quarantines portions of the States of California and Oregon because of the presence of *P. ramorum* and restricts the interstate movement of regulated articles from quarantined areas. Its implementation will require us to engage in certain information collection activities, in that regulated articles may not be moved interstate from quarantined areas unless they are accompanied by a certificate. A certificate may be issued by an inspector (i.e., an APHIS employee or other person authorized by the APHIS Administrator to enforce the regulations) or by a person who has entered into a written compliance agreement with APHIS. We are soliciting comments from the public concerning our information collection and recordkeeping requirements. These comments will help us:

(1) Evaluate whether the information collection is necessary for the proper performance of our agency's functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the information collection, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the information collection on those who are to respond (such as through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; *e.g.,* permitting electronic submission of responses).

Estimate of burden: Public reporting burden for this collection of information

is estimated to average 0.07372 hours per response.

Respondents: Persons engaged in growing, processing, handling, or moving regulated articles.

Estimated annual number of respondents: 387.

Estimated annual number of responses per respondent: 43.002.

Estimated annual number of responses: 16,642.

Estimated total annual burden on respondents: 1,227 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

Copies of this information collection can be obtained from Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

List of Subjects in 7 CFR Part 301

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

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

PART 301—DOMESTIC QUARANTINE NOTICES

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

Authority: 7 U.S.C. 166, 7711, 7712, 7714, 7731, 7735, 7751, 7752, 7753, and 7754; 7 CFR 2.22, 2.80, and 371.3.

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

2. Part 301 is amended by adding a new ''Subpart—Phytophthora Ramorum,'' §§ 301.92 through 301.92–10, to read as follows:

Subpart—Phytophthora Ramorum

Sec.

301.92 Restrictions on the interstate movement of regulated and restricted articles.
301.92–1 Definitions.
301.92–2 Regulated and restricted articles.
301.92–3 Quarantined areas.
301.92–4 Conditions governing the interstate movement of regulated and restricted articles from quarantined areas.
301.92–5 Issuance and cancellation of certificates.
301.92–6 Compliance agreements and cancellation.
301.92–7 Assembly and inspection of regulated articles.
301.92–8 Attachment and disposition of certificates.
301.92–9 Costs and charges.
301.92–10 Treatments.
301.92–11 Inspection and sampling protocol.

Subpart—Phytophthora Ramorum

§ 301.92 Restrictions on the interstate movement of regulated and restricted articles.

No person may move interstate from any quarantined area any regulated or restricted article except in accordance with this subpart.[1]

§ 301.92–1 Definitions.

Administrator. The Administrator, Animal and Plant Health Inspection Service, or any person authorized to act for the Administrator.

Animal and Plant Health Inspection Service. The Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture.

Bark chips. Bark fragments broken or shredded from a log or tree.

Certificate. A document in which an inspector or person operating under a compliance agreement affirms that a specified regulated article meets the requirements of § 301.92–5(a) of this subject and may be moved interstate to any destination.

Compliance agreement. A written agreement between APHIS and a person engaged in growing, processing, handling, or moving regulated articles, wherein the person agrees to comply with this subpart.

Departmental permit. A document issued by the Administrator in which he or she affirms that interstate movement of the regulated article identified on the document is for scientific or experimental purposes and that the regulated article is eligible for interstate movement in accordance with § 301.92–4(a)(2) of this subpart.

Duff. Decaying plant matter that includes leaf litter, green waste, stem material, bark, and any other plant material that, upon visual inspection, does not appear to have completely decomposed into soil.

Firewood. Wood that has been cut, sawn, or chopped into a shape and size commonly used for fuel.

Forest stock. All flowers, trees, shrubs, vines, scions, buds, fruit pits, or other seeds of fruit and ornamental trees or shrubs that are wild-grown, backyard-grown, or naturally occurring and do not meet the definition of nursery stock, and that are not located on a nursery premises.

Inspector. Any employee of APHIS, the U.S. Department of Agriculture, or other person authorized by the Administrator to perform the duties required under this subpart.

Interstate. From any State into or through any other State.

Log. The bole of a tree; trimmed timber that has not been sawn further than to form cants.

Lumber. Logs that have been sawn into boards, planks, or structural members such as beams.

Moved (move, movement). Shipped, offered for shipment, received for transportation, transported, carried, or allowed to be moved, shipped, transported, or carried.

Mulch. Bark chips, wood chips, wood shavings, or sawdust, or a mixture thereof, that could be used as a protective or decorative ground cover.

Nursery stock. All greenhouse or field-grown florist's stock, trees, shrubs, vines, cuttings, grafts, scions, buds, fruit pits, and other seeds of fruit and ornamental trees or shrubs, and other plants and plant products for propagation, except field, vegetable, and flower seeds, bedding plants, and other herbaceous plants, bulbs, and roots.

Person. Any association, company, corporation, firm, individual, joint stock company, partnership, society, or other entity.

Plant Protection and Quarantine. Plant Protection and Quarantine, Animal and Plant Health Inspection Service, United States Department of Agriculture.

Quarantined area. Any State, or any portion of a State, listed in § 301.92–3(c) of this subpart or otherwise designated as a quarantined area in accordance with § 301.92–3(b) of this subpart.

Regulated article. Any article listed in § 301.92–2(a) of this subpart.

Restricted article. Any article listed in § 301.92–2(b) of this subpart.

Soil. Any non-liquid combination of organic and/or inorganic material in which plants can grow.

State. The District of Columbia, Puerto Rico, the Northern Mariana Islands, or any State, territory, or possession of the United States.

§ 301.92–2 Regulated and restricted articles.

(a) The following are regulated articles, and may be moved interstate from a quarantined area only if accompanied by a certificate issued in accordance with the regulations in this subpart:

(1) Nursery stock (except acorns and seeds), unprocessed wood and wood products, and plant products, including firewood, logs, lumber, wreaths,

[1] Any properly identified inspector is authorized to stop and inspect persons and means of conveyance and to seize, quarantine, treat, apply other remedial measures to, destroy, or otherwise dispose of regulated or restricted articles as provided in sections 414, 421, and 434 of the Plant Protection Act (7 U.S.C. 7714, 7731, and 7754).

garlands, and greenery of arrowwood (*Viburnum* x *bodnantense*), big leaf maple (*Acer macrophyllum*), black oak (*Quercus kelloggii*), California bay laurel (*Umbellularia californica*), California buckeye (*Aesculus californica*), California coffeeberry (*Rhamnus californica*), California honeysuckle (*Lonicera hispidula*), coast live oak (*Quercus agrifolia*), huckleberry (*Vaccinium ovatum*) (except fruit), madrone (*Arbutus menziesii*), manzanita (*Arctostaphylos* spp.), rhododendron (*Rhododendron* spp., including azalea), Shreve's oak (*Quercus parvula* var. *shrevei*), tanoak (*Lithocarpus densiflorus*), and Toyon (*Heteromeles arbutifolia*).

(2) Soil.

(3) Any other product or article that an inspector determines to present a risk of spreading *Phytophthora ramorum,* if an inspector notifies the person in possession of the product or article that it is subject to the restrictions in the regulations.

(b) The following are restricted articles, and may only be moved interstate from a quarantined area by the U.S. Department of Agriculture for experimental or scientific purposes, and only in accordance with the regulations in § 301.92–4(a)(2) of this subpart:

(1) Bark chips, forest stock, or mulch of arrowwood (*Viburnum* × *bodnantense*), big leaf maple (*Acer macrophyllum*), black oak (*Quercus kelloggii*), California bay laurel (*Umbellularia californica*), California buckeye (*Aesculus californica*), California coffeeberry (*Rhamnus californica*), California honeysuckle (*Lonicera hispidula*), coast live oak (*Quercus agrifolia*), huckleberry (*Vaccinium ovatum*), madrone (*Arbutus menziesii*), manzanita (*Arctostaphylos* spp.), rhododendron (*Rhododendron* spp., including azalea), Shreve's oak (*Quercus parvula* var. *shrevei*), tanoak (*Lithocarpus densiflorus*), and Toyon (*Heteromeles arbutifolia*).

(2) Any other product or article that an inspector determines to present a risk of spreading *Phytophthora ramorum,* if an inspector notifies the person in possession of the product or article that it is a restricted article.

§ 301.92–3 Quarantined areas.

(a) Except as otherwise provided in paragraph (b) of this section, the Administrator will list as a quarantined area in paragraph (c) of this section each State, or each portion of a State, in which *Phytophthora ramorum* has been found by an inspector, in which the Administrator has reason to believe that *Phytophthora ramorum* is present, or that the Administrator considers necessary to quarantine because of its inseparability for quarantine enforcement purposes from localities in which *Phytophthora ramorum* has been found. Less than an entire State will be designated as a quarantined area only if the Administrator determines that:

(1) The State has adopted and is enforcing restrictions on the intrastate movement of the regulated articles that are substantially the same as those imposed by this subpart on the interstate movement of regulated articles; and

(2) The designation of less than the entire State as a quarantined area will prevent the interstate spread of *Phytophthora ramorum.*

(b) The Administrator or an inspector may temporarily designate any nonquarantined area in a State as a quarantined area in accordance with paragraph (a) of this section. The Administrator will give a copy of this regulation along with a written notice for the temporary designation to the owner or person in possession of the nonquarantined area. Thereafter, the interstate movement of any regulated article from an area temporarily designated as a quarantined area will be subject to this subpart. As soon as practicable, this area will be added to the list in paragraph (c) of this section or the designation will be terminated by the Administrator or an inspector. The owner or person in possession of an area for which designation is terminated will be given notice of the termination as soon as practicable.

(c) The following areas are designated as quarantined areas:

California

Alameda County. The entire county.
Marin County. The entire county.
Mendocino County. The entire county.
Monterey County. The entire county.
Napa County. The entire county.
San Mateo County. The entire county.
Santa Clara County. The entire county.
Santa Cruz County. The entire county.
Solano County. The entire county.
Sonoma County. The entire county.

Oregon

Curry County. That portion of the county bounded by a line drawn as follows: Beginning in the northwest corner of sec. 17, T. 40 S., R. 13 W., then east along sec. 17 and 16, T. 40 S., R. 13 W., to sec. 16, T. 40 S., R. 13 W., then south along sec. 16, 21, 28, and 33, T. 40 S., R. 13 W., to sec. 33, T. 40 S., R. 13 W., then west along sec. 33 and 32, T. 40 S., R. 13 W., to sec. 32, T. 40 S., R. 13 W., then north along sec. 32 and 29, T. 40 S., R. 13 W., to the midway point of the western boundary of sec. 29, T. 40 S., R. 13 W., then west to the center of sec. 30, T. 40 S., R. 13 W., then north through sec. 30 and 19, T. 40 S., R. 13 W., to the center of sec. 19, T. 40 S., R. 13 W., then east to the western boundary of sec. 20, T. 40 S., R. 13 W., then north along sec. 20 and 17, T. 40 S., R. 13 W., to the point of beginning.

§ 301.92–4 Conditions governing the interstate movement of regulated and restricted articles from quarantined areas.

Regulated articles and restricted articles may be moved interstate from a quarantined area [2] only if moved in accordance with this section.

(a) *With a certificate or departmental permit.*

(1) Any regulated articles may be moved interstate from a quarantined area if accompanied by a certificate issued and attached in accordance with §§ 301.92–5 and 301.92–8 of this subpart, and provided that the regulated article is moved through the quarantined area without stopping except for refueling, rest stops, emergency repairs, and for traffic conditions, such as traffic lights or stop signs.

(2) Any restricted article may be moved interstate from a quarantined area only if the article is moved:

(i) By the United States Department of Agriculture for experimental or scientific purposes;

(ii) Pursuant to a departmental permit issued by the Administrator for the article;

(iii) Under conditions specified on the departmental permit and found by the Administrator to be adequate to prevent the spread of *Phytophthora ramorum;* and

(iv) With a tag or label bearing the number of the departmental permit issued for the article attached to the outside of the container holding the article, or attached to the article itself if not in a container.

(b) *Without a certificate or departmental permit.*

(1) The regulated or restricted article originated outside the quarantined area and the point of origin of the article is indicated on the waybill of the vehicle transporting the article; and

(2) The regulated or restricted article is moved from outside the quarantined area through the quarantined area without stopping except for refueling or for traffic conditions, such as traffic lights or stop signs, and the article is not unpacked or unloaded in the quarantined area. (Approved by the Office of Management and Budget under control number 0579–0191)

[2] Requirements under all other applicable Federal domestic plant quarantines and regulations must also be met.

§ 301.92–5 Issuance and cancellation of certificates.

(a) An inspector[3] may issue a certificate for the interstate movement of regulated articles if an inspector determines that:

(1)(i) The regulated articles have been treated under the direction of an inspector in accordance with § 301.92–10 of this subpart; or

(ii) The regulated articles are wood products such as firewood, logs, or lumber that are free of bark; or

(iii) The regulated article is soil that has not been in direct physical contact with any article infected with *P. ramorum,* and from which all duff has been removed.

(iv) The regulated articles are articles of nursery stock that:

(A) Are shipped from a nursery or premises in a quarantined area that is inspected annually in accordance with the inspection and sampling protocol described in § 301.92–11(a) of this subpart, and that has been found free of *Phytophthora ramorum;* and

(B) Are part of a shipment of nursery stock that has been inspected prior to interstate movement in accordance with § 301.92–11(b) of this subpart, and that has been found free of *Phytophthora ramorum;* and

(C) Have been kept separate from regulated articles not inspected between the time of the inspection and the time of interstate movement; and

(D) Have not been grown in, or moved from, other areas within a quarantined area except nurseries or premises that are annually inspected for *Phytophthora ramorum* in accordance with this section, and that have been found free of *Phytophthora ramorum.*

(2) The regulated article is to be moved in compliance with any additional emergency conditions the Administrator may impose under section 414 of the Plant Protection Act (7 U.S.C. 7714)[4] to prevent the spread of *Phytophthora ramorum;* and

(3) The regulated article is eligible for unrestricted movement under all other Federal domestic plant quarantines and regulations applicable to the regulated article.

(b) Certificates may be issued by any person engaged in the business of growing, processing, handling, or moving regulated articles provided such person has entered into and is operating under a compliance agreement. Any such person may execute and issue a certificate for the interstate movement of regulated articles if an inspector has previously made the determination that the article is eligible for a certificate in accordance with § 301.92–5(a) of this subpart.

(c) Any certificate that has been issued may be withdrawn, either orally or in writing, by an inspector if he or she determines that the holder of the certificate has not complied with all conditions in this subpart for the use of the certificate. If the withdrawal is oral, the withdrawal and the reasons for the withdrawal will be confirmed in writing as promptly as circumstances allow. Any person whose certificate has been withdrawn may appeal the decision in writing to the Administrator within 10 days after receiving the written notification of the withdrawal. The appeal must state all of the facts and reasons upon which the person relies to show that the certificate was wrongfully withdrawn. As promptly as circumstances allow, the Administrator will grant or deny the appeal, in writing, stating the reasons for the decision. A hearing will be held to resolve any conflict as to any material fact. Rules of practice concerning a hearing will be adopted by the Administrator.

(Approved by the Office of Management and Budget under control number 0579–0191)

§ 301.92–6 Compliance agreements and cancellation.

(a) Any person engaged in growing, processing, handling, or moving regulated articles other than nursery stock may enter into a compliance agreement when an inspector determines that the person understands this subpart, agrees to comply with its provisions, and agrees to comply with all the provisions contained in the compliance agreement.[5]

(b) Any compliance agreement may be canceled, either orally or in writing, by an inspector whenever the inspector finds that the person who has entered into the compliance agreement has failed to comply with this subpart. If the cancellation is oral, the cancellation and the reasons for the cancellation will be confirmed in writing as promptly as circumstances allow. Any person whose compliance agreement has been canceled may appeal the decision, in writing, within 10 days after receiving written notification of the cancellation. The appeal must state all of the facts and reasons upon which the person relies to show that the compliance agreement was wrongfully canceled. As promptly as circumstances allow, the Administrator will grant or deny the appeal, in writing, stating the reasons for the decision. A hearing will be held to resolve any conflict as to any material fact. Rules of practice concerning a hearing will be adopted by the Administrator.

§ 301.92–7 Assembly and inspection of regulated articles.

(a) Any person (other than a person authorized to issue certificates under § 301.92–5(b) of this subpart) who desires to move a regulated article interstate accompanied by a certificate must notify an inspector[6] as far in advance of the desired interstate movement as possible, but no less than 14 days before the desired interstate movement.

(b) The regulated article must be assembled at the place and in the manner the inspector designates as necessary to comply with this subpart.

§ 301.92–8 Attachment and disposition of certificates.

(a) A certificate required for the interstate movement of a regulated article must, at all times during the interstate movement, be:

(1) Attached to the outside of the container containing the regulated article; or

(2) Attached to the regulated article itself if not in a container; or

(3) Attached to the consignee's copy of the accompanying waybill. If the certificate is attached to the consignee's copy of the waybill, the regulated article must be sufficiently described on the certificate and on the waybill to identify the regulated article.

(b) The certificate for the interstate movement of a regulated article must be furnished by the carrier to the consignee listed on the certificate upon arrival at the location provided on the certificate.

(Approved by the Office of Management and Budget under control number 0579–0191)

[3] Services of an inspector may be requested by contacting local offices of Plant Protection and Quarantine, which are listed in telephone directories. The addresses and telephone numbers of local offices may also be obtained from the Animal and Plant Health Inspection Service, Plant Protection and Quarantine, Invasive Species and Pest Management, 4700 River Road Unit 134, Riverdale MD 20737–1236, or the APHIS web site at http://www.aphis.usda.gov/travel/aqi.html.

[4] Sections 414, 421, and 434 of the Plant Protection Act (7 U.S.C. 7714, 7731, and 7754) provide that the Secretary of Agriculture may, under certain conditions, hold, seize, quarantine, treat, apply other remedial measures to destroy or otherwise dispose of any plant, plant pest, plant product, article, or means of conveyance that is moving, or has moved into or through the United States or interstate if the Secretary has reason to believe the article is a plant pest or is infested with a plant pest at the time of movement.

[5] Compliance agreement forms are available without charge from the Animal and Plant Health Inspection Service, Plant Protection and Quarantine, Invasive Species and Pest Management, 4700 River Road Unit 134, Riverdale, MD 20737–1236, and from local offices of the Plant Protection and Quarantine, which are listed in telephone directories.

[6] See footnote 3 of this subpart.

§ 301.92–9 Costs and charges.

The services of the inspector during normal business hours (8 a.m. to 4:30 p.m., Monday through Friday, except holidays) will be furnished without cost. The user will be responsible for all costs and charges arising from inspection and other services provided outside normal business hours.

§ 301.92–10 Treatments.

The following methods may be used to treat the regulated articles listed for *Phytophthora ramorum:*

(a) Soil must be heated to a temperature of at least 180 °F for 30 minutes in the presence of an inspector.

(b) Wreaths, garlands, and greenery of arrowwood (*Viburnum* × *bodnantense*), big leaf maple (*Acer macrophyllum*), black oak (*Quercus kelloggii*), California bay laurel (*Umbellularia californica*), California buckeye (*Aesculus californica*), California coffeeberry (*Rhamnus californica*), California honeysuckle (*Lonicera hispidula*), coast live oak (*Quercus agrifolia*), huckleberry (*Vaccinium ovatum*), madrone (*Arbutus menziesii*), manzanita (*Arctostaphylos* spp.), rhododendron (*Rhododendron* species, including azalea), Shreve's oak (*Quercus parvula* var. *shrevei*), tanoak (*Lithocarpus densiflorus*), and Toyon (*Heteromeles arbutifolia*) must be dipped for 1 hour in water that is held at a temperature of at least 160 °F.

§ 301.92–11 Inspection and sampling protocol.

(a) *Annual nursery inspection and sampling.* To meet the requirements of § 301.92–5(a)(1)(iv) of this subpart, nurseries that ship regulated articles of nursery stock interstate must be inspected for symptoms of *Phytophthora ramorum* annually in accordance with this section.

(1) If the nursery contains 100 or fewer regulated articles, an inspector will inspect each regulated article. If the nursery contains more than 100 regulated articles, an inspector will inspect 100 regulated articles and at least 2 percent of the number of regulated articles contained in the nursery that exceeds 100. The regulated articles to inspected will be randomly selected from throughout the nursery.

(2) If symptomatic plants are found upon inspection, the inspector must collect at least one sample per symptomatic plant.

(3) If fewer than 40 symptomatic plants are found in a nursery during an annual inspection, the inspector must collect samples from nonsymptomatic regulated articles of nursery stock so that the total number of sampled plants is at least 40.

(4) Samples must be labeled and sent for testing to a laboratory approved by APHIS.

(5) If any regulated articles within a nursery are found to be infected with *Phytophthora ramorum,* the nursery will be prohibited from moving regulated articles interstate until such time as an inspector can determine that the nursery is free of *Phytophthora ramorum.*

(b) *Inspection and sampling of individual shipments.* To meet the requirements of § 301.92–5(a)(1)(iv) of this subpart, each shipment of regulated articles of nursery stock intended for interstate movement must be inspected for symptoms of *Phytophthora ramorum* in accordance with this section.

(1) If a shipment contains 100 or fewer regulated articles, an inspector will inspect each regulated article. If a shipment contains more than 100 regulated articles, an inspector will inspect 100 regulated articles and at least 2 percent of the number of regulated articles contained in the shipment that exceeds 100. The regulated articles to be inspected will be randomly selected.

(2) If symptomatic plants are found upon inspection, the inspector will collect at least one sample per symptomatic plant, and one sample per regulated article of nursery stock that is in close proximity to, or that has had physical contact with a symptomatic plant.

(3) Samples will be labeled and sent for testing to a laboratory approved by APHIS, and must be found free of *Phytophthora ramorum* prior to the interstate movement of any regulated articles contained in the shipment.

(4) If any plants intended for interstate movement are found to be infected with *Phytophthora ramorum,* the nursery from which they originate will be prohibited from moving regulated articles interstate until such as time as an inspector can determine that the nursery is free of *Phytophthora ramorum.*

Done in Washington, DC, this 12th day of February 2002.

W. Ron DeHaven,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 02–3721 Filed 2–13–02; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 911 and 944

[Docket No. FV01–911–2 FR]

Limes Grown in Florida and Imported Limes; Suspension of Regulations

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule suspends regulations for one year for limes grown in Florida and for limes imported into the United States that are shipped to the fresh market. This rule suspends grade, size, quality, maturity, pack, inspection, assessment collection, reporting, and other requirements currently prescribed under the Florida lime marketing order (order). The order is administered locally by the Florida Lime Administrative Committee (Committee). This suspension gives the industry time to evaluate citrus canker eradication efforts and the market effects of suspending regulations for one year. This change reduces costs and will help the industry recover from the effects of citrus canker. The suspension of the grade, size, quality, maturity, and inspection requirements specified in the import regulation is required under section 8e of the Agricultural Marketing Agreement Act of 1937.

EFFECTIVE DATE: This final rule becomes effective February 19, 2002 through February 24, 2003.

FOR FURTHER INFORMATION CONTACT: Doris Jamieson, Marketing Specialist, Southeast Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 799 Overlook Drive, Suite A, Winter Haven, Florida 33884; telephone: (863) 324–3375, Fax: (863) 325–8793; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938, or E-mail: *Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing

Agreement No. 126 and Order No. 911, both as amended (7 CFR part 911), regulating the handling of limes grown in Florida, hereinafter referred to as the ''order.'' The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

This final rule is also issued under section 8e of the Act, which provides that whenever certain specified commodities, including limes, are regulated under a Federal marketing order, imports of these commodities into the United States are prohibited unless they meet the same or comparable grade, size, quality, or maturity requirements as those in effect for the domestically produced commodities.

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

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule 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 USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of import regulations issued under section 8e of the Act.

This final rule suspends regulations currently prescribed under the Florida lime marketing order. This rule suspends grade, size, quality, pack, inspection, assessment collection, and other requirements for one year. This suspension provides the industry time to evaluate citrus canker eradication efforts and assess the market effects of no regulation on the industry after the one-year suspension. This change also reduces costs and will help the industry recover from the effects of citrus canker.

Section 911.48 of the order authorizes the issuance of regulations for grade, size, quality, and pack for limes grown in the production area. Section 911.49 authorizes the modification, suspension, or termination of regulations issued under § 911.48. Section 911.51 provides that whenever limes are regulated pursuant to § 911.48, such limes must be inspected by the Federal-State Inspection Service, and certified as meeting the applicable requirements of such regulations. The cost of inspection and certification is borne by handlers.

Under the order, fresh market shipments of Florida limes are required to be inspected and are subject to grade, size, quality, pack, and container requirements. Section 911.344 *Grade and Size Requirements* (7 CFR 911.344) states that no handler shall handle any variety of limes grown in the production area unless such limes of the group known as seeded or true limes meet the requirements specified for U.S. No. 2 grade, except as to color. Further, if such limes do not meet these requirements, they may be handled within the production area if they meet the minimum juice content requirement of at least 42 percent by volume and if handled in containers other than those specified in § 911.329. Such limes of the group known as seedless, large-fruited, or Persian limes must meet the requirements in §§ 911.311 and 911.329 and grade at least a U.S. Combination, Mix Color. They also must be at least two inches in diameter from January 1 through May 31, and at least 1⅞ inches in diameter from June 1 through December 31. Further, they must contain not less than 42 percent juice content by volume. Section 911.344 also includes some container specifications and inspection requirements.

The order's pack and container requirements are specified in §§ 911.311 and 911.329. These sections state, in part, that limes must be packed in containers of 5.5, 8, 10, 20, and 38 pounds designated net weight. Each container of limes in each lot must be marked or stamped on the outside end in letters at least ¼ inch in height to show the United States grade and either the average juice content of the limes or the phrase ''average juice content forty-two percent (42%) or more.'' The containers must also be marked with a Federal-State Inspection Service lot stamp number showing that the limes have been inspected and with a stamp indicating size. Related provisions appear in the regulations at § 911.110 *Exemption certificates;* § 911.120 *Handler registration;* § 911.130 *Limes not subject to regulation;* and § 911.131 *Limes for processing.*

At its April 18, 2001, meeting, in a vote of six in favor and one opposed, the Committee recommended suspending the grade, size, quality, pack, inspection, assessment collection, and other requirements for one year. The Committee met again on May 16, 2001, to review the recommendation made at the earlier meeting and to clarify its original motion. The Committee requested that this rule be in place for one year beginning with the effective date of this rule.

Because limes are marketed all year, the Committee was not concerned about recommending a specific effective date for the suspension. The fiscal year covers the 12-month period beginning April 1 and ending March 31. Since the suspension only applies for the 12 months following the effective date of this final rule, the suspension of the handling, inspection, assessment, and other requirements will start during the 2001/2002 fiscal period and end during the 2002/2003 fiscal period. This is not expected to cause any problems for handlers.

The objective of the handling and inspection requirements is to ensure that only limes of acceptable quality enter fresh market channels, thereby ensuring consumer satisfaction, increasing sales, and improving returns to producers. While the industry continues to believe that quality is an important factor in maintaining sales, the Committee believes the costs associated with the order may exceed the benefits derived at this time, especially in view of the reduction in production due to citrus canker.

The Committee is concerned, however, that the elimination of current requirements could possibly result in lower quality limes being shipped to fresh markets and that markets will be hurt by poor quality. For this reason, the Committee recommended that the suspension of requirements be effective for one-year only. This will enable the Committee to study the impacts of canker and the suspension and consider appropriate actions for ensuing seasons.

This rule allows handlers to ship limes without regard to the minimum grade, size, quality, pack, and inspection requirements for one year. This allows handlers to decrease costs by eliminating the costs associated with inspection and assessments. This rule does not restrict handlers from seeking inspection on a voluntary basis.

The purpose of this rule is to reduce the burden on the industry. If at any

time during the suspension the Committee determines this action is having an unfavorable impact on the industry, the Committee could meet and rescind the suspension.

This rule suspends §§ 911.110, 911.120, 911.130, 911.131, 911.311, 911.329, and 911.344 of the rules and regulations in effect under the order. Section 911.110 provides for hardship exemptions from inspection. Section 911.120 provides for the registration of handlers. Section 911.130 specifies minimum quantity and gift exemptions, and defines commercial processing. Section 911.131 provides requirements for limes for processing.

This rule also suspends § 911.234 requiring that an assessment rate of $0.16 per 55-pound bushel equivalent of limes be collected from Florida lime handlers. Authorization to assess lime handlers enables the Committee to incur expenses that are necessary to administer the marketing order. With the suspension of handling, inspection, and assessment requirements, a limited Committee budget is needed for program administration. For the period of suspension, the Committee will meet and recommend a reduced budget. The Committee has about $26,000 in operating reserves to cover approved Committee expenses.

In 1995, citrus canker was detected near the Miami International Airport. Citrus canker spread throughout South Florida and by March 2000, almost 1,500 acres of lime groves had tested positive for citrus canker. Prior to the outbreak of citrus canker, there were approximately 3,200 acres of commercial lime groves in Dade County. Estimates now place the Florida lime industry at somewhere between 600 and 1,000 acres of production. During the 1999–2000 season, fresh lime production was 774,111 bushels. This past season, production fell to 344,032 bushels. Production in 2001–02 is estimated to be 300,000 bushels.

Citrus canker is a highly infectious disease that attacks citrus trees. Canker attacks the tree and the fruit and may produce a variety of effects, including defoliation, severely blemished fruit, reduced fruit quality, and premature fruit drop. The only known method of eradicating citrus canker is to bulldoze and burn infected and exposed trees. Trees surrounding infected trees must also be bulldozed and burned. At the beginning of the eradication program, trees within a 125 feet radius of an infected tree were destroyed. However, after research was conducted, it was determined that all trees within a 1,900 feet radius had to be destroyed. The removal of these additional trees has quickened the reduction of lime acreage in South Florida.

Many lime growers have lost all of their production to canker. By regulation, until citrus canker is eradicated, lime growers are not permitted to replant. The production area is also under a quarantine that makes it difficult to sell harvested fruit. Lost income from reduced volume and the cost of maintaining groves with reduced monetary returns have hurt the industry. Because of this and the substantially reduced crop, the Committee believes that regulation should be suspended.

By suspending regulation, the industry has an opportunity to evaluate how the citrus canker eradication efforts are progressing. The industry also has an opportunity to assess the market impact of having no regulation. Also, under a suspension, inspection fees and program assessment costs are eliminated. This is a savings for both growers and handlers. The savings will help offset some of the effects of citrus canker.

The Committee member who opposed the recommendation believes that there is enough limes remaining to warrant regulation. Without regulation, the member believes that poor quality lime shipments will negatively impact better quality shipments. He also stated that he believes imported limes will flood the market and destroy the market for domestically produced limes. USDA received several letters emphasizing these points. They were considered prior to the issuance of the proposed rule. As mentioned earlier, the Committee has similar concerns, but believes that a one-year suspension of regulations is necessary to help reduce costs for those producers and packers who still have limes to market. The suspension provides time to assess canker eradication efforts, evaluate the effects on the market of having no regulations for one year, and offers the industry some needed cost relief from assessments and inspection fees. For these reasons, the Committee voted to recommend that grade, size, quality, maturity, pack, inspection, assessment collection, and other requirements be suspended for one year.

Suspension of all of the specified requirements is expected to reduce the reporting burden on small or large Florida lime handlers by about 22 hours, and should further reduce industry expenses. During the suspension period, handlers will not have to file the following forms with the Committee: Application for Registered Handler (16.5 burden hours); Application for Registered Processor (10 minutes); Application for Lime Grade Label (5.5 burden hours).

Section 8e of the Act provides that when certain domestically produced commodities, including limes, are regulated under a Federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, and maturity requirements. Since this rule suspends regulations for domestically produced limes, a corresponding change to the import regulations must also be made.

Minimum grade, size, maturity, and quality requirements for limes imported into the United States are effective under § 944.209 (7 CFR 944.209). This rule suspends § 944.209 requiring that limes imported into the United States be inspected for grade, size, maturity, and quality. Because this rule suspends import requirements for one year, it could also result in reduced costs for importers.

Mexico is the largest exporter of limes to the United States. In calendar year 2000, Mexico exported approximately 9,630,909 bushels of limes to the United States, while all other import sources shipped a combined total of approximately 98,182 bushels during the same time period. Other sources of lime imports to the United States include Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, and Venezuela. Mexico's highest volume occurs in the months of June through September.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and 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 52 producers of limes in the production area and approximately 10 handlers subject to regulation under the marketing order. In addition, approximately 240 importers of limes are subject to import regulations and will be impacted by this suspension. Small agricultural producers are defined as those having annual receipts of less than $750,000,

and small agricultural service firms, which include handlers and importers, are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than $5,000,000.

The average f.o.b. price for fresh limes during the 2000–01 season was around $14.75 per bushel and total shipments were 344,032 bushels for the season. Using this price and total volume for the season, all lime handlers could be considered small businesses under the SBA definition, excluding receipts from other sources. The majority of Florida lime producers and handlers may be classified as small entities.

In calendar year 2000, imports of limes totaled about 9.7 million bushels. Assuming the same average f.o.b. price as for Florida limes, the average importer receives gross receipts of about $600,000. Thus, the majority of lime importers can be classified as small entities.

This final rule suspends grade, size, quality, pack, inspection, assessment collection, and other requirements as specified in §§ 911.110, 911.120, 911.130, 911.131, 911.234, 911.311, 911.329, and 911.344. Section 944.209 of the import regulations, specifying the requirements for limes imported into the United States, is also suspended in its entirety. The suspensions are in effect for one year.

Citrus canker has reduced Florida lime production from 3,200 acres to between 600 and 1,000 acres. The only known method for eradicating citrus canker is to bulldoze and burn infected trees and exposed trees. This suspension gives the industry time to evaluate citrus canker eradication efforts and to assess the effects on the market of having no regulations for one year. This change also reduces costs and will help the industry recover from the effects of citrus canker.

At the April and May meetings, the Committee discussed the impact of this change on handlers and producers in terms of cost. This rule allows handlers to ship limes without regard to the minimum grade, size, quality, maturity, pack, and inspection requirements. It will decrease handler costs associated with inspection. This action also will eliminate the cost of assessments. Currently, handlers are required to pay an inspection fee of $0.14 per bushel and an assessment rate of $0.16 per bushel handled. Eliminating these costs will result in a savings for growers and handlers. Importers also will benefit from the reduction in inspection costs. These savings will help offset the loss of income from canker, as well as assist in the costs of replanting, when replanting is again authorized. The purpose of this rule is to reduce the burden on the industry. If at any time during the suspension the Committee determines this action is having an unfavorable impact on the industry, the Committee could meet and rescind the suspension. The benefits of this rule are expected to be available to lime handlers, growers, and importers, regardless of their size of operation.

The Committee discussed alternatives to this change, including not suspending regulations at all, as well as terminating the order. Terminating the order was deemed too drastic an action at this time. However, most of the Committee members believe that suspension is necessary because of the substantially reduced crop and to reduce inspection and assessment costs. Citrus canker has had a negative economic impact on the lime industry and cost savings will be beneficial. Suspending regulations also provides the Committee time to evaluate the effects of canker and to consider what actions should be taken in the future. The Committee acknowledged that quality problems might occur in the absence of regulation, but believed that suspension was the best course of action at this time given the industry situation. Therefore, the alternatives of termination and continuing without change were rejected.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection requirements being suspended by this rule were approved previously by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0189. Suspension of all of the specified requirements is expected to reduce the reporting burden on small or large Florida lime handlers by 22 hours, and should further reduce industry expenses. During the suspension period, handlers will not have to file the following forms with the Committee: Application for Registered Handler (16.5 burden hours); Application for Registered Processor (10 minutes); Application for Lime Grade Label (5.5 burden hours). As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sectors.

Pursuant to section 8e of the Act, this action also suspends the lime import regulation (7 CFR 944.209). That regulation specifies grade, size, quality, maturity, inspection, and other requirements.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this final rule.

The Committee's meetings were widely publicized throughout the lime industry and all interested persons were invited to attend the meetings and participate in Committee deliberations on all issues. Like all Committee meetings, the April 18, 2001, and the May 16, 2001, meetings were public meetings and all entities, both large and small, were able to express views on this issue.

A proposed rule concerning this action was published in the **Federal Register** on August 6, 2001 (66 FR 40923). Copies of the rule were mailed or sent via facsimile to all Committee members and lime handlers. Finally, the Office of the Federal Register and USDA made the rule available through the Internet. A 30-day comment period ending September 5, 2001, was provided to allow interested persons to respond to the proposal.

Twenty-five comments were received during the comment period in response to the proposal. Many of the points made in the comments were thoroughly discussed prior to the Committee vote and the issuance of the proposed rule.

Of the twenty-five comments received, four were in support of the proposal, one from a grower, two from handlers, and one from an importer. Three of the comments in support of the suspension discussed the costs associated with growing, handling, and importing limes.

An importer of limes stated that, with no requirement to have limes inspected, there would be reduced costs for importers. The commenter further stated that this suspension would also result in cost savings for both growers and handlers of limes.

A handler and a grower of Florida limes stated that the lime industry cannot afford to maintain the Federal marketing order. One commenter stated that the costs for picking limes have exceeded the return to the grower, increasing the need for cost savings. Another commenter stated that the average return per bushel has declined by $4.00 since 1999. The effort to prevent the further spread of canker has also increased industry costs.

Before making a recommendation to suspend regulation, the Committee prepared a budget of expenses to determine the assessment rate necessary to cover expenses required to maintain the order. With the reduced production, the Committee determined an assessment rate of $0.30 per bushel would be necessary to maintain the order. That rate is almost double the

existing assessment rate. Increasing the assessment rate would have meant a further reduction in returns. The Committee believes the suspension will help increase returns by reducing costs.

Citrus canker has reduced the Florida lime industry from approximately 3,200 acres before the outbreak of citrus canker to less than 1,000 acres currently. The only known way to eradicate citrus canker is to bulldoze the infected and exposed trees and burn them. The production area is also quarantined and no new trees can be planted at this time. The money saved as a result of the suspension can be used to offset the loss of income due to the reduced production of limes.

Two commenters in support of suspension noted that this change is for a period not to exceed one year. The Committee determined that suspending regulations for a period not to exceed one year would give the industry time to assess the citrus canker eradication efforts and evaluate the effects of no regulations on the market. During the suspension, the Committee will meet periodically to discuss the effects citrus canker has had on the industry and the impact of no regulation. After the one-year period, regulations will return absent further action by the Committee. However, if conditions warrant, the Committee could recommend reinstating the suspended requirements earlier. During the period of suspension, handlers of domestic and imported limes are free to voluntarily obtain inspection to assure the quality of the limes marketed, and to meet the needs of their customers.

Two of the comments in favor of the rule discussed maintaining quality in the absence of regulations. Both commenters stated that the market and consumers would dictate the quality of limes that is acceptable. Shippers will continue to supply their customers with a high quality product because the buyer will pay a premium price for it. Also, as previously noted, inspection can be obtained to assure that the limes meet buyer specifications.

Twenty-one comments were received in opposition to this rule. Fourteen were from importers of limes and seven comments were received from Florida lime growers and handlers.

The fourteen lime importers opposing the suspension were concerned by the potential of poor quality imports, and the negative impact such imports could have on market prices and sales. Section 8e of the Act provides that when certain domestically produced commodities, including limes, are regulated under a Federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, and maturity requirements. Since this rule suspends regulations for domestically produced limes, a corresponding change to the import regulations must also be made.

The comments received from importers all expressed concern for the impact on quality resulting from the suspension. These same or similar concerns were also expressed in six of the comments received from Florida lime growers and handlers. The Committee itself had similar concerns, and weighed these concerns against the need to reduce costs. For this reason, the Committee recommended that the suspension of requirements be effective for one year only. This will enable the Committee to study the impacts of canker and the suspension, reduce costs during a very difficult time, and consider appropriate actions for ensuing seasons. If the elimination of the current requirements does result in the shipment of lower quality limes and markets are hurt, the Committee could recommend reinstitution of the requirements.

This rule relaxes requirements and provides handlers and importers of limes with more flexibility in meeting the needs of their buyers. Handlers and importers will be able to market limes without inspection and eliminate inspection costs. Buyer and seller interaction will determine the terms and conditions of sales and the quality of limes sold and purchased. As previously noted, even though inspection requirements are suspended, inspection of limes can be obtained on a voluntary basis for a fee by the handler or importer to assure quality and meet customer requirements.

The Committee believes one year of suspension will determine if consumer demand will keep quality high or result in product substitution and loss of market share. The purpose of this rule is to reduce the burden on the industry. If at any time during the suspension the Committee determines this action is having an unfavorable impact on the industry, the Committee could meet and rescind the suspension. Consequently, the Committee recommended suspending provisions for one year to garner the benefits of the associated cost savings and to study the effect on the market. This action reduces costs in view of the current industry situation. It also provides an opportunity to evaluate the progress on the eradication of citrus canker and the market impact of no regulation.

Five commenters addressed the suspension as if it were a termination of the marketing order. This action does not terminate the order. It only provides a one-year suspension of the regulations specified above. Terminating the order would require additional Committee action or action on the part of the industry.

Four comments stated that this rule change would only benefit importers of limes by allowing inferior limes to be imported into the U.S. It is doubtful whether the importation of inferior quality limes will benefit importers. Experience has shown that the marketing of poor quality tends to cause the market to deteriorate for everyone.

Another commenter expressed concern regarding Committee membership when an industry member may import limes in addition to handling limes. The commenter was concerned that this could unduly shape the decision-making of the Committee and bias decisions in favor of importers. The Committee is established and selected in accordance with the provisions of the order. Committee meetings concerning this action were widely publicized throughout the lime industry and all interested persons were invited to attend the meetings and participate in Committee deliberations on all issues. Further, many of the comments received in opposition to this action were from importers.

One commenter stated that some of the members voting for suspension were not qualified to serve as members. Nominations for the Committee were held in February 2001, and the new Committee was seated for the April meeting. Prior to seating the new Committee, qualifications to serve were confirmed by USDA field representatives.

Two comments expressed concern that some Committee members were not present at the time the Committee voted to make this recommendation. As with all Committee meetings, the time and place of the Committee meetings were well publicized throughout the industry. All members of the Committee and growers and handlers in the industry were given reasonable notice of the meeting, and given an opportunity to attend.

One commenter expressed concern that the members of the Committee that made this recommendation would be responsible for ending the suspension. The suspension of the handling, inspection, and assessment requirements is for a period of time not to exceed one year. At the end of that time, no action by the Committee will be required to reinstate regulations. Regulations will revert back at the end of the one-year period. However, further suspension or termination would

require action on the part of the Committee and a vote. The suspension could be removed sooner if marketing conditions deteriorate for limes, or for other good cause.

Two commenters stated that this action should be postponed until after the continuance referendum required under the order. Every sixth year, growers vote in a continuance referendum to determine whether or not the industry continues to support the marketing order. Such a referendum, absent this suspension, would have been scheduled for some time during the coming year. It now will most likely be scheduled after the suspension expires.

However, a continuance referendum would be an indication of industry support for the order, not an indicator of support or opposition to the suspension. Support for the order is something different than what is contemplated by this action. This suspension does not terminate the marketing order. This action was recommended by the Committee to reduce industry costs and to evaluate the progress of citrus canker and the market's response to no regulation during the one-year suspension.

USDA believes postponing the suspension until after a continuance referendum is held would not be in the best interest of industry. The question at hand is not whether or not to terminate the marketing order, but on whether or not the industry would benefit from the cost savings provided by the suspension. The Committee is the organization responsible for the local administration of the marketing order. The Committee voted six in favor to one opposed in support of the suspension. Delaying the suspension would only postpone the industry's opportunity to benefit from the cost saving offered by this suspension.

Another commenter stated that growers who have the majority of lime acreage do not support the suspension. The marketing order is created to benefit all growers, not just the ones with the most acreage. We do note that, of the grower members seated for the vote recommending this suspension, all three voted for suspension.

One commenter stated that the industry is still strong enough to maintain the marketing order. Another stated that the industry has a willingness to continue. The lime industry has overcome past hardships. However, this action will provide cost reduction relief in view of the current situation facing the lime industry.

Growers are facing reduced production from canker and increased costs from requirements established to battle its spread. After Hurricane Andrew, the Committee recommended that certain regulations be relaxed and assessments be eliminated for two years to help the industry recover. This action is another such incidence. This action does not terminate the order, but offers some cost relief to provide the industry an opportunity to recover.

In January 1996, the Committee was concerned by the state of the industry. To address its concerns, the Committee voted to suspend all regulation for a six-month period. However, prior to the suspension taking effect, the Committee determined the industry had sufficiently recovered and voted to rescind the suspension. The Committee has taken a similar action here. At any time during the one-year suspension, the Committee could vote to rescind the suspension and return to regulation.

Another commenter recommended that requirements for imports of size 250's apply year round as opposed to six months. However, this recommendation is not within the scope of the proposed rule on suspending the requirements.

One comment was received after the comment period ended. This comment did not raise any issues that were raised by comments that were timely filed.

The suspension will allow those still active in the lime industry to benefit from a needed reduction in costs given the current circumstances facing the industry. A one-year suspension of the regulations will provide needed cost savings and a period to evaluate the status of canker and on the market effects of the suspension of regulation. Accordingly, no changes are being made to the rule as it was proposed, based on the comments received.

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.

In accordance with section 8e of the Act, the United States Trade Representative has concurred with the issuance of this final rule.

After consideration of all relevant matter presented, including the information and recommendation submitted by the Committee, the comments received, and other available information, it is hereby found that the provisions suspended, as hereinafter set forth, will not tend to effectuate the declared policy of the Act for the period of suspension. Therefore, these provisions of the order are being suspended.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because handlers are already shipping limes from the 2001–02 crop, and this rule needs to be in effect as soon as possible to provide relief to the Florida lime industry. No special preparations are needed by handlers and importers to take advantage of this relaxation. Also, the industry has been discussing this issue for some time, and the Committee has kept the industry well informed. It has also been widely discussed at various industry and Committee meetings.

List of Subjects

7 CFR Part 911

Limes, Marketing agreements, Reporting and recordkeeping requirements.

7 CFR Part 944

Avocados, Food grades and standards, Grapefruit, Grapes, Imports, Kiwifruit, Limes, Olives, Oranges.

For the reasons set forth above, 7 CFR parts 911 and 944 are amended as follows:

PART 911—LIMES GROWN IN FLORIDA

1. The authority citation for 7 CFR parts 911 and 944 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. In part 911, §§ 911.110, 911.120, 911.130, 911.131, 911.234, 911.311, 911.329, and 911.344 are suspended in their entirety effective February 19, 2002, through February 24, 2003.

PART 944—FRUITS; IMPORT REGULATIONS

3. In Part 944, § 944.209 is suspended in its entirety effective effective February 19, 2002 through February 24, 2003.

Dated: February 8, 2002.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 02–3633 Filed 2–13–02; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 929

[Docket No. FV01–929–3 FR]

Cranberries Grown in the States of Massachusetts, et al.; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule increases the assessment rate established under the cranberry marketing order for the 2001–2002 and subsequent fiscal years from $.08 to $.18 per barrel of cranberries handled. Currently, funds derived from assessments are used to cover expenses incurred by the Cranberry Marketing Committee (Committee) in the performance of its duties and functions under the order and to fund an export market development program. The Committee is responsible for local administration of the marketing order which regulates the handling of cranberries grown in the production area. The proposed $.10 increase will be used to fund a domestic market development program. The fiscal year began September 1 and ends August 30. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

EFFECTIVE DATE: February 15, 2002.

FOR FURTHER INFORMATION CONTACT: Patricia A. Petrella or Kenneth G. Johnson, DC Marketing Field Office, Fruit and Vegetable Programs, AMS, USDA, Suite 2A04, Unit 155, 4700 River Road, Riverdale, Maryland 20737; telephone: (301) 734–5243, Fax: (301) 734–5275; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938, or e-mail: *Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION: This rule 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.''

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

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, cranberry handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable cranberries beginning September 1, 2001, and continue until amended, suspended, or terminated. This rule 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 USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule increases the assessment rate established for the Committee for the 2001–2002 and subsequent fiscal years for cranberries from $0.08 to $0.18 per barrel of cranberries.

The cranberry marketing order provides that one of the duties of the Committee is to formulate an annual budget of expenses and to recommend a rate of assessment necessary to administer the provisions of the order. The members of the Committee are producers of cranberries. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

Authority to fix the rate of assessment to be paid by each handler and to collect such assessment appears in § 928.41 of the order. In addition, § 929.45 of the order provides that the Committee, with the approval of USDA, may establish or provide for the establishment of production research, marketing research, and market development projects designed to assist, improve, or promote the marketing, distribution, consumption, or efficient production of cranberries. The expense of such projects is paid from funds collected pursuant to § 929.41 (Assessments), or from such other funds as approved by USDA.

For the 2000–2001 fiscal year, the Committee recommended, and the Department approved, an assessment rate of $.08 per barrel of cranberries handled that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee voted by mail and recommended 2001–2002 expenditures of $1,206,772 and an assessment rate of $.18 per barrel of cranberries. Six of the eight committee members voted in support of the $.10 per barrel increase. Two members did not return their mail ballots to the Committee. The assessment rate increase was considered by the Committee at an earlier public meeting. The budget for 2001–2002 was recommended to the full Committee by the Executive Committee. The major expenditures recommended by the Committee for the 2001–2002 fiscal period include $846,953 for market development (including $490,000 for domestic market development, $273,953 for export market development, and $83,000 for export market consulting services), $123,952 for administration costs, $129,500 for personnel, $75,000 for Committee meetings, and $31,367 for payroll taxes and benefits. Included in the budget calculations is about $6,000 interest and $213,953 Market Access Program (MAP) funds from USDA's Foreign Agricultural Service (FAS) for export market development. Budgeted expenses in the Committee's amended 2000–2001 budget were $223,647 for administration costs, $270,407 for export market development, $71,000 for export market consulting services, $119,464 for personnel, and $67,500 for Committee meetings. There was no

domestic market development program for the 2000–2001 fiscal year.

The Committee recommended the $.10 per barrel increase to fund a domestic market development program to increase demand for cranberries and cranberry products and thus expand cranberry shipments. Currently, supplies are outpacing demand. The Committee believes that a domestic market development program is needed to increase consumer awareness of the health benefits of cranberries and cranberry products. Currently, the Committee funds an export market development program with MAP money from FAS.

Over the past several years, per capita consumption of cranberries has averaged 1.68 pounds. Per capita consumption peaked in 1994 at 1.80 pounds and began trending downward. In 1998, per capita consumption was 1.67 pounds. Associated with these per capita consumption figures is the fact that total domestic sales also peaked in 1994 at 4,692,507 barrels and declined to 4,506,632 barrels in 1998. However, cranberry production reached an all-time high of 6,389,000 barrels in 1999. This is a 17 percent increase over 1998 production of approximately 5.4 million barrels. Available cranberry supplies continue to outpace demand, resulting in high levels of carryin inventories and low grower prices. Grower returns have fallen 73 percent from 1997 to 2000, dropping from $65.90 to $15–$20 per barrel.

The assessment rate recommended by the Committee was derived by estimating the cost of a viable domestic market development program ($490,000) and then increasing the assessment rate to cover such costs. Cranberry shipments are projected at 4.9 million barrels which will provide $882,000 in assessment income. Income derived from handler assessments, along with interest income, FAS market access program funds for export market development, and funds from the Committee's authorized reserve will be adequate to cover budgeted expenses expected to total $1,206,772 in 2001–2002. Funds in the reserve (currently $115,000) will be kept within the approximately one year's operational expenses permitted by the order (§ 929.42(a)).

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

Although the assessment rate will be effective for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or the Department. Committee meetings are open to the public and interested persons may express their views at these meetings. The Department evaluates Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Committee's 2001–2002 budget and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by USDA.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules 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, which includes handlers, 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 $750,000. The majority of cranberry handlers and producers may be classified as small businesses.

This rule increases the assessment rate established for the Committee and collected from handlers for the 2001–2002 and subsequent fiscal periods from $.08 to $.18 per barrel of cranberries. One barrel equals 100 pounds of cranberries.

The Committee discussed the alternative of continuing the existing assessment rate, but concluded that it needed to implement a domestic market development program funded through assessments. The assessment rate recommended by the Committee was derived by determining the cost of a viable domestic market development program ($490,000), and then increasing the assessment rate to cover the additional costs. Cranberry shipments are projected at 4.9 million barrels which would provide $882,000 assessment income. Income derived from handler assessments, along with interest income, FAS market access program funds, and funds from the Committee's authorized reserve will be adequate to cover budgeted expenses. Funds in the reserve (currently $115,000) would be kept within the approximately one year's operational expenses permitted by the order (§ 929.42(a)).

The major expenditures recommended by the Committee for the 2001–2002 fiscal period include $846,953 for market development (including $490,000 for domestic market development, $273,953 for export market development, and $83,000 for export market development consulting services), $123,952 for administration costs, $129,500 for personnel, $75,000 for Committee meetings, and $31,367 for payroll taxes and benefits. Included in the budget calculations is approximately $6,000 interest and $213,953 MAP funds from FAS for export market development. Budgeted expenses in the Committee's amended 2000–2001 budget were $223,647 for administration costs, $270,407 for export market development, $119,464 for personnel, and $67,500 for Committee meetings. There was no domestic market development program for the 2000–2001 fiscal period.

This action increases the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs will be offset by the benefits derived by the operation of the marketing order. In addition, the Committee's meeting was 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, all entities, both large and small, were able to express views on this issue.

This rule will impose no additional reporting or recordkeeping requirements on either small or large cranberry handlers.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and

duplication by industry and public sector agencies.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A proposed rule concerning this action was published in the **Federal Register** on September 21, 2001 (66 FR 48626). Copies of the rule were mailed by the Committee's staff to all Committee members and handlers. In addition, the rule was made available through the Internet by the Office of the Federal Register and USDA. A 15-day comment period ending October 9, 2001, was provided to allow interested persons to respond to the proposal.

Eighteen comments were received during the comment period in response to the proposal. Nine were received in favor of the proposal and nine were in opposition. Most of the comments were received from cranberry growers. Comments also were received from the Committee, two handlers, and an institute that supports research on the health benefits of cranberries.

Those in support favored the assessment rate increase because the funds will be the major source of funding for domestic market development activities, needed to increase shipments. The cranberry industry is faced with low prices primarily due to large surpluses. Industry-wide market development activities are needed to expand domestic markets and the consumption of cranberries and cranberry products. The initiation of these activities is expected to bring demand closer into balance with supply over the long term, and, in turn, help bring returns to growers back to acceptable levels.

The main comments in opposition to the proposal were: The funds would be wasted because the Committee's marketing efforts have not been successful in the past and the Committee does not have the public relations/marketing development expertise of well known public relations firms; growers do not have a means of holding the Committee accountable for its results; other State organizations can work with the Cranberry Institute (an organization that funds research on the potential health benefits of cranberries and cranberry products) to accomplish the same goal; growers have not been informed of the domestic marketing plan, and, thus, do not know how the increased assessments will be spent; and farm gate prices are extremely low at this time to fund such an endeavor.

Any market development program initiated by the Committee to expand domestic markets would be approved and overseen by USDA. In the development stages, USDA would provide general guidance on the conduct of market development. USDA also would review the program goals and the program activities, methods, and techniques to be employed in meeting the goals. The Committee and USDA would monitor any program implemented to determine that the program goals have or have not been met, and if not, the reason for the failure, that the assessment funds used for the program have been properly spent, and to determine whether the program should be continued unchanged, changed, or discontinued. Also, upon conclusion of any program, but at least annually, the Committee would report on the program status and accomplishments to the industry and the USDA.

With respect to the comment that the Wisconsin Cranberry Board already collects funds for generic promotion and health related research and that the growers do not need to fund similar Committee activities, it should be noted that the Committee's anticipated domestic market development effort is intended to be industry-wide and not regional in scope. A broader based effort is needed to foster the domestic market growth needed to absorb production. The Committee commented that it surveyed growers in the industry and they overwhelmingly favored (449 out of 496 respondents) an industry-wide market development program. The Committee also stated that the market development program will be designed to complement ongoing promotion programs within the industry and to take advantage of the Cranberry Institute's health related research.

With respect to the type of promotion that would be funded, the Committee's comments describe its initial plans for a promotion program. The Committee comprised of members from the different growing areas would decide what type of program would be implemented. Preliminary discussions on a domestic market development effort have begun, but have not been finalized by the Committee. The Committee commented that the initial focus of any market development effort undertaken would be to inform buyers of the health benefits of cranberries and cranberry products. Once the final plan is developed and recommended by the Committee, the plan would have to be approved by USDA before it could be implemented.

Commenters in favor of the increased assessment rate stated that the goal of a domestic market development program implemented under the order would be to build markets and that this should help bring demand closer to the productive capacity of the industry. The ultimate goal, of course, is to help the industry return to profitability over time.

Finally, those in opposition commented that prices are at an all time low and the Committee should not be raising assessments while farmers are going broke. One commenter in favor of the proposed assessment rate increase stated that the additional $.10 per barrel assessment is insignificant to the lost income growers are enduring as a result of the surplus situation currently being faced by the industry because of overproduction and reduced demand. The Committee expects such a program to stimulate growth in demand for cranberries and cranberry products and increase grower returns to a more acceptable level. Another commenter in favor of the increase noted that growers need to recognize that building demand for cranberries is the only long-term sustainable solution to the oversupply problem.

One commenter did not approve of the increase because Ocean Spray members would pay a disproportionate share of the cost. Ocean Spray management submitted a comment in favor of the increase.

Two commenters stated that growers have not been allowed to vote for some time on the continuation of the marketing order. They said that growers should be allowed to vote on whether they want to continue the order before raising the assessment rate. The issue of holding a continuance referendum was not part of the notice concerning this rulemaking action, but such referenda are periodically conducted by USDA.

Accordingly, no changes will be made to the rule as proposed, based on the comments received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at the following Web site: *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.

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

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5

U.S.C. 553) because the 2001–2002 fiscal period began on September 1, 2001, and the marketing order requires that the rate of assessment for each fiscal period apply to all assessable cranberries handled during such fiscal period, and the Committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis. Further, handlers are aware of this action which was recommended by the Committee at a public meeting and is similar to other assessment rate actions issued in past years. Also, a 15-day comment period was provided for in the proposed rule, and all comments received have been addressed.

List of Subjects in 7 CFR Part 929

Cranberries, Marketing agreements, Reporting and recordkeeping requirements.

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

For the reasons set forth in the preamble, 7 CFR part 929 is amended as follows:

1. The authority citation for 7 CFR part 929 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Section 929.239 is revised to read as follows:

§ 929.239 Assessment rate.

On and after September 1, 2001, an assessment rate of $0.18 per barrel is established for cranberries.

Dated: February 8, 2002.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 02–3635 Filed 2–13–02; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–CE–58–AD; Amendment 39–12643; AD 2002–03–02]

RIN 2120–AA64

Airworthiness Directives; British Aerospace Model HP.137 Jetstream Mk.1, Jetstream Series 200, and Jetstream Series 3101 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes Airworthiness Directive (AD) 98–13–03, which currently requires repetitive inspections of the main landing gear (MLG) hinge fittings, support angles, and attachment bolts on British Aerospace Model HP.137 Jetstream Mk.1, Jetstream Series 200, and Jetstream Series 3101 airplanes. AD 98–13–03 also requires eventual installation of improved design MLG hinge fittings as terminating action for the repetitive inspections of the hinge fittings and attachment bolts. AD 98–13–03 specifies repetitive inspections of the support angles for those airplanes with the improved design MLG hinge fittings installed and exempts from the applicability those airplanes with the improved design MLG hinge fittings installed. This AD retains the requirements of AD 98–13–03 and removes the applicability exemption of those Model HP.137 Jetstream Mk.1 and Jetstream Series 200 airplanes with the improved design MLG hinge fittings installed. The actions specified by this AD are intended to detect, correct, and prevent future fatigue cracking of the MLG, which could result in structural failure of the MLG and consequent loss of airplane control during takeoff, landing, or taxi operations.

DATES: This AD becomes effective on April 2, 2002.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of April 2, 2002.

ADDRESSES: You may get the service information referenced in this AD from British Aerospace Regional Aircraft, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland; telephone: (01292) 479888; facsimile: (01292) 479703. You may view this information at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2000–CE–58–AD, 901 Locust, Room 506, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; facsimile: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Discussion

Has FAA Taken any Action on the Main Landing Gear (MLG) Hinge Fittings, Support Angles, and Attachment Bolts on British Aerospace Model HP.137 Jetstream Mk.1, Jetstream Series 200, and Jetstream Series 3101 Airplanes to This Point?

On June 8, 1998, FAA issued AD 98–13–03, Amendment 39–10591 (63 FR 33532, June 19, 1998). This AD currently requires the following on the above-referenced airplanes:

—Repetitive inspections of the MLG hinge fitting, support angles, and attachment bolts, and repairing or replacing any part that is cracked; and

—Eventual installation of improved design MLG hinge fittings, part number (P/N) 1379133B1 and 1379133B2 (Modification 5218), as terminating action for the repetitive inspections of the hinge fittings and attachment bolts. This AD specifies repetitive inspections of the support angles for those airplanes with the improved design MLG hinge fittings installed. However, the applicability of AD 98–13–03 exempts those airplanes with the improved design MLG hinge fittings installed from the actions of the AD.

Accomplishment of these actions is required in accordance with the following service information:

—British Aerospace Jetstream Mandatory Service Bulletin (MSB) No. 7/5, which includes procedures for inspecting the left and right main landing gear hinge attachment nuts to the auxiliary and aft spars for signs of relative movement between the nuts and hinge fitting on Model HP.137 Jetstream Mk.1 and Jetstream Series 200 airplanes. This MSB incorporates the following effective pages:

Pages	Revision Level	Date
2 and 4	Original Issue	March 31, 1982.

Pages	Revision Level	Date
1 and 3	Revision 1	May 23, 1988.

—British Aerospace MSB No. 7/8, which includes procedures for inspecting the MLG hinge fitting for cracks, and repairing cracked hinge fittings on Model HP.137 Jetstream Mk.1 and Jetstream Series 200 airplanes. This MSB incorporates the following effective pages:

Pages	Revision level	Date
2, 5, 6, 7, and 8	Revision 2	January 6, 1983.
1, 3, and 4	Revision 3	May 23, 1988.

—Jetstream Alert Service Bulletin (ASB) 32–A–JA 850127, which includes procedures for inspecting the MLG hinge fitting and support angle for cracks on Jetstream Series 3101 airplanes. This ASB incorporates the following effective pages:

Pages	Revision level	Date
5 through 14	Original Issue	April 17, 1985.
1 through 4	Revision 2	November 11, 1994.

—Jetstream Service Bulletin (SB) 57–JM 5218, which includes procedures for installing improved design MLG hinge fittings, P/N 1379133B1 and 1379133B2 (Modification 5218), on Model HP.137 Jetstream Mk.1, Jetstream Series 200, and certain Jetstream Series 3101 airplanes. This SB incorporates the following effective pages:

Pages	Revision level	Date
11, 12, 17, 18, 19, 21, 22, 23, 24, 27, 28, 29, 30, and 31	Revision 1	September 29, 1987.
20	Revision 3	January 29, 1990.
13 and 14	Revision 4	October 31, 1990.
1 through 10, 15, 16, 25, and 26	Revision 5	July 28, 1997.

The actions of AD 98–13–03 are consistent with our aging commuter aircraft policy, which briefly states that, when a modification exists that could eliminate or reduce the number of required critical inspections, the modification should be incorporated. This policy is based on our determination that reliance on critical repetitive inspections on airplanes utilized in commuter service carries an unnecessary safety risk when a design change exists that could eliminate or, in certain instances, reduce the number of those critical inspections.

The alternative to installing improved design MLG hinge fittings would be to repetitively inspect this area for the life of the airplane.

What Has Happened Since AD 98–13–03 To Initiate This Action?

Since AD 98–13–03 became effective, FAA received comments regarding the applicability. The applicability of AD 98–13–03 exempts those airplanes with the improved design MLG hinge fittings installed as of the effective date of the AD. However, those airplanes that have the improved design MLG hinge fittings incorporated after the effective date of the AD are subject to repetitive inspections of the MLG support angles. Our intent was to require the inspections of the MLG support angles regardless of when the improved design MLG hinge fittings are incorporated.

Therefore, we then determined that the exemption of those airplanes with the improved design MLG hinge fittings installed should be removed, and that all affected airplanes should have the MLG support angles repetitively inspected.

Consequently, we issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain British Aerospace Models HP.137 Jetstream Mk.1, Jetstream Series 200, and Jetstream Series 3101 airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on July 18, 2001 (66 FR 37435). The NPRM proposed to supersede AD 98–13–03. The NPRM also proposed to:

—Retain the requirement of repetitively inspecting the main landing gear (MLG) hinge fittings, support angles, and attachment bolts and the requirement of repairing any cracked part;

—Require eventual installation of improved design MLG hinge fittings as terminating action for the repetitive inspections of the hinge fittings and attachment bolts; and

—Require repetitive inspections of the MLG support angles on all affected airplanes, even those with the improved design MLG hinge fittings installed.

Based on comments received on this NPRM, we made minor changes to the proposed action. Another comment indicated that the manufacturer was not providing parts to accomplish the proposed action free of charge as previously referenced. Because this shifts the cost burden of these improved design MLG hinge fittings from the manufacturer to the owner/operator, we reopened the comment period for this proposed AD and issued a supplemental NPRM.

This supplemental NPRM was published in the **Federal Register** on November 19, 2001 (66 FR 57890). We received no comments on this supplemental NPRM.

FAA's Determination

What Is FAA's Final Determination on This Issue?

We carefully reviewed all available information related to the subject presented above and determined that air safety and the public interest require the adoption of the rule as proposed except for minor editorial changes. We have determined that these changes:

—Provide the intent that was proposed in the NPRM for correcting the unsafe condition; and

—Do not add any additional burden upon the public than was already proposed in the NPRM.

Cost Impact

How Many Airplanes Does This AD Impact?

We estimate that this AD affects 71 airplanes in the U.S. registry.

What Is the Cost Impact of This AD on Owners/Operators of the Affected Airplanes?

The FAA estimates that this AD will affect 71 airplanes in the U.S. registry. We estimate the following costs to accomplish the actions:

	Labor cost	Parts cost	Per airplane cost	Fleet cost
Initial inspection	61 workhours × $60 per hour = $3,660	Not Applicable	$3,660 per airplane	71 airplanes × $3,660 = $259,860.
Hinge fitting installation	210 workhours × $60 per hour = $12,600.	$14,000 per airplane.	$26,600 per airplane.	71 airplanes × $26,600 = $1,888,600.
Repetitive Support angle inspections.	10 workhours × $60 per hour = $600 per inspection.	Not Applicable	$600 per airplane per inspection.	71 airplanes × $600 = $42,600 per inspection.

Regulatory Impact

Does This AD Impact Various Entities?

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

Does This AD Involve a Significant Rule or Regulatory Action?

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the final evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. FAA amends § 39.13 by removing Airworthiness Directive (AD) 98–13–03, Amendment 39–10591 (63 FR 33532, June 19, 1998), and by adding a new AD to read as follows:

2002–03–02 British Aerospace: Amendment 39–12643; Docket No. 2000–CE–58–AD; Supersedes AD 98–13–03, Amendment 39–10591.

(a) *What airplanes are affected by this AD?* This AD affects the following airplane models and serial numbers that are certificated in any category:

Model	Serial No.
HP.137 Jetstream Mk.1.	All serial numbers.
Jetstream Series 200	All serial numbers.
Jetstream Series 3101.	601 through 695 that do not have Jetstream Service Bulletin 57–JM 5218 incorporated (using the applicable Revision 4 or Revision 5 pages).

(b) *Who must comply with this AD?* Anyone who wishes to operate any of the airplanes identified in paragraph (a) of this AD must comply with this AD.

(c) *What problem does this AD address?* The actions specified by this AD are intended to detect, correct, and prevent future fatigue cracking of the main landing gear (MLG), which could result in structural failure of the MLG and consequent loss of airplane control during takeoff, landing, or taxi operations.

Note 1: The compliance times of this AD are presented in landings. If you do not keep the total number of landings, then you may multiply the total number of airplane hours time-in-service (TIS) by 0.75.

(d) *What actions must I accomplish to address this problem?* To address this problem, you must accomplish the following:

Actions	Compliance	Procedures
(1) For the Models HP.137 Jetstream Mk.1 and Jetstream 200 Series airplanes, accomplish the following if part number (P/N) 1379133B1 (or FAA-approved equivalent P/N) and P/N 1379133B2 (or FAA-approved equivalent P/N) MLG hinge fittings are not installed. These installations incorporate Modification 5218: (i) Inspect the MLG hinge attachment nuts to auxiliary and aft spars on both the left and right MLG for signs of fuel leakage or signs of relative movement between the nuts and hinge fitting. (ii) If any signs of fuel leakage or relative movement between the nuts and hinge fitting are found during any inspection required by paragraph (d)(1)(i) of this AD, resecure the MLG hinge fitting to auxiliary spar. (iii) You may terminate the above inspections when Modification 5218 is incorporated. The repetitive inspection of the MLG hinge support angles as required by paragraph(d)(2) of this AD are still required.	Inspect within the next 50 landings after June 8, 1998 (the effective date of AD 98–13–03) or within 200 landings TIS after the last inspection required by 98–13–03, whichever occurs later, and thereafter at intervals not to exceed 200 landings. Resecure the MLG hinge fitting prior to further flight after the applicable inspection.	Use the service information presented in paragraph (h)(1)(i) of this AD.
(2) For all airplanes regardless of the MLG hinge fitting installed, inspect the MLG hinge support angles for cracks. If any crack(s) is/are found in the support angles, replace the cracked MLG hinge fitting(s) with a P/N 1379133B1 (or FAA-approved equivalent P/N) or P/N 1379133B2 (or FAA-approved equivalent P/N) fitting. (i) For all airplanes: you may terminate the repetitive inspection requirement of paragraphs (d)(1)(i) and (d)(1)(ii) of this AD after incorporating Modification JM5218 on both sides of the airplane. (ii) For Jetstream 3101 Series airplanes: the repetitive inspections of the MLG support angles required by paragraph (d)(2) of this AD are no longer required after incorporating Modification JM5218 on both sides of the airplane. (iii) If Modification JM5218 is incorporated on both sides of a Jetstream 3101 Series airplane in accordance with the provisions of AD 98–13–03, then the intent of paragraph (d)(3) of this AD is met and paragraph (d)(4) of this AD is the only paragraph that applies. (iv) For the affected Models HP.137 Jetstream Mk.1 and Jetstream Series 200 airplanes: the repetitive inspections of the MLG support angles required by paragraph (d)(2) of this AD are still required after incorporating Modification JM5218.	Inspect upon accumulating 4,000 landings on each MLG hinge fitting or within the next 50 hours TIS after April 2, 2002 (the effective date of this AD), whichever occurs later, unless already accomplished, and thereafter at intervals not to exceed 400 hours TIS. Accomplish any necessary replacement prior to further flight after the inspection where the cracked support angle(s) is/are found.	Inspect in accordance with the service information presented in paragraph (h)(1)(ii) or (h)(1)(iii) of this AD, as applicable. Replace in accordance with the service information presented in paragraph (h)(1)(iv) of this AD.
(3) For all airplanes, install improved design MLG hinge fittings, P/N 1379133B1 (or FAA-approved equivalent P/N) and P/N 1379133B2 (or FAA-approved equivalent P/N). These installations incorporate Modification JM5218. (i) For all airplanes: you may terminate the repetitive inspection requirement of paragraphs (d)(1)(i) and (d)(1)(ii) of this AD after incorporating Modification JM5218 on both sides of the airplane. (ii) For Jetstream 3101 Series airplanes: the repetitive inspections of the MLG support angles required by paragraph (d)(2) of this AD are no longer required after incorporating Modification JM5218 on both sides of the airplane. (iii) If Modification JM5218 is incorporated on both sides of a Jetstream 3101 Series airplane in accordance with the provisions of AD 98–13–03, then the intent of paragraph (d)(3) of this AD is met and paragraph (d)(4) of this AD is the only paragraph that applies. (iv) For the affected Models HP.137 Jetstream Mk.1 and Jetstream Series 200 airplanes: the repetitive inspections of the MLG support angles required by paragraph (d)(2) of this AD are still required after incorporating Modification JM5218.	Upon accumulating 20,000 landings on each MLG hinge fitting or within the next 50 landings after June 8, 1998 (the effective date of AD 98–13–03), whichever occurs later, unless already accomplished.	Inspect in accordance with the service information presented in paragraph (h)(1)(iv) of this AD.
(4) Do not install, on any affected airplane, MLG hinge fittings that are not P/N 1379133B1 (or FAA-approved equivalent P/N) or P/N 1379133B2 (or FAA-approved equivalent P/N).	As of April 2, 2002 (the effective date of this AD).	Not Applicable.

(e) *Can I comply with this AD in any other way?*

(1) You may use an alternative method of compliance or adjust the compliance time if:

(i) Your alternative method of compliance provides an equivalent level of safety; and

(ii) The Manager, Standards Office, Small Airplane Directorate, approves your alternative. Submit your request through an FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Standards Office, Small Airplane Directorate.

(2) Alternative methods of compliance approved in accordance with AD 98–13–03, which is superseded by this AD, are approved as alternative methods of compliance with this AD.

Note 2: This AD applies to each airplane identified in paragraph (a) of this AD, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (e) of this AD. The request should include an

assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if you have not eliminated the unsafe condition, specific actions you propose to address it.

(f) *Where can I get information about any already-approved alternative methods of compliance?* Contact Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; facsimile: (816) 329–4090.

(g) *What if I need to fly the airplane to another location to comply with this AD?* The FAA can issue a special flight permit under sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate your airplane to a location where you can accomplish the requirements of this AD.

(h) *Are any service bulletins incorporated into this AD by reference?*

(1) Actions required by this AD must be done in accordance with the following:

(i) British Aerospace Jetstream Mandatory Service Bulletin No. 7/5, which applies to the affected Models Model HP.137 Jetstream Mk.1 and Jetstream Series 200 airplanes and incorporates the following pages:

Pages	Revision level	Date
2 and 4	Original Issue	March 31, 1982.
1 and 3	Revision 1	May 23, 1988.

(ii) British Aerospace Mandatory Service Bulletin No. 7/8, which applies to the affected Models HP.137 Jetstream Mk.1 and Jetstream Series 200 airplanes and incorporates the following effective pages:

Pages	Revision level	Date
2, 5, 6, 7, and 8	Revision 2	January 6, 1983.
1, 3, and 4	Revision 3	May 23, 1988.

(iii) Jetstream Alert Service Bulletin 32–A–JA 850127, which applies to the affected Jetstream Series 3101 airplanes and incorporates the following effective pages:

Pages	Revision level	Date
5 through 14	Original Issue	April 17, 1985.
1 through 4	Revision 2	November 11, 1994.

(iv) Jetstream Service Bulletin 57–JM 5218, which applies to all of the affected airplanes and incorporates the following effective pages:

Pages	Revision level	Date
11, 12, 17, 18, 19, 21, 22, 23, 24, 27, 28, 29, 30, and 31	Revision 1	September 29, 1987.
20	Revision 3	January 29, 1990.
13 and 14	Revision 4	October 31, 1990.
1 through 10, 15, 16, 25, and 26	Revision 5	July 28, 1997.

(2) The Director of the Federal Register approved this incorporation by reference under 5 U.S.C. 552(a) and 1 CFR part 51.

(3) You can get copies from British Aerospace Regional Aircraft, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland. You can look at copies at FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri, or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

(i) *Does this AD action affect any existing AD actions?* This amendment supersedes AD 98–13–03, Amendment 39–10591.

(j) *When does this amendment become effective?* This amendment becomes effective on April 2, 2002.

Issued in Kansas City, Missouri, on February 5, 2002.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–3163 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NE–20–AD; Amendment 39–12461; AD 2002–02–13]

RIN 2120–AA64

Airworthiness Directives; CFM International, S.A. CFM56–5 Series Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), that is applicable to CFM International, S.A. (CFMI) CFM56–5 series turbofan engines. This amendment requires replacement of the magnetic drain plug on certain part number (P/N) air turbine engine starters manufactured by Honeywell Engines & Systems. This amendment is prompted by three instances of uncontained air turbine engine starter failures, resulting in cowl damage. The actions specified by this AD are intended to prevent uncontained failure of the starter and possible damage to the airplane.

DATES: Effective date March 21, 2002. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of March 21, 2002.

ADDRESSES: The service information referenced in this AD may be obtained from Honeywell Engines & Systems, Technical Publications Department, 111 South 34th Street, Phoenix, Arizona 85034; telephone (602) 365–5535, fax (602) 365–5577. This information may be examined, by appointment, at the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: James Rosa, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7152, fax (781) 238–7199.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that is applicable to CMFI CFM56–5 series turbofan engines was published in the **Federal Register** on October 19, 2001 (66 FR 53131). That action proposed to require replacement of the magnetic drain plug on certain P/N air turbine engine starters manufactured by Honeywell Engines & Systems, in accordance with Honeywell Service Bulletin 3505582–80–1706, dated March 8, 2000.

Comments

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

The commenter states that the new drain plug P/N is incorrect, the replaced packing P/N is incorrect, and the new packing P/N is incorrect as called out in paragraph (a) of the NPRM.

The FAA agrees. Paragraph (a) is now corrected to reflect new drain plug P/N 572–8510–9152, replaced packing P/N S9413–555, and new packing P/N S3225–905.

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

Economic Analysis

The FAA estimates that about 512 engines installed on airplanes of U.S. registry would be affected by this AD. The FAA also estimates that it would take approximately 0.1 work hours per engine to accomplish the actions, and that the average labor rate is $60 per work hour. Required parts would cost approximately $787 per engine. Based on these figures, the total cost effect of this AD on U.S. operators is estimated to be $406,016. CFMI may provide parts at no cost, which would significantly reduce this figure.

Regulatory Analysis

This final rule does not have federalism implications, as defined in Executive Order 13132, because 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. Accordingly, the FAA has not consulted with state authorities prior to publication of this final rule.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

2002–02–13 CFM International: Amendment 39–12461. Docket No. 2001-NE–20–AD.

Applicability: This airworthiness directive (AD) is applicable to CFM International, S.A. CFM56–5 series turbofan engines with Honeywell Engines & Systems air turbine engine starters, part numbers (P/N's) 3505582–2, 3505582–3, 3505582–4, 3505582–12, 3505582–14, 3505582–15, 3505582–22, and 3505582–23 installed. These engines are installed on, but not limited to Airbus Industries A318, A319, A320, A321 and A340 airplanes.

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

Compliance: Compliance with this AD is required within 500 cycles-in-service after the effective date of this AD, unless already done.

To prevent uncontained failure of the starter due to loss of oil and possible damage to the airplane, do the following:

(a) Replace the magnetic drain plug, P/N 572–510–9004, with a new redesigned magnetic drain plug P/N 572–8510–9152; replace the packing P/N S9413–555, with packing P/N S3225–905, and remark the air turbine engine starter in accordance with paragraphs 2.A. through 2.C. of the Accomplishment Instructions of Honeywell Service Bulletin 3505582–80–1706, dated March 8, 2000.

(b) Replenish the air turbine starter.

Alternative Methods of Compliance

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

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

Special Flight Permits

(d) Special flight permits may be issued in accordance with §§ 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be done.

Documents That Have Been Incorporated by Reference

(e) The inspection must be done in accordance with Honeywell Service Bulletin 3505582–80–1706, dated March 8, 2000. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Honeywell Engines & Systems, Technical Publications Department, 111 South 34th Street, Phoenix, Arizona 85034; telephone (602) 365–5535, fax (602) 365–5577. Copies may be inspected, by appointment, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(f) This amendment becomes effective on March 21, 2002.

Issued in Burlington, Massachusetts, on February 1, 2002.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 02–3161 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–224–AD; Amendment 39–12648; AD 2002–03–07]

RIN 2120–AA64

Airworthiness Directives; BAE Systems (Operations) Limited Model BAe 146 and Avro 146–RJ Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain BAE Systems (Operations) Limited Model BAe 146 and Avro 146-RJ series airplanes, that requires a one-time inspection to detect corrosion of the flap structure and machined ribs, corrective actions if necessary, and reprotection of the rib boss bores. This action is necessary to detect and correct corrosion in the flap structure and machined ribs, which could result in reduced structural integrity of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective March 21, 2002.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of March 21, 2002.

ADDRESSES: The service information referenced in this AD may be obtained from British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1175; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain BAE Systems (Operations) Limited Model BAe 146 and Avro 146–RJ series airplanes was published in the **Federal Register** on October 4, 2001 (66 FR 50586). That action proposed to require a one-time inspection to detect corrosion of the flap structure and machined ribs, corrective actions if necessary, and reprotection of the rib boss bores.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were submitted in response to the proposal or the FAA's determination of the cost to the public.

Explanation of Change to Final Rule

For conditions where corrosion is detected, paragraph (a)(2)(ii) of the proposed AD specifies eventual repetition of the detailed visual inspection in paragraph (a) of the proposed AD (following the accomplishment of corrective actions and reprotection of the boss bores). However, paragraph (a)(2)(ii) of the proposed AD does not make clear that any follow-on actions to the detailed visual inspection must also be accomplished. Therefore, for clarification, we have revised paragraph (a)(2)(ii) of this final rule to require eventual repetition of the detailed visual inspection and accomplishment of applicable follow-on actions. We find that this change does not expand the scope of the proposed AD but merely provides clarification of the requirements of this AD.

Conclusion

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

Cost Impact

The FAA estimates that 60 Model BAe 146 and Avro 146–RJ series airplanes of U.S. registry will be affected by this AD, that it will take approximately 160 work hours per airplane (including access, testing, and close-up) to accomplish the required inspection, and that the average labor rate is $60 per work hour. Based on these figures, the cost impact of the inspection required by this AD on U.S. operators is estimated to be $576,000, or $9,600 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between

the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

2002–03–07 BAE Systems (Operations) Limited (Formerly British Aerospace Regional Aircraft): Amendment 39–12648. Docket 2001–NM–224–AD.

Applicability: Model BAe 146 and Avro 146–RJ series airplanes, certificated in any category; except those modified in accordance with BAE Systems Modification HCM01694F.

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

Compliance: Required as indicated, unless accomplished previously.

To detect and correct corrosion in the flap structure and machined ribs, which could result in reduced structural integrity of the airplane, accomplish the following:

Inspection

(a) Within 6 years since the date of manufacture of the airplane, or within 2 years after the effective date of this AD, whichever occurs later: Perform a detailed visual inspection to detect corrosion of the flap structure and machined ribs, in accordance with BAE Systems (Operations) Limited Inspection Service Bulletin ISB.57–066, dated May 15, 2001.

(1) If no corrosion is detected: Prior to further flight, reprotect the boss bores in accordance with the service bulletin.

(2) If any corrosion is detected: Except as required by paragraph (b) of this AD, accomplish the actions required by paragraphs (a)(2)(i) and (a)(2)(ii) of this AD.

(i) Prior to further flight: Perform corrective actions and reprotect the boss bores in accordance with the service bulletin.

(ii) Within 3 years but not sooner than 2 years following the reprotection specified by paragraph (a)(2)(i) of this AD: Repeat the detailed visual inspection and applicable follow-on actions.

Note 2: For the purposes of this AD, a detailed visual inspection is defined as: ''An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required.''

(b) If any inspection required by this AD reveals any corrosion or other discrepancy for which the service bulletin specifies to contact the manufacturer for appropriate action: Prior to further flight, repair per a method approved by either the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the Civil Aviation Authority (CAA) (or its delegated agent).

Note 3: BAE Systems (Operations) Limited Inspection Service Bulletin ISB.57–066 recommends that operators submit a report of their inspection findings to the manufacturer. Although operators may submit such a report, this AD does not require it.

Spares

(c) As of the effective date of this AD, no person may install a flap on any affected airplane, unless the inspection and applicable corrective actions have been accomplished in accordance with the requirements of this AD.

Alternative Methods of Compliance

(d) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, International Branch, ANM–116. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, International Branch, ANM–116.

Note 4: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the International Branch, ANM–116.

Special Flight Permits

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

Incorporation by Reference

(f) Except as provided by paragraph (b) of this AD, the actions shall be done in accordance with BAE Systems (Operations) Limited Inspection Service Bulletin ISB.57–066, dated May 15, 2001. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 5: The subject of this AD is addressed in British airworthiness directive 002–05–2001.

Effective Date

(g) This amendment becomes effective on March 21, 2002.

Issued in Renton, Washington, on February 5, 2002.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–3287 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–CE–10–AD; Amendment 39–12644; AD 2002–03–03]

RIN 2120–AA64

Airworthiness Directives; SOCATA—Groupe AEROSPATIALE Model TBM 700 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that applies to certain SOCATA—Groupe AEROSPATIALE (SOCATA) Model TBM 700 airplanes. This AD requires you to install a new strainer draining system in the cabin fuselage. This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for France. The actions specified by this AD are intended to prevent water from accumulating in the fuselage, then freezing and interfering with or causing the elevator controls to seize. This could result in loss of elevator control with consequent loss of airplane control.

DATES: This AD becomes effective on March 29, 2002.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of March 29, 2002.

ADDRESSES: You may get the service information referenced in this AD from SOCATA—Groupe AEROSPATIALE, Customer Support, Aerodrome Tarbes-Ossun-Lourdes, BP 930–F65009 Tarbes Cedex, France; telephone: (33) (0)5.62.41.73.00; facsimile: (33) (0)5.62.41.76.54; or the Product Support Manager, SOCATA—Groupe AEROSPATIALE, North Perry Airport, 7501 Pembroke Road, Pembroke Pines, Florida 33023; telephone: (954) 893–1400; facsimile: (954) 964–4191. You may view this information at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2001–CE–10–AD, 901 Locust, Room 506, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Karl Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4146; facsimile: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Discussion

What Events Have Caused This AD?

The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, recently notified FAA that an unsafe condition may exist on certain SOCATA Model TBM 700 airplanes. The DGAC reports an incident in which the elevator controls jammed on one of the affected airplanes.

Jamming of the elevator controls occurred because water accumulated in the fuselage and froze. Water had accumulated in the fuselage because the strainer and draining hole became clogged.

What Is the Potential Impact if FAA Took No Action?

If this condition is not corrected, water may accumulate in the fuselage, freeze and interfere with or cause the elevator controls to seize. This could result in loss of elevator control.

Has FAA Taken Any Action to This Point?

We issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain SOCATA Model TBM 700 airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on November 14, 2001 (66 FR 57007). The NPRM proposed to require you to install a new strainer draining system in the cabin fuselage.

Was the Public Invited To Comment?

The FAA encouraged interested persons to participate in the making of this amendment. We did not receive any comments on the proposed rule or on our determination of the cost to the public.

FAA's Determination

What Is FAA's Final Determination on This Issue?

After careful review of all available information related to the subject presented above, we have determined that air safety and the public interest require the adoption of the rule as proposed except for minor editorial corrections. We have determined that these minor corrections:

—provide the intent that was proposed in the NPRM for correcting the unsafe condition; and

—do not add any additional burden upon the public than was already proposed in the NPRM.

Cost Impact

How Many Airplanes Does This AD Impact?

We estimate that this AD affects 79 airplanes in the U.S. registry.

What Is the Cost Impact of This AD on Owners/Operators of the Affected Airplanes?

We estimate the following costs to accomplish the modification:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
2 workhours × $60 = $120	$114	$234	$18,486

Compliance Time of This AD

What Is the Compliance Time of This AD?

The compliance time of this AD is ''within the next 3 months after the effective date of this AD''.

Why Is the Compliance Time Presented in Calendar Time Instead of Hours Time-in-Service (TIS)?

Although water in the cabin fuselage could interfere with the elevator controls and become unsafe during flight, the condition is not a direct result of airplane operation. The chance of this situation occurring is the same for an airplane with 10 hours time-in-service (TIS) as it would be for an airplane with 500 hours TIS. A calendar time for compliance will assure that the unsafe condition is addressed on all airplanes in a reasonable time period.

Regulatory Impact

Does This AD Impact Various Entities?

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national government and the States,

or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

Does This AD Involve a Significant Rule or Regulatory Action?

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the final evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. FAA amends § 39.13 by adding a new AD to read as follows:

2002–03–03 Socata—Groupe Aerospatiale: Amendment 39–12644; Docket No. 2001–CE–10–AD.

(a) *What airplanes are affected by this AD?* This AD affects Model TBM 700 airplanes, serial numbers 1 through 164, that are certificated in any category.

(b) *Who must comply with this AD?* Anyone who wishes to operate any of the airplanes identified in paragraph (a) of this AD must comply with this AD.

(c) *What problem does this AD address?* The actions specified by this AD are intended to prevent water from accumulating in the fuselage, then freezing and interfering with or causing the elevator controls to seize. This could result in loss of elevator control with consequent loss of airplane control.

(d) *What actions must I accomplish to address this problem?* To address this problem, you must accomplish the following:

Actions	Compliance	Procedures
Incorporate Kit No. OPT70 K072–53	Within the next 3 months after March 29, 2002 (the effective date of this AD), unless already accomplished.	In accordance with the Technical Instructions supplied with Kit No. OPT70 K072–53, as specified in Socata Service Bulletin SB 70–082 53, dated June 2000.

(e) *Can I comply with this AD in any other way?* You may use an alternative method of compliance or adjust the compliance time if:

(1) Your alternative method of compliance provides an equivalent level of safety; and

(2) The Manager, Standards Office, Small Airplane Directorate, approves your alternative. Submit your request through an FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Standards Office, Small Airplane Directorate.

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

(f) *Where can I get information about any already-approved alternative methods of compliance?* Contact Karl Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4146; facsimile: (816) 329–4090.

(g) *What if I need to fly the airplane to another location to comply with this AD?* The FAA can issue a special flight permit under sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate your airplane to a location where you can accomplish the requirements of this AD.

(h) *Are any service bulletins incorporated into this AD by reference?* Actions required by this AD must be done in accordance with the Technical Instructions supplied with Kit No. OPT70 K072–53, as specified in Socata Service Bulletin SB 70–082 53, dated June 2000. The Director of the Federal Register approved this incorporation by reference under 5 U.S.C. 552(a) and 1 CFR part 51. You can get copies from SOCATA—Groupe AEROSPATIALE, Customer Support, Aerodrome Tarbes-Ossun-Lourdes, BP 930—F65009 Tarbes Cedex, France; or the Product Support Manager, SOCATA—Groupe AEROSPATIALE, North Perry Airport, 7501 Pembroke Road, Pembroke Pines, Florida 33023. You can look at copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri, or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

Note 2: The subject of this AD is addressed in French AD 2000–373(A), dated October 18, 2000.

(i) *When does this amendment become effective?* This amendment becomes effective on March 29, 2002.

Issued in Kansas City, Missouri, on February 4, 2002.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–3167 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NM–266–AD; Amendment 39–12651; AD 2002–03–10]

RIN 2120–AA64

Airworthiness Directives; BAE Systems (Operations) Limited Model BAe 146 Series Airplanes and Model Avro 146–RJ Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain BAE Systems (Operations) Limited Model BAe 146 and Avro 146–RJ series airplanes, that requires repetitive inspections to detect cracking of the oleo strut of the nose landing gear (NLG), and corrective actions if necessary. This AD also provides for optional terminating action for the repetitive inspections. This action is necessary to detect and correct fatigue cracking of the oleo strut of the NLG, which could result in failure of the NLG. This action is intended to address the identified unsafe condition.

DATES: Effective March 21, 2002.

The incorporation by reference of certain publications listed in the

regulations is approved by the Director of the Federal Register as of March 21, 2002.

ADDRESSES: The service information referenced in this AD may be obtained from British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain BAE Systems (Operations) Limited Model BAe 146 and Avro 146–RJ series airplanes was published in the **Federal Register** on November 23, 2001 (66 FR 58678). That action proposed to require repetitive inspections to detect cracking of the oleo strut of the nose landing gear, and corrective actions if necessary. That action also proposed to provide for optional terminating action for the repetitive inspections.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were submitted in response to the proposal or the FAA's determination of the cost to the public.

Conclusion

The FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

The FAA estimates that 60 Model BAe 146 series airplanes and Model Avro 146–RJ series airplanes of U.S. registry will be affected by this AD, that it will take approximately 1 work hour per airplane to accomplish the required inspection, and that the average labor rate is $60 per work hour. Based on these figures, the cost impact of the requirements of this AD on U.S. operators is estimated to be $3,600, or $60 per airplane, per inspection cycle.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

2002–03–10 BAE Systems (Operations) Limited (Formerly British Aerospace Regional Aircraft): Amendment 39–12651. Docket 2000–NM–266–AD.

Applicability: Model BAe 146 series airplanes and Model Avro 146–RJ series airplanes, certificated in any category, as listed in BAE Systems (Operations) Limited Service Bulletin SB.32–158, dated June 2, 2000, except those on which Messier-Dowty Modification AC12248 has been installed.

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

Compliance: Required as indicated, unless accomplished previously.

To detect and correct fatigue cracking of the oleo strut of the nose landing gear (NLG), which could result in failure of the NLG, accomplish the following:

Inspection

(a) Perform an ultrasonic inspection to detect cracking of the oleo strut of the NLG, in accordance with BAE Systems (Operations) Limited Service Bulletin SB.32–158, dated June 2, 2000, according to the applicable time schedule specified in paragraphs (a)(1), (a)(2), and (a)(3) of this AD. Thereafter, repeat the inspection at least every 2,500 landings, until the actions specified by paragraph (c) of this AD have been performed.

(1) For NLGs identified in paragraph D.(3) of BAE Systems (Operations) Limited Service Bulletin SB.32–158, dated June 2, 2000: Inspect before the NLG accumulates 2,500 landings after accomplishment of the initial inspection specified by Messier-Dowty Service Bulletin 146–32–149, or within 30 days after the effective date of this AD, whichever occurs later.

(2) For NLGs having part number 201138002, serial numbers M–DG–0158 to M–DG–0168 inclusive, as identified in paragraph D.(4) of BAE Systems (Operations) Limited Service Bulletin SB. 32–158, dated June 2, 2000: Inspect before the NLG accumulates 20,000 total landings, or within 500 landings after the effective date of this AD, whichever occurs later.

(3) For NLGs other than those identified in paragraph (a)(1) or (a)(2) of this AD: Inspect before the NLG accumulates 8,000 total landings, or within 500 landings after the effective date of this AD, whichever occurs later.

Corrective Actions

(b) If any crack is found during any inspection required by this AD: Before further flight, replace the oleo strut of the

NLG with a new or serviceable strut in accordance with BAE Systems (Operations) Limited Service Bulletin SB.32–158, dated June 2, 2000.

Optional Terminating Action

(c) Modification of the NLG in accordance with BAE Systems (Operations) Limited Service Bulletin SB.32–159–70668ABC, dated June 14, 2000, terminates the repetitive inspections required by this AD.

Alternative Methods of Compliance

(d) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, International Branch, ANM–116.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the International Branch, ANM–116.

Special Flight Permits

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

Incorporation by Reference

(f) The inspections and replacement, as applicable, shall be done in accordance with BAE Systems (Operations) Limited Service Bulletin SB.32–158, dated June 2, 2000. The terminating action, if accomplished, shall be done in accordance with BAE Systems (Operations) Limited Service Bulletin SB.32–159–70668ABC, dated June 14, 2000. (Only the first page of these documents is dated; no other page of these documents contains this information.) This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 3: The subject of this AD is addressed in British airworthiness directive 002–06–2000.

Effective Date

(g) This amendment becomes effective on March 21, 2002.

Issued in Renton, Washington, on February 6, 2002.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–3309 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NE–34–AD; Amendment 39–12642; AD 2002–03–01]

RIN 2120–AA64

Airworthiness Directives; Honeywell International, Inc., (Formerly AlliedSignal, Inc., and Textron Lycoming) T5311A, T5311B, T5313B, T5317A, T5317B, T53–L–11, T53–L–11A, T53–L–11B, T53–L–11C, T53–L–11D, T53–L–11A S/SA, T53–L–13B, T53–L–13B S/SA, T53–L–13B S/SB, and T53–L–703 Turboshaft Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), that is applicable to Honeywell International, Inc., (formerly AlliedSignal, Inc., and Textron Lycoming) T5311A, T5311B, T5313B, T5317A, T5317B, and former military T53–L–11, T53–L–11A, T53–L–11B, T53–L–11C, T53–L–11D, T53–L–11A S/SA, T53–L–13B, T53–L–13B S/SA, T53–L–13B S/SB, and T53–L–703 series turboshaft engines. This amendment requires initial and repetitive special vibration tests of the engine, and if necessary replacement with a serviceable reduction gearbox assembly, or a serviceable engine before further flight. This amendment is prompted by reports of tachometer drive spur gear failure, resulting in potential engine overspeed, loss of power turbine speed (N2) instrument panel indication, and hard landings. The actions specified in this AD are intended to prevent excessive vibrations produced by the reduction gearbox assembly that could cause failure of the tachometer drive spur gear.

DATES: Effective date March 21, 2002. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of March 21, 2002.

ADDRESSES: The service information referenced in this AD may be obtained from Honeywell International, Inc., (formerly AlliedSignal, Inc., and Textron Lycoming), Attn: Data Distribution, M/S 64–3/2101–201, P.O. Box 29003, Phoenix, AZ 85038–9003; telephone: (602) 365–2493; fax: (602) 365–5577. This information may be examined, by appointment, at the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Robert Baitoo, Aerospace Engineer, Los Angeles Aircraft Certification Office, FAA, Transport Airplane Directorate, 3960 Paramount Blvd., Lakewood, CA 90712–4137; telephone: (562) 627–5245; fax: (562) 627–5210.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that is applicable to Honeywell International, Inc., (formerly AlliedSignal, Inc., and Textron Lycoming) T5311A, T5311B, T5313B, T5317A, T5317B, and former military T53–L–11, T53–L–11A, T53–L–11B, T53–L–11C, T53–L–11D, T53–L–11A S/SA, T53–L–13B, T53–L–13B S/SA, T53–L–13B S/SB, and T53–L–703 series turboshaft engines was published in the **Federal Register** on June 15, 2001 (66 FR 32591). That action proposed to require initial and repetitive special vibration tests of the engine, and if necessary replacement with a serviceable reduction gearbox assembly, or a serviceable engine before further flight, in accordance with AlliedSignal, Inc., Service Bulletin (SB) No.''s T5311A/B–0100, dated January 20, 2000; T5313B/17–0100, dated November 19, 1999; T53–L–11–0100, dated January 20, 2000; T53–L–13B–0100, Revision 2, dated May 11, 1999; and T53–L–703–0100, Revision 2, dated May 11, 1999.

Comments

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

The commenter stated that further investigation into the root problem causing the spur gear failures needs to be addressed. The problem may be a manufacturing problem from one U.S. Government contract supplier.

The FAA does not agree. The commenter did not supply sufficient evidence substantiating a design nonconformity.

After careful review of the available data, including the comment noted above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Economic Analysis

There are about 4,500 engines of the affected design in the worldwide fleet. The FAA estimates that 300 engines

installed on aircraft of U.S. registry would be affected by this AD, and that it would take about four work hours per engine to accomplish each special vibration test, and that the average labor rate is $60 per work hour. Based on these figures, for each special vibration test, the total labor cost effect on U.S. operators is estimated to be $240 per engine. The FAA estimates that operators, on average, will perform ten special vibration tests per year, resulting in a total annual cost on U.S. operators of $720,000.

Regulatory Analysis

This final rule does not have federalism implications, as defined in Executive Order 13132, because 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. Accordingly, the FAA has not consulted with state authorities prior to publication of this final rule.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

2002–03–01 Honeywell International, Inc.: Amendment 39–12642. Docket No. 2000–NE–34–AD.

Applicability: This airworthiness directive (AD) is applicable to Honeywell International, Inc., (formerly AlliedSignal, Inc., and Textron Lycoming) T5311A, T5311B, T5313B, T5317A, T5317B, and former military T53–L–11, T53–L–11A, T53–L–11B, T53–L–11C, T53–L–11D, T53–L–11A S/SA, T53–L–13B, T53–L–13B S/SA, T53–L–13B S/SB, and T53–L–703 turboshaft engines. These engines are installed on, but not limited to Bell Helicopter Textron 204, 205, and 209 series, and Kaman K–1200 series helicopters, and the following surplus military helicopters that have been certified in accordance with sections 21.25 or 21.27 of the Federal Aviation Regulations (14 CFR 21.25 or 21.27): Bell Helicopter Textron manufactured AH–1, HH–43, TH–1, UH–1 and SW–204/205 (UH–1) series.

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

Compliance: Compliance with this AD is required as indicated, unless already done.

To prevent excessive vibrations produced by the reduction gearbox assembly that could cause failure of the tachometer drive spur gear, do the following:

Initial and Repetitive Special Vibration Tests

(a) Perform an initial special vibration test of the engine in accordance with the applicable service bulletin (SB) listed in the following Table 1, within 100 flight hours after the effective date of this AD:

TABLE 1. ALLIEDSIGNAL SB'S FOR SPECIAL VIBRATION TESTS.

Engine	SB's
(1) T5311A and T5311B	T5311A/B–0100, dated January 20, 2000.
(2) T5313B, T5317A, and T5317B	T5313B/17–0100, dated November 19, 1999.
(3) T53–L–11, –11A, –11B, –11C, –11D, and 11A S/SA	T53–L–11–0100, Revision 2, dated January 20, 2000.
(4) T53–L–13B, –13B S/SA, and –13B S/SB	T53–L–13B–0100, Revision 2, dated May 11, 1999.
(5) T53–L–703	T53–L–703–0100, Revision 2, dated May 11, 1999.

(b) Perform repetitive special vibration tests of the engine in accordance with the applicable SB listed in Table 1 of this AD, as follows:

(1) For engines that have tachometer drive spur gear part number (P/N) 1–070–062–04 installed, perform repetitive special vibration tests within 500 flight hours since the last special vibration test.

(2) For engines that have tachometer drive spur gear P/N 1–070–062–06 installed, perform repetitive special vibration tests within 1,000 flight hours since the last special vibration test.

Engines That Fail Special Vibration Tests

(c) For engines that fail a special vibration test performed in accordance with paragraph (a) or (b) of this AD, do either of the following:

(1) Replace the gearbox assembly with a serviceable reduction gearbox assembly, and before further flight perform an initial special vibration test as specified in paragraph (a) of this AD; or

(2) Replace the engine with a serviceable engine, and before further flight perform an initial special vibration test as specified in paragraph (a) of this AD.

Alternative Methods of Compliance

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

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

Special Flight Permits

(e) Special flight permits may be issued in accordance with §§ 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the aircraft to a location where the special vibration tests and engine replacement requirements of this AD can be done.

Documents That Have Been Incorporated By Reference

(f) The inspection must be done in accordance with the following AlliedSignal, Inc. Service Bulletins (SB's):

Document No.	Pages	Revision	Date
SB T5311A/B–0100 Total pages: 5	All	Original	January 20, 2000.
SB T5313B/17–0100 Total pages: 5	All	Original	November 19, 1999.
SB T53–L–11–0100 Total pages: 5	All	Revision 2	January 20, 2000.
SB T53–L–13B–0100 Total pages: 5	All	Revision 2	May 11, 1999.
SB T53–L–703–0100 Total pages: 5	All	Revision 2	May 11, 1999.

This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Honeywell International, Inc. (formerly AlliedSignal, Inc. and Textron Lycoming), Attn: Data Distribution, M/S 64–3/2101–201, P.O. Box 29003, Phoenix, AZ 85038–9003; telephone: (602) 365–2493; fax: (602) 365–5577. Copies may be inspected, by appointment, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

Effective Date

(g) This amendment becomes effective on March 21, 2002.

Issued in Burlington, Massachusetts, on February 4, 2002.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 02–3310 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NE–02–AD; Amendment 39–12460; AD 2002–02–12]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc RB211–524G and –524H Series Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD) that is applicable to Rolls-Royce plc (RR) RB211–524G and –524H series turbofan engines. That AD currently requires initial and repetitive ultrasonic inspections for cracks in fan blade dovetail roots, and, if necessary, replacement with serviceable parts. That action also provides the options of installing improved design fan blades or reworking current fan blades to the improved configuration as terminating action for the inspections. This amendment requires initial inspection at lower thresholds, using either the blade root probe method or the surface wave probe method. This amendment also removes the option of reworking blades as terminating action for the inspections. Lastly, this amendment adds the model RB211–524H–T–36 engine to the applicability of this AD. This amendment is prompted by two additional reports of fan blade cracks found during inspections performed in accordance with the current AD. The actions specified in this AD are intended to detect cracked fan blades, which could result in an uncontained engine failure and damage to the airplane.

DATES: Effective March 1, 2002. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of March 1, 2002.

Comments for inclusion in the Rules Docket must be received on or before April 15, 2002.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 2000–NE–02–AD, 12 New England Executive Park, Burlington, MA 01803–5299. Comments may be inspected at this location, by appointment, between 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. Comments may also be sent via the Internet using the following address: ''9-ane-adcomment@faa.gov''. Comments sent via the Internet must contain the docket number in the subject line.

The service information referenced in this AD may be obtained from Rolls-Royce plc, PO Box 31, Derby, England; telephone: 011 44 1332–249428; fax: 011 44 1332–249223. This information may be examined at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Keith Mead, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7744 fax (781) 238–7199.

SUPPLEMENTARY INFORMATION: The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom (UK), had notified the Federal Aviation Administration (FAA) in March of 2000, that an unsafe condition may exist on certain Rolls-Royce plc (RR) RB211–524 series turbofan engines. The CAA had received reports of three fan blade failures up to that time. Subsequent inspections of the dovetail root area on other fan blades revealed the existence of dovetail root cracks in the same region as the failed blades.

The FAA issued AD 2000–05–12 to require initial and repetitive ultrasonic inspections for cracks in fan blade dovetail roots, and, if necessary, replacement with serviceable parts. That action also provided the options of installing improved design fan blades or reworking current fan blades to the improved configuration as terminating action for the inspections. Since that AD was published, two additional reports of fan blades found cracked have been received. The FAA has determined through information provided by RR

that the fan blade inspection requirements and rejection criteria need to be changed. This condition, if not corrected, could result in possible multiple fan blade failures, which could result in an uncontained engine failure and damage to the aircraft.

Manufacturer's Service Information

Rolls-Royce plc has issued mandatory service bulletin (MSB) No. RB.211–72–C818, Revision 5, dated March 30, 2001, that specifies lower initial inspection thresholds, and repetitive ultrasonic inspections for cracks in fan blade dovetail roots, using either the blade root probe method, or the surface wave probe method. However, fan blades part numbers (P/N's) UL38052 and UL38628, are restricted to the root probe method only. Investigation by the manufacturer has shown that the surface wave probe method on these fan blades does not routinely detect cracking of this blade root design configuration. Also, this MSB Revision 5 adds the model RB211–524H–T–36 engine to the applicability.

Bilateral Airworthiness Agreement

These engine models are manufactured in the United Kingdom (UK) and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the UK has kept the FAA informed of the situation described above. The FAA has examined the findings of the UK, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

FAA's Determination of an Unsafe Condition and Required Actions

Although none of these affected engine models are used on any airplanes that are registered in the United States, the possibility exists that the engine models could be used on airplanes that are registered in the United States in the future. Since an unsafe condition has been identified that is likely to exist or develop on other Rolls-Royce plc RB211–524G series and RB211–524H series turbofan engines of the same type design, this AD is being issued to detect cracked fan blades, which could result in an uncontained engine failure and damage to the airplane. This AD requires initial ultrasonic inspection at lower thresholds, and repetitive ultrasonic inspections, for cracks in fan blade dovetail roots, using either the blade root probe method or the surface wave probe method. This AD also adds the model RB211–524H–T–36 engine to the applicability. The actions are required to be done in accordance with the mandatory service bulletin described previously.

Immediate Adoption of This AD

Since there are currently no domestic operators of these engine models, notice and opportunity for prior public comment are unnecessary. Therefore, a situation exists that allows the immediate adoption of this regulation.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES**. All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2000–NE–02–AD.'' The postcard will be date stamped and returned to the commenter.

Regulatory Analysis

This final rule does not have federalism implications, as defined in Executive Order 13132, because 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. Accordingly, the FAA has not consulted with state authorities prior to publication of this final rule.

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing Amendment 39–11622 (65 FR 14207, March 16, 2000) and adding a new airworthiness directive, Amendment 39–12460, to read as follows:

2002–02–12 Rolls-Royce plc: Amendment 39–12460. Docket No. 2000–NE–02–AD. Supersedes AD 2000–05–12, Amendment 39–11622.

Applicability: This airworthiness directive (AD) is applicable to Rolls-Royce plc (RR) models RB211–524G2–19, RB211–524G2–T–19, RB211–524G3–19, RB211–524G3–T–19, RB211–524H2–19, RB211–524H2–T–19, RB211–524H–36, and RB211–524H–T–36 turbofan engines, with fan blades part numbers (P/N's) UL23061, UL25772, UL27253, UL29561, UL29573, UL30533, UL36245, UL38009, UL38052, or UL38628, installed. These engines are installed on, but not limited to Boeing 747–400 series and 767 series airplanes.

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

Compliance: Compliance with this AD is required as indicated, unless already done.

To detect cracked fan blades, which could result in an uncontained engine failure and damage to the airplane, do the following:

Initial Inspection

(a) Ultrasonically inspect for cracks in the dovetail slots of the fan blades using the Initial Inspection cycles-since-new (CSN) for Root Probe Method or Wave Probe Method, in accordance with EITHER paragraph 3.E. (Root Probe Method) OR 3.F. (Wave Probe Method) of the Accomplishment Instructions of RR service bulletin (SB) RB.211–72–C818, Revision 5, dated March 30, 2001 and using Table 1 of this AD:

TABLE 1.—INITIAL AND REPETITIVE INSPECTION COMPLIANCE TIMES

Fan blade P/N's	For root probe method		For wave probe method	
	Initial inspection	Repetitive inspection	Initial inspection	Repetitive inspection
(1) UL23061, UL25772, UL27253, UL29561, UL29573, UL30533.	Within 6,500 CSN	Within 330 cycles-since-last-inspection (CSLI).	Within 6,500 CSN	Within 270 CSLI.
(2) UL36245, UL38009	Within 1,150 CSN	Within 290 CSLI	Within 1,150 CSN	Within 250 CSLI.
(3) UL38052, UL38628	Within 1,150 CSN	Within 290 CSLI	Not Allowed	Not Allowed.

(b) For fan blades P/N's UL38052 or UL38628 initially inspected using paragraph 3.F. of the Accomplishment Instructions of RR SB RB.211–72–C818, Revision 4, dated June 23, 2000, inspect the blades for cracks in accordance with paragraph 3.E. of the Accomplishment Instructions of RR SB RB.211–72–C818, Revision 5, dated March 30, 2001 using the cycles-since-last-inspection (CSLI) times specified in Table 2 of this AD:

TABLE 2.—INSPECTION CSLI FOR FAN BLADES INSPECTED USING RR SB RB.211–72–C818, REVISION 4, DATED JUNE 23, 2000

Number of CSLI	Inspection interval after the effective date of this AD
(1) 290 to 500 CSLI	Within 100 cycles-in-service (CIS).
(2) 501 to 750 CSLI	Within 50 CIS.
(3) More than 750 CSLI	Within 25 CIS.

Additional Requirement When Both Engines of the Same Boeing 767 Airplane Have One or More Fan Blades P/N's UL38052 or UL38628 Installed

(c) For fan blades, P/N's UL38052 and UL38628 that are installed in both engines of the same Boeing 767 airplane, and that have accumulated more than 290 CSLI, ultrasonic-inspect blades of one engine for cracks within 25 CIS after the effective date of this AD in accordance with paragraph 3.E. of the Accomplishment Instructions of RR SB RB.211–72–C818, Revision 5, dated March 30, 2001.

Repetitive Inspections

(d) Thereafter, ultrasonically inspect for cracks in the dovetail slots of the fan blades using the Repetitive Inspection CSLI for Root Probe Method or Wave Probe Method, in accordance with EITHER paragraph 3.E. OR 3.F. of the Accomplishment Instructions of RR SB RB.211–72–C818, Revision 5, dated March 30, 2001 and using Table 1 of this AD.

Dispositioning of Cracked Fan Blades

(e) Before further flight, replace any fan blade that does not meet the acceptance criteria specified in paragraph 3.E or 3.F. of the Accomplishment Instructions of SB RR SB RB.211–72–C818, Revision 5, dated March 30, 2001.

Terminating Action

(f) Removal from service of fan blades P/N's UL23061, UL25772, UL27253, UL29561, UL29573, UL30533, UL36245, UL38009, UL38052, and UL38628, and replacement with serviceable fan blades with P/N's other than these P/N's constitutes terminating action for the inspection requirements of this AD.

Alternative Methods of Compliance

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

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

Special Flight Permits

(h) Special flight permits may be issued in accordance with §§ 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be done.

Documents That Have Been Incorporated By Reference

(i) The inspections must be done in accordance with Rolls-Royce plc Mandatory Service Bulletin No. RB.211–72–C818, Revision 5, dated March 30, 2001. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Rolls-Royce plc, PO Box 31, Derby, England; telephone: 011 44 1332–249428; fax: 011 44 1332–249223. Copies may be inspected, by appointment, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

Effective Date

(j) This amendment becomes effective on March 1, 2002.

Issued in Burlington, Massachusetts, on February 1, 2002.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 02–3162 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–114–AD; Amendment 39–12647; AD 2002–03–06]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model DC–9–81, –82, –83, and –87 Series Airplanes, Model MD–88 Airplanes, and Model MD–90–30 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to certain McDonnell Douglas Model DC–9–81, –82, –83, and –87 series airplanes, Model MD–88 airplanes, and Model MD–90–30 series airplanes, that currently requires a revision to the applicable Airplane Flight Manual (AFM) to provide the flightcrew with the appropriate landing distance and flap positions, if applicable, for wet or icy runways. That AD also provides for an optional terminating action for the applicable AFM revision. For certain airplanes, this action requires accomplishment of the previously optional terminating action. The actions specified by this AD are intended to prevent the flightcrew from performing a scheduled landing on a runway of potentially insufficient length due to failure of the weight-on-wheels spoiler lockout mechanism system and possible inactivation of the autospoiler actuator, which could result in the airplane overrunning the end of the runway during landing on a wet or icy runway.

DATES: Effective March 21, 2002.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of March 21, 2002.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Aircraft Group, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Albert Lam, Aerospace Engineer, Systems and Equipment Branch, ANM–130L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5346; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 2001–07–10, amendment 39–12176 (66 FR 18870, April 12, 2001), which is applicable to certain McDonnell Douglas Model DC–9–81, –82, –83, and –87 series airplanes, Model MD–88 airplanes, and Model MD–90–30 series airplanes, was published in the **Federal Register** on June 29, 2001 (66 FR 34593). The action proposed to continue to require a revision to the applicable Airplane Flight Manual (AFM) to provide the flightcrew with the appropriate landing distance and flap positions, if applicable, for wet or icy runways. That action also proposed to continue to provide for an optional terminating action for the applicable AFM revision. For certain airplanes, that action also proposed to require accomplishment of the previously optional terminating action.

Comments

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

Request To Approve Previous Alternative Methods of Compliance (AMOCs)

One commenter requests that AMOCs approved for AD 2001–07–10 (amendment 39–12176) remain valid for the purposes of the the proposed rule. The commenter notes that, since the proposed rule merely requires compliance with a previously optional terminating action, the existing AMOCs should also be given credit in the proposed rule.

The FAA agrees with the commenter's request, and has revised paragraph (e) of the final rule to reflect credit for the accomplishment of AMOCs in accordance with AD 2001–07–10.

Request To Clarify the Requirements of Paragraph (d) of the Proposed Rule

One commenter notes that paragraph (d) of the proposed rule (which is applicable to Model MD–90 series airplanes) refers to doing the actions specified in paragraphs (c)(1) and (c)(2) of the AD (which applies to Model MD–80 series airplanes). To eliminate any confusion, the commenter requests that paragraph (d) of the proposed rule be revised to clearly specify the actions required for the MD–90 series airplanes, rather than refering to paragraph (c) of the proposed rule.

The FAA acknowledges that clarification is needed. We have revised paragraph (d) of the final rule to add new paragraphs (d)(1) and (d)(2) to clarify the actions required for Model MD–90 series airplanes.

Conclusion

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes previously described.

Cost Impact

There are approximately 224 Model DC–9–81, –82, –83, and –87 series airplanes, Model MD–88 airplanes, and Model MD–90–30 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 67 airplanes of U.S. registry will be affected by this AD.

The AFM revisions that are currently required by AD 2001–07–10, and retained in this AD, take approximately 1 work hour per airplane to accomplish, at an average labor rate of $60 per work hour. Based on these figures, the cost impact of the currently required actions on U.S. operators is estimated to be $4,020, or $60 per airplane.

For certain airplanes, the new terminating action that is required by this AD will take approximately 22 work hours per airplane to accomplish, at an average labor rate of $60 per work hour. The manufacturer has committed previously to its customers that it will bear the cost of replacement parts. Based on these figures, the cost impact of these requirements on U.S. operators of Model MD–90–30 series airplanes is estimated to be $1,320 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Should an operator of Model DC–9–81, –82, –83, and –87 series airplanes, and Model MD–88 airplanes elect to accomplish the optional terminating action that will be provided by this AD action, it will take approximately 22 work hours to accomplish it, at an average labor rate of $60 per work hour. The manufacturer has committed previously to its customers that it will bear the cost of replacement parts. Based on these figures, the cost impact of the optional terminating action will be $1,320 per airplane.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between

the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing amendment 39–12176 (66 FR 18870, April 12, 2001), and by adding a new airworthiness directive (AD), amendment 39–12647, to read as follows:

2002–03–06 McDonnell Douglas: Amendment 39–12647. Docket 2001–NM–114–AD. Supersedes AD 2001–07–10, Amendment 39–12176.

Applicability: Models identified in Table 1 of this AD, certificated in any category; excluding those airplanes on which the modification specified in the applicable service bulletin listed in Table 1 of this AD has been done. Table 1 is as follows:

TABLE 1—APPLICABILITY

Model	As listed in
DC–9–81, –82, –83, and –87 series airplanes, and MD–88 airplanes	Boeing Alert Service Bulletin MD80–27A359, Revision 01, dated March 26, 2001.
MD–90–30 series airplanes	Boeing Alert Service Bulletin MD90–27A031, Revision 01, dated March 26, 2001.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent the flightcrew from performing a scheduled landing on a runway of potentially insufficient length due to failure of the weight-on-wheels spoiler lockout mechanism system and possible inactivation of the autospoiler actuator, which could result in the airplane overrunning the end of the runway during landing on a wet or icy runway, accomplish the following:

Restatement of Requirements of AD 2001–07–10

Airplane Flight Manual Revisions

(a) For Model DC–9–81, –82, –83, and –87 series airplanes, and MD–88 airplanes: Within 48 clock hours after April 27, 2001 (the effective date AD 2001–07–10, amendment 39–12176), revise the Performance Section of the FAA-approved Airplane Flight Manual (AFM) to include the following statement. This may be done by inserting a copy of this AD in the AFM.

''In-flight Spoiler Lockout Mechanism Installed and Activated, and Automatic Ground Spoiler System Operated.

When the in-flight spoiler lockout mechanism is installed and activated, the wet or icy runway landing field length, which is determined from the appropriate Landing Field Length and Speed Chart, must be increased by 1,720 feet under either of the following conditions:

a. The weight-on-wheels unlocking feature is not installed; or

b. The weight-on-wheels unlocking feature is installed, but inoperative.

When the in-flight spoiler lockout mechanism is deactivated, the above landing field length is not required.''

(b) For Model MD–90–30 series airplanes: Within 48 clock hours after April 27, 2001, do the actions specified in either paragraph (b)(1) or (b)(2) of this AD.

(1) Revise the Performance Section of the FAA-approved AFM to include the following statement. This may be done by inserting a copy of this AD in the AFM.

''Landing Field Length for A Wet or Icy Runway.

Increase landing field length, which is determined from the Basic Manual, by 1,800 feet (549 meters) for a wet or icy runway with 28-degree and 40-degree flaps.

There is no landing field length penalty for a dry runway.

In-flight spoiler lockout mechanism may NOT be deactivated, as indicated in the Master Minimum Equipment List (MMEL).''

(2) Revise the Performance Section of the FAA-approved AFM by inserting a copy of Appendix 3E, Section 4, of MD–90 AFM MDC–91K0930, dated March 14, 2001, into the AFM.

Note 2: The MD–90 Master Minimum Equipment List (MMEL), system and sequence number 65–02, and the second proviso of system and sequence number 65–03, currently specifies that, for 10 days, the in-flight spoiler lockout mechanism system may be deactivated. Where differences exist between the current specification of the MMEL and the requirements of this AFM limitation, the AFM limitation prevails.

Optional Terminating Modifications

(c) For Model DC–9–81, –82, –83, and –87 series airplanes, and MD–88 airplanes: Accomplishment of the actions specified in paragraphs (c)(1) and (c)(2) of this AD, per Boeing Alert Service Bulletin MD80–27A359, dated January 29, 2001, or Revision 01, dated March 26, 2001, terminates the AFM revision requirements of paragraph (a) of this AD. After doing those actions, the AFM revision required by paragraph (a) of this AD may be removed from the AFM:

(1) Install the spoiler support bracket assemblies and relays; and

(2) Revise the spoiler lockout relay wiring.

New Actions Required by This AD

Terminating Modification for Model MD–90–30 Series Airplanes

(d) For Model MD–90–30 series airplanes: Within 18 months after the effective date of this AD, do the actions specified in paragraphs (d)(1) and (d)(2) of this AD, per Boeing Alert Service Bulletin MD90–27A031, dated January 29, 2001, or Revision 01, dated March 26, 2001. Accomplishment of those actions terminates the AFM revision

requirements of paragraph (b) of this AD. After doing those actions, the AFM revision required by paragraph (b) of this AD may be removed from the AFM:

(1) Install the spoiler support bracket assemblies and relays, and

(2) Revise the spoiler lockout relay wiring.

Alternative Methods of Compliance

(e)(1) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Los Angeles ACO.

(2) Alternative methods of compliance, approved previously in accordance with AD 2001–07–10, amendment 39–12176, are approved as alternative methods of compliance with this AD.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Los Angeles ACO.

Special Flight Permits

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

Incorporation by Reference

(g) The actions required by paragraph shall be done in accordance with Boeing Alert Service Bulletin MD90–27A031, dated January 29, 2001, or Boeing Alert Service Bulletin MD90–27A031, Revision 01, dated March 26, 2001. The optional terminating modification specified in paragraph (c) of this AD, if accomplished, shall be done in accordance with Boeing Alert Service Bulletin MD80–27A359, dated January 29, 2001, or Boeing Alert Service Bulletin MD80–27A359, Revision 01, dated March 26, 2001. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Aircraft Group, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(h) This amendment becomes effective on March 21, 2002.

Issued in Renton, Washington, on February 5, 2002.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–3289 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NM–350–AD; Amendment 39–12512; AD 2001–23–13]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; correction.

SUMMARY: This document corrects information in an existing airworthiness directive (AD) that applies to certain Boeing Model 747 series airplanes. That AD currently requires an inspection of the flap drive transmission of the trailing edge flaps at positions 2 and 7 to determine if a discrepant torque brake is installed; and corrective action, if necessary. That AD also imposes certain restrictions on the installation of affected spare parts. This document corrects and clarifies that the spares requirement in paragraph (b) of the final rule applies to only positions 2 and 7 of the trailing edge flaps, as identified in the Boeing service bulletin. This correction is necessary to ensure that operators are made aware that the spares requirement does not apply to positions 4 and 5 of the trailing edge flaps.

DATES: Effective December 31, 2001.

The incorporation by reference of certain publications listed in the regulations was approved previously by the Director of the Federal Register as of December 31, 2001 (66 FR 58918, November 26, 2001).

FOR FURTHER INFORMATION CONTACT: Barbara Mudrovich, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2983; fax (425) 227–1181.

SUPPLEMENTARY INFORMATION: On November 15, 2001, the Federal Aviation Administration (FAA) issued AD 2001–23–13, amendment 39–12512 (66 FR 58918, November 26, 2001), which applies to certain Boeing Model 747 series airplanes. That AD requires an inspection of the flap drive transmission of the trailing edge flaps at positions 2 and 7 to determine if a discrepant torque brake is installed; and corrective action, if necessary. That AD also imposes certain restrictions on the installation of affected spare parts. The actions required by that AD are intended to prevent damage to the flap system, adjacent systems, or structural components; or excessive skew of the trailing edge flap, which could result in flap asymmetry and consequent reduced controllability of the airplane.

Need for the Correction

Information obtained recently by the FAA indicates that the spares requirement in paragraph (b) of the final rule needs to be clarified and corrected.

As published, paragraph (b) of the final rule states that ''no person shall install on any airplane any transmission or torque brake assembly identified in the ''Existing Part Number'' column of Paragraph 2.E. of Boeing Service Bulletin 747–27–2374, dated November 18, 1999.''

Although paragraph (b) of the final rule did not limit the spares requirement to only positions 2 and 7 of the trailing edge flaps of the flap drive transmission, as indicated in the ''Summary'' of the final rule, and as clearly described in the ''Differences'' paragraph in the Notice of Proposed Rulemaking, it was the FAA's intent to do so.

The FAA has determined that a correction to AD 2001–23–13 is necessary to correct and clarify the spares requirement. This correction will specify that the spares requirement in paragraph (b) of this AD is limited to the transmission or torque brake assembly of the trailing edge flaps at positions 2 and 7.

Correction of Publication

This document corrects the error in AD 2001–23–13 and correctly adds the AD as an amendment to section 39.13 of the Federal Aviation Regulations (14 CFR 39.13).

The AD is reprinted in its entirety for the convenience of affected operators. The effective date of the AD remains December 31, 2001.

Since this action only clarifies and corrects a current requirement, it has no adverse economic impact and imposes no additional burden on any person. Therefore, the FAA has determined that notice and public procedures are unnecessary.

List of Subjects in 14 CFR Part 39

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

Adoption of the Correction

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Corrected]

2. Section 39.13 is amended by correctly adding the following airworthiness directive (AD):

2001–23–13 Boeing: Amendment 39–12512. Docket 2000–NM–350–AD.

Applicability: Model 747 series airplanes, line numbers 0001 through 1207, certificated in any category; excluding the airplanes having line number 1174 and Model 747SP series airplanes.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent damage to the flap system, adjacent systems, or structural components; or excessive skew of the trailing edge flap; which could result in flap asymmetry and consequent reduced controllability of the airplane, accomplish the following:

Part Verification/Replacement/Modification

(a) Within 18 months or 7,500 flight hours after December 31, 2001, whichever occurs later: Inspect the flap drive transmission of the trailing edge flaps at positions 2 and 7 to determine if a discrepant (''Belleville'' spring design) torque brake is installed in the transmission, by verifying the transmission part number, per Boeing Service Bulletin 747–27–2374, dated November 18, 1999. Then do the actions specified in paragraphs (a)(1) and (a)(2) of this AD, as applicable.

(1) If the part number of the flap drive transmission shows that no discrepant torque brake is installed, no further action is required by this AD.

(2) If the part number of the flap drive transmission shows that a discrepant torque brake may be installed, within the compliance time required by paragraph (a) of this AD: Inspect the part number of the torque brake to verify whether it is a discrepant torque brake, per the Accomplishment Instructions of the service bulletin.

(i) If the part number of the torque brake shows that it is not a discrepant torque brake, no further action is required by this AD.

(ii) If the part number of the torque brake shows that it is a discrepant torque brake: Within the compliance time required by paragraph (a) of this AD either replace the transmission with a new, improved transmission or rework the existing transmission by replacing the torque brake with a new or reworked torque brake having the part number specified in the service bulletin; per the Accomplishment Instructions of the service bulletin.

Spares

(b) As of December 31, 2001, no person shall install on any airplane any transmission or torque brake assembly of the trailing edge flaps at positions 2 or 7, as identified in the ''Existing Part Number'' column of Paragraph 2.E. of Boeing Service Bulletin 747–27–2374, dated November 18, 1999.

Alternative Methods of Compliance

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

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

Special Flight Permit

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

Incorporation by Reference

(e) The actions shall be done in accordance with Boeing Service Bulletin 747–27–2374, dated November 18, 1999. This incorporation by reference was approved previously by the Director of the Federal Register as of December 31, 2001 (66 FR 58918, November 26, 2001). Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(f) The effective date of this amendment remains December 31, 2001.

Issued in Renton, Washington, on February 7, 2002.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–3588 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

Oral Dosage Form New Animal Drugs; Carprofen

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Pfizer, Inc. The supplemental NADA provides for a once daily, 2-milligram per pound (mg/lb) dosage of carprofen, by oral chewable tablet, for the relief of pain and inflammation associated with osteoarthritis in dogs.

DATES: This rule is effective February 14, 2002.

FOR FURTHER INFORMATION CONTACT: Melanie R. Berson, Center for Veterinary Medicine (HFV–110), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–7540, e-mail: mberson@cvm.fda.gov.

SUPPLEMENTARY INFORMATION: Pfizer, Inc., 235 East 42d St., New York, NY 10017–5755, filed a supplement to approved NADA 141–111 that provides for veterinary prescription use of RIMADYL (carprofen) Chewable Tablets for the relief of pain and inflammation associated with osteoarthritis in dogs. The supplemental NADA provides for a once daily, 2-mg/lb dosage for the oral chewable tablet dosage form. The supplemental application is approved as of November 26, 2001, and the regulations are amended in 21 CFR 520.309 to reflect the approval. The basis of approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of 21 CFR part 20 and 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9

a.m. and 4 p.m., Monday through Friday.

The agency has determined under 21 CFR 25.33(d)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 520

Animal drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 520 is amended as follows:

PART 520–ORAL DOSAGE FORM NEW ANIMAL DRUGS

1. The authority citation for 21 CFR part 520 continues to read as follows:

Authority: 21 U.S.C. 360b.

2. Section 520.309 is amended in paragraph (a) by removing ''of'' and by revising paragraph (d)(1) to read as follows:

§ 520.309 Carprofen.

* * * * *

(d) * * *

(1) *Amount.* 2 mg per pound (/lb) of body weight once daily or 1 mg/lb twice daily.

* * * * *

Dated: February 5, 2002.

Stephen F. Sundlof,

Director, Center for Veterinary Medicine.

[FR Doc. 02–3682 Filed 2–13–02; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 522

Implantation or Injectable Dosage Form New Animal Drugs; Florfenicol

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Schering-Plough Animal Health Corp. The supplement provides for changing a pathogen genus from *Pasteurella* to *Mannheimia* on labeling of florfenicol injectable solution.

DATES: This rule is effective February 14, 2002.

FOR FURTHER INFORMATION CONTACT: Naba K. Das, Center for Veterinary Medicine (HFV–133), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–7569, e-mail: ndas@cvm.fda.gov.

SUPPLEMENTARY INFORMATION: Schering-Plough Animal Health Corp., 1095 Morris Ave., P.O. Box 3182, Union, NJ 07083, is the sponsor of NADA 141–063 that provides for use of NUFLOR (florfenicol) Injectable Solution in cattle. Schering-Plough Animal Health Corp. filed a supplemental NADA providing for changing a pathogen genus from *Pasteurella* to *Mannheimia* on product labeling. The NADA is approved as of November 8, 2001, and the regulations are amended in § 522.955 (21 CFR 522.955) to reflect the approval. Section 522.955 is also being amended to reflect an updated format. Approval of this supplemental NADA did not require review of safety or effectiveness data; therefore, a freedom of information summary is not required.

The agency has determined under 21 CFR 25.33(a)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 522

Animal drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 522 is amended as follows:

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

1. The authority citation for 21 CFR part 522 continues to read as follows:

Authority: 21 U.S.C. 360b.

2. Section 522.955 is amended by revising the section heading and by revising paragraphs (a), (d)(1)(i), (d)(1)(ii), and (d)(1)(iii) to read as follows:

§ 522.955 Florfenicol.

(a) *Specifications.* Each milliliter of solution contains 300 milligrams (mg) of florfenicol.

* * * * *

(d) * * *

(1) * * *

(i) *Amount.* 20 mg per kilogram (/kg) of body weight as an intramuscular injection. A second dose should be administered 48 hours later.

(A) *Indications for use.* For treatment of bovine respiratory disease (BRD) associated with *Mannheimia (Pasteurella) haemolytica*,*P. multocida*, and *Haemophilus somnus*. For treatment of bovine interdigital phlegmon (foot rot, acute interdigital necrobacillosis, infectious pododermatitis) associated with *Fusobacterium necrophorum* and*Bacteroides melaninogenicus*.

(B) [Reserved]

(ii) *Amount.* 40 mg/kg body weight as a single subcutaneous injection.

(A) *Indications for use.* As in paragraph (d)(1)(i)(A) of this section; for control of respiratory disease in cattle at high risk of developing BRD associated with *M. (Pasteurella) haemolytica*, *P. multocida*, and *H. somnus*.

(B) [Reserved]

(iii) *Limitations.* Do not slaughter within 28 days of last intramuscular treatment or within 38 days of subcutaneous treatment. Do not use in female dairy cattle 20 months of age or older. Use may cause milk residues. A withdrawal period has not been established in preruminating calves. Do not use in calves to be processed for veal. Federal law restricts this drug to use by or on the order of a licensed veterinarian.

* * * * *

Dated: January 31, 2002.

Claire M. Lathers,

Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

[FR Doc. 02–3680 Filed 2–13–02; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 522 and 556

Implantation or Injectable Dosage Form New Animal Drugs; Zeranol

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule, technical amendment.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a new animal drug application (NADA) filed by Schering-Plough Animal Health Corp. The NADA provides for use of a subcutaneous ear implant containing zeranol in pasture cattle for increased rate of weight gain. FDA is also amending the regulations to add the acceptable daily intake (ADI) for total residues of zeranol.

DATES: This rule is effective February 14, 2002.

FOR FURTHER INFORMATION CONTACT: Daniel A. Benz, Center for Veterinary Medicine (HFV–126), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–0223, e-mail: dbenz@cvm.fda.gov.

SUPPLEMENTARY INFORMATION: Schering-Plough Animal Health Corp., 1095 Morris Ave., P.O. Box 3182, Union, NJ 07083, filed NADA 141–192 for RALGRO LA (zeranol), a subcutaneous ear implant containing 138 milligrams (mg) zeranol. The implants are used for increased rate of weight gain for up to 210 days in pasture cattle (slaughter, stocker, and feeder steers, and heifers). The application is approved as of November 1, 2001, and the regulations are amended in § 522.2680 (21 CFR 522.2680) to reflect the approval. The basis of approval is discussed in the freedom of information summary.

Section 522.2680 is also being amended to reflect a current format for regulations pertaining to cattle ear implants. This action is being taken to improve the clarity and readability of the regulations. In addition, the regulations are amended in 21 CFR 556.760 by adding the previously established ADI for total residues of zeranol, and editorially, to reflect current format.

In accordance with the freedom of information provisions of 21 CFR part 20 and 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

Under section 512(c)(2)(F)(ii) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(c)(2)(F)(ii)), this approval for food-producing animals qualifies for 3 years of marketing exclusivity beginning November 1, 2001, because the application contains substantial evidence of the effectiveness of the drug involved, any studies of animal safety, or, in the case of food-producing animals, human food safety studies (other than bioequivalence or residue studies) required for the approval and conducted or sponsored by the applicant.

The agency has carefully considered the potential environmental impact of this action and has concluded that the action will not have a significant impact on the human environment and that an environmental impact statement is not required. FDA's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects

21 CFR Part 522

Animal drugs.

21 CFR Part 556

Animal drugs, Foods.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 522 and 556 are amended as follows:

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

1. The authority citation for 21 CFR part 522 continues to read as follows:

Authority: 21 U.S.C. 360b.

2. Section 522.2680 is amended by revising paragraphs (a), (d)(1)(i), (d)(2)(i), (d)(3)(i), and (d)(3)(ii), and by adding paragraph (d)(4) to read as follows:

§ 522.2680 Zeranol.

(a) *Specifications*. Each pellet contains 12, 18, or 20 milligrams (mg) zeranol.

* * * * *

(d) *Conditions of use*—(1) *Beef cattle*—(i) *Amount*. 36 mg zeranol (one implant consisting of 3 pellets, each pellet containing 12 mg zeranol) per implant dose.

* * * * *

(2) *Feedlot lambs*—(i) *Amount*. 12 mg zeranol (one implant consisting of 1 pellet containing 12 mg zeranol) per implant dose.

* * * * *

(3) *Steers fed in confinement for slaughter*—(i) *Amount*. 72 mg zeranol (one implant consisting of 6 pellets, each pellet containing 12 mg zeranol) per implant dose.

(ii) *Indications for use*. For increased rate of weight gain and improved feed efficiency.

* * * * *

(4) *Pasture cattle (slaughter, stocker, feeder steers, and heifers)*—(i) *Amount*. 138 mg zeranol (one implant consisting of 7 pellets, each of 6 pellets containing 20 mg zeranol and a seventh pellet containing 18 mg zeranol) per implant dose.

(ii) *Indications for use*. For increased rate of weight gain.

(iii) *Limitations*. Implant subcutaneously in ear only.

PART 556—TOLERANCES FOR RESIDUES OF NEW ANIMAL DRUGS IN FOOD

3. The authority citation for 21 CFR part 556 continues to read as follows:

Authority: 21 U.S.C. 342, 360b, 371.

4. Section 556.760 is amended by redesignating paragraphs (a) and (b) as paragraphs (b)(1), and (b)(2), respectively, by revising newly redesignated paragraph (b)(1), and by adding paragraph (a) to read as follows:

§ 556.760 Zeranol.

(a) *Acceptable daily intake (ADI)*. The ADI for total residues of zeranol is 0.00125 milligrams per kilogram of body weight per day.

(b) *Tolerances*—(1) *Cattle*. Tolerances for residues of zeranol in edible tissues are not needed.

* * * * *

Dated: February 1, 2002.

Stephen F. Sundlof,

Director, Center for Veterinary Medicine.

[FR Doc. 02–3681 Filed 2–13–02; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 558

New Animal Drugs for Use in Animal Feeds; Bacitracin Methylene Disalicylate and Zoalene

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Alpharma, Inc. The supplemental NADA provides for using approved single-ingredient bacitracin methylene disalicylate and zoalene Type A medicated articles to make two-way combination drug Type C medicated feeds used for the management of necrotic enteritis and coccidiosis in replacement and broiler chickens.

DATES: This rule is effective February 14, 2002.

FOR FURTHER INFORMATION CONTACT: Steven D. Vaughn, Center for Veterinary Medicine (HFV–130), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–7580, e-mail: svaughn@cvm.fda.gov.

SUPPLEMENTARY INFORMATION: Alpharma, Inc., One Executive Dr., P.O. Box 1399, Fort Lee, NJ 07024, filed supplemental NADA 141–085 that provides for combining approved BMD (10, 25, 30, 40, 50, 60, or 75 grams per pound (g/lb) bacitracin methylene disalicylate) and ZOAMIX (113.5 g/lb zoalene) Type A medicated articles to make two-way combination drug Type C medicated chicken feeds containing 50 or 100 to 200 g/ton bacitracin methylene disalicylate and 36.3 to 113.5 or 113.5 g/ton zoalene. The combination Type C feeds containing 50 g/ton bacitracin methylene disalicylate and 36.3 to 113.5 g/ton zoalene are used as an aid in the prevention of necrotic enteritis caused or complicated by *Clostridium* spp. or other organisms susceptible to bacitracin and for the development of active immunity to coccidiosis in replacement chickens. The combination Type C feeds containing 100 to 200 g/ton bacitracin methylene disalicylate and 36.3 to 113.5 g/ton zoalene are used as an aid in the control of necrotic enteritis caused or complicated by *Clostridium* spp. or other organisms susceptible to bacitracin and for the development of active immunity to coccidiosis in replacement chickens. The combination Type C feeds containing 50 g/ton bacitracin methylene disalicylate and 113.5 g/ton zoalene are used as an aid in the prevention of necrotic enteritis caused or complicated by *Clostridium* spp. or other organisms susceptible to bacitracin and for the prevention and control of coccidiosis in broiler chickens. The combination Type C feeds containing 100 to 200 g/ton bacitracin methylene disalicylate and 113.5 g/ton zoalene are used as an aid in the control of necrotic enteritis caused or complicated by *Clostridium* spp. or other organisms susceptible to bacitracin and for the prevention and control of coccidiosis in broiler chickens. The supplemental NADA is approved as of November 30, 2001, and the regulations are amended in 21 CFR 558.680 to reflect the approval. The basis of approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of 21 CFR part 20 and 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

FDA has determined under 21 CFR 25.33(a)(2) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 558

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 558 is amended as follows:

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

1. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: 21 U.S.C. 360b, 371.

2. Section 558.680 is amended by redesignating paragraphs (a), (b), and (c) as paragraphs (b), (c), and (d), respectively; by adding new paragraph (a); by revising newly redesignated paragraph (b); and in the table in paragraph (d)(1) by adding in item (i) after the entry for ''Arsanilic acid 90 (0.01%) plus penicillin 2.4 to 50'' the entries for ''Bacitracin methylene disalicylate 50'' and ''Bacitracin methylene disalicylate 100 to 200'', and by adding in item (ii) after the entry for ''Bacitracin 4 to 50 plus roxarsone 22.7 to 45.4 (0.0025% to 0.005%)'' the entries for ''Bacitracin methylene disalicylate 50'' and ''Bacitracin methylene disalicylate 100 to 200'' to read as follows:

§ 558.680 Zoalene.

(a) *Specifications.* Type A medicated article containing 25 percent zoalene.

(b) *Approvals.* See No. 046573 in § 510.600(c) of this chapter.

* * * * *

(d) * * *

(1) * * *

Zoalene in grams/ton	Combination in grams/ton	Indications for use	Limitations
* *	* *	* *	*
(i) 36.3–113.5 (0.004–0.0125%)	* * *	* * *	* * *
	Bacitracin methylene disalicylate 50	Replacement chickens; development of active immunity to coccidiosis; as an aid in the prevention of necrotic enteritis caused or complicated by *Clostridium* spp. or other organisms susceptible to bacitracin.	Feed continuously as sole ration as in subtable in this item (i); grower ration not to be fed to birds over 14 weeks of age. Bacitracin methylene disalicylate as provided by 046573 in § 510.600(c) of this chapter.

Zoalene in grams/ton	Combination in grams/ton	Indications for use	Limitations
	Bacitracin methylene di salicylate 100 to 200	Replacement chickens; development of active immunity to coccidiosis; as an aid in the control of necrotic enteritis caused or complicated by *Clostridium* spp. or other organisms susceptible to bacitracin.	Feed continuously as sole ration as in subtable in this item (i). To control necrotic enteritis, start medication at first clinical signs of disease; vary bacitracin dosage based on the severity of infection; administer continuously for 5 to 7 days or as long as clinical signs persist, then reduce bacitracin to prevention level (50 grams/ton). Bacitracin methylene disalicylate as provided by 046573 in § 510.600(c) of this chapter.
* *	* *	* *	*
(ii) 113.5 (0.0125%)	* * *	* * *	* * *
	Bacitracin methylene di salicylate 50	Broiler chickens; prevention and control of coccidiosis; as an aid in the prevention of necrotic enteritis caused or complicated by *Clostridium* spp. or other organisms susceptible to bacitracin.	Feed continuously as sole ration. Bacitracin methylene disalicylate as provided by 046573 in § 510.600(c) of this chapter.
	Bacitracin methylene di salicylate 100 to 200	Broiler chickens; prevention and control of coccidiosis; as an aid in the control of necrotic enteritis caused or complicated by *Clostridium* spp. or other organisms susceptible to bacitracin.	Feed continuously as sole ration. To control necrotic enteritis, start medication at first clinical signs of disease; vary bacitracin dosage based on the severity of infection; administer continuously for 5 to 7 days or as long as clinical signs persist, then reduce bacitracin to prevention level (50 grams/ton). Bacitracin methylene disalicylate as provided by 046573 in § 510.600(c) of this chapter.
* *	* *	* *	*

* * * * *

Dated: February 1, 2002.

Claire M. Lathers,

Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

[FR Doc. 02–3614 Filed 2–13–02; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF TRANSPORTATION

Saint Lawrence Seaway Development Corporation

33 CFR Part 402

[Docket No. SLSDC 2002–11529]

RIN 2135–AA14

Tariff of Tolls

AGENCY: Saint Lawrence Seaway Development Corporation, DOT.

ACTION: Final rule.

SUMMARY: The Saint Lawrence Seaway Development Corporation (SLSDC) and the St. Lawrence Seaway Management Corporation (SLSMC) of Canada, under international agreement, jointly publish and presently administer the St. Lawrence Seaway Tariff of Tolls in their respective jurisdictions. The Tariff sets forth the level of tolls assessed on all commodities and vessels transiting the facilities operated by the SLSDC and the SLSMC. The SLSDC is revising its regulations to reflect the fees and charges charged by the SLSMC in Canada starting in the 2002 navigation season, which are effective only in Canada.

DATES: This rule is effective on March 18, 2002.

FOR FURTHER INFORMATION CONTACT: Marc C. Owen, Chief Counsel, Saint Lawrence Seaway Development Corporation, 400 Seventh Street, SW, Washington, DC 20590, (202) 366–6823.

SUPPLEMENTARY INFORMATION: The Saint Lawrence Seaway Development Corporation (SLSDC) and the St. Lawrence Seaway Management Corporation (SLSMC) of Canada, under international agreement, jointly publish and presently administer the St. Lawrence Seaway Tariff of Tolls in their respective jurisdictions. (The Tariff is called the Schedule of Fees and Charges in Canada.) The amendments are described in the following summary.

The Tariff sets forth the level of tolls assessed on all commodities and vessels transiting the facilities operated by the SLSDC and the SLSMC. The SLSDC is revising § 402.8, ''Schedule of tolls'', to reflect the fees and charges charged by the SLSMC in Canada starting in the 2002 navigation season. The changes affect the tolls for commercial vessels and are applicable only in Canada as the collection of the U.S. portion of tolls for commercial vessels is waived by law (33 U.S.C. 988a(a)).

Regulatory Evaluation

This regulation involves a foreign affairs function of the United States and therefore Executive Order 12866 does not apply. This regulation has also been evaluated under the Department of Transportation's Regulatory Policies and Procedures and the regulation is not considered significant under those procedures and its economic impact is expected to be so minimal that a full economic evaluation is not warranted.

Regulatory Flexibility Act Determination

The Saint Lawrence Seaway Development Corporation certifies that this regulation will not have a significant economic impact on a substantial number of small entities. The St. Lawrence Seaway Tariff of Tolls primarily relates to commercial users of the Seaway, the vast majority of whom are foreign vessel operators. Therefore, any resulting costs will be borne mostly by foreign vessels.

Environmental Impact

This regulation does not require an environmental impact statement under the National Environmental Policy Act (49 U.S.C. 4321, *et seq.*) because it is not a major federal action significantly affecting the quality of human environment.

Federalism

The Corporation has analyzed this rule under the principles and criteria in Executive Order 13132, dated August 4, 1999, and has determined that the rule does not have sufficient federalism implications to warrant a Federalism Assessment.

Unfunded Mandates

The Corporation has analyzed this rule under title II of the Unfunded Mandates Reform Act of 1995 (Public Law 104–4, 109 Stat. 48) and determined that it does not impose unfunded mandates on State, local, and tribal governments and the private sector requiring a written statement of economic and regulatory alternatives.

Paperwork Reduction Act

This regulation has been analyzed under the Paperwork Reduction Act of 1995 and does not contain new or modified information collection requirements subject to the Office of Management and Budget review.

List of Subjects in 33 CFR Part 402

Vessels, Waterways.

Accordingly, the Saint Lawrence Seaway Development Corporation amends 33 CFR part 402, Tariff of Tolls, as follows:

PART 402—TARIFF OF TOLLS

1. The authority citation for part 402 continues to read as follows:

Authority: 33 U.S.C. 983(a), 984(a)(4), and 988, as amended; 49 CFR 1.52.

2. § 402.8 is revised to read as follows:

§ 402.8 Schedule of tolls.

Item No. and description of charges	Rate ($) Montreal to or from Lake Ontario (5 locks)	Rate ($) Welland Canal—Lake Ontario to or from Lake Erie (8 locks)
1. Subject to item 3, for complete transit of the Seaway, a composite toll, comprising:		
(1) a charge per gross registered ton of the ship, applicable whether the ship is wholly or partially laden, or is in ballast, and the gross registered tonnage being calculated according to prescribed rules for measurement in the United States or under the International Convention on Tonnage Measurement of Ships, 1969, as amended from time to time.	0.0883	0.1436
(2) a charge per metric ton of cargo as certified on the ship's manifest or other document, as follows:		
(*a*) bulk cargo	0.9164	0.6072
(*b*) general cargo	2.2081	0.9717
(*c*) steel slab	1.9984	0.6956
(*d*) containerized cargo	0.9164	0.6072
(*e*) government aid cargo	N/a	N/a
(*f*) grain	0.5630	0.6072
(*g*) coal	0.5410	0.6072
(3) a charge per passenger per lock	1.3028	1.3028
(4) a charge per lock for transit of the Welland Canal in either direction by cargo ships:		
(*a*) loaded	N/a	484.93
(*b*) in ballast	N/a	358.29
2. Subject to item 3, for partial transit of the Seaway	20 per cent per lock of the applicable charge under items 1 (1) and (2) plus the applicable charge under items 1 (3) and (4).	13 per cent per lock of the applicable charge under items 1(1) and (2) plus the applicable charge under items 1 (3) and (4)
3. Minimum charge per ship per lock transited for full or partial transit of the Seaway.	16.24	16.24
4. A rebate applicable for the 2001 navigation season to the rates of item 1 to 3.	Rebate of 1.5%	Rebate of 1.5%
5. A charge per pleasure craft per lock transited for full or partial transit of the Seaway, including applicable federal taxes[1].	20.00	20.00

[1] The applicable charge at the Saint Lawrence Seaway Development Corporation's locks (Eisenhower, Snell) is $20 U.S. or $30 Canadian per lock. The other amounts are in Canadian dollars and are for the Canadian share of tolls. The collection of the U.S. portion of tolls for commercial vessels is waived by law (33 U.S.C. 988a(a)).

Issued at Washington, DC on February 8, 2002.

Saint Lawrence Seaway Development Corporation.

Albert S. Jacquez,

Administrator.

[FR Doc. 02–3559 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–61–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AK87

Claims Based on Exposure to Ionizing Radiation

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends VA regulations governing the establishment of service connection for polycythemia vera due to radiation exposure in service. This amendment clarifies that although VA does not consider polycythemia vera to be a ''radiogenic disease'' under its adjudication regulations, a veteran is not precluded from claiming service connection for this condition on a direct-incurrence basis due to exposure to ionizing

radiation in service. This final rule simply reflects legislative changes and case law requirements.

DATES: *Effective Date:* February 14, 2002.

FOR FURTHER INFORMATION CONTACT: Beth McCoy, Consultant, Regulations Staff, Compensation and Pension Service (211A), Department of Veterans Affairs, 575 N. Pennsylvania St., Suite 309, Indianapolis, IN 46237, (317) 226–5209 extension 3058.

SUPPLEMENTARY INFORMATION: In the ''Veterans' Dioxin and Radiation Exposure Compensation Standards Act,'' Public Law 98–542, Congress concluded that VA had no specific guidelines, standards, or criteria for use in deciding claims for entitlement to disability benefits based on exposure to ionizing radiation. Thus, Congress required VA to undertake rulemaking to specify, among other things, which diseases result from exposure to ionizing radiation in service and the circumstances under which VA would award benefits to veterans on the basis of claimed radiation-related disabilities.

The Act established the ''Veterans Advisory Committee on Environmental Hazards'' and required VA to consult with this Committee in the development of the new regulations. Section 5 of the Act specifically required VA to determine whether service connection could be granted based on exposure to ionizing radiation for the following diseases: soft tissue sarcoma, porphyria cutanea tarda, chloracne, leukemia, malignancies of the thyroid, female breast, lung, bone, liver and skin, and polycythemia vera. Based on the advice of the Committee, VA concluded that service connection can be granted for all of these diseases except polycythemia vera and implemented the provisions of the governing statute by publishing 38 CFR 3.311b.

Although over the years VA added several conditions to the list, VA treated the list of radiogenic diseases in § 3.311b (later recodified as § 3.311) as an exclusive list and generally denied service connection based on radiation exposure for any disease not included on that list. However, the U.S. Court of Appeals for the Federal Circuit in *Combee* v. *Brown*, 34 F.3d 1039 (Fed. Cir. 1994), held that Public Law 98–542 did not authorize VA to establish an exclusive list of radiogenic diseases for which a claimant might establish entitlement to direct service connection under § 3.311. Following the Combee decision, Congress amended 38 U.S.C. 1113(b) to provide that nothing in section 5 of Public Law 98–542 shall be construed to prevent granting of service connection for any disease or disorder shown by sound judgment to have been incurred in or aggravated by active duty service.

VA subsequently amended § 3.311 (60 FR 9627, February 21, 1995) to permit consideration of service connection for any disease other than polycythemia vera if a claimant cites or submits competent scientific or medical evidence that the claimed disease may be induced by ionizing radiation.

The list of radiogenic diseases in § 3.311(b)(2) is not an exclusive list. The fact that VA has determined that polycythemia vera is not a radiogenic disease does not deprive claimants of the opportunity to cite or submit evidence showing that polycythemia vera may be induced by exposure to ionizing radiation. We are amending § 3.311(b) to indicate that if a claimant cites or submits evidence showing polycythemia vera may be induced by exposure to ionizing radiation, VA will obtain a dose estimate, forward the claim for review by the Under Secretary for Benefits, and request an advisory medical opinion from the Under Secretary for Health under the provisions of § 3.311.

This final rule simply reflects legislative changes and case law requirements. Thus, there is a basis for dispensing with prior notice and comment and delayed effective date provisions of 5 U.S.C. 552 and 553.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3520).

Executive Order 12866

This document has been reviewed by the Office of Management and Budget Under Executive Order 12866.

Regulatory Flexibility Act

Because no notice of proposed rule making was required in connection with the adoption of this final rule, no regulatory flexibility analysis is required under the Regulatory Flexibility Act (5 U.S.C. 601–612). Even so, the Secretary hereby certifies that this regulatory amendment will not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final flexibility analysis requirements of sections 603 and 604.

The Catalog of Federal Domestic Assistance numbers are 64.102, 64.109 and 64.110.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Approved: October 30, 2001.

Anthony J. Principi,

Secretary of Veterans Affairs.

For the reasons set forth in the preamble, 38 CFR part 3 is amended as follows:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. In § 3.311, paragraphs (b)(3) and (b)(4) are revised to read as follows:

§ 3.311 Claims based on exposure to ionizing radiation.

* * * * *

(b) * * *

(3) Public Law 98–542 requires VA to determine whether sound medical and scientific evidence supports establishing a rule identifying polycythemia vera as a radiogenic disease. VA has determined that sound medical and scientific evidence does not support including polycythemia vera on the list of known radiogenic diseases in this regulation. Even so, VA will consider a claim based on the assertion that polycythemia vera is a radiogenic disease under the provisions of paragraph (b)(4) of this section. (Authority: Pub. L. 98–542, section 5(b)(2)(A)(i), (iii)).

(4) If a claim is based on a disease other than one of those listed in paragraph (b)(2) of this section, VA shall nevertheless consider the claim under the provisions of this section provided that the claimant has cited or submitted competent scientific or medical evidence that the claimed condition is a radiogenic disease.

* * * * *

[FR Doc. 02–3676 Filed 2–13–02; 8:45 am]

BILLING CODE 8320–01–U

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 3 and Part 4

RIN 2900–AK66

Special Monthly Compensation for Women Veterans Who Lose a Breast as a Result of a Service-Connected Disability

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs adjudication regulations to provide for payment of special monthly compensation for a woman veteran who loses one or both breasts as a result of service-connected disability. The intended effect of this amendment is to implement legislation authorizing VA to provide this benefit.

DATES: *Effective Date:* This amendment is effective March 18, 2002.

FOR FURTHER INFORMATION CONTACT: Caroll McBrine, M.D., Consultant, Policy and Regulations Staff (211A), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 273–7230.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of July 20, 2001 (66 FR 37940–37941), we published a proposal to implement section 302 of the Veterans Benefits and Health Care Improvement Act of 2000, Public Law 106–419, 114 Stat. 1822, 1853 which amended 38 U.S.C. 1114(k) by providing entitlement to special monthly compensation (SMC) if a woman veteran suffers the anatomical loss of one or both breasts (including loss by mastectomy) as a result of service-connected disability. We proposed to amend 38 CFR 3.350(a), which is titled ''Special monthly compensation ratings,'' by adding new paragraph (7) to define ''anatomical loss of a breast'' for purposes of this benefit as requiring ''complete surgical removal of breast tissue (or the equivalent loss of breast tissue due to injury).'' This includes radical mastectomy, modified radical mastectomy, and simple (or total) mastectomy, but not wide local excision (including partial mastectomy, lumpectomy, tylectomy, segmentectomy, and quadrantectomy).

We received 19 comments on the proposed regulation, one from the Vietnam Veterans of America, one from the Disabled American Veterans, and 17 from individuals. Fifteen commenters supported the proposal, many very strongly.

Three commenters, while supporting the proposal, felt that men should also receive SMC for a mastectomy. Public Law 106–419, Section 302, 114 Stat. at 1853, authorizes this benefit only ''in the case of a woman veteran,'' and we therefore have no legal authority to award SMC to male veterans based on anatomical loss of one or both breasts.

One commenter inquired about whether this rulemaking would encourage women veterans to choose mastectomy over lumpectomy. We do not believe that payment of this additional benefit for complete surgical removal of breast tissue will influence a woman's decision about what procedure to undergo in order to rid her body of cancer. Rather, we believe that this decision, like other medical decisions, will be based on many factors and will be made in consultation with her physician. Moreover, VA has statutory authority to award SMC only for anatomical loss of one or both breasts and a lumpectomy clearly does not constitute such loss.

The same commenter inquired about the rationale for paying SMC for a mastectomy. The commenter asked whether a mastectomy impinges on an individual's ability to do a job and whether SMC is intended to negate mental anguish. The commenter also asked whether there is disability, i.e., restricted ability to earn income, after an individual's recovery from a mastectomy is complete. Another commenter objected to payment of SMC based on anatomical loss of a breast because a mastectomy does not interfere with the ability to hold a job or earn a living.

Generally, basic rates of wartime disability compensation are based on the average impairment in earning capacity resulting from a particular disability, as set forth in the Schedule for Rating Disabilities. 38 U.S.C. 1155. Congress, however, has authorized payment of SMC based on noneconomic factors resulting from a service-connected disability such as personal inconvenience, social inadaptability, or the profound nature of the disability. See S. Rep. No. 82–1681, at 2, 130–31 (1952); H.R. Rep. No. 89–6, at 4 (1965). Congress has authorized SMC for anatomical loss of a breast, and VA is obligated to carry out 38 U.S.C. 1114(k), as amended by Public Law 106–419.

One commenter felt that anatomical loss of a breast is not a service-connected disability and that SMC should be paid only if the breast surgery took place on active duty. Another commenter inquired about whether a veteran must develop the condition that results in loss of a breast or breasts while on active duty. Another commenter opposed paying this benefit at all because there is no evidence that anything in service could have caused breast cancer.

New 38 U.S.C. 1114(k) provides SMC if the loss of one or both breasts occurred ''as the result of a service-connected disability.'' ''Service connected'' means that a disability was incurred or aggravated in line of duty in the active military, naval, or air service. 38 U.S.C. 101(16). ''Line of duty'' means that, at the time the injury or disease causing the disability occurred, the veteran was in active military, naval, or air service and that the injury or disease was not the result of the veteran's own willful misconduct or abuse of alcohol or drugs. 38 U.S.C. 105(a). Thus, a disability need not be the result of exposure to contaminants, chemicals, or drugs during service, as one of the commenters suggested, in order to be service connected. Further, if a woman veteran contracts breast cancer while on active duty, any disability resulting from the cancer would be service connected and SMC would be payable for a resulting mastectomy, irrespective of when the operation occurred. If a veteran is diagnosed with breast cancer after service, any resulting disability would be service connected, and SMC would be payable for a resulting mastectomy, if the evidence establishes that the cancer was incurred during service or during a post-service presumptive period. 38 CFR 3.303(a). The statute entitles women who have anatomical loss of one or both breasts to this benefit, and VA is obligated to pay the benefit as directed by Congress. Again, if the disability causing the mastectomy is service connected, a woman veteran would be entitled to SMC, irrespective of when her surgery occurred.

One commenter asked whether SMC would be paid for prophylactic mastectomies. We will pay SMC for any mastectomy that is medically determined to be secondary to, or necessary to treat, a service-connected condition.

Two commenters objected to restricting this benefit to those who have had a complete mastectomy, rather than including those with less extensive breast surgery such as wide local excision that they maintain can result in ''significant'' anatomical loss. They feel that VA's definition of the statutory term ''anatomical loss'' in new section 3.350(a)(7) as requiring loss of all breast tissue is contrary to 38 U.S.C. 1114(k) and Congress' intent. 38 U.S.C. 1114(k), to which Congress added loss of one or both breasts as a basis for SMC, clearly

distinguishes between anatomical loss and loss of use of a body part. Section 1114(k) provides SMC if a veteran, as a result of a service-connected disability, ''has suffered the anatomical loss or loss of use of one or more creative organs, or one foot, or one hand, or both buttocks,'' or, in the case of a woman veteran, ''the anatomical loss of one or both breasts.'' Anatomical loss for purposes of section 1114(k) in each case means loss of the entire body part, although less than complete anatomical loss may qualify as ''loss of use''. For example, when VA pays SMC due to less than complete removal of a testicle, it is paid on the basis of loss of use, rather than anatomical loss, of the affected organ. (See 38 CFR 3.350(a)(1).) Given the plain language of section 302 of Public Law 106–419, providing SMC for ''anatomical loss of one or both breasts (including loss by mastectomy),'' we believe that the definition of this phrase in new section 3.350(a)(7), requiring complete removal of a breast in order to receive SMC, is in accord with 38 U.S.C. 1114(k).

One of these commenters noted that, in the preamble to the proposed rule, VA chose complete peroneal nerve paralysis as an analogous situation to anatomical loss of one or both breasts and said that a much better analogy is loss of use of a testicle, where SMC is awarded based on a reduction in the size of the organ.

SMC is payable under 38 U.S.C. 1114(k) for ''the anatomical loss or loss of use of one or more creative organs.'' Consistent with section 1114(k), 38 CFR 3.350(a)(1)(i) states that loss of a creative organ (such as a testicle) means acquired absence of the organ. Section 3.350(a)(1)(i)(a) and (b) also define loss of use of one testicle as the situation where either the diameters of the affected testicle are reduced to one-third of the corresponding diameters of the paired normal testicle, or the diameters of the affected testicle are reduced to one-half or less of the corresponding normal testicle and there is alteration of consistency so that the affected testicle is considerably harder or softer than the corresponding normal testicle. We believe that defining ''anatomical loss'' of a breast as ''complete surgical removal of breast tissue'' is consistent with defining loss of a creative organ to mean ''acquired absence'' of the organ. Since Congress provided no statutory authority to pay SMC for loss of use of one or both breasts, we make no change based on this comment.

One of the commenters also said that VA requirements for finding ''anatomical loss'' of other body parts present even more compelling evidence that it has not approached this rulemaking fairly and objectively because under 38 CFR 4.71a, diagnostic codes 5126 to 5131, VA considers the amputation of four or five fingers to constitute anatomical loss of a hand. The footnotes under these diagnostic codes state ''Entitled to [SMC]'' but do not indicate whether SMC is based on anatomical loss of a hand or loss of use of a hand. The language of 38 CFR 3.350(a)(2)(i), dealing with SMC ratings for loss of use of a hand, however, makes it clear that the situations cited in diagnostic codes 5126 to 5131 constitute loss of use of a hand for purposes of SMC. Section 3.350(a)(2)(i) states that ''[l]oss of use of a hand . . . will be held to exist when no effective function remains other than that which would be equally well served by an amputation stump at the site of election below elbow . . . with use of a suitable prosthetic appliance.'' We therefore make no change based on these comments.

VA appreciates the comments submitted in response to the proposed rule, which is now adopted without change.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3520).

Regulatory Flexibility Act

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. The reason for this certification is that this amendment would not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Order 12866

This final rule has been reviewed by the Office of Management and Budget under Executive Order 12866.

The Catalog of Federal Domestic Assistance program numbers are 64.104 and 64.109.

List of Subjects

38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Veterans, Vietnam.

38 CFR Part 4

Disability benefits, Individuals with disabilities, Pensions, Veterans.

Approved: January 9, 2002.

Anthony J. Principi,

Secretary of Veterans Affairs.

For the reasons set out in the preamble, 38 CFR part 3 is amended as set forth below:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. In § 3.350, paragraph (a) introductory text, the first sentence is revised; and a new paragraph (a)(7) is added immediately following the authority citation for paragraph (a)(6), to read as follows:

§ 3.350 Special monthly compensation ratings.

* * * * *

(a) * * * Special monthly compensation under 38 U.S.C. 1114(k) is payable for each anatomical loss or loss of use of one hand, one foot, both buttocks, one or more creative organs, blindness of one eye having only light perception, deafness of both ears, having absence of air and bone conduction, complete organic aphonia with constant inability to communicate by speech or, in the case of a woman veteran, the anatomical loss of one or both breasts (including loss by mastectomy).* * *

* * * * *

(7) Anatomical loss of a breast exists when there is complete surgical removal of breast tissue (or the equivalent loss of breast tissue due to injury). As defined in 38 CFR 4.116, radical mastectomy, modified radical mastectomy, and simple (or total) mastectomy result in anatomical loss of a breast, but wide local excision, with or without significant alteration of size or form, does not.

(Authority: 38 U.S.C. 501, 1114(k))

* * * * *

PART 4—SCHEDULE FOR RATING DISABILITIES

Subpart B—Disability Ratings

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

Authority: 38 U.S.C. 1155, unless otherwise noted.

4. Section 4.116, Note 2 is amended by removing ''one or more creative organs,'' and adding, in its place, ''one or more creative organs or anatomical loss of one or both breasts,'.

5. Diagnostic code 7626 in 38 CFR 4.116 is revised to read as follows:

§ 4.116 Schedule of ratings—gynecological conditions and disorders of the breast.

	Rating
* * * * *	
7626 Breast, surgery of:	
Following radical mastectomy:	
Both	[1]80
One	[1]50
Following modified radical mastectomy:	
Both	[1]60
One	[1]40
Following simple mastectomy or wide local excision with significant alteration of size or form:	
Both	[1]50
One	[1]30
Following wide local excision without significant alteration of size or form:	
Both or one	0
Note: For VA purposes:	

[1] *Radical mastectomy* means removal of the entire breast, underlying pectoral muscles, and regional lymph nodes up to the coracoclavicular ligament.

[2] *Modified radical mastectomy* means removal of the entire breast and axillary lymph nodes (in continuity with the breast). Pectoral muscles are left intact.

[3] *Simple (or total) mastectomy* means removal of all of the breast tissue, nipple, and a small portion of the overlying skin, but lymph nodes and muscles are left intact.

[4] *Wide local excision* (including partial mastectomy, lumpectomy, tylectomy, segmentectomy, and quadrantectomy) means removal of a portion of the breast tissue.

* * * * *

[FR Doc. 02–3677 Filed 2–13–02; 8:45 am]

BILLING CODE 8320–01–U

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AK89

Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA)

AGENCY: Department of Veterans Affairs

ACTION: Interim final rule; Correction.

SUMMARY: In a document published in the **Federal Register** on January 30, 2002 (67 FR 4357), VA amended its medical regulations concerning the ''Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA)'' That interim final rule implemented the provisions of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 and the Veterans' Survivor Benefits Improvements Act of 2001. This document makes a correction in § 17.274(c)(ii) by changing the reference to the effective date of the reduced cost-sharing catastrophic cap from January 1, 2001 to January 1, 2002 to reflect the correct date established by statute.

EFFECTIVE DATE: This document is effective on February 14, 2002.

FOR FURTHER INFORMATION CONTACT: Susan Schmetzer, Chief, Policy & Compliance Division, VA Health Administration Center, P.O. Box 65020, Denver, CO 80206–9020, telephone (303) 331–7552.

In rule FR Doc. 02–2206 published on January 30, 2002 (67 FR 4357), make the following correction: on page 4359, in paragraph (c)(ii), third column, ''January 1, 2001'' is amended to read ''January 1, 2002''.

Approved: February 7, 2002.

Thomas O. Gessel,

Director, Office of Regulations Management, Office of General Counsel, Department of Veterans Affairs.

[FR Doc. 02–3675 Filed 2–13–02; 8:45 am]

BILLING CODE 8320–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 82

RIN 0920–ZA00

Methods for Radiation Dose Reconstruction Under the Energy Employees Occupational Illness Compensation Act of 2000

AGENCY: Department of Health and Human Services.

ACTION: Interim Final Rule; Reopening of Comment Period.

SUMMARY: The Department of Health and Human Services (DHHS), is reopening the comment period for the interim final rule for dose reconstruction for certain claims for cancer under the Energy Employees Occupational Illness Program Act (EEOICPA) that was published in the **Federal Register** on Friday, October 5, 2001. After considering these comments, comments previously received, and comments from the Advisory Board on Radiation and Worker Health (ABRWH) DHHS will publish a final rule.

DATES: Public written comments must be received on or before Friday, March 1, 2002.

ADDRESSES: Submit written comments to: Attention—Dose Reconstruction Comments, Department of Health and Human Services, National Institute for Occupational Safety and Health (NIOSH), Robert A. Taft Laboratories, MS–C34, 4676 Columbia Parkway, Cincinnati, OH 45226, Telephone: (513) 533–8450, Fax: (513) 533–8285, email: *NIOCINDOCKET@CDC.GOV.*

FOR FURTHER INFORMATION CONTACT: Larry Elliott, Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health, 4676 Columbia Parkway, Cincinnati, OH 45226, Telephone (513) 841–4498 (this is not a toll free number). Information requests may also be submitted by e-mail to *OCAS@CDC.GOV.*

SUPPLEMENTARY INFORMATION: On October 5, 2001, HHS published an interim final rule establishing methods for radiation dose reconstruction to be conducted for certain cancer claims filed under EEOICPA, Public Law 106–398 [See FR Vol. 66, No. 194, 50978]. The notice included a public comment period that ended November 5, 2001. However, DHHS requested the ABRWH to conduct a review of its dose reconstruction methods.

The ABRWH held its first meeting in Washington, DC on January 22–23, 2002. Due to the ABRWH's intensive work on the statutorily required technical review of the proposed probability of causation rule, the ABRWH was unable to complete the requested review of the interim final rule. Public comments, both written and oral, were accepted for inclusion in the docket on both the interim final rule and proposed rulemaking prior to and during the ABRWH meeting. The public comment period closed on the last day of the ABRWH meeting, January 23, 2002.

To allow the ABRWH ample opportunity to complete their review of and comments on the interim final rule, the public comment period for the interim final rule on dose reconstruction will be re-opened until Friday, March 1, 2002. This will allow the ABRWH to have at least one more meeting to prepare their comments on the interim final rule, and to accept further written and oral comments from the general public at its next meeting.

All written comments on the interim final rule for dose reconstruction must be received at the Docket Office on or before Friday, March 1, 2002. Written and oral comments made during the meeting(s) of the ABRWH prior to Friday, March 1, 2002 will also be included in the docket for the interim final rule.

Dated: February 12, 2002.

Tommy G. Thompson,

Secretary.

[FR Doc. 02–3809 Filed 2–12–02; 3:00 pm]

BILLING CODE 4160–17–U

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

45 CFR Part 2553

RIN 3045–AA31

Retired and Senior Volunteer Program; Amendments

AGENCY: Corporation for National and Community Service.

ACTION: Final rule.

SUMMARY: The amendments to the Regulation governing the Retired and Senior Volunteer Program include: improving access of persons with limited English speaking proficiency; and increasing sponsor flexibility to use project resources as needed.

DATES: These regulations take effect February 14, 2002.

FOR FURTHER INFORMATION CONTACT: John B. Keller, 202–606–5000, ext. 285.

SUPPLEMENTARY INFORMATION: The Corporation published a notice of proposed rulemaking (NPRM) for the Retired and Senior Volunteer Program 45 CFR part 2553 in the **Federal Register** at 66 FR 56793, November 13, 2001.

Summary of Main Comments

In response to the Corporation's invitation in the NPRM, the Corporation received 41 letter and/or email responses. Of these, 30 were in full support of the proposed rule, 3 sought clarification, and 8 opposed the proposed rule. The eight opposing the proposed rule voiced specific objection to the following Section:

Section 2553.72 (e), How much of the grant must be budgeted to pay volunteer expenses or cost reimbursements?

Comments: The eight opposing the proposed rule to eliminate the requirement that cost reimbursements for RSVP volunteers be an amount equal to at least 25 percent of the Corporation funds, objected because they feared it would permit the sponsor to use RSVP funds for purposes unrelated to RSVP.

Response: The Corporation response is that all funds approved in the grant award must be used for purposes set forth in the grant application, and may not be used for purposes unrelated to RSVP.

Impact of Various Acts and Executive Orders

After carefully reviewing the changes implemented by this amendment, it has been determined that (1) This is not a significant regulatory action under section 3(f)(4) of Executive Order 12866, ''Regulatory Planning and Review''; and (2) The Regulatory Flexibility Act does not apply because there is no ''significant economic impact on a substantial number of small entities''; (3) The Unfunded Mandates Act of 1995 does not apply because the amendment does not result in any annual expenditures of $100 million by State, local, Indian Tribal governments or the private sector; (4) The Paperwork Reduction Act does not apply because the amendments do not impose any additional reporting or record-keeping requirements; (5) The Small Business Regulatory Enforcement Fairness Act of 1996 does not apply because it is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, and would not result in an annual effect on the economy of $100 million or more; result in an increase in cost or prices; or have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets; and (6) Executive Order 13132: Federalism does not apply because it would not have substantial direct effects on the States or the relationship between the national government and the States.

List of Subjects in 45 CFR Part 2553

Aged, Grant programs—social programs, Volunteers.

For the reasons set forth in the preamble, 45 CFR Part 2553 is revised to read as follows:

PART 2553—THE RETIRED AND SENIOR VOLUNTEER PROGRAM

1. The authority citation for part 2553 continues to read as follows:

Authority: 42 U.S.C. 4950 *et seq.*

2. Revise § 2553.23(c)(2)(iv) to read as follows:

§ 2553.23 What are a sponsor's program responsibilities?

* * * * *

(c) * * *

(2) * * *

(iv) That states the station assures it will not discriminate against RSVP volunteers or in the operation of its program on the basis of race; color; national origin, including individuals with limited English proficiency; sex; age; political affiliation; religion; or on the basis of disability, if the participant or member is a qualified individual with a disability; and

* * * * *

§ 2553.72 [Amended]

3. In § 2553.72, remove paragraph (e).

4. Revise § 2553.73(i) to read as follows:

§ 2553.73 What are grants management requirements?

* * * * *

(i) Written Corporation State Office approval/concurrence is required for a change in the approved service area.

Dated: February 8, 2002.

Tess Scannell,

Director, National Senior Service Corps.

[FR Doc. 02–3601 Filed 2–13–02; 8:45 am]

BILLING CODE 6050–$$–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 02–241, MM Docket No. 01–1, RM–10013]

Digital Television Broadcast Service; Macon, GA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Gannett Georgia, L.P., licensee of station WMAZ–TV, substitutes DTV channel 4 for DTV channel 45 at Macon, Georgia. *See* 66 FR 2396, January 11, 2001. DTV channel 4 can be allotted to Macon, Georgia, in compliance with the principle community coverage requirements of Section 73.625(a) at reference coordinates (32–45–10 N. and 83–33–32 W.) with a power of 5.0, HAAT of 238 meters and with a DTV service population of 683 thousand.

With is action, this proceeding is terminated.

DATES: Effective March 25, 2002.

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Mass Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 01–1, adopted February 1, 2002, and released February 6, 2002. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th

Street, SW., Room CY–A257, Washington, DC. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., CY–B402, Washington, DC, 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

List of Subjects in 47 CFR Part 73

Television, Digital television broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

47 CFR Part 73—[Amended]

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

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622 [Amended]

2. Section 73.622(b), the Table of Digital Television Allotments under Georgia, is amended by removing DTV channel 45 and adding DTV channel 4 at Macon.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Services Division, Mass Media Bureau.

[FR Doc. 02–3572 Filed 2–13–02; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 02–242, MM Docket No. 00–117 , RM–9810]

Digital Television Broadcast Service; Salem, OR

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Paxson Salem License, Inc., licensee of station KPXG(TV), substitutes DTV channel 4 for DTV channel 20 at Salem, Oregon. *See* 65 FR 41620, July 6, 2000. DTV channel 4 can be allotted to Salem in compliance with the principle community coverage requirements of section 73.625(a) at reference coordinates 45–30–58 N. 122–43–59 W. with a power of 17, HAAT of 455 meters and with a DTV service population of 2040 thousand. Since the community of Salem is located within 400 kilometers of the U.S.-Canadian border, concurrence by the Canadian government has been obtained for this allotment. With this action, this proceeding is terminated.

DATES: Effective March 25, 2002.

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Mass Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 00–117, adopted February 1, 2002, and released February 6, 2002. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., CY–B402, Washington, DC, 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

List of Subjects in 47 CFR Part 73

Television, Digital television broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

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

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622 [Amended]

2. Section 73.622(b), the Table of Digital Television Allotments under Oregon, is amended by removing DTV channel 20 and adding DTV channel 4 at Salem.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Services Division, Mass Media Bureau.

[FR Doc. 02–3573 Filed 2–13–02; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 02–256, MM Docket No. 01–301, RM–10207]

Digital Television Broadcast Service; Mississippi State, MS

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Mississippi Authority for Educational Television, licensee of noncommercial station WMAB–TV, Mississippi State, Mississippi, substitutes DTV channel *10 for DTV channel *38. *See* 66 FR 54190, October 26, 2001. DTV channel *10 can be allotted to Mississippi State in compliance with the principle community coverage requirements of Section 73.625(a) at reference coordinates (33–21–14 N. and 89–09–00 W.) with a power of 4.3, HAAT of 349 meters and with a DTV service population of 330 thousand. With this action, this proceeding is terminated.

DATES: Effective March 25, 2002.

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Mass Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 01–301, adopted February 1, 2002, and released February 7, 2002. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

List of Subjects in 47 CFR Part 73

Television, Digital television broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

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

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622 [Amended]

2. Section 73.622(b), the Table of Digital Television Allotments under Mississippi, is amended by removing DTV channel *38 and adding DTV channel *10 at Mississippi State.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Services Division, Mass Media Bureau.

[FR Doc. 02–3575 Filed 2–13–02; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 02–61]

Radio Broadcasting Services; Various Locations

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, on its own motion, editorially amends the Table of FM Allotments to specify the actual classes of channels allotted to various communities. The changes in channel classifications have been authorized in response to applications filed by licensees and permittees operating on these channels. This action is taken pursuant to *Revision of Section 73.3573(a)(1) of the Commission's Rules Concerning the Lower Classification of an FM Allotment,* 4 FCC Rcd 2413 (1989), and the *Amendment of the Commission's Rules to permit FM Channel and Class Modifications [Upgrades] by Applications,* 8 FCC Rcd 4735 (1993).

DATES: Effective February 14, 2002.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, adopted January 2, 2002, and released January 11, 2002. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC, 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

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

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Arkansas, is amended by removing Channel 293A and adding Channel 293C3 at Horseshoe Bend.

3. Section 73.202(b), the Table of FM Allotments under Illinois, is amended by removing Channel 258B and adding Channel 258C1 at Quincy.

4. Section 73.202(b), the Table of FM Allotments under New York, is amended by removing Channel 292C3 and adding Channel 292C2 at Saranac Lake.

5. Section 73.202(b), the Table of FM Allotments under Oregon, is amended by removing Channel 259C3 and adding Channel 259C2 at Bend.

6. Section 73.202(b), the Table of FM Allotments under Texas, is amended by removing Channel 263C2 and adding Channel 236C2 at College Station.[1]

7. Section 73.202(b), the Table of FM Allotments under Utah, is amended by removing Channel 244C1 and adding Channel 244C at Levan.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 02–3622 Filed 2–13–02; 8:45 am]

BILLING CODE 6712–01–P

[1] This action corrects the FM Table of Allotments to show the allotment of Channel 236C2 at College Station in lieu of Channel 263C2. MM Docket No. 91–58 substituted Channel 236C2 for Channel 297C3 at College Station. *See* 60 FR 35512, July 10, 1995.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 011129286-2022-02; I.D. 110601B]

RIN 0648-AP65

Fisheries of the Northeastern United States; Summer Flounder, Scup, and Black Sea Bass; Quota Counting Procedures

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

ACTION: Final rule and technical amendment.

SUMMARY: NMFS issues this final rule to establish cut-off dates for using landings data from the commercial summer flounder, scup, and black sea bass fisheries to calculate quota overages. The establishment of landings cut-off dates for these fisheries will enable NMFS to establish final adjusted quotas before the beginning of each fishing year on January 1. This final rule also removes regulatory language that specifies publication dates for proposed annual summer flounder, scup, and black sea bass fishing measures and makes a technical change to the regulations to clarify the annual exploitation target for scup.

DATES: Effective February 14, 2002.

ADDRESSES: Copies of the Environmental Assessment (EA) and Regulatory Impact Review (RIR) are available at the following address: National Marine Fisheries Service, One Blackburn Drive, Gloucester, MA 01930-2298. This document is also accessible via the Internet at http://www.nero.nmfs.gov.

FOR FURTHER INFORMATION CONTACT: Allison Ferreira, Fishery Management Specialist, 978-281-9103, or by e-mail at Allison.Ferreira@noaa.gov.

SUPPLEMENTARY INFORMATION:

Background

The Fishery Management Plan for the Summer Flounder, Scup, and Black Sea Bass Fisheries (FMP) requires that NMFS compile all landings information on summer flounder, scup, and black sea bass and compare these landings to the quotas allocated to those fisheries. Landings in excess of quota allocations (overages) are required to be deducted from the quota allocations for the following year. The annual quota allocations are specified through a process that culminates in the publication of final specifications, which are to be published prior to January 1 each year. However, because the fishing year for these fisheries does not end until December 31, it is impossible to have a final accounting of annual landings at the time the annual specifications are published for the fishing year beginning January 1. As a result, NMFS has had to make overage adjustments during the fishing year, when overages were identified.

This regulatory amendment to the FMP resolves the timing problems associated with the overage provisions of the FMP by establishing a cut-off date of October 31 for commercial summer flounder, scup, and black sea bass landings data to be used in setting quotas for the upcoming fishing year. Therefore, this final rule will enable NMFS to compile landings information, determine quota overages, and publish final adjusted annual fishing quotas for these fisheries prior to January 1. If, during the fishing year, NMFS discovers that any overage deduction was made in error, e.g., based on calculated landings that exceeded actual landings for the period concerned, NMFS will restore all

or part of the overage to the appropriate quota allocation and announce the restoration by publishing a notification in the **Federal Register**.

This final rule also removes the regulatory language in §§ 648.100(d), 648.120(c), and 648.140(c) that specifies publication dates for proposed annual summer flounder, scup, and black sea bass fishing measures. The data required to conduct the analyses necessary for developing proposed measures are not available in time to allow publication by the current specified dates of October 15 for proposed annual fishing measures and of February 15 for proposed recreational measures.

The measures contained in this final rule are unchanged from those published in the proposed rule (66 FR 64392, December 13, 2001). A complete discussion of the development of this regulatory amendment appeared in the preamble of the proposed rule and is not repeated here.

As stated previously, this final rule establishes a landings cut-off date of October 31. Landings data for the full fishing year 2000 were used to calculate overages and make necessary adjustments in 2001. This measure is being phased in for the 2002 fishery; only landings from January through October 2001 are being used to determine 2001 overages for purposes of the 2002 quotas. The quota overages reflected in the final 2002 specifications for the summer flounder, scup, and black sea bass fisheries (66 FR 66348, December 26, 2001) are based on landings from January 1 - October 31, 2001. However, the quota adjustments were noted as preliminary in the final rule for 2002 specifications because the proposed rule for this regulatory amendment was still under public comment (66 FR 64392, December 13, 2001). This final rule notifies the public that the preliminary quota adjustments made in the final rule establishing the 2002 specifications for the summer flounder, scup, and black sea bass fisheries are final. For the 2003 fishery and subsequent years, implementation will occur as described below.

Summer Flounder

During November of a given year, all available landings data for January 1 - October 31 of that year will be compiled and compared to that year's state quota allocations. Any overages will be determined and required deductions will be made to state allocations for the upcoming fishing year in the final rule that establishes those measures (to be published by December 31). If any further overage deductions are necessary as a result of landings made during November - December, or as a result of late data submitted for January 1 - October 31, those overages will be applied to the quota allocations for the next fishing year.

Table 1 provides an example of how the quota counting procedures established by this final rule will function with respect to the establishment of the 2002 and 2003 annual summer flounder quota allocations.

TABLE 1. CALCULATION OF SUMMER FLOUNDER QUOTA OVERAGES

Summer Flounder Quotas	2001 Fishing Year		2002 Fishing Year	
	Jan-Oct	Nov-Dec	Jan-Oct	Nov-Dec
2002 quotas adjusted for overages in final 2002 specifications based on:				
2001 Jan-Oct landings compared to annual 2001 quotas	x	.....	.....	.....
2003 quotas adjusted for overages in final 2003 specifications based on:				
2002 Jan-Oct landings compared to annual 2002 quotas	.....	.....	X	.....
2001 Nov-Dec landings compiled during 2002	.....	X	.....	.....
2001 Jan-Oct landings received in 2002 (late reports)	X	.....	.....	.....

Scup

During November of each year, all available landings data for that year for January 1 - October 31 will be compiled and compared to that year's Winter I (Jan-Apr) and Summer (May-Oct) quota allocations. Any overages will be determined and required deductions will be made to the Winter I and/or Summer allocations for the upcoming fishing year in the final rule that establishes those measures (to be published by December 31).

By June 30 of the following year, all available landings data for the prior year's Winter II quota period (November-December) will be compiled and compared to the Winter II quota allocation for that year. Any overages will then be determined and required deductions will be made to the Winter II allocation for the current fishing year. The public will be informed of this adjustment in a **Federal Register** notification published in July of the current fishing year. Any further overages identified as the result of late data submitted for any of a given year's quota periods will be applied to the quota allocations for the next fishing year.

Table 2 provides an example of how the quota counting procedures established in this final rule will function with respect to the establishment of the 2002 and 2003 annual scup quota allocations.

TABLE 2. CALCULATION OF SCUP QUOTA OVERAGES

Scup Quotas	2001 Fishing Year		2002 Fishing Year	
	Jan-Oct	Nov-Dec	Jan-Oct	Nov-Dec
2002 quotas for Winter I and Summer quota periods adjusted for overages in final 2002 specifications based on:				
2001 Jan-Oct landings compared to annual 2001 Winter I and Summer quotas	x	.....	.....	.....

TABLE 2. CALCULATION OF SCUP QUOTA OVERAGES—Continued

Scup Quotas	2001 Fishing Year		2002 Fishing Year	
	Jan-Oct	Nov-Dec	Jan-Oct	Nov-Dec
2002 quota for Winter II quota period adjusted for overages in FEDERAL REGISTER notice published July 2002, based on:				
2001 Nov-Dec landings compared to 2001 Winter II quota	.....	X	.....	.....
2003 quotas for Winter I and Summer quota periods adjusted for overages in final 2003 specifications based on:				
2002 Jan-Oct landings compared to 2002 Winter I and Summer quotas	.....	.....	X	.....
Additional 2001 Jan-Dec landings compiled during 2002 (late reports)	X	X	.....	.....
2003 quota for Winter II adjusted for overages in FEDERAL REGISTER notice published in July 2003, based on:				
2002 Nov-Dec landings compared to 2002 Winter II quota	.....	.....	.....	X

Black Sea Bass

During November of each year, all available landings data for that year for Quarters 1-3 (January 1 - September 30) received by the cut-off date of October 31 will be compiled and compared to that year's quota allocations for Quarters 1, 2 and 3. Any overages will be determined and required deductions will be made to the Quarter 1, 2 or 3 quota allocations for the upcoming fishing year in the final rule that establishes those measures (to be published by December 31).

By June 30 of the following year, all available landings data for the prior year's Quarter 4 quota period (October-December) will be compiled and compared to the Quarter 4 allocation for that year. Any overage will be determined and required deductions will be made to the Quarter 4 allocation for the current fishing year. The public will be informed of this adjustment in a **Federal Register** notification published in July of the current fishing year. Any further overages identified as the result of late data submitted for any of a given year's quota periods will be applied to the quota allocations for the next fishing year.

Table 3 provides an example of how the quota counting procedures established in this final rule will function with respect to the establishment of the 2002 and 2003 annual black sea bass quota allocations.

TABLE 3. CALCULATION OF BLACK SEA BASS QUOTA OVERAGES

Black Sea Bass Quotas	2001 Fishing Year		2002 Fishing Year	
	Jan-Sept	Oct-Dec	Jan-Sept	Oct-Dec
2002 quotas for Quarters 1-3 adjusted for overages in final 2002 specifications based on:				
2001 Jan-Sep landings received by October 31 and compared to annual 2001 Quarter 1-3 quotas	x	.....	.....	.....
2002 quota for Quarter 4 adjusted for overages in FEDERAL REGISTER notice published July 2002, based on:				
2001 Oct-Dec landings compared to 2001 Quarter 4 quota	.....	X	.....	.....
2003 quotas for Quarters 1-3 adjusted for overages in final 2003 specifications based on:				
2002 Jan-Sept landings received by Oct 31 and compared to 2002 Quarter 1-3 quotas	.....	.....	X	.....
Additional 2001 Jan-Dec landings compiled during 2002 (late reports)	X	X	.....	.....
2003 quota for Quarter 4 adjusted for overages in FEDERAL REGISTER notice published in July 2003, based on:				
2002 Oct-Dec landings compared to 2002 Quarter 4 quota	.....	.....	.....	X

Comments and Responses

One comment was received in support of the proposed measures, which NMFS is implementing through this final rule. The commentor stated its support for the proposed means of calculating quota overages for the summer flounder, scup, and black sea bass fisheries, and also supported the removal of the regulatory language specifying publication dates for annual management measures for these fisheries. The commentor felt that this regulatory amendment would address many of their concerns regarding the timing of annual specifications for the summer flounder, scup, and black sea bass fisheries.

Response: Comment is acknowledged.

Changes From the Proposed Rule

This final rule makes a technical amendment to § 648.120(a), which specifies the annual exploitation targets

for scup. In Amendment 8 to the FMP the exploitation target specified for 2002 and thereafter was Fmax. The value of F_{max} estimated in Amendment 8 corresponded to an exploitation rate of 19 percent and thus § 648.120(a) included that value. However, the F_{max} estimate has changed and the 19-percent figure currently contained in the regulatory text is no longer correct. Therefore, the regulatory text is revised to clarify that the annual target exploitation rate is associated with F_{max}, rather than a fixed percentage. There are no other changes from the proposed rule.

Classification

This final rule has been determined to be not significant for purposes of Executive Order 12866.

In accordance with 5 U.S.C. 553(b)(B), the Administrator finds that advance notice and public comment on the portion of this rule that implements the technical change in the regulations for specifying the annual target exploitation rate for scup are not necessary. This technical change is not substantive. It merely modifies the regulations by incorporating a reference to F(max) instead of the numerical value of the exploitation rate associated with a specific value of F(max) since F(max) is not a constant and may change slightly over time. This modification is consistent with the FMP. Further, this technical change corrects a previous NMFS action that inadvertently removed this text from the Code of Federal Regulations and reinserted the numerical value of the exploitation rate associated with a previous estimate of F(max) that is no longer correct. This inadvertent revision was inconsistent with the FMP. The application of the exploitation rate associated with the current value of F(max) during the specification process resulted in a negligible change to the quota calculation. Any change to the overall quota would be further minimized and dispersed as the quota is allocated into the three quota periods. Any impacts that would be experienced by individual fishermen as a consequence of a change in the overall quota would be de minimus.

This final rule's removal of publication date requirements for proposed annual fishing measures for these fisheries and modification of the procedure for tabulating landings in order to calculate quota overages are not substantive. These changes merely inform the public of the change in the agency's process for tabulating landings data in order to calculate overages for the upcoming and subsequent fishing year. This process does not change the proposition that all landings in excess of a state or period quota during a fishing year constitute an overage. As is currently the practice, changes to annual quotas to reflect the impacts of landings on the summer flounder, scup and black sea bass stocks would be made pursuant to future rulemakings. Because none of the measures in this final rule is substantive, the 30-day delay in effectiveness required by 5 U.S.C. 553(d) does not apply.

This final rule does not contain policies with federalism implications, as that term is defined in Executive Order 13132.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that the proposed rule for this action would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was published within the proposed rule. No comments were received regarding the economic impacts of this action. As a result no regulatory flexibility analysis was prepared.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

February 7, 2002.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 648.100, the first sentence of paragraph (d) introductory text, and paragraph (d)(1)(ii) are revised to read as follows:

§ 648.100 Catch quotas and other restrictions.

* * * * *

(d) After such review, the Regional Administrator will publish a proposed rule in the **Federal Register** to implement a coastwide commercial quota, a recreational harvest limit, and additional management measures for the commercial fishery. * * *

(1) * * *

(ii) All summer flounder landed for sale in a state shall be applied against that state's annual commercial quota, regardless of where the summer flounder were harvested. Any landings in excess of the commercial quota in any state will be deducted from that state's annual quota for the following year in the final rule that establishes the annual state-by-state quotas. The overage deduction will be based on landings for the current year through October 31, and on landings for the previous calendar year that were not included when the overage deduction was made in the final rule that established the annual quota for the current year. If the Regional Administrator determines during the fishing year that any part of an overage deduction was based on erroneous landings data that were in excess of actual landings for the period concerned, he/she will restore the overage that was deducted in error to the appropriate quota allocation. The Regional Administrator will publish a notice in the **Federal Register** announcing such restoration.

* * * * *

3. In § 648.120, paragraphs (d)(4), (d)(5), and (d)(6) are removed; paragraphs (a) and (c) are revised; and paragraph (d)(3) is added to read as follows:

§ 648.120 Catch quotas and other restrictions.

(a) *Annual review.* The Scup Monitoring Committee shall review the following data, subject to availability, on or before August 15 of each year: Commercial, recreational and research data; current estimates of fishing mortality; stock status; recent estimates of recruitment; virtual population analysis results; levels of noncompliance by fishermen or individual states; impact of size/mesh regulations; impact of gear on the mortality of scup; and any other relevant information. This review will be conducted to determine the allowable levels of fishing and other restrictions necessary to achieve the F that produces the maximum yield per recruit (F_{max}).

* * * * *

(c) *Annual fishing measures.* The Demersal Species Committee shall review the recommendations of the Scup Monitoring Committee. Based on these recommendations and any public comment, the Demersal Species Committee shall recommend to the MAFMC measures necessary to assure that the specified exploitation rate will not be exceeded. The MAFMC's recommendation must include supporting documentation, as appropriate, concerning the environmental and economic impacts of

the recommendations. The Regional Administrator shall review these recommendations and any recommendations of the Commission. After such review, NMFS will publish a proposed rule to implement a commercial quota in the **Federal Register**, specifying the amount of quota allocated to each of the three periods, landings limits for the Winter I and Winter II periods, the percentage of landings attained during the Winter I fishery at which the landing limits will be reduced, a recreational harvest limit, and additional management measures for the commercial fishery. If the Regional Administrator determines that additional recreational measures are necessary to assure that the specified exploitation rate will not be exceeded, he or she will publish a proposed rule in the **Federal Register** to implement additional management measures for the recreational fishery. After considering public comment, the Regional Administrator will publish a final rule in the **Federal Register** to implement annual measures.

(d) * * *

(3) All scup landed for sale in any state during a quota period shall be applied against the coastwide commercial quota for that period, regardless of where the scup were harvested. Any current year landings in excess of the commercial quota in any quota period will be deducted from that quota period's annual quota in the following year as prescribed below:

(i) For the Winter I and Summer quota periods, landings in excess of the allocation will be deducted from the appropriate quota period for the following year in the final rule that establishes the annual quota. The overage deduction will be based on landings for the current year through October 31, and on landings for the previous calendar year that were not included when the overage deduction was made in the final rule that established the period quotas for the current year. If the Regional Administrator determines during the fishing year that any part of an overage deduction was based on erroneous landings data that were in excess of actual landings for the period concerned, he/she will restore the overage that was deducted in error to the appropriate quota allocation. The Regional Administrator will publish a notice in the **Federal Register** announcing the restoration.

(ii) For the Winter II quota period, landings in excess of the allocation will be deducted from the Winter II period for the following year in a notice published in the **Federal Register** during July of the following year. The overage deduction will be based on landings information available for the Winter II period as of June 30 of the following year. If the Regional Administrator determines during the fishing year that any part of an overage deduction was based on erroneous landings data that were in excess of actual landings for the period concerned, he/she will restore the overage that was deducted in error to the appropriate quota allocation. The Regional Administrator will publish a notice in the **Federal Register** announcing the restoration.

* * * * *

4. In § 648.140, paragraphs (c) and (d)(2) are revised and paragraphs (d)(3) and (d)(4) are added to read as follows:

§ 648.140 Catch quotas and other restrictions.

* * * * *

(c) *Annual fishing measures.* The Demersal Species Committee shall review the recommendations of the Black Sea Bass Monitoring Committee. Based on these recommendations and any public comment, the Demersal Species Committee shall make its recommendations to the Council with respect to the measures necessary to assure that the target exploitation rate specified in paragraph (a) of this section is not exceeded. The Council shall review these recommendations and, based on the recommendations and public comment, make recommendations to the Regional Administrator with respect to the measures necessary to assure that the target exploitation rate specified in paragraph (a) of this section is not exceeded. Included in the recommendation will be supporting documents, as appropriate, concerning the environmental and economic impacts of the final rule. The Regional Administrator will review these recommendations and any recommendations of the Commission. After such review, the Regional Administrator will publish a proposed rule in the **Federal Register** to implement a commercial quota, a recreational harvest limit, and additional management measures for the commercial fishery. If the Regional Administrator determines that additional recreational measures are necessary to assure that the target exploitation rate specified in paragraph (a) of this section will not be exceeded, he or she will publish a proposed rule in the **Federal Register** to implement additional management measures for the recreational fishery. After considering public comment, the Regional Administrator will publish a final rule in the **Federal Register** to implement the measures necessary to assure that the target exploitation rate specified in paragraph (a) of this section is not exceeded.

(d) * * *

(2) All black sea bass landed for sale in the states from North Carolina through Maine by a vessel with a moratorium permit issued under § 648.4(a)(7) shall be applied against that quarter's commercial quota, regardless of where the black sea bass were harvested. All black sea bass harvested north of 35°15.3′ N. lat., and landed for sale in the states from North Carolina through Maine by any vessel without a moratorium permit and fishing exclusively in state waters will be counted against the quota by the state in which it is landed pursuant to the Fishery Management Plan for the Black Sea Bass Fishery adopted by the Commission. The Regional Administrator will determine the date on which the quarterly quota will have been harvested; the EEZ north of 35°15.3′ N. lat. will be closed on that date. The Regional Administrator will publish a notice in the **Federal Register** advising that, upon, and after, that date, no vessel may possess black sea bass in the EEZ north of 35°15.3′ N. lat. during a closure, nor may vessels issued a moratorium permit land black sea bass during the closure. Individual states will have the responsibility to close their ports to landings of black sea bass during a closure pursuant to the Fishery Management Plan for the Black Sea Bass Fishery adopted by the Commission.

(3) For the Quarter 1 through Quarter 3 quota periods, landings in excess of the quarterly allocations will be deducted from the appropriate quota period allocation for the following year in the final rule that establishes the annual quota. The overage deduction will be based on landings for the current year through September 30, and landings for the previous calendar year that were not included when the overage deduction was made in the final rule that established the quarterly quotas for the current year. If the Regional Administrator determines during the fishing year that any part of an overage deduction was based on erroneous landings data that were in excess of actual landings for the period concerned, he/she will restore the overage that was deducted in error to the appropriate quota allocation. The Regional Administrator will publish a notice in the **Federal Register** announcing the restoration.

(4) For the Quarter 4 quota period, landings in excess of the quarterly allocation will be deducted from the Quarter 4 period allocation for the following year in a notice published in the **Federal Register** during July of the following year. The overage deduction will be based on landings information available for the Quarter 4 period as of June 30 of the following year. If the Regional Administrator determines during the fishing year that any part of an overage deduction was based on erroneous landings data that were in excess of actual landings for the period concerned, he/she will restore the overage that was deducted in error to the appropriate quota allocation. The Regional Administrator will publish a notice in the **Federal Register** announcing the restoration.

* * * * *

[FR Doc. 02–3667 Filed 2–13–02; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 011218304–1304–01; I.D. 021102A]

Fisheries of the Exclusive Economic Zone Off Alaska; Atka Mackerel in the Central Aleutian District

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

ACTION: Closure.

SUMMARY: NMFS is prohibiting directed fishing for Atka mackerel in the Central Aleutian District of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the A season allowance of Atka mackerel total allowable catch (TAC) in this area.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), February 11, 2002, until 1200 hrs, A.l.t., September 1, 2002.

FOR FURTHER INFORMATION CONTACT: Andrew Smoker, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The A season allowance of Atka mackerel TAC in the Central Aleutian District of the BSAI is 11,008 metric tons (mt) as established by an emergency rule implementing 2002 harvest specifications and associated management measures for the groundfish fisheries off Alaska (67 FR 956, January 8, 2002).

In accordance with § 679.20 (d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the A season allowance of the Atka mackerel TAC in the Central Aleutian District will be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 10,008 mt, and is setting aside the remaining 1,000 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20 (d)(1)(iii), the Regional Administrator finds that this directed fishing allowance will be reached. Consequently, NMFS is prohibiting directed fishing for Atka mackerel in the Central Aleutian District of the BSAI.

Maximum retainable bycatch amounts may be found in the regulations at § 679.20(e) and (f).

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, finds that the need to immediately implement this action to prevent exceeding the amount of the A season allowance of Atka mackerel TAC in the Central Aleutian District of the BSAI constitutes good cause to waive the requirement to provide prior notice opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553 (b)(3)(B) and 50 CFR 679.20 (b)(3)(iii)(A), as such procedures would be unnecessary and contrary to the public interest. Similarly, the need to implement these measures in a timely fashion to prevent exceeding the A season allowance of Atka mackerel TAC in the Central Aleutian District of the BSAI constitutes good cause to find that the effective date of this action cannot be delayed for 30 days. Accordingly, under 5 U.S.C. 553 (d), a delay in the effective date is hereby waived.

This action is required by §§ 679.20 and 679.22 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: February 11, 2002.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 02–3652 Filed 2–11–02; 3:54 pm]

BILLING CODE 3510–22–S

Rules and Regulations

Federal Register
Vol. 67, No. 31
Thursday, February 14, 2002

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

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

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 01–054–1]

Phytophthora Ramorum; Quarantine and Regulations

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and notice of public hearings.

SUMMARY: We are quarantining 10 counties in the State of California and a portion of 1 county in the State of Oregon because of the presence of *Phytophthora ramorum* and regulating the interstate movement of regulated and restricted articles from the quarantined area. This action is necessary on an emergency basis to prevent the spread of *P. ramorum* to noninfested areas of the United States.

DATES: This interim rule is effective February 14, 2002. We will consider all comments we receive that are postmarked, delivered, or e-mailed by April 15, 2002. We will also consider comments made at public hearings to be held in Petaluma, CA, on February 27, 2002; and in Riverdale, MD, on March 27, 2002.

ADDRESSES: You may submit comments by postal mail/commercial delivery or electronically. If you use postal mail/commercial delivery, please send four copies (an original and three copies) to: Docket No. 01–054–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 01–054–1. To submit a comment electronically, please visit *http://comments.aphis.usda.gov.*

You may read any comments that we receive on this docket in our reading room, or by visiting http://comments.aphis.usda.gov. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

APHIS documents published in the **Federal Register**, and related information, including the names of organizations and individuals who have commented on APHIS dockets, are available on the Internet at http://www.aphis.usda.gov/ppd/rad/webrepor.html.

Public hearing regarding this rule will be held at the following locations:

1. Petaluma, CA: Petaluma Community Center, 320 N. McDowell Blvd., Petaluma, CA.
2. Riverdale, MD: USDA Center at Riverside, 4700 River Road, Riverdale, MD.

FOR FURTHER INFORMATION CONTACT: Mr. Jonathan Jones, Operations Officer, Invasive Species and Pest Management, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737; (301) 734–8247.

SUPPLEMENTARY INFORMATION:

Public Hearings

We are advising the public that we are hosting two public hearings on this interim rule. The first public hearing will be held in Petaluma, CA, on Wednesday, February 27, 2002. The second public hearing will be held in Riverdale, MD, on Wednesday, March 27, 2002.

A representative of the Animal and Plant Health Inspection Service (APHIS), U.S. Department of Agriculture (USDA or the Department), will preside at the public hearings. Any interested person may appear and be heard in person, by attorney, or by other representative. Written statements may be submitted and will be made part of the hearing record. A transcript of the public hearings will be placed in the rulemaking record and will be available for public inspection.

The purpose of the hearings is to give interested persons an opportunity for oral presentation of data, views, and arguments. Questions about the content of the interim rule may be part of the commenters' oral presentations. However, neither the presiding officer nor any other representative of APHIS will respond to comments at the hearings, except to clarify or explain provisions of the interim rule.

The public hearings will begin at 9 a.m. and are scheduled to end at 4:30 p.m., local time. The presiding officer may limit the time for each presentation so that all interested persons appearing at each hearing have an opportunity to participate. Each hearing may be terminated at any time if all persons desiring to speak have been heard.

Registration for the hearings may be accomplished by registering with the presiding officer between 8:30 a.m. and 9 a.m. on the day of the hearing. Persons who wish to speak at a hearing will be asked to sign in with their name and organization to establish a record for the hearing. We ask that anyone who reads a statement provide two copies to the presiding officer at the hearing. Those who wish to form a panel to present their views will be asked to provide the name of each member of the panel and the organizations the panel members represent.

Persons or panels wishing to speak at one or both of the public hearings may register in advance by phone or e-mail. Persons wishing to register by phone should call the Regulatory Analysis and Development voice mail at (301) 734–4339. Callers must leave a message clearly stating (1) the location of the hearing the registrant wishes to speak at, (2) the registrant's name and organization, and, if registering for a panel, (3) the name of each member of the panel and the organization each panel member represents. Persons wishing to register by e-mail must send an e-mail with the same information described above to ispm@aphis.usda.gov. Please write ''Public Hearing Registration'' in the subject line of your e-mail. Advance registration for the Petaluma, CA, hearing must be received by 3 p.m. on Monday, February 25, 2002. Advance registration for the Riverdale, MD, hearing must be received by 3 p.m. on Tuesday, March 26, 2002.

If you require special accommodations, such as a sign language interpreter, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

Parking and Security Procedures at the USDA Center

Please note that a fee of $2.25 is required to enter the parking lot at the USDA Center. The machine accepts $1 bills and quarters.

Upon entering the building, visitors should inform security personnel that they are attending the *Phytophthora ramorum* quarantine public hearing. Identification is required. Security personnel will direct visitors to the registration tables located outside of Conference Rooms C and D on the first floor. Registration upon arrival is necessary for all participants, including those who have registered to speak in advance. Visitor badges must be worn throughout the day.

Background

Phytophthora ramorum is a harmful fungus that has been found in arrowwood (*Viburnum* x *bodnantense*), big leaf maple (*Acer macrophyllum*), black oak (*Quercus kelloggii*), California bay laurel (*Umbellularia californica*), California buckeye (*Aesculus californhica*), California coffeeberry (*Rhamnus californica*), California honeysuckle (*Lonicera hispidula*), coast live oak (*Quercus agrifolia*), huckleberry (*Vaccinium ovatum*), madrone (*Arbutus menziesii*), manzanita (*Arctostaphylos* spp.), rhododendron (*Rhododendron* spp., including azalea), Shreve's oak (*Quercus parvula* var. *shrevei*), tanoak (*Lithocarpus densiflorus*), and Toyon (*Heteromeles arbutifolia*).

According to available research and observations, similar symptoms of infection with *P. ramorum* have been identified in tanoak, coast live oak, black oak and Shreve's oak. Although symptoms are similar in these species, their appearance, both chronologically and physically, varies somewhat. In tanoak, leaf symptoms are usually the first to appear, as new growth may droop or turn yellow to brown. In coast live oak, black oak, and Shreve's oak, the earliest symptom is the appearance of a bleeding canker; burgundy-red to tar-black thick sap oozes on the bark surface. Similar bleeding, though less viscous, has been observed on tanoak, although tanoak may not show the bleeding symptom at all. This bleeding is a response to infection with *P. ramorum,* and is typically found from the root crown (the area where the trunk fans out to the roots) to a height of 6 feet. Bleeding has occasionally been observed at greater heights. Oaks showing these symptoms typically die within a few months of the appearance of symptoms. Other hosts are not typically killed by *P. ramorum.* Symptoms of infection in other hosts include leaf spotting and stem canker infections.

Since its initial discovery in Marin County, CA, in 1995, *P. ramorum* has been confirmed to exist in nine additional counties along or near the northern California coastline: Alameda, Mendocino, Monterey, Napa, San Mateo, Santa Clara, Santa Cruz, Solano, and Sonoma. *P. ramorum* also has been found in a portion of Curry County, OR. *P. ramorum,* which has been commonly referred to as Sudden Oak Death or Oak Mortality Syndrome, has caused the death of thousands of mature oaks in these counties, and there is presently no known treatment for infected plants that kills the fungus but allows plants to survive.

Infected plants and plant products that move interstate could serve as a pathway for the introduction of *P. ramorum* to other areas of the United States. It is unclear how *P. ramorum* spreads, though available research suggests it is spread by water, soil, and infected plant material. It is also possible that *P. ramorum* spreads by air. Regardless, the movement of infected plants and plant products of the *P. ramorum* hosts listed earlier in this document is believed to provide a pathway for the spread of *P. ramorum.*

As explained below, the States of California and Oregon have restricted the intrastate movement of certain articles from infested areas to prevent the spread of *P. ramorum* within California and Oregon. However, Federal regulations are necessary to restrict the interstate movement of certain articles from the infested area to prevent the spread of *P. ramorum* to noninfested areas of the United States.

We are amending the ''Domestic Quarantine Notices'' in 7 CFR part 301 by adding a new subpart, ''Phytophthora Ramorum'' (§§ 301.92 through 301.92–10, referred to below as the regulations). The regulations, which are described below, quarantine portions of the States of California and Oregon because of *P. ramorum* and restrict the interstate movement of regulated and restricted articles from quarantined areas. The interstate movement of regulated and restricted articles from nonquarantined areas is not restricted under this interim rule.

Section 301.92—Restrictions on the Interstate Movement of Regulated Articles

Section 301.92 prohibits the interstate movement of regulated and restricted articles from quarantined areas except in accordance with the regulations.

Section 301.92–1—Definitions

Section 301.92–1 contains definitions of the following terms: *Administrator, Animal and Plant Health Inspection Service, bark chips, certificate, compliance agreement, departmental permit, duff, firewood, forest stock, inspector, interstate, log, moved (move, movement), mulch, nursery stock, person, Plant Protection and Quarantine, quarantined area, regulated article, restricted article, soil,* and *State.*

Section 301.92–2—Regulated and Restricted Articles

Certain articles present a significant risk of spreading *P. ramorum* if they are moved from quarantined areas without restrictions. We call these articles regulated and restricted articles. Regulated articles may be moved interstate from quarantined areas under certificates issued by an inspector in accordance with § 301.92–5. Restricted articles, however, may only be moved interstate by USDA under departmental permits issued in accordance with § 301.92–4(a)(2).

Paragraph (a) of § 301.92–2 lists soil and nursery stock (except acorns and seeds), unprocessed wood and wood products including firewood, logs, lumber, wreaths, garlands, and greenery of the following species as regulated articles:

- Arrowwood (*Viburnum* x *bodnantense*);
- Big leaf maple (*Acer macrophyllum*);
- Black oak (*Quercus kelloggii*);
- California bay laurel (*Umbellularia californica*);
- California buckeye (*Aesculus californica*);
- California coffeeberry (*Rhamnus californica*);
- California honeysuckle (*Lonicera hispidula*);
- Coast live oak (*Quercus agrifolia*);
- Huckleberry (*Vaccinium ovatum*);[1]
- Madrone (*Arbutus menziesii*);
- Manzanita (*Arctostaphylos manzanita*);
- Rhododendron (*Rhododendron* spp., including azalea);
- Shreve's oak (*Quercus parvula* var. *shrevei*);
- Tanoak (*Lithocarpus densiflorus*); and
- Toyon (*Heteromeles arbutifolia*).

Paragraph (b) of the regulations lists bark chips, forest stock, and mulch of the species of plants listed above as restricted articles. Again, restricted articles may only be moved interstate by USDA under a departmental permit

[1] Fruits of huckleberry are not regulated articles.

issued in accordance with § 301.92–4(a)(2).

The regulations in § 301.92–2 also provide that any other product or article that an inspector determines to present a risk of spreading *P. ramorum* can also be considered a regulated or restricted article if the inspector notifies the person in possession of the product or article that it is subject to the restrictions in the regulations. This provision is necessary to ensure that APHIS is able to regulate the movement of all articles, especially newly identified hosts of *P. ramorum* not listed in the regulations, that pose a risk of spreading *P. ramorum* if moved without restriction.

Section 301.92–3—Quarantined Areas

Paragraph (a) of § 301.92–3 provides the criteria for the inclusion of States, or portions of States, in the list of quarantined areas. Under these criteria, any State or portion of a State in which *P. ramorum* is found by an inspector, or in which the Administrator has reason to believe that *P. ramorum* is present, will be listed as a quarantined area. These criteria also provide that an area will be designated as a quarantined area when the Administrator considers it necessary due to the area's inseparability for quarantine enforcement purposes from localities in which *P. ramorum* has been found.

Paragraph (a) of § 301.92–3 also provides that we will designate less than an entire State as a quarantined area only if we determine that the State has adopted and is enforcing restrictions on the intrastate movement of regulated articles that are equivalent to those imposed on the interstate movement of regulated articles and that the designation of less than the entire State as a quarantined area will prevent the interstate spread of *P. ramorum*. These determinations would indicate that infestations are confined to the quarantined areas and eliminate the need for designating an entire State as a quarantined area.

We have determined that it is not necessary to designate the entire States of California and Oregon as quarantined areas. The State of California has adopted restrictions on the intrastate movement of regulated and restricted articles from the following counties: Alameda, Marin, Mendocino, Monterey, Napa, San Mateo, Santa Clara, Santa Cruz, Solano, and Sonoma.

The State of Oregon has adopted restrictions on the intrastate movement of regulated and restricted articles from a 9-square-mile area near the Brookings area of Curry County.

P. ramorum has not been found in any other areas of California or Oregon besides those listed above, and California and Oregon have adopted and are enforcing restrictions on the intrastate movement of regulated and restricted articles from those areas that are substantially the same as those we are imposing on the interstate movement of regulated and restricted articles.

The State of California is not attempting to eradicate *P. ramorum* from the State, and has quarantined any county where *P. ramorum* has been confirmed to exist, regardless of the distribution of *P. ramorum* within that county. APHIS is also using this criterion in setting the *P. ramorum* quarantine boundaries for the State of California.

Oregon is attempting to eradicate *P. ramorum* from the area in Curry County where it has been detected. The quarantined area covers 9 square miles in the Brookings area of Curry County. All boundaries of the quarantined area are at least ½ to 1 mile from any *P. ramorum* detection site. APHIS believes that this distance is sufficient to ensure that *P. ramorum* is not spread to areas outside the quarantined area. The boundary lines may vary due to factors such as the location of *P. ramorum* host material and the use of clearly identifiable lines for the boundaries. The boundaries themselves are described in the rule portion of this document.

Paragraph (b) of § 301.92–3 provides that we may temporarily designate any nonquarantined area in a State as a quarantined area when we determine that the nonquarantined area meets the criteria for designation as a quarantined area described in § 301.92–3(a). In such cases, we will give the owner or person in possession of the area a copy of the regulations along with written notice of the area's temporary designation as a quarantined area, after which time the interstate movement of any regulated or restricted article from the area will be subject to the regulations. This provision is necessary to prevent the spread of *P. ramorum* during the time between the detection of the disease and the time a document quarantining the area can be made effective and published in the **Federal Register**. In the event that an area's designation as a temporary quarantined area is terminated, we will provide written notice of that termination to the owner or person in possession of the area as soon as is practicable.

Section 301.92–4—Conditions Governing the Interstate Movement of Regulated and Restricted Articles from Quarantined Areas

This section provides that regulated articles may be moved interstate from quarantined areas if they are accompanied by a certificate issued in accordance with §§ 301.92–5 and 301.92–8, and provided that they are moved through the quarantined area without stopping except for refueling, rest stops, emergency repairs, and for traffic conditions, such as traffic lights or stop signs.

Additionally, this section provides that restricted articles may be moved interstate from quarantined areas by APHIS or the Department for experimental or scientific purposes. Such articles must be moved in accordance with a departmental permit issued by the Administrator, under conditions specified on the permit to prevent the spread of *P. ramorum*.

Regulated or restricted articles that are moved from outside quarantined areas and that are accompanied by a waybill that indicates the point of origin may be moved interstate through a quarantined area without a certificate or a departmental permit. The articles must also be moved from outside the quarantined area through the quarantined area without stopping (except for refueling, rest stops, emergency repairs, and for traffic conditions such as traffic lights and stop signs), and the articles must not be unpacked or unloaded in the quarantined area.

Section 301.92–5—Issuance and Cancellation of Certificates

Certificates are issued for regulated articles when an inspector finds that, because of certain conditions, there is no disease risk associated with moving a regulated article from a quarantined area. Regulated articles accompanied by a certificate may be moved interstate without further restrictions. Section 301.92–5(a) provides that a certificate will be issued by an inspector for the movement of regulated articles if the inspector determines that any one of the following conditions have been met:

- The regulated articles have been treated under the direction of an inspector in accordance with § 301.92–10 of this subpart.
- The regulated articles are wood products such as firewood, logs, or lumber that are free of bark.
- The regulated article is soil that has not been in direct physical contact with any article infected with *P. ramorum*,

and from which all duff[2] has been removed.

• The regulated articles are articles of nursery stock that (1) are shipped from a nursery or premises in a quarantined area that is inspected annually by an inspector for *P. ramorum* in accordance with the inspection and sampling protocol described in § 301.92–11(a), and that has been found free of *P. ramorum*; (2) are part of a shipment of nursery stock that has been inspected immediately prior to interstate movement in accordance with § 301.92–11(b), and that has been found free of *P. ramorum*; (3) have been kept separate from regulated articles not inspected between the time of the inspection and the time of interstate movement; and (4) have not been grown in, or moved from, other areas within a quarantined area except nurseries or premises that have been inspected for *P. ramorum* in accordance with this section; and that have been found free of *P. ramorum*.

The regulations in § 301.92–5(a) also require that inspectors may only issue certificates for the interstate movement of regulated articles if the inspector determines that the regulated articles: (1) Are to be moved in compliance with any additional emergency conditions the Administrator may impose under section 414 of the Plant Protection Act (7 U.S.C. 7714)[3] to prevent the spread of *P. ramorum*, and (2) are eligible for unrestricted movement under all other Federal domestic plant quarantines and regulations applicable to the regulated article.

We have included a footnote that provides an address for securing the addresses and telephone numbers of the local Plant Protection and Quarantine offices at which services of inspectors may be requested. We have also included a footnote that explains that the Secretary of Agriculture can, under the Plant Protection Act, take emergency actions to seize, quarantine, treat, destroy, or apply other remedial measures to articles that are, or that he or she has reason to believe are, infested or infected by or contain plant pests.

Paragraph (b) of § 301.92–5 allows any person who has entered into and is operating under a compliance agreement to issue a certificate for the interstate movement of a regulated article after an inspector has determined that the article is eligible for a certificate under § 301.92–5(a).

Also, § 301.92–5(c) contains provisions for the withdrawal of a certificate by an inspector if the inspector determines that the holder of the certificate has not complied with conditions for the use of the document. This section also contains provisions for notifying the holder of the reasons for the withdrawal and for holding a hearing if there is any conflict concerning any material fact in the event that the person wishes to appeal the cancellation.

Section 301.92–6—Compliance Agreements and Cancellation

Section 301.92–6 provides for the issuance and cancellation of compliance agreements. Persons who enter into compliance agreements with APHIS are allowed to self-certify that certain regulated articles meet APHIS requirements for interstate movement. Compliance agreements are provided in order to facilitate the interstate movement of certain regulated articles while still minimizing the risk that *P. ramorum* could spread interstate. A compliance agreement will be issued when an inspector has determined that the person requesting the compliance agreement is knowledgeable regarding the requirements of the regulations and the person has agreed to comply with those requirements. Since movements of nursery stock are dependent on inspection or testing by an inspector, compliance agreements will not be issued to persons interested in moving nursery stock interstate. Inspectors will issue certificates for the interstate movement of regulated articles of nursery stock after they inspect, and if necessary, test regulated articles of nursery stock and determine that they are free of *P. ramorum*.

Section 301.92–6 contains a footnote that explains how compliance agreements may be arranged. Section 301.92–6 also provides that an inspector may cancel the compliance agreement upon finding that a person who has entered into the agreement has failed to comply with any of the provisions of the regulations. The inspector will notify the holder of the compliance agreement of the reasons for cancellation and offer an opportunity for a hearing to resolve any conflicts of material fact in the event that the person wishes to appeal the cancellation.

Section 301.92–7—Assembly and Inspection of Regulated Articles

Section 301.92–7 provides that any person (other than a person authorized to issue certificates under § 301.92–5(b)) who desires a certificate to move regulated articles must request, at least 14 days before the desired interstate movement, that an inspector issue a certificate. The regulated articles must be assembled in a place and manner directed by the inspector. These provisions are necessary to ensure that persons desiring inspection services can obtain them before the intended movement date.

Section 301.92–8—Attachment and Disposition of Certificates

Section 301.92–8 requires the certificate issued for movement of the regulated article to be attached, during the interstate movement, to the regulated article, or to a container carrying the regulated article, or to the accompanying waybill. Further, the section requires that the carrier must furnish the certificate to the consignee listed on the certificate upon arrival at the location provided on the certificate. These provisions are necessary for enforcement purposes.

Section 301.92–9—Costs and Charges

Section 301.92–9 explains the APHIS policy that the services of an inspector that are needed to comply with the regulations are provided without cost between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays, to persons requiring those services, but that we will not be responsible for any other costs or charges (such as overtime costs for inspections conducted at times other than between 8 a.m. to 4:30 p.m., Monday through Friday, except holidays).

Section 301.92–10—Treatments

Section 301.92–10 lists treatments that qualify soil and certain regulated articles for interstate movement with a certificate, as provided in § 301.92–5(a)(1)(i).

Under paragraph (a), soil may be heat-treated to a temperature of at least 180 °F for 30 minutes in the presence of an inspector.[4]

Under paragraph (b), wreaths, garlands, and greenery of arrowwood (*Viburnum × bodnantense*), big leaf maple (*Acer macrophyllum*), black oak (*Quercus kelloggii*), California bay laurel (*Umbellularia californica*), California buckeye (*Aesculus californica*),

[2] Duff is decaying plant material including leaf litter, green waste, stem material, bark, and any other plant material that, upon visual inspection, does not appear to have completely decomposed into soil.

[3] Sections 414, 421, and 434 of the Plant Protection Act (7 U.S.C. 7714, 7731, and 7754) provide that the Secretary of Agriculture may, under certain conditions, hold, seize, quarantine, treat, apply other remedial measures to destroy or otherwise dispose of any plant, plant pest, plant product, article, or means of conveyance that is moving, or has moved into or through the United States or interstate if the Secretary has reason to believe the article is a plant pest or is infested with a plant pest at the time of movement.

[4] Soil may also be moved interstate without heat treatment if it meets the requirements in § 301.92–5(a)(1)(iii) or (iv).

California coffeeberry (*Rhamnus californica*), California honeysuckle (*Lonicera hispidula*), coast live oak (*Quercus agrifolia*), huckleberry (*Vaccinium ovatum*), madrone (*Arbutus menziesii*), manzanita (*Arctostaphylos* spp.), rhododendron (*Rhododendron* spp., including azalea), Shreve's oak (*Quercus parvula* var. *shrevei*), tanoak (*Lithocarpus densiflorus*), and Toyon (*Heteromeles arbutifolia*) may be dipped for 1 hour in water that is held at a temperature of at least 160 °F.

Section 301.92–11—Inspection and Sampling Protocol

Section 301.92–11 describes the inspection and sampling protocol that must be followed by nurseries moving regulated articles of nursery stock interstate from quarantined areas. Under the regulations, regulated articles of nursery stock will be subject to two kinds of inspections: (1) Annual inspection and sampling of regulated articles of nursery stock contained in a nursery, and

(2) inspection of individual interstate shipments of nursery stock and testing of symptomatic plants prior to interstate movement of the shipment from the quarantined area.

Annual Nursery Inspections

For an annual nursery inspection, an inspector must visually inspect regulated articles of nursery stock for symptoms of *P. ramorum*. If the nursery contains 100 or fewer regulated articles, an inspector will inspect each regulated article. If the nursery contains more than 100 regulated articles, an inspector will inspect 100 regulated articles and at least 2 percent of the number of regulated articles contained in the nursery that exceeds 100. The regulated articles to be inspected will be randomly selected from throughout the nursery.

If symptomatic plants are found upon inspection, the inspector will collect at least one sample per symptomatic plant. If fewer than 40 symptomatic plants are found in a nursery during an inspection, the inspector must collect samples from nonsymptomatic regulated articles of nursery stock so that the total number of sampled plants is at least 40. Samples must then be labeled and sent for testing to a laboratory approved by APHIS.

If any regulated articles within a nursery are found to be infected with *P. ramorum*, the nursery will be prohibited from moving regulated articles interstate until such time as an inspector can determine that the nursery is free of *P. ramorum*.

Inspections of Individual Interstate Shipments

For an inspection of a shipment of regulated articles of nursery stock, an inspector must visually inspect the nursery stock for symptoms of *P. ramorum*. If the shipment contains 100 or fewer regulated articles, an inspector will inspect each regulated article. If the shipment contains more than 100 regulated articles, an inspector will inspect 100 regulated articles and at least 2 percent of the number of regulated articles contained in the shipment that exceeds 100. The regulated articles to be inspected will be randomly selected.

If symptomatic plants are found upon inspection, the inspector must collect at least one sample per symptomatic plant, and one sample per regulated article of nursery stock that is in close proximity to, or that has had physical contact with a symptomatic plant. Samples must be labeled and sent for testing to a laboratory approved by APHIS, and must be found free of *P. ramorum* prior to the interstate movement of any regulated articles contained in the shipment.

If any plants intended for interstate movement are found to be infected with *P. ramorum*, the nursery from which they originate will be prohibited from moving regulated articles interstate until such as time as an inspector can determine that the nursery is free of *P. ramorum*.

Request for Information

As stated earlier in this document, there is much that is unknown about *P. ramorum*. In this rule, APHIS has endeavored to regulate the movement of articles that could cause *P. ramorum* to spread to unaffected areas based on the best scientific evidence available to us at this time. We invite the public to submit any information that supports or contradicts our regulatory strategy, including:

- Evidence demonstrating whether contaminated soil provides a viable or likely pathway for the spread of, or infection of natural hosts by, *P. ramorum*.
- Evidence demonstrating whether debarked wood provides a viable or likely pathway for the spread of, or infection of natural hosts by, *P. ramorum*.
- Evidence demonstrating whether acorns, seeds, or fruits of host plants are naturally infected by *P. ramorum* or carry *P. ramorum*, and whether acorns, seeds, or fruits of host plants provide viable or likely pathways for the spread of, or infection of natural hosts by, *P. ramorum*.
- Comments on the inspection and sampling requirements for nurseries, including comments providing a scientific basis for a longer or shorter inspection cycle, or an alternative sampling protocol.
- Data related to the accuracy, specificity, ease of use, and cost effectiveness of tests that can be used to detect *P. ramorum* on nursery stock of host plants.
- Evidence demonstrating whether certain treatments are effective in eliminating *P. ramorum* infection in regulated articles.

Emergency Action

This rulemaking is necessary on an emergency basis to prevent *P. ramorum* from spreading to noninfested areas of the United States. Under these circumstances, the Administrator has determined that prior notice and opportunity for public comment are contrary to the public interest and that there is good cause under 5 U.S.C. 553 for making this rule effective less than 30 days after publication in the **Federal Register**.

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

Executive Order 12866 and Regulatory Flexibility Act

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

In accordance with 5 U.S.C. 603, we have performed an initial regulatory flexibility analysis, which is set out below, regarding the economic effects of this interim rule on small entities. Based on the information we have, there is no basis to conclude that adoption of this interim rule would result in any significant economic effect on a substantial number of small entities. However, we do not currently have all of the data necessary for a comprehensive analysis of the effects of this interim rule on small entities. Therefore, we are inviting comments on potential effects. In particular, we are interested in determining the number and kind of small entities that may incur benefits or costs from the implementation of this interim rule.

The Plant Protection Act (7 U.S.C. 7701–7772) authorizes the Secretary of Agriculture to prohibit or restrict the interstate movement of any plant, plant product, article, or means of conveyance if the Secretary determines that the prohibition or restriction is necessary to prevent the dissemination of a plant pest within the United States.

As stated earlier in this document, *Phytophthora ramorum* is known to infect arrowwood (*Viburnum* × *bodnantense*), big leaf maple (*Acer macrophyllum*), black oak (*Quercus kelloggii*), California bay laurel (*Umbellularia californica*), California buckeye (*Aesculus califorica*), California coffeeberry (*Rhamnus californica*), California honeysuckle (*Lonicera hispidula*), coast live oak (*Quercus agrifolia*), huckleberry (*Vaccinium ovatum*), madrone (*Arbutus menziesii*), manzanita (*Arctostaphylos* spp.), rhododendron (*Rhododendron* spp., including *azalea*), Shreve's oak (*Quercus parvula* var. *shrevei*), tanoak (*Lithocarpus densiflorus*), and Toyon (*Heteromeles arbutifolia*). *P. ramorum* has been confirmed to exist in 10 counties along or near the northern California coastline: Alameda, Marin, Mendocino, Monterey, Napa, San Mateo, Santa Clara, Santa Cruz, Solano, and Sonoma. *P. ramorum* also has been found in a portion of Curry County, OR.

This interim rule is issued to quarantine portions of the States of California and Oregon where *P. ramorum* is confirmed to exist, and regulate the movement of certain host articles to prevent the risk of spread of *P. ramorum* to other noninfested areas in the United States. California is not attempting to eradicate *P. ramorum* from the 10 counties in the State where the disease is confirmed to exist. Oregon is attempting to eradicate the disease from an area in Curry County, the only county where *P. ramorum* is known to exist in the State. Both States have restricted the intrastate movement of certain articles from infested areas to prevent the spread of *P. ramorum* within California and Oregon. A Federal quarantine of the affected counties, comprising approximately 5 percent of the area of the State of California, and a portion of one county in Oregon is necessary to protect oak forests and urban tree resources across the United States.

P. ramorum is apparently capable of killing healthy, mature black oaks (*Quercus kelloggii*), coast live oak (*Quercus agrifolia*), and tanoaks (*Lithocarpus densiflorus*). *Quercus* spp. are considered the most important and widespread of the hardwood trees in the north temperate zone, consisting of about 300 species. The United States has about 58 oak species of tree size and 10 species that are classified as shrubs. If other *Quercus* or *Lithocarpus* spp. in the Eastern deciduous forests prove susceptible to the pathogen under natural environmental conditions, the economic impact could be significant. The commercial hardwood timber production in the United States alone is worth over $30 billion. Should the disease become widespread, some countries would likely place restrictions on U.S. exports of oak and other hardwood products which generated nearly $3 billion in revenue in 2000.

The pathogen has also been isolated from *Rhododendron* spp., arrowwood (*Viburnum* × *bodnantense*), and in huckleberry (*Vaccinium* spp.), the genus of which includes the commercially important blueberries and cranberries. *P. ramorum* causes leaf spotting and twig dieback on these species, and in severe cases in huckleberry, can kill the plant. Nursery stock is a probable route of long distance spread of the disease since spores that give rise to *P. ramorum* can be dispersed by soil, or infected shoots, and foliage. Federal restrictions on nursery stock is necessary as *Rhododendron* spp. and viburnum are important components of the ornamental nursery trade. Additionally, two of the host species of oak are sold as nursery stock and are used as ornamentals in landscaping. The importance of the Federal quarantine and restrictions is further underscored by the fact that there is currently no known treatment for infected plants that kills the fungus but allows plants to survive. Federal action is necessary to protect the U.S. nursery industry whose sales in 1997 was estimated at almost $11 billion.

Impact of the Interim Rule

Under the interim rule, nursery stock moving interstate from the quarantined area must be accompanied by a certificate stating that, among other things, the stock (1) originates from a nursery that has been inspected for *P. ramorum* on an annual basis and that has been found free, and (2) is part of shipment of nursery stock that has been inspected for *P. ramorum* prior to interstate movement and that has been found free. The impact of the restriction on interstate movement of nursery stock would depend on the amount of host products that are to be moved outside the quarantined area. The 1997 Census of Agriculture data show that in that year, there were some 1,214 nurseries in the 10 affected counties in California which accounted for 24 percent of the number of nurseries and 27 percent of the value of nursery sales in California, or 5.5 percent of total U.S. sales of nursery stock in 1997. There were 7 nurseries in Curry County, OR, which comprised less than 0.2 percent of the number of nurseries, and 0.15 percent of sales. Not all of the 1,214 nurseries in the 10 California counties, however, are expected to be affected by this rule. Some indication of the impact may be surmised from the preliminary results of a survey jointly conducted by the California Department of Food and Agriculture and USDA/APHIS, between January and March 2001. The respondents to the survey were 517 wholesale and retail establishments in 6 counties in California (no survey was available for Oregon). These businesses include facilities that sold lumber, firewood cutters and dealers, and nurseries involved in propagation and sale of oaks, rhododendrons, and other host products.

Approximately 234, or 45 percent, of the businesses surveyed had contact with host materials. The total sales value of these businesses amounted to some $7 million. A large amount of the aggregate receipts (nearly 85 percent) were derived from the sale of azaleas and rhododendron. The next largest category of sales is from oak firewood (12.7 percent), followed by oak nursery stock (2.5 percent), and mulch and chips from oak (0.17 percent).

This interim rule may impact some of the wholesale nurseries who move rhododendrons and oak nursery stock to nurseries outside the State. Nurseries that do not meet APHIS's requirements must divert their products to markets within the quarantined area, or if a market cannot be found, lose sales of that commodity. Although some information is available from the survey on the number of businesses who have contact with host materials (234 establishments), and the relatively large amount of receipts earned from sales of *Rhododendron* spp. (including azaleas) is also known, the amount of these hosts that are intended for interstate shipment is unknown. Thus, a conclusive statement cannot be made about the extent of the impact due to the movement restriction. APHIS invites comments from members of the public who may be impacted by the restriction on interstate movement of *Rhododendron* spp.

Besides rhododendrons and azaleas, wholesale nurseries within the affected area that sell oak seedlings and trees to nurseries outside the State would also be affected by the rule. The proportion of the 234 establishments that would be affected by the restrictions on movement of oak seedlings is unknown.

However, trade of seedlings is primarily on one type of host species, the coast live oak, which is not believed to be shipped interstate to a significant degree. We therefore expect that the restriction on the movement of oak nursery stock to be small.

Under this rule, producers in the quarantined counties who wish to sell wreaths, garlands, or greenery outside their counties are required to treat these products with hot water. The cost of hot water treatment is not known, and we invite public comments on treatment costs.

The economic effects that could result from the requirement that unprocessed wood or wood products (including firewood, logs, lumber, and other wood products) be debarked prior to interstate movement are unknown. We invite public comments on any costs to affected entities that may result from the debarking requirements of this rule.

The businesses surveyed that are involved in firewood distribution, from cutters to wholesalers to retailers, are generally small entities who sell primarily intrastate. The economic effects of the rule on entities involved in the firewood business is expected to be small as their sales are believed to be largely to markets within the quarantined area.

The effects of this rule on persons moving soil interstate from quarantined areas, and persons who wish to move forest stock (non-nursery grown trees, shrubs, etc.) interstate is also unknown at this time. We invite public comments on these potential effects.

In general, the economic effects of this rule could be small because many host products are sold primarily within the affected States, often within quarantined areas. Consequently, State regulations on intrastate movement would likely have a larger impact on business within the affected counties than APHIS's quarantine and regulations on interstate movement.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act requires that APHIS specifically consider the economic impact of the interim rule on small entities. The Small Business Administration (SBA) has established size criteria for determining which economic entities meet the definition of a small firm. The small entity size standard for nursery and tree production (NAICS 111421) is $750,000 or less in annual receipts; for forest nurseries and gathering of forest products (NAICS 113210) is $5,000,000 or less in annual receipts. The SBA classifies logging operations (NAICS 113310), as well as sawmills, and wood product manufacturers as small entities if fewer than 500 people are employed.

Based on the above criteria, the majority of nurseries in the affected counties of California and Oregon would likely be classified as small entities. The impact of the rule on businesses handling host materials, whether small or large, would depend on the amount of regulated articles moved in interstate commerce that would have to meet APHIS's requirements as a condition of movement. Some businesses may incur additional costs for hot water treatment or debarking.

Preliminary results from a survey of businesses in 6 of the 10 affected counties in California indicate that host materials worth over $7 million in annual sales may be potentially affected by the interim rule. The actual impact (that is, the number of affected establishments and the amount of additional costs or losses incurred) is not known. The negative impact of this interim rule could be small as a majority of host products is sold primarily within the regulated counties in the States. Consequently, State regulations on intrastate movement would likely have a larger impact on businesses within the affected counties than APHIS's regulations on interstate movement. The public is invited to submit information regarding the percentage of sales of regulated articles that moves intra-county, inter-county, and interstate.

The economic effects of this rule are expected to be offset by large benefits to the public in terms of preventing disease spread and harm to forest and urban resources in unaffected regions across the country.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

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

Paperwork Reduction Act

In accordance with section 3507(j) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection and recordkeeping requirements included in this interim rule have been submitted for emergency approval to the Office of Management and Budget (OMB). OMB has assigned control number 0579–0191 to the information collection and recordkeeping requirements.

We plan to request continuation of that approval for 3 years. Please send written comments on the 3-year approval request to the following addresses: (1) Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503; and (2) Docket No. 01–054–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comments refer to Docket No. 01–054–1 and send your comments within 60 days of publication of this rule.

This interim rule quarantines portions of the States of California and Oregon because of the presence of *P. ramorum* and restricts the interstate movement of regulated articles from quarantined areas. Its implementation will require us to engage in certain information collection activities, in that regulated articles may not be moved interstate from quarantined areas unless they are accompanied by a certificate. A certificate may be issued by an inspector (i.e., an APHIS employee or other person authorized by the APHIS Administrator to enforce the regulations) or by a person who has entered into a written compliance agreement with APHIS. We are soliciting comments from the public concerning our information collection and recordkeeping requirements. These comments will help us:

(1) Evaluate whether the information collection is necessary for the proper performance of our agency's functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the information collection, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the information collection on those who are to respond (such as through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; *e.g.,* permitting electronic submission of responses).

Estimate of burden: Public reporting burden for this collection of information

is estimated to average 0.07372 hours per response.

Respondents: Persons engaged in growing, processing, handling, or moving regulated articles.

Estimated annual number of respondents: 387.

Estimated annual number of responses per respondent: 43.002.

Estimated annual number of responses: 16,642.

Estimated total annual burden on respondents: 1,227 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

Copies of this information collection can be obtained from Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

List of Subjects in 7 CFR Part 301

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

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

PART 301—DOMESTIC QUARANTINE NOTICES

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

Authority: 7 U.S.C. 166, 7711, 7712, 7714, 7731, 7735, 7751, 7752, 7753, and 7754; 7 CFR 2.22, 2.80, and 371.3.

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

2. Part 301 is amended by adding a new ''Subpart—Phytophthora Ramorum,'' §§ 301.92 through 301.92–10, to read as follows:

Subpart—Phytophthora Ramorum

Sec.

301.92 Restrictions on the interstate movement of regulated and restricted articles.
301.92–1 Definitions.
301.92–2 Regulated and restricted articles.
301.92–3 Quarantined areas.
301.92–4 Conditions governing the interstate movement of regulated and restricted articles from quarantined areas.
301.92–5 Issuance and cancellation of certificates.
301.92–6 Compliance agreements and cancellation.
301.92–7 Assembly and inspection of regulated articles.
301.92–8 Attachment and disposition of certificates.
301.92–9 Costs and charges.
301.92–10 Treatments.
301.92–11 Inspection and sampling protocol.

Subpart—Phytophthora Ramorum

§ 301.92 Restrictions on the interstate movement of regulated and restricted articles.

No person may move interstate from any quarantined area any regulated or restricted article except in accordance with this subpart.[1]

§ 301.92–1 Definitions.

Administrator. The Administrator, Animal and Plant Health Inspection Service, or any person authorized to act for the Administrator.

Animal and Plant Health Inspection Service. The Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture.

Bark chips. Bark fragments broken or shredded from a log or tree.

Certificate. A document in which an inspector or person operating under a compliance agreement affirms that a specified regulated article meets the requirements of § 301.92–5(a) of this subject and may be moved interstate to any destination.

Compliance agreement. A written agreement between APHIS and a person engaged in growing, processing, handling, or moving regulated articles, wherein the person agrees to comply with this subpart.

Departmental permit. A document issued by the Administrator in which he or she affirms that interstate movement of the regulated article identified on the document is for scientific or experimental purposes and that the regulated article is eligible for interstate movement in accordance with § 301.92–4(a)(2) of this subpart.

Duff. Decaying plant matter that includes leaf litter, green waste, stem material, bark, and any other plant material that, upon visual inspection, does not appear to have completely decomposed into soil.

Firewood. Wood that has been cut, sawn, or chopped into a shape and size commonly used for fuel.

Forest stock. All flowers, trees, shrubs, vines, scions, buds, fruit pits, or other seeds of fruit and ornamental trees or shrubs that are wild-grown, backyard-grown, or naturally occurring and do not meet the definition of nursery stock, and that are not located on a nursery premises.

Inspector. Any employee of APHIS, the U.S. Department of Agriculture, or other person authorized by the Administrator to perform the duties required under this subpart.

Interstate. From any State into or through any other State.

Log. The bole of a tree; trimmed timber that has not been sawn further than to form cants.

Lumber. Logs that have been sawn into boards, planks, or structural members such as beams.

Moved (move, movement). Shipped, offered for shipment, received for transportation, transported, carried, or allowed to be moved, shipped, transported, or carried.

Mulch. Bark chips, wood chips, wood shavings, or sawdust, or a mixture thereof, that could be used as a protective or decorative ground cover.

Nursery stock. All greenhouse or field-grown florist's stock, trees, shrubs, vines, cuttings, grafts, scions, buds, fruit pits, and other seeds of fruit and ornamental trees or shrubs, and other plants and plant products for propagation, except field, vegetable, and flower seeds, bedding plants, and other herbaceous plants, bulbs, and roots.

Person. Any association, company, corporation, firm, individual, joint stock company, partnership, society, or other entity.

Plant Protection and Quarantine. Plant Protection and Quarantine, Animal and Plant Health Inspection Service, United States Department of Agriculture.

Quarantined area. Any State, or any portion of a State, listed in § 301.92–3(c) of this subpart or otherwise designated as a quarantined area in accordance with § 301.92–3(b) of this subpart.

Regulated article. Any article listed in § 301.92–2(a) of this subpart.

Restricted article. Any article listed in § 301.92–2(b) of this subpart.

Soil. Any non-liquid combination of organic and/or inorganic material in which plants can grow.

State. The District of Columbia, Puerto Rico, the Northern Mariana Islands, or any State, territory, or possession of the United States.

§ 301.92–2 Regulated and restricted articles.

(a) The following are regulated articles, and may be moved interstate from a quarantined area only if accompanied by a certificate issued in accordance with the regulations in this subpart:

(1) Nursery stock (except acorns and seeds), unprocessed wood and wood products, and plant products, including firewood, logs, lumber, wreaths,

[1] Any properly identified inspector is authorized to stop and inspect persons and means of conveyance and to seize, quarantine, treat, apply other remedial measures to, destroy, or otherwise dispose of regulated or restricted articles as provided in sections 414, 421, and 434 of the Plant Protection Act (7 U.S.C. 7714, 7731, and 7754).

garlands, and greenery of arrowwood (*Viburnum* x *bodnantense*), big leaf maple (*Acer macrophyllum*), black oak (*Quercus kelloggii*), California bay laurel (*Umbellularia californica*), California buckeye (*Aesculus californica*), California coffeeberry (*Rhamnus californica*), California honeysuckle (*Lonicera hispidula*), coast live oak (*Quercus agrifolia*), huckleberry (*Vaccinium ovatum*) (except fruit), madrone (*Arbutus menziesii*), manzanita (*Arctostaphylos* spp.), rhododendron (*Rhododendron* spp., including azalea), Shreve's oak (*Quercus parvula* var. *shrevei*), tanoak (*Lithocarpus densiflorus*), and Toyon (*Heteromeles arbutifolia*).

(2) Soil.

(3) Any other product or article that an inspector determines to present a risk of spreading *Phytophthora ramorum,* if an inspector notifies the person in possession of the product or article that it is subject to the restrictions in the regulations.

(b) The following are restricted articles, and may only be moved interstate from a quarantined area by the U.S. Department of Agriculture for experimental or scientific purposes, and only in accordance with the regulations in § 301.92–4(a)(2) of this subpart:

(1) Bark chips, forest stock, or mulch of arrowwood (*Viburnum* × *bodnantense*), big leaf maple (*Acer macrophyllum*), black oak (*Quercus kelloggii*), California bay laurel (*Umbellularia californica*), California buckeye (*Aesculus californica*), California coffeeberry (*Rhamnus californica*), California honeysuckle (*Lonicera hispidula*), coast live oak (*Quercus agrifolia*), huckleberry (*Vaccinium ovatum*), madrone (*Arbutus menziesii*), manzanita (*Arctostaphylos* spp.), rhododendron (*Rhododendron* spp., including azalea), Shreve's oak (*Quercus parvula* var. *shrevei*), tanoak (*Lithocarpus densiflorus*), and Toyon (*Heteromeles arbutifolia*).

(2) Any other product or article that an inspector determines to present a risk of spreading *Phytophthora ramorum,* if an inspector notifies the person in possession of the product or article that it is a restricted article.

§ 301.92–3 Quarantined areas.

(a) Except as otherwise provided in paragraph (b) of this section, the Administrator will list as a quarantined area in paragraph (c) of this section each State, or each portion of a State, in which *Phytophthora ramorum* has been found by an inspector, in which the Administrator has reason to believe that *Phytophthora ramorum* is present, or that the Administrator considers necessary to quarantine because of its inseparability for quarantine enforcement purposes from localities in which *Phytophthora ramorum* has been found. Less than an entire State will be designated as a quarantined area only if the Administrator determines that:

(1) The State has adopted and is enforcing restrictions on the intrastate movement of the regulated articles that are substantially the same as those imposed by this subpart on the interstate movement of regulated articles; and

(2) The designation of less than the entire State as a quarantined area will prevent the interstate spread of *Phytophthora ramorum.*

(b) The Administrator or an inspector may temporarily designate any nonquarantined area in a State as a quarantined area in accordance with paragraph (a) of this section. The Administrator will give a copy of this regulation along with a written notice for the temporary designation to the owner or person in possession of the nonquarantined area. Thereafter, the interstate movement of any regulated article from an area temporarily designated as a quarantined area will be subject to this subpart. As soon as practicable, this area will be added to the list in paragraph (c) of this section or the designation will be terminated by the Administrator or an inspector. The owner or person in possession of an area for which designation is terminated will be given notice of the termination as soon as practicable.

(c) The following areas are designated as quarantined areas:

California

Alameda County. The entire county.
Marin County. The entire county.
Mendocino County. The entire county.
Monterey County. The entire county.
Napa County. The entire county.
San Mateo County. The entire county.
Santa Clara County. The entire county.
Santa Cruz County. The entire county.
Solano County. The entire county.
Sonoma County. The entire county.

Oregon

Curry County. That portion of the county bounded by a line drawn as follows: Beginning in the northwest corner of sec. 17, T. 40 S., R. 13 W., then east along sec. 17 and 16, T. 40 S., R. 13 W., to sec. 16, T. 40 S., R. 13 W., then south along sec. 16, 21, 28, and 33, T. 40 S., R. 13 W., to sec. 33, T. 40 S., R. 13 W., then west along sec. 33 and 32, T. 40 S., R. 13 W., to sec. 32, T. 40 S., R. 13 W., then north along sec. 32 and 29, T. 40 S., R. 13 W., to the midway point of the western boundary of sec. 29, T. 40 S., R. 13 W., then west to the center of sec. 30, T. 40 S., R. 13 W., then north through sec. 30 and 19, T. 40 S., R. 13 W., to the center of sec. 19, T. 40 S., R. 13 W., then east to the western boundary of sec. 20, T. 40 S., R. 13 W., then north along sec. 20 and 17, T. 40 S., R. 13 W., to the point of beginning.

§ 301.92–4 Conditions governing the interstate movement of regulated and restricted articles from quarantined areas.

Regulated articles and restricted articles may be moved interstate from a quarantined area [2] only if moved in accordance with this section.

(a) *With a certificate or departmental permit.*

(1) Any regulated articles may be moved interstate from a quarantined area if accompanied by a certificate issued and attached in accordance with §§ 301.92–5 and 301.92–8 of this subpart, and provided that the regulated article is moved through the quarantined area without stopping except for refueling, rest stops, emergency repairs, and for traffic conditions, such as traffic lights or stop signs.

(2) Any restricted article may be moved interstate from a quarantined area only if the article is moved:

(i) By the United States Department of Agriculture for experimental or scientific purposes;

(ii) Pursuant to a departmental permit issued by the Administrator for the article;

(iii) Under conditions specified on the departmental permit and found by the Administrator to be adequate to prevent the spread of *Phytophthora ramorum;* and

(iv) With a tag or label bearing the number of the departmental permit issued for the article attached to the outside of the container holding the article, or attached to the article itself if not in a container.

(b) *Without a certificate or departmental permit.*

(1) The regulated or restricted article originated outside the quarantined area and the point of origin of the article is indicated on the waybill of the vehicle transporting the article; and

(2) The regulated or restricted article is moved from outside the quarantined area through the quarantined area without stopping except for refueling or for traffic conditions, such as traffic lights or stop signs, and the article is not unpacked or unloaded in the quarantined area. (Approved by the Office of Management and Budget under control number 0579–0191)

[2] Requirements under all other applicable Federal domestic plant quarantines and regulations must also be met.

§ 301.92–5 Issuance and cancellation of certificates.

(a) An inspector[3] may issue a certificate for the interstate movement of regulated articles if an inspector determines that:

(1)(i) The regulated articles have been treated under the direction of an inspector in accordance with § 301.92–10 of this subpart; or

(ii) The regulated articles are wood products such as firewood, logs, or lumber that are free of bark; or

(iii) The regulated article is soil that has not been in direct physical contact with any article infected with *P. ramorum,* and from which all duff has been removed.

(iv) The regulated articles are articles of nursery stock that:

(A) Are shipped from a nursery or premises in a quarantined area that is inspected annually in accordance with the inspection and sampling protocol described in § 301.92–11(a) of this subpart, and that has been found free of *Phytophthora ramorum;* and

(B) Are part of a shipment of nursery stock that has been inspected prior to interstate movement in accordance with § 301.92–11(b) of this subpart, and that has been found free of *Phytophthora ramorum;* and

(C) Have been kept separate from regulated articles not inspected between the time of the inspection and the time of interstate movement; and

(D) Have not been grown in, or moved from, other areas within a quarantined area except nurseries or premises that are annually inspected for *Phytophthora ramorum* in accordance with this section, and that have been found free of *Phytophthora ramorum.*

(2) The regulated article is to be moved in compliance with any additional emergency conditions the Administrator may impose under section 414 of the Plant Protection Act (7 U.S.C. 7714)[4] to prevent the spread of *Phytophthora ramorum;* and

(3) The regulated article is eligible for unrestricted movement under all other Federal domestic plant quarantines and regulations applicable to the regulated article.

(b) Certificates may be issued by any person engaged in the business of growing, processing, handling, or moving regulated articles provided such person has entered into and is operating under a compliance agreement. Any such person may execute and issue a certificate for the interstate movement of regulated articles if an inspector has previously made the determination that the article is eligible for a certificate in accordance with § 301.92–5(a) of this subpart.

(c) Any certificate that has been issued may be withdrawn, either orally or in writing, by an inspector if he or she determines that the holder of the certificate has not complied with all conditions in this subpart for the use of the certificate. If the withdrawal is oral, the withdrawal and the reasons for the withdrawal will be confirmed in writing as promptly as circumstances allow. Any person whose certificate has been withdrawn may appeal the decision in writing to the Administrator within 10 days after receiving the written notification of the withdrawal. The appeal must state all of the facts and reasons upon which the person relies to show that the certificate was wrongfully withdrawn. As promptly as circumstances allow, the Administrator will grant or deny the appeal, in writing, stating the reasons for the decision. A hearing will be held to resolve any conflict as to any material fact. Rules of practice concerning a hearing will be adopted by the Administrator.

(Approved by the Office of Management and Budget under control number 0579–0191)

§ 301.92–6 Compliance agreements and cancellation.

(a) Any person engaged in growing, processing, handling, or moving regulated articles other than nursery stock may enter into a compliance agreement when an inspector determines that the person understands this subpart, agrees to comply with its provisions, and agrees to comply with all the provisions contained in the compliance agreement.[5]

(b) Any compliance agreement may be canceled, either orally or in writing, by an inspector whenever the inspector finds that the person who has entered into the compliance agreement has failed to comply with this subpart. If the cancellation is oral, the cancellation and the reasons for the cancellation will be confirmed in writing as promptly as circumstances allow. Any person whose compliance agreement has been canceled may appeal the decision, in writing, within 10 days after receiving written notification of the cancellation. The appeal must state all of the facts and reasons upon which the person relies to show that the compliance agreement was wrongfully canceled. As promptly as circumstances allow, the Administrator will grant or deny the appeal, in writing, stating the reasons for the decision. A hearing will be held to resolve any conflict as to any material fact. Rules of practice concerning a hearing will be adopted by the Administrator.

§ 301.92–7 Assembly and inspection of regulated articles.

(a) Any person (other than a person authorized to issue certificates under § 301.92–5(b) of this subpart) who desires to move a regulated article interstate accompanied by a certificate must notify an inspector[6] as far in advance of the desired interstate movement as possible, but no less than 14 days before the desired interstate movement.

(b) The regulated article must be assembled at the place and in the manner the inspector designates as necessary to comply with this subpart.

§ 301.92–8 Attachment and disposition of certificates.

(a) A certificate required for the interstate movement of a regulated article must, at all times during the interstate movement, be:

(1) Attached to the outside of the container containing the regulated article; or

(2) Attached to the regulated article itself if not in a container; or

(3) Attached to the consignee's copy of the accompanying waybill. If the certificate is attached to the consignee's copy of the waybill, the regulated article must be sufficiently described on the certificate and on the waybill to identify the regulated article.

(b) The certificate for the interstate movement of a regulated article must be furnished by the carrier to the consignee listed on the certificate upon arrival at the location provided on the certificate.

(Approved by the Office of Management and Budget under control number 0579–0191)

[3] Services of an inspector may be requested by contacting local offices of Plant Protection and Quarantine, which are listed in telephone directories. The addresses and telephone numbers of local offices may also be obtained from the Animal and Plant Health Inspection Service, Plant Protection and Quarantine, Invasive Species and Pest Management, 4700 River Road Unit 134, Riverdale MD 20737–1236, or the APHIS web site at http://www.aphis.usda.gov/travel/aqi.html.

[4] Sections 414, 421, and 434 of the Plant Protection Act (7 U.S.C. 7714, 7731, and 7754) provide that the Secretary of Agriculture may, under certain conditions, hold, seize, quarantine, treat, apply other remedial measures to destroy or otherwise dispose of any plant, plant pest, plant product, article, or means of conveyance that is moving, or has moved into or through the United States or interstate if the Secretary has reason to believe the article is a plant pest or is infested with a plant pest at the time of movement.

[5] Compliance agreement forms are available without charge from the Animal and Plant Health Inspection Service, Plant Protection and Quarantine, Invasive Species and Pest Management, 4700 River Road Unit 134, Riverdale, MD 20737–1236, and from local offices of the Plant Protection and Quarantine, which are listed in telephone directories.

[6] See footnote 3 of this subpart.

§ 301.92–9 Costs and charges.

The services of the inspector during normal business hours (8 a.m. to 4:30 p.m., Monday through Friday, except holidays) will be furnished without cost. The user will be responsible for all costs and charges arising from inspection and other services provided outside normal business hours.

§ 301.92–10 Treatments.

The following methods may be used to treat the regulated articles listed for *Phytophthora ramorum:*

(a) Soil must be heated to a temperature of at least 180 °F for 30 minutes in the presence of an inspector.

(b) Wreaths, garlands, and greenery of arrowwood (*Viburnum* × *bodnantense*), big leaf maple (*Acer macrophyllum*), black oak (*Quercus kelloggii*), California bay laurel (*Umbellularia californica*), California buckeye (*Aesculus californica*), California coffeeberry (*Rhamnus californica*), California honeysuckle (*Lonicera hispidula*), coast live oak (*Quercus agrifolia*), huckleberry (*Vaccinium ovatum*), madrone (*Arbutus menziesii*), manzanita (*Arctostaphylos* spp.), rhododendron (*Rhododendron* species, including azalea), Shreve's oak (*Quercus parvula* var. *shrevei*), tanoak (*Lithocarpus densiflorus*), and Toyon (*Heteromeles arbutifolia*) must be dipped for 1 hour in water that is held at a temperature of at least 160 °F.

§ 301.92–11 Inspection and sampling protocol.

(a) *Annual nursery inspection and sampling.* To meet the requirements of § 301.92–5(a)(1)(iv) of this subpart, nurseries that ship regulated articles of nursery stock interstate must be inspected for symptoms of *Phytophthora ramorum* annually in accordance with this section.

(1) If the nursery contains 100 or fewer regulated articles, an inspector will inspect each regulated article. If the nursery contains more than 100 regulated articles, an inspector will inspect 100 regulated articles and at least 2 percent of the number of regulated articles contained in the nursery that exceeds 100. The regulated articles to inspected will be randomly selected from throughout the nursery.

(2) If symptomatic plants are found upon inspection, the inspector must collect at least one sample per symptomatic plant.

(3) If fewer than 40 symptomatic plants are found in a nursery during an annual inspection, the inspector must collect samples from nonsymptomatic regulated articles of nursery stock so that the total number of sampled plants is at least 40.

(4) Samples must be labeled and sent for testing to a laboratory approved by APHIS.

(5) If any regulated articles within a nursery are found to be infected with *Phytophthora ramorum,* the nursery will be prohibited from moving regulated articles interstate until such time as an inspector can determine that the nursery is free of *Phytophthora ramorum.*

(b) *Inspection and sampling of individual shipments.* To meet the requirements of § 301.92–5(a)(1)(iv) of this subpart, each shipment of regulated articles of nursery stock intended for interstate movement must be inspected for symptoms of *Phytophthora ramorum* in accordance with this section.

(1) If a shipment contains 100 or fewer regulated articles, an inspector will inspect each regulated article. If a shipment contains more than 100 regulated articles, an inspector will inspect 100 regulated articles and at least 2 percent of the number of regulated articles contained in the shipment that exceeds 100. The regulated articles to be inspected will be randomly selected.

(2) If symptomatic plants are found upon inspection, the inspector will collect at least one sample per symptomatic plant, and one sample per regulated article of nursery stock that is in close proximity to, or that has had physical contact with a symptomatic plant.

(3) Samples will be labeled and sent for testing to a laboratory approved by APHIS, and must be found free of *Phytophthora ramorum* prior to the interstate movement of any regulated articles contained in the shipment.

(4) If any plants intended for interstate movement are found to be infected with *Phytophthora ramorum,* the nursery from which they originate will be prohibited from moving regulated articles interstate until such as time as an inspector can determine that the nursery is free of *Phytophthora ramorum.*

Done in Washington, DC, this 12th day of February 2002.

W. Ron DeHaven,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 02–3721 Filed 2–13–02; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 911 and 944

[Docket No. FV01–911–2 FR]

Limes Grown in Florida and Imported Limes; Suspension of Regulations

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule suspends regulations for one year for limes grown in Florida and for limes imported into the United States that are shipped to the fresh market. This rule suspends grade, size, quality, maturity, pack, inspection, assessment collection, reporting, and other requirements currently prescribed under the Florida lime marketing order (order). The order is administered locally by the Florida Lime Administrative Committee (Committee). This suspension gives the industry time to evaluate citrus canker eradication efforts and the market effects of suspending regulations for one year. This change reduces costs and will help the industry recover from the effects of citrus canker. The suspension of the grade, size, quality, maturity, and inspection requirements specified in the import regulation is required under section 8e of the Agricultural Marketing Agreement Act of 1937.

EFFECTIVE DATE: This final rule becomes effective February 19, 2002 through February 24, 2003.

FOR FURTHER INFORMATION CONTACT: Doris Jamieson, Marketing Specialist, Southeast Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 799 Overlook Drive, Suite A, Winter Haven, Florida 33884; telephone: (863) 324–3375, Fax: (863) 325–8793; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938, or E-mail: *Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing

Agreement No. 126 and Order No. 911, both as amended (7 CFR part 911), regulating the handling of limes grown in Florida, hereinafter referred to as the ''order.'' The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

This final rule is also issued under section 8e of the Act, which provides that whenever certain specified commodities, including limes, are regulated under a Federal marketing order, imports of these commodities into the United States are prohibited unless they meet the same or comparable grade, size, quality, or maturity requirements as those in effect for the domestically produced commodities.

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

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule 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 USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of import regulations issued under section 8e of the Act.

This final rule suspends regulations currently prescribed under the Florida lime marketing order. This rule suspends grade, size, quality, pack, inspection, assessment collection, and other requirements for one year. This suspension provides the industry time to evaluate citrus canker eradication efforts and assess the market effects of no regulation on the industry after the one-year suspension. This change also reduces costs and will help the industry recover from the effects of citrus canker.

Section 911.48 of the order authorizes the issuance of regulations for grade, size, quality, and pack for limes grown in the production area. Section 911.49 authorizes the modification, suspension, or termination of regulations issued under § 911.48. Section 911.51 provides that whenever limes are regulated pursuant to § 911.48, such limes must be inspected by the Federal-State Inspection Service, and certified as meeting the applicable requirements of such regulations. The cost of inspection and certification is borne by handlers.

Under the order, fresh market shipments of Florida limes are required to be inspected and are subject to grade, size, quality, pack, and container requirements. Section 911.344 *Grade and Size Requirements* (7 CFR 911.344) states that no handler shall handle any variety of limes grown in the production area unless such limes of the group known as seeded or true limes meet the requirements specified for U.S. No. 2 grade, except as to color. Further, if such limes do not meet these requirements, they may be handled within the production area if they meet the minimum juice content requirement of at least 42 percent by volume and if handled in containers other than those specified in § 911.329. Such limes of the group known as seedless, large-fruited, or Persian limes must meet the requirements in §§ 911.311 and 911.329 and grade at least a U.S. Combination, Mix Color. They also must be at least two inches in diameter from January 1 through May 31, and at least 1⅞ inches in diameter from June 1 through December 31. Further, they must contain not less than 42 percent juice content by volume. Section 911.344 also includes some container specifications and inspection requirements.

The order's pack and container requirements are specified in §§ 911.311 and 911.329. These sections state, in part, that limes must be packed in containers of 5.5, 8, 10, 20, and 38 pounds designated net weight. Each container of limes in each lot must be marked or stamped on the outside end in letters at least ¼ inch in height to show the United States grade and either the average juice content of the limes or the phrase ''average juice content forty-two percent (42%) or more.'' The containers must also be marked with a Federal-State Inspection Service lot stamp number showing that the limes have been inspected and with a stamp indicating size. Related provisions appear in the regulations at § 911.110 *Exemption certificates;* § 911.120 *Handler registration;* § 911.130 *Limes not subject to regulation;* and § 911.131 *Limes for processing.*

At its April 18, 2001, meeting, in a vote of six in favor and one opposed, the Committee recommended suspending the grade, size, quality, pack, inspection, assessment collection, and other requirements for one year. The Committee met again on May 16, 2001, to review the recommendation made at the earlier meeting and to clarify its original motion. The Committee requested that this rule be in place for one year beginning with the effective date of this rule.

Because limes are marketed all year, the Committee was not concerned about recommending a specific effective date for the suspension. The fiscal year covers the 12-month period beginning April 1 and ending March 31. Since the suspension only applies for the 12 months following the effective date of this final rule, the suspension of the handling, inspection, assessment, and other requirements will start during the 2001/2002 fiscal period and end during the 2002/2003 fiscal period. This is not expected to cause any problems for handlers.

The objective of the handling and inspection requirements is to ensure that only limes of acceptable quality enter fresh market channels, thereby ensuring consumer satisfaction, increasing sales, and improving returns to producers. While the industry continues to believe that quality is an important factor in maintaining sales, the Committee believes the costs associated with the order may exceed the benefits derived at this time, especially in view of the reduction in production due to citrus canker.

The Committee is concerned, however, that the elimination of current requirements could possibly result in lower quality limes being shipped to fresh markets and that markets will be hurt by poor quality. For this reason, the Committee recommended that the suspension of requirements be effective for one-year only. This will enable the Committee to study the impacts of canker and the suspension and consider appropriate actions for ensuing seasons.

This rule allows handlers to ship limes without regard to the minimum grade, size, quality, pack, and inspection requirements for one year. This allows handlers to decrease costs by eliminating the costs associated with inspection and assessments. This rule does not restrict handlers from seeking inspection on a voluntary basis.

The purpose of this rule is to reduce the burden on the industry. If at any

time during the suspension the Committee determines this action is having an unfavorable impact on the industry, the Committee could meet and rescind the suspension.

This rule suspends §§ 911.110, 911.120, 911.130, 911.131, 911.311, 911.329, and 911.344 of the rules and regulations in effect under the order. Section 911.110 provides for hardship exemptions from inspection. Section 911.120 provides for the registration of handlers. Section 911.130 specifies minimum quantity and gift exemptions, and defines commercial processing. Section 911.131 provides requirements for limes for processing.

This rule also suspends § 911.234 requiring that an assessment rate of $0.16 per 55-pound bushel equivalent of limes be collected from Florida lime handlers. Authorization to assess lime handlers enables the Committee to incur expenses that are necessary to administer the marketing order. With the suspension of handling, inspection, and assessment requirements, a limited Committee budget is needed for program administration. For the period of suspension, the Committee will meet and recommend a reduced budget. The Committee has about $26,000 in operating reserves to cover approved Committee expenses.

In 1995, citrus canker was detected near the Miami International Airport. Citrus canker spread throughout South Florida and by March 2000, almost 1,500 acres of lime groves had tested positive for citrus canker. Prior to the outbreak of citrus canker, there were approximately 3,200 acres of commercial lime groves in Dade County. Estimates now place the Florida lime industry at somewhere between 600 and 1,000 acres of production. During the 1999–2000 season, fresh lime production was 774,111 bushels. This past season, production fell to 344,032 bushels. Production in 2001–02 is estimated to be 300,000 bushels.

Citrus canker is a highly infectious disease that attacks citrus trees. Canker attacks the tree and the fruit and may produce a variety of effects, including defoliation, severely blemished fruit, reduced fruit quality, and premature fruit drop. The only known method of eradicating citrus canker is to bulldoze and burn infected and exposed trees. Trees surrounding infected trees must also be bulldozed and burned. At the beginning of the eradication program, trees within a 125 feet radius of an infected tree were destroyed. However, after research was conducted, it was determined that all trees within a 1,900 feet radius had to be destroyed. The removal of these additional trees has quickened the reduction of lime acreage in South Florida.

Many lime growers have lost all of their production to canker. By regulation, until citrus canker is eradicated, lime growers are not permitted to replant. The production area is also under a quarantine that makes it difficult to sell harvested fruit. Lost income from reduced volume and the cost of maintaining groves with reduced monetary returns have hurt the industry. Because of this and the substantially reduced crop, the Committee believes that regulation should be suspended.

By suspending regulation, the industry has an opportunity to evaluate how the citrus canker eradication efforts are progressing. The industry also has an opportunity to assess the market impact of having no regulation. Also, under a suspension, inspection fees and program assessment costs are eliminated. This is a savings for both growers and handlers. The savings will help offset some of the effects of citrus canker.

The Committee member who opposed the recommendation believes that there is enough limes remaining to warrant regulation. Without regulation, the member believes that poor quality lime shipments will negatively impact better quality shipments. He also stated that he believes imported limes will flood the market and destroy the market for domestically produced limes. USDA received several letters emphasizing these points. They were considered prior to the issuance of the proposed rule. As mentioned earlier, the Committee has similar concerns, but believes that a one-year suspension of regulations is necessary to help reduce costs for those producers and packers who still have limes to market. The suspension provides time to assess canker eradication efforts, evaluate the effects on the market of having no regulations for one year, and offers the industry some needed cost relief from assessments and inspection fees. For these reasons, the Committee voted to recommend that grade, size, quality, maturity, pack, inspection, assessment collection, and other requirements be suspended for one year.

Suspension of all of the specified requirements is expected to reduce the reporting burden on small or large Florida lime handlers by about 22 hours, and should further reduce industry expenses. During the suspension period, handlers will not have to file the following forms with the Committee: Application for Registered Handler (16.5 burden hours); Application for Registered Processor (10 minutes); Application for Lime Grade Label (5.5 burden hours).

Section 8e of the Act provides that when certain domestically produced commodities, including limes, are regulated under a Federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, and maturity requirements. Since this rule suspends regulations for domestically produced limes, a corresponding change to the import regulations must also be made.

Minimum grade, size, maturity, and quality requirements for limes imported into the United States are effective under § 944.209 (7 CFR 944.209). This rule suspends § 944.209 requiring that limes imported into the United States be inspected for grade, size, maturity, and quality. Because this rule suspends import requirements for one year, it could also result in reduced costs for importers.

Mexico is the largest exporter of limes to the United States. In calendar year 2000, Mexico exported approximately 9,630,909 bushels of limes to the United States, while all other import sources shipped a combined total of approximately 98,182 bushels during the same time period. Other sources of lime imports to the United States include Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, and Venezuela. Mexico's highest volume occurs in the months of June through September.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and 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 52 producers of limes in the production area and approximately 10 handlers subject to regulation under the marketing order. In addition, approximately 240 importers of limes are subject to import regulations and will be impacted by this suspension. Small agricultural producers are defined as those having annual receipts of less than $750,000,

and small agricultural service firms, which include handlers and importers, are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than $5,000,000.

The average f.o.b. price for fresh limes during the 2000–01 season was around $14.75 per bushel and total shipments were 344,032 bushels for the season. Using this price and total volume for the season, all lime handlers could be considered small businesses under the SBA definition, excluding receipts from other sources. The majority of Florida lime producers and handlers may be classified as small entities.

In calendar year 2000, imports of limes totaled about 9.7 million bushels. Assuming the same average f.o.b. price as for Florida limes, the average importer receives gross receipts of about $600,000. Thus, the majority of lime importers can be classified as small entities.

This final rule suspends grade, size, quality, pack, inspection, assessment collection, and other requirements as specified in §§ 911.110, 911.120, 911.130, 911.131, 911.234, 911.311, 911.329, and 911.344. Section 944.209 of the import regulations, specifying the requirements for limes imported into the United States, is also suspended in its entirety. The suspensions are in effect for one year.

Citrus canker has reduced Florida lime production from 3,200 acres to between 600 and 1,000 acres. The only known method for eradicating citrus canker is to bulldoze and burn infected trees and exposed trees. This suspension gives the industry time to evaluate citrus canker eradication efforts and to assess the effects on the market of having no regulations for one year. This change also reduces costs and will help the industry recover from the effects of citrus canker.

At the April and May meetings, the Committee discussed the impact of this change on handlers and producers in terms of cost. This rule allows handlers to ship limes without regard to the minimum grade, size, quality, maturity, pack, and inspection requirements. It will decrease handler costs associated with inspection. This action also will eliminate the cost of assessments. Currently, handlers are required to pay an inspection fee of $0.14 per bushel and an assessment rate of $0.16 per bushel handled. Eliminating these costs will result in a savings for growers and handlers. Importers also will benefit from the reduction in inspection costs. These savings will help offset the loss of income from canker, as well as assist in the costs of replanting, when replanting is again authorized. The purpose of this rule is to reduce the burden on the industry. If at any time during the suspension the Committee determines this action is having an unfavorable impact on the industry, the Committee could meet and rescind the suspension. The benefits of this rule are expected to be available to lime handlers, growers, and importers, regardless of their size of operation.

The Committee discussed alternatives to this change, including not suspending regulations at all, as well as terminating the order. Terminating the order was deemed too drastic an action at this time. However, most of the Committee members believe that suspension is necessary because of the substantially reduced crop and to reduce inspection and assessment costs. Citrus canker has had a negative economic impact on the lime industry and cost savings will be beneficial. Suspending regulations also provides the Committee time to evaluate the effects of canker and to consider what actions should be taken in the future. The Committee acknowledged that quality problems might occur in the absence of regulation, but believed that suspension was the best course of action at this time given the industry situation. Therefore, the alternatives of termination and continuing without change were rejected.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection requirements being suspended by this rule were approved previously by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0189. Suspension of all of the specified requirements is expected to reduce the reporting burden on small or large Florida lime handlers by 22 hours, and should further reduce industry expenses. During the suspension period, handlers will not have to file the following forms with the Committee: Application for Registered Handler (16.5 burden hours); Application for Registered Processor (10 minutes); Application for Lime Grade Label (5.5 burden hours). As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sectors.

Pursuant to section 8e of the Act, this action also suspends the lime import regulation (7 CFR 944.209). That regulation specifies grade, size, quality, maturity, inspection, and other requirements.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this final rule.

The Committee's meetings were widely publicized throughout the lime industry and all interested persons were invited to attend the meetings and participate in Committee deliberations on all issues. Like all Committee meetings, the April 18, 2001, and the May 16, 2001, meetings were public meetings and all entities, both large and small, were able to express views on this issue.

A proposed rule concerning this action was published in the **Federal Register** on August 6, 2001 (66 FR 40923). Copies of the rule were mailed or sent via facsimile to all Committee members and lime handlers. Finally, the Office of the Federal Register and USDA made the rule available through the Internet. A 30-day comment period ending September 5, 2001, was provided to allow interested persons to respond to the proposal.

Twenty-five comments were received during the comment period in response to the proposal. Many of the points made in the comments were thoroughly discussed prior to the Committee vote and the issuance of the proposed rule.

Of the twenty-five comments received, four were in support of the proposal, one from a grower, two from handlers, and one from an importer. Three of the comments in support of the suspension discussed the costs associated with growing, handling, and importing limes.

An importer of limes stated that, with no requirement to have limes inspected, there would be reduced costs for importers. The commenter further stated that this suspension would also result in cost savings for both growers and handlers of limes.

A handler and a grower of Florida limes stated that the lime industry cannot afford to maintain the Federal marketing order. One commenter stated that the costs for picking limes have exceeded the return to the grower, increasing the need for cost savings. Another commenter stated that the average return per bushel has declined by $4.00 since 1999. The effort to prevent the further spread of canker has also increased industry costs.

Before making a recommendation to suspend regulation, the Committee prepared a budget of expenses to determine the assessment rate necessary to cover expenses required to maintain the order. With the reduced production, the Committee determined an assessment rate of $0.30 per bushel would be necessary to maintain the order. That rate is almost double the

existing assessment rate. Increasing the assessment rate would have meant a further reduction in returns. The Committee believes the suspension will help increase returns by reducing costs.

Citrus canker has reduced the Florida lime industry from approximately 3,200 acres before the outbreak of citrus canker to less than 1,000 acres currently. The only known way to eradicate citrus canker is to bulldoze the infected and exposed trees and burn them. The production area is also quarantined and no new trees can be planted at this time. The money saved as a result of the suspension can be used to offset the loss of income due to the reduced production of limes.

Two commenters in support of suspension noted that this change is for a period not to exceed one year. The Committee determined that suspending regulations for a period not to exceed one year would give the industry time to assess the citrus canker eradication efforts and evaluate the effects of no regulations on the market. During the suspension, the Committee will meet periodically to discuss the effects citrus canker has had on the industry and the impact of no regulation. After the one-year period, regulations will return absent further action by the Committee. However, if conditions warrant, the Committee could recommend reinstating the suspended requirements earlier. During the period of suspension, handlers of domestic and imported limes are free to voluntarily obtain inspection to assure the quality of the limes marketed, and to meet the needs of their customers.

Two of the comments in favor of the rule discussed maintaining quality in the absence of regulations. Both commenters stated that the market and consumers would dictate the quality of limes that is acceptable. Shippers will continue to supply their customers with a high quality product because the buyer will pay a premium price for it. Also, as previously noted, inspection can be obtained to assure that the limes meet buyer specifications.

Twenty-one comments were received in opposition to this rule. Fourteen were from importers of limes and seven comments were received from Florida lime growers and handlers.

The fourteen lime importers opposing the suspension were concerned by the potential of poor quality imports, and the negative impact such imports could have on market prices and sales. Section 8e of the Act provides that when certain domestically produced commodities, including limes, are regulated under a Federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, and maturity requirements. Since this rule suspends regulations for domestically produced limes, a corresponding change to the import regulations must also be made.

The comments received from importers all expressed concern for the impact on quality resulting from the suspension. These same or similar concerns were also expressed in six of the comments received from Florida lime growers and handlers. The Committee itself had similar concerns, and weighed these concerns against the need to reduce costs. For this reason, the Committee recommended that the suspension of requirements be effective for one year only. This will enable the Committee to study the impacts of canker and the suspension, reduce costs during a very difficult time, and consider appropriate actions for ensuing seasons. If the elimination of the current requirements does result in the shipment of lower quality limes and markets are hurt, the Committee could recommend reinstitution of the requirements.

This rule relaxes requirements and provides handlers and importers of limes with more flexibility in meeting the needs of their buyers. Handlers and importers will be able to market limes without inspection and eliminate inspection costs. Buyer and seller interaction will determine the terms and conditions of sales and the quality of limes sold and purchased. As previously noted, even though inspection requirements are suspended, inspection of limes can be obtained on a voluntary basis for a fee by the handler or importer to assure quality and meet customer requirements.

The Committee believes one year of suspension will determine if consumer demand will keep quality high or result in product substitution and loss of market share. The purpose of this rule is to reduce the burden on the industry. If at any time during the suspension the Committee determines this action is having an unfavorable impact on the industry, the Committee could meet and rescind the suspension. Consequently, the Committee recommended suspending provisions for one year to garner the benefits of the associated cost savings and to study the effect on the market. This action reduces costs in view of the current industry situation. It also provides an opportunity to evaluate the progress on the eradication of citrus canker and the market impact of no regulation.

Five commenters addressed the suspension as if it were a termination of the marketing order. This action does not terminate the order. It only provides a one-year suspension of the regulations specified above. Terminating the order would require additional Committee action or action on the part of the industry.

Four comments stated that this rule change would only benefit importers of limes by allowing inferior limes to be imported into the U.S. It is doubtful whether the importation of inferior quality limes will benefit importers. Experience has shown that the marketing of poor quality tends to cause the market to deteriorate for everyone.

Another commenter expressed concern regarding Committee membership when an industry member may import limes in addition to handling limes. The commenter was concerned that this could unduly shape the decision-making of the Committee and bias decisions in favor of importers. The Committee is established and selected in accordance with the provisions of the order. Committee meetings concerning this action were widely publicized throughout the lime industry and all interested persons were invited to attend the meetings and participate in Committee deliberations on all issues. Further, many of the comments received in opposition to this action were from importers.

One commenter stated that some of the members voting for suspension were not qualified to serve as members. Nominations for the Committee were held in February 2001, and the new Committee was seated for the April meeting. Prior to seating the new Committee, qualifications to serve were confirmed by USDA field representatives.

Two comments expressed concern that some Committee members were not present at the time the Committee voted to make this recommendation. As with all Committee meetings, the time and place of the Committee meetings were well publicized throughout the industry. All members of the Committee and growers and handlers in the industry were given reasonable notice of the meeting, and given an opportunity to attend.

One commenter expressed concern that the members of the Committee that made this recommendation would be responsible for ending the suspension. The suspension of the handling, inspection, and assessment requirements is for a period of time not to exceed one year. At the end of that time, no action by the Committee will be required to reinstate regulations. Regulations will revert back at the end of the one-year period. However, further suspension or termination would

require action on the part of the Committee and a vote. The suspension could be removed sooner if marketing conditions deteriorate for limes, or for other good cause.

Two commenters stated that this action should be postponed until after the continuance referendum required under the order. Every sixth year, growers vote in a continuance referendum to determine whether or not the industry continues to support the marketing order. Such a referendum, absent this suspension, would have been scheduled for some time during the coming year. It now will most likely be scheduled after the suspension expires.

However, a continuance referendum would be an indication of industry support for the order, not an indicator of support or opposition to the suspension. Support for the order is something different than what is contemplated by this action. This suspension does not terminate the marketing order. This action was recommended by the Committee to reduce industry costs and to evaluate the progress of citrus canker and the market's response to no regulation during the one-year suspension.

USDA believes postponing the suspension until after a continuance referendum is held would not be in the best interest of industry. The question at hand is not whether or not to terminate the marketing order, but on whether or not the industry would benefit from the cost savings provided by the suspension. The Committee is the organization responsible for the local administration of the marketing order. The Committee voted six in favor to one opposed in support of the suspension. Delaying the suspension would only postpone the industry's opportunity to benefit from the cost saving offered by this suspension.

Another commenter stated that growers who have the majority of lime acreage do not support the suspension. The marketing order is created to benefit all growers, not just the ones with the most acreage. We do note that, of the grower members seated for the vote recommending this suspension, all three voted for suspension.

One commenter stated that the industry is still strong enough to maintain the marketing order. Another stated that the industry has a willingness to continue. The lime industry has overcome past hardships. However, this action will provide cost reduction relief in view of the current situation facing the lime industry.

Growers are facing reduced production from canker and increased costs from requirements established to battle its spread. After Hurricane Andrew, the Committee recommended that certain regulations be relaxed and assessments be eliminated for two years to help the industry recover. This action is another such incidence. This action does not terminate the order, but offers some cost relief to provide the industry an opportunity to recover.

In January 1996, the Committee was concerned by the state of the industry. To address its concerns, the Committee voted to suspend all regulation for a six-month period. However, prior to the suspension taking effect, the Committee determined the industry had sufficiently recovered and voted to rescind the suspension. The Committee has taken a similar action here. At any time during the one-year suspension, the Committee could vote to rescind the suspension and return to regulation.

Another commenter recommended that requirements for imports of size 250's apply year round as opposed to six months. However, this recommendation is not within the scope of the proposed rule on suspending the requirements.

One comment was received after the comment period ended. This comment did not raise any issues that were raised by comments that were timely filed.

The suspension will allow those still active in the lime industry to benefit from a needed reduction in costs given the current circumstances facing the industry. A one-year suspension of the regulations will provide needed cost savings and a period to evaluate the status of canker and on the market effects of the suspension of regulation. Accordingly, no changes are being made to the rule as it was proposed, based on the comments received.

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.

In accordance with section 8e of the Act, the United States Trade Representative has concurred with the issuance of this final rule.

After consideration of all relevant matter presented, including the information and recommendation submitted by the Committee, the comments received, and other available information, it is hereby found that the provisions suspended, as hereinafter set forth, will not tend to effectuate the declared policy of the Act for the period of suspension. Therefore, these provisions of the order are being suspended.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because handlers are already shipping limes from the 2001–02 crop, and this rule needs to be in effect as soon as possible to provide relief to the Florida lime industry. No special preparations are needed by handlers and importers to take advantage of this relaxation. Also, the industry has been discussing this issue for some time, and the Committee has kept the industry well informed. It has also been widely discussed at various industry and Committee meetings.

List of Subjects

7 CFR Part 911

Limes, Marketing agreements, Reporting and recordkeeping requirements.

7 CFR Part 944

Avocados, Food grades and standards, Grapefruit, Grapes, Imports, Kiwifruit, Limes, Olives, Oranges.

For the reasons set forth above, 7 CFR parts 911 and 944 are amended as follows:

PART 911—LIMES GROWN IN FLORIDA

1. The authority citation for 7 CFR parts 911 and 944 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. In part 911, §§ 911.110, 911.120, 911.130, 911.131, 911.234, 911.311, 911.329, and 911.344 are suspended in their entirety effective February 19, 2002, through February 24, 2003.

PART 944—FRUITS; IMPORT REGULATIONS

3. In Part 944, § 944.209 is suspended in its entirety effective effective February 19, 2002 through February 24, 2003.

Dated: February 8, 2002.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 02–3633 Filed 2–13–02; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 929

[Docket No. FV01–929–3 FR]

Cranberries Grown in the States of Massachusetts, et al.; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule increases the assessment rate established under the cranberry marketing order for the 2001–2002 and subsequent fiscal years from $.08 to $.18 per barrel of cranberries handled. Currently, funds derived from assessments are used to cover expenses incurred by the Cranberry Marketing Committee (Committee) in the performance of its duties and functions under the order and to fund an export market development program. The Committee is responsible for local administration of the marketing order which regulates the handling of cranberries grown in the production area. The proposed $.10 increase will be used to fund a domestic market development program. The fiscal year began September 1 and ends August 30. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

EFFECTIVE DATE: February 15, 2002.

FOR FURTHER INFORMATION CONTACT: Patricia A. Petrella or Kenneth G. Johnson, DC Marketing Field Office, Fruit and Vegetable Programs, AMS, USDA, Suite 2A04, Unit 155, 4700 River Road, Riverdale, Maryland 20737; telephone: (301) 734–5243, Fax: (301) 734–5275; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938, or e-mail: *Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION: This rule 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.''

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

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, cranberry handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable cranberries beginning September 1, 2001, and continue until amended, suspended, or terminated. This rule 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 USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule increases the assessment rate established for the Committee for the 2001–2002 and subsequent fiscal years for cranberries from $0.08 to $0.18 per barrel of cranberries.

The cranberry marketing order provides that one of the duties of the Committee is to formulate an annual budget of expenses and to recommend a rate of assessment necessary to administer the provisions of the order. The members of the Committee are producers of cranberries. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

Authority to fix the rate of assessment to be paid by each handler and to collect such assessment appears in § 928.41 of the order. In addition, § 929.45 of the order provides that the Committee, with the approval of USDA, may establish or provide for the establishment of production research, marketing research, and market development projects designed to assist, improve, or promote the marketing, distribution, consumption, or efficient production of cranberries. The expense of such projects is paid from funds collected pursuant to § 929.41 (Assessments), or from such other funds as approved by USDA.

For the 2000–2001 fiscal year, the Committee recommended, and the Department approved, an assessment rate of $.08 per barrel of cranberries handled that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee voted by mail and recommended 2001–2002 expenditures of $1,206,772 and an assessment rate of $.18 per barrel of cranberries. Six of the eight committee members voted in support of the $.10 per barrel increase. Two members did not return their mail ballots to the Committee. The assessment rate increase was considered by the Committee at an earlier public meeting. The budget for 2001–2002 was recommended to the full Committee by the Executive Committee. The major expenditures recommended by the Committee for the 2001–2002 fiscal period include $846,953 for market development (including $490,000 for domestic market development, $273,953 for export market development, and $83,000 for export market consulting services), $123,952 for administration costs, $129,500 for personnel, $75,000 for Committee meetings, and $31,367 for payroll taxes and benefits. Included in the budget calculations is about $6,000 interest and $213,953 Market Access Program (MAP) funds from USDA's Foreign Agricultural Service (FAS) for export market development. Budgeted expenses in the Committee's amended 2000–2001 budget were $223,647 for administration costs, $270,407 for export market development, $71,000 for export market consulting services, $119,464 for personnel, and $67,500 for Committee meetings. There was no

domestic market development program for the 2000–2001 fiscal year.

The Committee recommended the $.10 per barrel increase to fund a domestic market development program to increase demand for cranberries and cranberry products and thus expand cranberry shipments. Currently, supplies are outpacing demand. The Committee believes that a domestic market development program is needed to increase consumer awareness of the health benefits of cranberries and cranberry products. Currently, the Committee funds an export market development program with MAP money from FAS.

Over the past several years, per capita consumption of cranberries has averaged 1.68 pounds. Per capita consumption peaked in 1994 at 1.80 pounds and began trending downward. In 1998, per capita consumption was 1.67 pounds. Associated with these per capita consumption figures is the fact that total domestic sales also peaked in 1994 at 4,692,507 barrels and declined to 4,506,632 barrels in 1998. However, cranberry production reached an all-time high of 6,389,000 barrels in 1999. This is a 17 percent increase over 1998 production of approximately 5.4 million barrels. Available cranberry supplies continue to outpace demand, resulting in high levels of carryin inventories and low grower prices. Grower returns have fallen 73 percent from 1997 to 2000, dropping from $65.90 to $15–$20 per barrel.

The assessment rate recommended by the Committee was derived by estimating the cost of a viable domestic market development program ($490,000) and then increasing the assessment rate to cover such costs. Cranberry shipments are projected at 4.9 million barrels which will provide $882,000 in assessment income. Income derived from handler assessments, along with interest income, FAS market access program funds for export market development, and funds from the Committee's authorized reserve will be adequate to cover budgeted expenses expected to total $1,206,772 in 2001–2002. Funds in the reserve (currently $115,000) will be kept within the approximately one year's operational expenses permitted by the order (§ 929.42(a)).

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

Although the assessment rate will be effective for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or the Department. Committee meetings are open to the public and interested persons may express their views at these meetings. The Department evaluates Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Committee's 2001–2002 budget and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by USDA.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules 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, which includes handlers, 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 $750,000. The majority of cranberry handlers and producers may be classified as small businesses.

This rule increases the assessment rate established for the Committee and collected from handlers for the 2001–2002 and subsequent fiscal periods from $.08 to $.18 per barrel of cranberries. One barrel equals 100 pounds of cranberries.

The Committee discussed the alternative of continuing the existing assessment rate, but concluded that it needed to implement a domestic market development program funded through assessments. The assessment rate recommended by the Committee was derived by determining the cost of a viable domestic market development program ($490,000), and then increasing the assessment rate to cover the additional costs. Cranberry shipments are projected at 4.9 million barrels which would provide $882,000 assessment income. Income derived from handler assessments, along with interest income, FAS market access program funds, and funds from the Committee's authorized reserve will be adequate to cover budgeted expenses. Funds in the reserve (currently $115,000) would be kept within the approximately one year's operational expenses permitted by the order (§ 929.42(a)).

The major expenditures recommended by the Committee for the 2001–2002 fiscal period include $846,953 for market development (including $490,000 for domestic market development, $273,953 for export market development, and $83,000 for export market development consulting services), $123,952 for administration costs, $129,500 for personnel, $75,000 for Committee meetings, and $31,367 for payroll taxes and benefits. Included in the budget calculations is approximately $6,000 interest and $213,953 MAP funds from FAS for export market development. Budgeted expenses in the Committee's amended 2000–2001 budget were $223,647 for administration costs, $270,407 for export market development, $119,464 for personnel, and $67,500 for Committee meetings. There was no domestic market development program for the 2000–2001 fiscal period.

This action increases the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs will be offset by the benefits derived by the operation of the marketing order. In addition, the Committee's meeting was 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, all entities, both large and small, were able to express views on this issue.

This rule will impose no additional reporting or recordkeeping requirements on either small or large cranberry handlers.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and

duplication by industry and public sector agencies.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A proposed rule concerning this action was published in the **Federal Register** on September 21, 2001 (66 FR 48626). Copies of the rule were mailed by the Committee's staff to all Committee members and handlers. In addition, the rule was made available through the Internet by the Office of the Federal Register and USDA. A 15-day comment period ending October 9, 2001, was provided to allow interested persons to respond to the proposal.

Eighteen comments were received during the comment period in response to the proposal. Nine were received in favor of the proposal and nine were in opposition. Most of the comments were received from cranberry growers. Comments also were received from the Committee, two handlers, and an institute that supports research on the health benefits of cranberries.

Those in support favored the assessment rate increase because the funds will be the major source of funding for domestic market development activities, needed to increase shipments. The cranberry industry is faced with low prices primarily due to large surpluses. Industry-wide market development activities are needed to expand domestic markets and the consumption of cranberries and cranberry products. The initiation of these activities is expected to bring demand closer into balance with supply over the long term, and, in turn, help bring returns to growers back to acceptable levels.

The main comments in opposition to the proposal were: The funds would be wasted because the Committee's marketing efforts have not been successful in the past and the Committee does not have the public relations/marketing development expertise of well known public relations firms; growers do not have a means of holding the Committee accountable for its results; other State organizations can work with the Cranberry Institute (an organization that funds research on the potential health benefits of cranberries and cranberry products) to accomplish the same goal; growers have not been informed of the domestic marketing plan, and, thus, do not know how the increased assessments will be spent; and farm gate prices are extremely low at this time to fund such an endeavor.

Any market development program initiated by the Committee to expand domestic markets would be approved and overseen by USDA. In the development stages, USDA would provide general guidance on the conduct of market development. USDA also would review the program goals and the program activities, methods, and techniques to be employed in meeting the goals. The Committee and USDA would monitor any program implemented to determine that the program goals have or have not been met, and if not, the reason for the failure, that the assessment funds used for the program have been properly spent, and to determine whether the program should be continued unchanged, changed, or discontinued. Also, upon conclusion of any program, but at least annually, the Committee would report on the program status and accomplishments to the industry and the USDA.

With respect to the comment that the Wisconsin Cranberry Board already collects funds for generic promotion and health related research and that the growers do not need to fund similar Committee activities, it should be noted that the Committee's anticipated domestic market development effort is intended to be industry-wide and not regional in scope. A broader based effort is needed to foster the domestic market growth needed to absorb production. The Committee commented that it surveyed growers in the industry and they overwhelmingly favored (449 out of 496 respondents) an industry-wide market development program. The Committee also stated that the market development program will be designed to complement ongoing promotion programs within the industry and to take advantage of the Cranberry Institute's health related research.

With respect to the type of promotion that would be funded, the Committee's comments describe its initial plans for a promotion program. The Committee comprised of members from the different growing areas would decide what type of program would be implemented. Preliminary discussions on a domestic market development effort have begun, but have not been finalized by the Committee. The Committee commented that the initial focus of any market development effort undertaken would be to inform buyers of the health benefits of cranberries and cranberry products. Once the final plan is developed and recommended by the Committee, the plan would have to be approved by USDA before it could be implemented.

Commenters in favor of the increased assessment rate stated that the goal of a domestic market development program implemented under the order would be to build markets and that this should help bring demand closer to the productive capacity of the industry. The ultimate goal, of course, is to help the industry return to profitability over time.

Finally, those in opposition commented that prices are at an all time low and the Committee should not be raising assessments while farmers are going broke. One commenter in favor of the proposed assessment rate increase stated that the additional $.10 per barrel assessment is insignificant to the lost income growers are enduring as a result of the surplus situation currently being faced by the industry because of overproduction and reduced demand. The Committee expects such a program to stimulate growth in demand for cranberries and cranberry products and increase grower returns to a more acceptable level. Another commenter in favor of the increase noted that growers need to recognize that building demand for cranberries is the only long-term sustainable solution to the oversupply problem.

One commenter did not approve of the increase because Ocean Spray members would pay a disproportionate share of the cost. Ocean Spray management submitted a comment in favor of the increase.

Two commenters stated that growers have not been allowed to vote for some time on the continuation of the marketing order. They said that growers should be allowed to vote on whether they want to continue the order before raising the assessment rate. The issue of holding a continuance referendum was not part of the notice concerning this rulemaking action, but such referenda are periodically conducted by USDA.

Accordingly, no changes will be made to the rule as proposed, based on the comments received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at the following Web site: *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.

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

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5

U.S.C. 553) because the 2001–2002 fiscal period began on September 1, 2001, and the marketing order requires that the rate of assessment for each fiscal period apply to all assessable cranberries handled during such fiscal period, and the Committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis. Further, handlers are aware of this action which was recommended by the Committee at a public meeting and is similar to other assessment rate actions issued in past years. Also, a 15-day comment period was provided for in the proposed rule, and all comments received have been addressed.

List of Subjects in 7 CFR Part 929

Cranberries, Marketing agreements, Reporting and recordkeeping requirements.

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

For the reasons set forth in the preamble, 7 CFR part 929 is amended as follows:

1. The authority citation for 7 CFR part 929 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Section 929.239 is revised to read as follows:

§ 929.239 Assessment rate.

On and after September 1, 2001, an assessment rate of $0.18 per barrel is established for cranberries.

Dated: February 8, 2002.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 02–3635 Filed 2–13–02; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–CE–58–AD; Amendment 39–12643; AD 2002–03–02]

RIN 2120–AA64

Airworthiness Directives; British Aerospace Model HP.137 Jetstream Mk.1, Jetstream Series 200, and Jetstream Series 3101 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes Airworthiness Directive (AD) 98–13–03, which currently requires repetitive inspections of the main landing gear (MLG) hinge fittings, support angles, and attachment bolts on British Aerospace Model HP.137 Jetstream Mk.1, Jetstream Series 200, and Jetstream Series 3101 airplanes. AD 98–13–03 also requires eventual installation of improved design MLG hinge fittings as terminating action for the repetitive inspections of the hinge fittings and attachment bolts. AD 98–13–03 specifies repetitive inspections of the support angles for those airplanes with the improved design MLG hinge fittings installed and exempts from the applicability those airplanes with the improved design MLG hinge fittings installed. This AD retains the requirements of AD 98–13–03 and removes the applicability exemption of those Model HP.137 Jetstream Mk.1 and Jetstream Series 200 airplanes with the improved design MLG hinge fittings installed. The actions specified by this AD are intended to detect, correct, and prevent future fatigue cracking of the MLG, which could result in structural failure of the MLG and consequent loss of airplane control during takeoff, landing, or taxi operations.

DATES: This AD becomes effective on April 2, 2002.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of April 2, 2002.

ADDRESSES: You may get the service information referenced in this AD from British Aerospace Regional Aircraft, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland; telephone: (01292) 479888; facsimile: (01292) 479703. You may view this information at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2000–CE–58–AD, 901 Locust, Room 506, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; facsimile: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Discussion

Has FAA Taken any Action on the Main Landing Gear (MLG) Hinge Fittings, Support Angles, and Attachment Bolts on British Aerospace Model HP.137 Jetstream Mk.1, Jetstream Series 200, and Jetstream Series 3101 Airplanes to This Point?

On June 8, 1998, FAA issued AD 98–13–03, Amendment 39–10591 (63 FR 33532, June 19, 1998). This AD currently requires the following on the above-referenced airplanes:

—Repetitive inspections of the MLG hinge fitting, support angles, and attachment bolts, and repairing or replacing any part that is cracked; and

—Eventual installation of improved design MLG hinge fittings, part number (P/N) 1379133B1 and 1379133B2 (Modification 5218), as terminating action for the repetitive inspections of the hinge fittings and attachment bolts. This AD specifies repetitive inspections of the support angles for those airplanes with the improved design MLG hinge fittings installed. However, the applicability of AD 98–13–03 exempts those airplanes with the improved design MLG hinge fittings installed from the actions of the AD.

Accomplishment of these actions is required in accordance with the following service information:

—British Aerospace Jetstream Mandatory Service Bulletin (MSB) No. 7/5, which includes procedures for inspecting the left and right main landing gear hinge attachment nuts to the auxiliary and aft spars for signs of relative movement between the nuts and hinge fitting on Model HP.137 Jetstream Mk.1 and Jetstream Series 200 airplanes. This MSB incorporates the following effective pages:

Pages	Revision Level	Date
2 and 4	Original Issue	March 31, 1982.

Pages	Revision Level	Date
1 and 3	Revision 1	May 23, 1988.

—British Aerospace MSB No. 7/8, which includes procedures for inspecting the MLG hinge fitting for cracks, and repairing cracked hinge fittings on Model HP.137 Jetstream Mk.1 and Jetstream Series 200 airplanes. This MSB incorporates the following effective pages:

Pages	Revision level	Date
2, 5, 6, 7, and 8	Revision 2	January 6, 1983.
1, 3, and 4	Revision 3	May 23, 1988.

—Jetstream Alert Service Bulletin (ASB) 32–A–JA 850127, which includes procedures for inspecting the MLG hinge fitting and support angle for cracks on Jetstream Series 3101 airplanes. This ASB incorporates the following effective pages:

Pages	Revision level	Date
5 through 14	Original Issue	April 17, 1985.
1 through 4	Revision 2	November 11, 1994.

—Jetstream Service Bulletin (SB) 57–JM 5218, which includes procedures for installing improved design MLG hinge fittings, P/N 1379133B1 and 1379133B2 (Modification 5218), on Model HP.137 Jetstream Mk.1, Jetstream Series 200, and certain Jetstream Series 3101 airplanes. This SB incorporates the following effective pages:

Pages	Revision level	Date
11, 12, 17, 18, 19, 21, 22, 23, 24, 27, 28, 29, 30, and 31	Revision 1	September 29, 1987.
20	Revision 3	January 29, 1990.
13 and 14	Revision 4	October 31, 1990.
1 through 10, 15, 16, 25, and 26	Revision 5	July 28, 1997.

The actions of AD 98–13–03 are consistent with our aging commuter aircraft policy, which briefly states that, when a modification exists that could eliminate or reduce the number of required critical inspections, the modification should be incorporated. This policy is based on our determination that reliance on critical repetitive inspections on airplanes utilized in commuter service carries an unnecessary safety risk when a design change exists that could eliminate or, in certain instances, reduce the number of those critical inspections.

The alternative to installing improved design MLG hinge fittings would be to repetitively inspect this area for the life of the airplane.

What Has Happened Since AD 98–13–03 To Initiate This Action?

Since AD 98–13–03 became effective, FAA received comments regarding the applicability. The applicability of AD 98–13–03 exempts those airplanes with the improved design MLG hinge fittings installed as of the effective date of the AD. However, those airplanes that have the improved design MLG hinge fittings incorporated after the effective date of the AD are subject to repetitive inspections of the MLG support angles. Our intent was to require the inspections of the MLG support angles regardless of when the improved design MLG hinge fittings are incorporated.

Therefore, we then determined that the exemption of those airplanes with the improved design MLG hinge fittings installed should be removed, and that all affected airplanes should have the MLG support angles repetitively inspected.

Consequently, we issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain British Aerospace Models HP.137 Jetstream Mk.1, Jetstream Series 200, and Jetstream Series 3101 airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on July 18, 2001 (66 FR 37435). The NPRM proposed to supersede AD 98–13–03. The NPRM also proposed to:

—Retain the requirement of repetitively inspecting the main landing gear (MLG) hinge fittings, support angles, and attachment bolts and the requirement of repairing any cracked part;

—Require eventual installation of improved design MLG hinge fittings as terminating action for the repetitive inspections of the hinge fittings and attachment bolts; and

—Require repetitive inspections of the MLG support angles on all affected airplanes, even those with the improved design MLG hinge fittings installed.

Based on comments received on this NPRM, we made minor changes to the proposed action. Another comment indicated that the manufacturer was not providing parts to accomplish the proposed action free of charge as previously referenced. Because this shifts the cost burden of these improved design MLG hinge fittings from the manufacturer to the owner/operator, we reopened the comment period for this proposed AD and issued a supplemental NPRM.

This supplemental NPRM was published in the **Federal Register** on November 19, 2001 (66 FR 57890). We received no comments on this supplemental NPRM.

FAA's Determination

What Is FAA's Final Determination on This Issue?

We carefully reviewed all available information related to the subject presented above and determined that air safety and the public interest require the adoption of the rule as proposed except for minor editorial changes. We have determined that these changes:

—Provide the intent that was proposed in the NPRM for correcting the unsafe condition; and

—Do not add any additional burden upon the public than was already proposed in the NPRM.

Cost Impact

How Many Airplanes Does This AD Impact?

We estimate that this AD affects 71 airplanes in the U.S. registry.

What Is the Cost Impact of This AD on Owners/Operators of the Affected Airplanes?

The FAA estimates that this AD will affect 71 airplanes in the U.S. registry. We estimate the following costs to accomplish the actions:

	Labor cost	Parts cost	Per airplane cost	Fleet cost
Initial inspection	61 workhours × $60 per hour = $3,660	Not Applicable	$3,660 per airplane	71 airplanes × $3,660 = $259,860.
Hinge fitting installation	210 workhours × $60 per hour = $12,600.	$14,000 per airplane.	$26,600 per airplane.	71 airplanes × $26,600 = $1,888,600.
Repetitive Support angle inspections.	10 workhours × $60 per hour = $600 per inspection.	Not Applicable	$600 per airplane per inspection.	71 airplanes × $600 = $42,600 per inspection.

Regulatory Impact

Does This AD Impact Various Entities?

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

Does This AD Involve a Significant Rule or Regulatory Action?

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the final evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. FAA amends § 39.13 by removing Airworthiness Directive (AD) 98–13–03, Amendment 39–10591 (63 FR 33532, June 19, 1998), and by adding a new AD to read as follows:

2002–03–02 British Aerospace: Amendment 39–12643; Docket No. 2000–CE–58–AD; Supersedes AD 98–13–03, Amendment 39–10591.

(a) *What airplanes are affected by this AD?* This AD affects the following airplane models and serial numbers that are certificated in any category:

Model	Serial No.
HP.137 Jetstream Mk.1.	All serial numbers.
Jetstream Series 200	All serial numbers.
Jetstream Series 3101.	601 through 695 that do not have Jetstream Service Bulletin 57–JM 5218 incorporated (using the applicable Revision 4 or Revision 5 pages).

(b) *Who must comply with this AD?* Anyone who wishes to operate any of the airplanes identified in paragraph (a) of this AD must comply with this AD.

(c) *What problem does this AD address?* The actions specified by this AD are intended to detect, correct, and prevent future fatigue cracking of the main landing gear (MLG), which could result in structural failure of the MLG and consequent loss of airplane control during takeoff, landing, or taxi operations.

Note 1: The compliance times of this AD are presented in landings. If you do not keep the total number of landings, then you may multiply the total number of airplane hours time-in-service (TIS) by 0.75.

(d) *What actions must I accomplish to address this problem?* To address this problem, you must accomplish the following:

Actions	Compliance	Procedures
(1) For the Models HP.137 Jetstream Mk.1 and Jetstream 200 Series airplanes, accomplish the following if part number (P/N) 1379133B1 (or FAA-approved equivalent P/N) and P/N 1379133B2 (or FAA-approved equivalent P/N) MLG hinge fittings are not installed. These installations incorporate Modification 5218: (i) Inspect the MLG hinge attachment nuts to auxiliary and aft spars on both the left and right MLG for signs of fuel leakage or signs of relative movement between the nuts and hinge fitting. (ii) If any signs of fuel leakage or relative movement between the nuts and hinge fitting are found during any inspection required by paragraph (d)(1)(i) of this AD, resecure the MLG hinge fitting to auxiliary spar. (iii) You may terminate the above inspections when Modification 5218 is incorporated. The repetitive inspection of the MLG hinge support angles as required by paragraph(d)(2) of this AD are still required.	Inspect within the next 50 landings after June 8, 1998 (the effective date of AD 98–13–03) or within 200 landings TIS after the last inspection required by 98–13–03, whichever occurs later, and thereafter at intervals not to exceed 200 landings. Resecure the MLG hinge fitting prior to further flight after the applicable inspection.	Use the service information presented in paragraph (h)(1)(i) of this AD.
(2) For all airplanes regardless of the MLG hinge fitting installed, inspect the MLG hinge support angles for cracks. If any crack(s) is/are found in the support angles, replace the cracked MLG hinge fitting(s) with a P/N 1379133B1 (or FAA-approved equivalent P/N) or P/N 1379133B2 (or FAA-approved equivalent P/N) fitting. (i) For all airplanes: you may terminate the repetitive inspection requirement of paragraphs (d)(1)(i) and (d)(1)(ii) of this AD after incorporating Modification JM5218 on both sides of the airplane. (ii) For Jetstream 3101 Series airplanes: the repetitive inspections of the MLG support angles required by paragraph (d)(2) of this AD are no longer required after incorporating Modification JM5218 on both sides of the airplane. (iii) If Modification JM5218 is incorporated on both sides of a Jetstream 3101 Series airplane in accordance with the provisions of AD 98–13–03, then the intent of paragraph (d)(3) of this AD is met and paragraph (d)(4) of this AD is the only paragraph that applies. (iv) For the affected Models HP.137 Jetstream Mk.1 and Jetstream Series 200 airplanes: the repetitive inspections of the MLG support angles required by paragraph (d)(2) of this AD are still required after incorporating Modification JM5218.	Inspect upon accumulating 4,000 landings on each MLG hinge fitting or within the next 50 hours TIS after April 2, 2002 (the effective date of this AD), whichever occurs later, unless already accomplished, and thereafter at intervals not to exceed 400 hours TIS. Accomplish any necessary replacement prior to further flight after the inspection where the cracked support angle(s) is/are found.	Inspect in accordance with the service information presented in paragraph (h)(1)(ii) or (h)(1)(iii) of this AD, as applicable. Replace in accordance with the service information presented in paragraph (h)(1)(iv) of this AD.
(3) For all airplanes, install improved design MLG hinge fittings, P/N 1379133B1 (or FAA-approved equivalent P/N) and P/N 1379133B2 (or FAA-approved equivalent P/N). These installations incorporate Modification JM5218. (i) For all airplanes: you may terminate the repetitive inspection requirement of paragraphs (d)(1)(i) and (d)(1)(ii) of this AD after incorporating Modification JM5218 on both sides of the airplane. (ii) For Jetstream 3101 Series airplanes: the repetitive inspections of the MLG support angles required by paragraph (d)(2) of this AD are no longer required after incorporating Modification JM5218 on both sides of the airplane. (iii) If Modification JM5218 is incorporated on both sides of a Jetstream 3101 Series airplane in accordance with the provisions of AD 98–13–03, then the intent of paragraph (d)(3) of this AD is met and paragraph (d)(4) of this AD is the only paragraph that applies. (iv) For the affected Models HP.137 Jetstream Mk.1 and Jetstream Series 200 airplanes: the repetitive inspections of the MLG support angles required by paragraph (d)(2) of this AD are still required after incorporating Modification JM5218.	Upon accumulating 20,000 landings on each MLG hinge fitting or within the next 50 landings after June 8, 1998 (the effective date of AD 98–13–03), whichever occurs later, unless already accomplished.	Inspect in accordance with the service information presented in paragraph (h)(1)(iv) of this AD.
(4) Do not install, on any affected airplane, MLG hinge fittings that are not P/N 1379133B1 (or FAA-approved equivalent P/N) or P/N 1379133B2 (or FAA-approved equivalent P/N).	As of April 2, 2002 (the effective date of this AD).	Not Applicable.

(e) *Can I comply with this AD in any other way?*

(1) You may use an alternative method of compliance or adjust the compliance time if:

(i) Your alternative method of compliance provides an equivalent level of safety; and

(ii) The Manager, Standards Office, Small Airplane Directorate, approves your alternative. Submit your request through an FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Standards Office, Small Airplane Directorate.

(2) Alternative methods of compliance approved in accordance with AD 98–13–03, which is superseded by this AD, are approved as alternative methods of compliance with this AD.

Note 2: This AD applies to each airplane identified in paragraph (a) of this AD, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (e) of this AD. The request should include an

assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if you have not eliminated the unsafe condition, specific actions you propose to address it.

(f) *Where can I get information about any already-approved alternative methods of compliance?* Contact Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; facsimile: (816) 329–4090.

(g) *What if I need to fly the airplane to another location to comply with this AD?* The FAA can issue a special flight permit under sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate your airplane to a location where you can accomplish the requirements of this AD.

(h) *Are any service bulletins incorporated into this AD by reference?*

(1) Actions required by this AD must be done in accordance with the following:

(i) British Aerospace Jetstream Mandatory Service Bulletin No. 7/5, which applies to the affected Models Model HP.137 Jetstream Mk.1 and Jetstream Series 200 airplanes and incorporates the following pages:

Pages	Revision level	Date
2 and 4	Original Issue	March 31, 1982.
1 and 3	Revision 1	May 23, 1988.

(ii) British Aerospace Mandatory Service Bulletin No. 7/8, which applies to the affected Models HP.137 Jetstream Mk.1 and Jetstream Series 200 airplanes and incorporates the following effective pages:

Pages	Revision level	Date
2, 5, 6, 7, and 8	Revision 2	January 6, 1983.
1, 3, and 4	Revision 3	May 23, 1988.

(iii) Jetstream Alert Service Bulletin 32–A–JA 850127, which applies to the affected Jetstream Series 3101 airplanes and incorporates the following effective pages:

Pages	Revision level	Date
5 through 14	Original Issue	April 17, 1985.
1 through 4	Revision 2	November 11, 1994.

(iv) Jetstream Service Bulletin 57–JM 5218, which applies to all of the affected airplanes and incorporates the following effective pages:

Pages	Revision level	Date
11, 12, 17, 18, 19, 21, 22, 23, 24, 27, 28, 29, 30, and 31	Revision 1	September 29, 1987.
20	Revision 3	January 29, 1990.
13 and 14	Revision 4	October 31, 1990.
1 through 10, 15, 16, 25, and 26	Revision 5	July 28, 1997.

(2) The Director of the Federal Register approved this incorporation by reference under 5 U.S.C. 552(a) and 1 CFR part 51.

(3) You can get copies from British Aerospace Regional Aircraft, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland. You can look at copies at FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri, or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

(i) *Does this AD action affect any existing AD actions?* This amendment supersedes AD 98–13–03, Amendment 39–10591.

(j) *When does this amendment become effective?* This amendment becomes effective on April 2, 2002.

Issued in Kansas City, Missouri, on February 5, 2002.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–3163 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NE–20–AD; Amendment 39–12461; AD 2002–02–13]

RIN 2120–AA64

Airworthiness Directives; CFM International, S.A. CFM56–5 Series Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), that is applicable to CFM International, S.A. (CFMI) CFM56–5 series turbofan engines. This amendment requires replacement of the magnetic drain plug on certain part number (P/N) air turbine engine starters manufactured by Honeywell Engines & Systems. This amendment is prompted by three instances of uncontained air turbine engine starter failures, resulting in cowl damage. The actions specified by this AD are intended to prevent uncontained failure of the starter and possible damage to the airplane.

DATES: Effective date March 21, 2002. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of March 21, 2002.

ADDRESSES: The service information referenced in this AD may be obtained from Honeywell Engines & Systems, Technical Publications Department, 111 South 34th Street, Phoenix, Arizona 85034; telephone (602) 365–5535, fax (602) 365–5577. This information may be examined, by appointment, at the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: James Rosa, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7152, fax (781) 238–7199.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that is applicable to CMFI CFM56–5 series turbofan engines was published in the **Federal Register** on October 19, 2001 (66 FR 53131). That action proposed to require replacement of the magnetic drain plug on certain P/N air turbine engine starters manufactured by Honeywell Engines & Systems, in accordance with Honeywell Service Bulletin 3505582–80–1706, dated March 8, 2000.

Comments

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

The commenter states that the new drain plug P/N is incorrect, the replaced packing P/N is incorrect, and the new packing P/N is incorrect as called out in paragraph (a) of the NPRM.

The FAA agrees. Paragraph (a) is now corrected to reflect new drain plug P/N 572–8510–9152, replaced packing P/N S9413–555, and new packing P/N S3225–905.

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

Economic Analysis

The FAA estimates that about 512 engines installed on airplanes of U.S. registry would be affected by this AD. The FAA also estimates that it would take approximately 0.1 work hours per engine to accomplish the actions, and that the average labor rate is $60 per work hour. Required parts would cost approximately $787 per engine. Based on these figures, the total cost effect of this AD on U.S. operators is estimated to be $406,016. CFMI may provide parts at no cost, which would significantly reduce this figure.

Regulatory Analysis

This final rule does not have federalism implications, as defined in Executive Order 13132, because 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. Accordingly, the FAA has not consulted with state authorities prior to publication of this final rule.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

2002–02–13 CFM International: Amendment 39–12461. Docket No. 2001-NE–20–AD.

Applicability: This airworthiness directive (AD) is applicable to CFM International, S.A. CFM56–5 series turbofan engines with Honeywell Engines & Systems air turbine engine starters, part numbers (P/N's) 3505582–2, 3505582–3, 3505582–4, 3505582–12, 3505582–14, 3505582–15, 3505582–22, and 3505582–23 installed. These engines are installed on, but not limited to Airbus Industries A318, A319, A320, A321 and A340 airplanes.

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

Compliance: Compliance with this AD is required within 500 cycles-in-service after the effective date of this AD, unless already done.

To prevent uncontained failure of the starter due to loss of oil and possible damage to the airplane, do the following:

(a) Replace the magnetic drain plug, P/N 572–510–9004, with a new redesigned magnetic drain plug P/N 572–8510–9152; replace the packing P/N S9413–555, with packing P/N S3225–905, and remark the air turbine engine starter in accordance with paragraphs 2.A. through 2.C. of the Accomplishment Instructions of Honeywell Service Bulletin 3505582–80–1706, dated March 8, 2000.

(b) Replenish the air turbine starter.

Alternative Methods of Compliance

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

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

Special Flight Permits

(d) Special flight permits may be issued in accordance with §§ 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be done.

Documents That Have Been Incorporated by Reference

(e) The inspection must be done in accordance with Honeywell Service Bulletin 3505582–80–1706, dated March 8, 2000. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Honeywell Engines & Systems, Technical Publications Department, 111 South 34th Street, Phoenix, Arizona 85034; telephone (602) 365–5535, fax (602) 365–5577. Copies may be inspected, by appointment, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(f) This amendment becomes effective on March 21, 2002.

Issued in Burlington, Massachusetts, on February 1, 2002.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 02–3161 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–224–AD; Amendment 39–12648; AD 2002–03–07]

RIN 2120–AA64

Airworthiness Directives; BAE Systems (Operations) Limited Model BAe 146 and Avro 146–RJ Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain BAE Systems (Operations) Limited Model BAe 146 and Avro 146-RJ series airplanes, that requires a one-time inspection to detect corrosion of the flap structure and machined ribs, corrective actions if necessary, and reprotection of the rib boss bores. This action is necessary to detect and correct corrosion in the flap structure and machined ribs, which could result in reduced structural integrity of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective March 21, 2002.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of March 21, 2002.

ADDRESSES: The service information referenced in this AD may be obtained from British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1175; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain BAE Systems (Operations) Limited Model BAe 146 and Avro 146–RJ series airplanes was published in the **Federal Register** on October 4, 2001 (66 FR 50586). That action proposed to require a one-time inspection to detect corrosion of the flap structure and machined ribs, corrective actions if necessary, and reprotection of the rib boss bores.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were submitted in response to the proposal or the FAA's determination of the cost to the public.

Explanation of Change to Final Rule

For conditions where corrosion is detected, paragraph (a)(2)(ii) of the proposed AD specifies eventual repetition of the detailed visual inspection in paragraph (a) of the proposed AD (following the accomplishment of corrective actions and reprotection of the boss bores). However, paragraph (a)(2)(ii) of the proposed AD does not make clear that any follow-on actions to the detailed visual inspection must also be accomplished. Therefore, for clarification, we have revised paragraph (a)(2)(ii) of this final rule to require eventual repetition of the detailed visual inspection and accomplishment of applicable follow-on actions. We find that this change does not expand the scope of the proposed AD but merely provides clarification of the requirements of this AD.

Conclusion

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

Cost Impact

The FAA estimates that 60 Model BAe 146 and Avro 146–RJ series airplanes of U.S. registry will be affected by this AD, that it will take approximately 160 work hours per airplane (including access, testing, and close-up) to accomplish the required inspection, and that the average labor rate is $60 per work hour. Based on these figures, the cost impact of the inspection required by this AD on U.S. operators is estimated to be $576,000, or $9,600 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between

the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

2002–03–07 BAE Systems (Operations) Limited (Formerly British Aerospace Regional Aircraft): Amendment 39–12648. Docket 2001–NM–224–AD.

Applicability: Model BAe 146 and Avro 146–RJ series airplanes, certificated in any category; except those modified in accordance with BAE Systems Modification HCM01694F.

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

Compliance: Required as indicated, unless accomplished previously.

To detect and correct corrosion in the flap structure and machined ribs, which could result in reduced structural integrity of the airplane, accomplish the following:

Inspection

(a) Within 6 years since the date of manufacture of the airplane, or within 2 years after the effective date of this AD, whichever occurs later: Perform a detailed visual inspection to detect corrosion of the flap structure and machined ribs, in accordance with BAE Systems (Operations) Limited Inspection Service Bulletin ISB.57–066, dated May 15, 2001.

(1) If no corrosion is detected: Prior to further flight, reprotect the boss bores in accordance with the service bulletin.

(2) If any corrosion is detected: Except as required by paragraph (b) of this AD, accomplish the actions required by paragraphs (a)(2)(i) and (a)(2)(ii) of this AD.

(i) Prior to further flight: Perform corrective actions and reprotect the boss bores in accordance with the service bulletin.

(ii) Within 3 years but not sooner than 2 years following the reprotection specified by paragraph (a)(2)(i) of this AD: Repeat the detailed visual inspection and applicable follow-on actions.

Note 2: For the purposes of this AD, a detailed visual inspection is defined as: ''An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required.''

(b) If any inspection required by this AD reveals any corrosion or other discrepancy for which the service bulletin specifies to contact the manufacturer for appropriate action: Prior to further flight, repair per a method approved by either the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the Civil Aviation Authority (CAA) (or its delegated agent).

Note 3: BAE Systems (Operations) Limited Inspection Service Bulletin ISB.57–066 recommends that operators submit a report of their inspection findings to the manufacturer. Although operators may submit such a report, this AD does not require it.

Spares

(c) As of the effective date of this AD, no person may install a flap on any affected airplane, unless the inspection and applicable corrective actions have been accomplished in accordance with the requirements of this AD.

Alternative Methods of Compliance

(d) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, International Branch, ANM–116. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, International Branch, ANM–116.

Note 4: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the International Branch, ANM–116.

Special Flight Permits

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

Incorporation by Reference

(f) Except as provided by paragraph (b) of this AD, the actions shall be done in accordance with BAE Systems (Operations) Limited Inspection Service Bulletin ISB.57–066, dated May 15, 2001. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 5: The subject of this AD is addressed in British airworthiness directive 002–05–2001.

Effective Date

(g) This amendment becomes effective on March 21, 2002.

Issued in Renton, Washington, on February 5, 2002.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–3287 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–CE–10–AD; Amendment 39–12644; AD 2002–03–03]

RIN 2120–AA64

Airworthiness Directives; SOCATA—Groupe AEROSPATIALE Model TBM 700 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that applies to certain SOCATA—Groupe AEROSPATIALE (SOCATA) Model TBM 700 airplanes. This AD requires you to install a new strainer draining system in the cabin fuselage. This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for France. The actions specified by this AD are intended to prevent water from accumulating in the fuselage, then freezing and interfering with or causing the elevator controls to seize. This could result in loss of elevator control with consequent loss of airplane control.

DATES: This AD becomes effective on March 29, 2002.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of March 29, 2002.

ADDRESSES: You may get the service information referenced in this AD from SOCATA—Groupe AEROSPATIALE, Customer Support, Aerodrome Tarbes-Ossun-Lourdes, BP 930–F65009 Tarbes Cedex, France; telephone: (33) (0)5.62.41.73.00; facsimile: (33) (0)5.62.41.76.54; or the Product Support Manager, SOCATA—Groupe AEROSPATIALE, North Perry Airport, 7501 Pembroke Road, Pembroke Pines, Florida 33023; telephone: (954) 893–1400; facsimile: (954) 964–4191. You may view this information at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2001–CE–10–AD, 901 Locust, Room 506, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Karl Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4146; facsimile: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Discussion

What Events Have Caused This AD?

The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, recently notified FAA that an unsafe condition may exist on certain SOCATA Model TBM 700 airplanes. The DGAC reports an incident in which the elevator controls jammed on one of the affected airplanes.

Jamming of the elevator controls occurred because water accumulated in the fuselage and froze. Water had accumulated in the fuselage because the strainer and draining hole became clogged.

What Is the Potential Impact if FAA Took No Action?

If this condition is not corrected, water may accumulate in the fuselage, freeze and interfere with or cause the elevator controls to seize. This could result in loss of elevator control.

Has FAA Taken Any Action to This Point?

We issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain SOCATA Model TBM 700 airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on November 14, 2001 (66 FR 57007). The NPRM proposed to require you to install a new strainer draining system in the cabin fuselage.

Was the Public Invited To Comment?

The FAA encouraged interested persons to participate in the making of this amendment. We did not receive any comments on the proposed rule or on our determination of the cost to the public.

FAA's Determination

What Is FAA's Final Determination on This Issue?

After careful review of all available information related to the subject presented above, we have determined that air safety and the public interest require the adoption of the rule as proposed except for minor editorial corrections. We have determined that these minor corrections:

—provide the intent that was proposed in the NPRM for correcting the unsafe condition; and

—do not add any additional burden upon the public than was already proposed in the NPRM.

Cost Impact

How Many Airplanes Does This AD Impact?

We estimate that this AD affects 79 airplanes in the U.S. registry.

What Is the Cost Impact of This AD on Owners/Operators of the Affected Airplanes?

We estimate the following costs to accomplish the modification:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
2 workhours × $60 = $120	$114	$234	$18,486

Compliance Time of This AD

What Is the Compliance Time of This AD?

The compliance time of this AD is ''within the next 3 months after the effective date of this AD''.

Why Is the Compliance Time Presented in Calendar Time Instead of Hours Time-in-Service (TIS)?

Although water in the cabin fuselage could interfere with the elevator controls and become unsafe during flight, the condition is not a direct result of airplane operation. The chance of this situation occurring is the same for an airplane with 10 hours time-in-service (TIS) as it would be for an airplane with 500 hours TIS. A calendar time for compliance will assure that the unsafe condition is addressed on all airplanes in a reasonable time period.

Regulatory Impact

Does This AD Impact Various Entities?

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national government and the States,

or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

Does This AD Involve a Significant Rule or Regulatory Action?

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the final evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. FAA amends § 39.13 by adding a new AD to read as follows:

2002–03–03 Socata—Groupe Aerospatiale: Amendment 39–12644; Docket No. 2001–CE–10–AD.

(a) *What airplanes are affected by this AD?* This AD affects Model TBM 700 airplanes, serial numbers 1 through 164, that are certificated in any category.

(b) *Who must comply with this AD?* Anyone who wishes to operate any of the airplanes identified in paragraph (a) of this AD must comply with this AD.

(c) *What problem does this AD address?* The actions specified by this AD are intended to prevent water from accumulating in the fuselage, then freezing and interfering with or causing the elevator controls to seize. This could result in loss of elevator control with consequent loss of airplane control.

(d) *What actions must I accomplish to address this problem?* To address this problem, you must accomplish the following:

Actions	Compliance	Procedures
Incorporate Kit No. OPT70 K072–53	Within the next 3 months after March 29, 2002 (the effective date of this AD), unless already accomplished.	In accordance with the Technical Instructions supplied with Kit No. OPT70 K072–53, as specified in Socata Service Bulletin SB 70–082 53, dated June 2000.

(e) *Can I comply with this AD in any other way?* You may use an alternative method of compliance or adjust the compliance time if:

(1) Your alternative method of compliance provides an equivalent level of safety; and

(2) The Manager, Standards Office, Small Airplane Directorate, approves your alternative. Submit your request through an FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Standards Office, Small Airplane Directorate.

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

(f) *Where can I get information about any already-approved alternative methods of compliance?* Contact Karl Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4146; facsimile: (816) 329–4090.

(g) *What if I need to fly the airplane to another location to comply with this AD?* The FAA can issue a special flight permit under sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate your airplane to a location where you can accomplish the requirements of this AD.

(h) *Are any service bulletins incorporated into this AD by reference?* Actions required by this AD must be done in accordance with the Technical Instructions supplied with Kit No. OPT70 K072–53, as specified in Socata Service Bulletin SB 70–082 53, dated June 2000. The Director of the Federal Register approved this incorporation by reference under 5 U.S.C. 552(a) and 1 CFR part 51. You can get copies from SOCATA—Groupe AEROSPATIALE, Customer Support, Aerodrome Tarbes-Ossun-Lourdes, BP 930—F65009 Tarbes Cedex, France; or the Product Support Manager, SOCATA—Groupe AEROSPATIALE, North Perry Airport, 7501 Pembroke Road, Pembroke Pines, Florida 33023. You can look at copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri, or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

Note 2: The subject of this AD is addressed in French AD 2000–373(A), dated October 18, 2000.

(i) *When does this amendment become effective?* This amendment becomes effective on March 29, 2002.

Issued in Kansas City, Missouri, on February 4, 2002.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–3167 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NM–266–AD; Amendment 39–12651; AD 2002–03–10]

RIN 2120–AA64

Airworthiness Directives; BAE Systems (Operations) Limited Model BAe 146 Series Airplanes and Model Avro 146–RJ Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain BAE Systems (Operations) Limited Model BAe 146 and Avro 146–RJ series airplanes, that requires repetitive inspections to detect cracking of the oleo strut of the nose landing gear (NLG), and corrective actions if necessary. This AD also provides for optional terminating action for the repetitive inspections. This action is necessary to detect and correct fatigue cracking of the oleo strut of the NLG, which could result in failure of the NLG. This action is intended to address the identified unsafe condition.

DATES: Effective March 21, 2002.

The incorporation by reference of certain publications listed in the

regulations is approved by the Director of the Federal Register as of March 21, 2002.

ADDRESSES: The service information referenced in this AD may be obtained from British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain BAE Systems (Operations) Limited Model BAe 146 and Avro 146–RJ series airplanes was published in the **Federal Register** on November 23, 2001 (66 FR 58678). That action proposed to require repetitive inspections to detect cracking of the oleo strut of the nose landing gear, and corrective actions if necessary. That action also proposed to provide for optional terminating action for the repetitive inspections.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were submitted in response to the proposal or the FAA's determination of the cost to the public.

Conclusion

The FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

The FAA estimates that 60 Model BAe 146 series airplanes and Model Avro 146–RJ series airplanes of U.S. registry will be affected by this AD, that it will take approximately 1 work hour per airplane to accomplish the required inspection, and that the average labor rate is $60 per work hour. Based on these figures, the cost impact of the requirements of this AD on U.S. operators is estimated to be $3,600, or $60 per airplane, per inspection cycle.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

2002–03–10 BAE Systems (Operations) Limited (Formerly British Aerospace Regional Aircraft): Amendment 39–12651. Docket 2000–NM–266–AD.

Applicability: Model BAe 146 series airplanes and Model Avro 146–RJ series airplanes, certificated in any category, as listed in BAE Systems (Operations) Limited Service Bulletin SB.32–158, dated June 2, 2000, except those on which Messier-Dowty Modification AC12248 has been installed.

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

Compliance: Required as indicated, unless accomplished previously.

To detect and correct fatigue cracking of the oleo strut of the nose landing gear (NLG), which could result in failure of the NLG, accomplish the following:

Inspection

(a) Perform an ultrasonic inspection to detect cracking of the oleo strut of the NLG, in accordance with BAE Systems (Operations) Limited Service Bulletin SB.32–158, dated June 2, 2000, according to the applicable time schedule specified in paragraphs (a)(1), (a)(2), and (a)(3) of this AD. Thereafter, repeat the inspection at least every 2,500 landings, until the actions specified by paragraph (c) of this AD have been performed.

(1) For NLGs identified in paragraph D.(3) of BAE Systems (Operations) Limited Service Bulletin SB.32–158, dated June 2, 2000: Inspect before the NLG accumulates 2,500 landings after accomplishment of the initial inspection specified by Messier-Dowty Service Bulletin 146–32–149, or within 30 days after the effective date of this AD, whichever occurs later.

(2) For NLGs having part number 201138002, serial numbers M–DG–0158 to M–DG–0168 inclusive, as identified in paragraph D.(4) of BAE Systems (Operations) Limited Service Bulletin SB. 32–158, dated June 2, 2000: Inspect before the NLG accumulates 20,000 total landings, or within 500 landings after the effective date of this AD, whichever occurs later.

(3) For NLGs other than those identified in paragraph (a)(1) or (a)(2) of this AD: Inspect before the NLG accumulates 8,000 total landings, or within 500 landings after the effective date of this AD, whichever occurs later.

Corrective Actions

(b) If any crack is found during any inspection required by this AD: Before further flight, replace the oleo strut of the

NLG with a new or serviceable strut in accordance with BAE Systems (Operations) Limited Service Bulletin SB.32–158, dated June 2, 2000.

Optional Terminating Action

(c) Modification of the NLG in accordance with BAE Systems (Operations) Limited Service Bulletin SB.32–159–70668ABC, dated June 14, 2000, terminates the repetitive inspections required by this AD.

Alternative Methods of Compliance

(d) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, International Branch, ANM–116.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the International Branch, ANM–116.

Special Flight Permits

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

Incorporation by Reference

(f) The inspections and replacement, as applicable, shall be done in accordance with BAE Systems (Operations) Limited Service Bulletin SB.32–158, dated June 2, 2000. The terminating action, if accomplished, shall be done in accordance with BAE Systems (Operations) Limited Service Bulletin SB.32–159–70668ABC, dated June 14, 2000. (Only the first page of these documents is dated; no other page of these documents contains this information.) This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 3: The subject of this AD is addressed in British airworthiness directive 002–06–2000.

Effective Date

(g) This amendment becomes effective on March 21, 2002.

Issued in Renton, Washington, on February 6, 2002.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–3309 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NE–34–AD; Amendment 39–12642; AD 2002–03–01]

RIN 2120–AA64

Airworthiness Directives; Honeywell International, Inc., (Formerly AlliedSignal, Inc., and Textron Lycoming) T5311A, T5311B, T5313B, T5317A, T5317B, T53–L–11, T53–L–11A, T53–L–11B, T53–L–11C, T53–L–11D, T53–L–11A S/SA, T53–L–13B, T53–L–13B S/SA, T53–L–13B S/SB, and T53–L–703 Turboshaft Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), that is applicable to Honeywell International, Inc., (formerly AlliedSignal, Inc., and Textron Lycoming) T5311A, T5311B, T5313B, T5317A, T5317B, and former military T53–L–11, T53–L–11A, T53–L–11B, T53–L–11C, T53–L–11D, T53–L–11A S/SA, T53–L–13B, T53–L–13B S/SA, T53–L–13B S/SB, and T53–L–703 series turboshaft engines. This amendment requires initial and repetitive special vibration tests of the engine, and if necessary replacement with a serviceable reduction gearbox assembly, or a serviceable engine before further flight. This amendment is prompted by reports of tachometer drive spur gear failure, resulting in potential engine overspeed, loss of power turbine speed (N2) instrument panel indication, and hard landings. The actions specified in this AD are intended to prevent excessive vibrations produced by the reduction gearbox assembly that could cause failure of the tachometer drive spur gear.

DATES: Effective date March 21, 2002. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of March 21, 2002.

ADDRESSES: The service information referenced in this AD may be obtained from Honeywell International, Inc., (formerly AlliedSignal, Inc., and Textron Lycoming), Attn: Data Distribution, M/S 64–3/2101–201, P.O. Box 29003, Phoenix, AZ 85038–9003; telephone: (602) 365–2493; fax: (602) 365–5577. This information may be examined, by appointment, at the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Robert Baitoo, Aerospace Engineer, Los Angeles Aircraft Certification Office, FAA, Transport Airplane Directorate, 3960 Paramount Blvd., Lakewood, CA 90712–4137; telephone: (562) 627–5245; fax: (562) 627–5210.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that is applicable to Honeywell International, Inc., (formerly AlliedSignal, Inc., and Textron Lycoming) T5311A, T5311B, T5313B, T5317A, T5317B, and former military T53–L–11, T53–L–11A, T53–L–11B, T53–L–11C, T53–L–11D, T53–L–11A S/SA, T53–L–13B, T53–L–13B S/SA, T53–L–13B S/SB, and T53–L–703 series turboshaft engines was published in the **Federal Register** on June 15, 2001 (66 FR 32591). That action proposed to require initial and repetitive special vibration tests of the engine, and if necessary replacement with a serviceable reduction gearbox assembly, or a serviceable engine before further flight, in accordance with AlliedSignal, Inc., Service Bulletin (SB) No.''s T5311A/B–0100, dated January 20, 2000; T5313B/17–0100, dated November 19, 1999; T53–L–11–0100, dated January 20, 2000; T53–L–13B–0100, Revision 2, dated May 11, 1999; and T53–L–703–0100, Revision 2, dated May 11, 1999.

Comments

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

The commenter stated that further investigation into the root problem causing the spur gear failures needs to be addressed. The problem may be a manufacturing problem from one U.S. Government contract supplier.

The FAA does not agree. The commenter did not supply sufficient evidence substantiating a design nonconformity.

After careful review of the available data, including the comment noted above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Economic Analysis

There are about 4,500 engines of the affected design in the worldwide fleet. The FAA estimates that 300 engines

installed on aircraft of U.S. registry would be affected by this AD, and that it would take about four work hours per engine to accomplish each special vibration test, and that the average labor rate is $60 per work hour. Based on these figures, for each special vibration test, the total labor cost effect on U.S. operators is estimated to be $240 per engine. The FAA estimates that operators, on average, will perform ten special vibration tests per year, resulting in a total annual cost on U.S. operators of $720,000.

Regulatory Analysis

This final rule does not have federalism implications, as defined in Executive Order 13132, because 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. Accordingly, the FAA has not consulted with state authorities prior to publication of this final rule.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

2002–03–01 Honeywell International, Inc.: Amendment 39–12642. Docket No. 2000–NE–34–AD.

Applicability: This airworthiness directive (AD) is applicable to Honeywell International, Inc., (formerly AlliedSignal, Inc., and Textron Lycoming) T5311A, T5311B, T5313B, T5317A, T5317B, and former military T53–L–11, T53–L–11A, T53–L–11B, T53–L–11C, T53–L–11D, T53–L–11A S/SA, T53–L–13B, T53–L–13B S/SA, T53–L–13B S/SB, and T53–L–703 turboshaft engines. These engines are installed on, but not limited to Bell Helicopter Textron 204, 205, and 209 series, and Kaman K–1200 series helicopters, and the following surplus military helicopters that have been certified in accordance with sections 21.25 or 21.27 of the Federal Aviation Regulations (14 CFR 21.25 or 21.27): Bell Helicopter Textron manufactured AH–1, HH–43, TH–1, UH–1 and SW–204/205 (UH–1) series.

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

Compliance: Compliance with this AD is required as indicated, unless already done.

To prevent excessive vibrations produced by the reduction gearbox assembly that could cause failure of the tachometer drive spur gear, do the following:

Initial and Repetitive Special Vibration Tests

(a) Perform an initial special vibration test of the engine in accordance with the applicable service bulletin (SB) listed in the following Table 1, within 100 flight hours after the effective date of this AD:

TABLE 1. ALLIEDSIGNAL SB'S FOR SPECIAL VIBRATION TESTS.

Engine	SB's
(1) T5311A and T5311B	T5311A/B–0100, dated January 20, 2000.
(2) T5313B, T5317A, and T5317B	T5313B/17–0100, dated November 19, 1999.
(3) T53–L–11, –11A, –11B, –11C, –11D, and 11A S/SA	T53–L–11–0100, Revision 2, dated January 20, 2000.
(4) T53–L–13B, –13B S/SA, and –13B S/SB	T53–L–13B–0100, Revision 2, dated May 11, 1999.
(5) T53–L–703	T53–L–703–0100, Revision 2, dated May 11, 1999.

(b) Perform repetitive special vibration tests of the engine in accordance with the applicable SB listed in Table 1 of this AD, as follows:

(1) For engines that have tachometer drive spur gear part number (P/N) 1–070–062–04 installed, perform repetitive special vibration tests within 500 flight hours since the last special vibration test.

(2) For engines that have tachometer drive spur gear P/N 1–070–062–06 installed, perform repetitive special vibration tests within 1,000 flight hours since the last special vibration test.

Engines That Fail Special Vibration Tests

(c) For engines that fail a special vibration test performed in accordance with paragraph (a) or (b) of this AD, do either of the following:

(1) Replace the gearbox assembly with a serviceable reduction gearbox assembly, and before further flight perform an initial special vibration test as specified in paragraph (a) of this AD; or

(2) Replace the engine with a serviceable engine, and before further flight perform an initial special vibration test as specified in paragraph (a) of this AD.

Alternative Methods of Compliance

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

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

Special Flight Permits

(e) Special flight permits may be issued in accordance with §§ 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the aircraft to a location where the special vibration tests and engine replacement requirements of this AD can be done.

Documents That Have Been Incorporated By Reference

(f) The inspection must be done in accordance with the following AlliedSignal, Inc. Service Bulletins (SB's):

Document No.	Pages	Revision	Date
SB T5311A/B–0100 Total pages: 5	All	Original	January 20, 2000.
SB T5313B/17–0100 Total pages: 5	All	Original	November 19, 1999.
SB T53–L–11–0100 Total pages: 5	All	Revision 2	January 20, 2000.
SB T53–L–13B–0100 Total pages: 5	All	Revision 2	May 11, 1999.
SB T53–L–703–0100 Total pages: 5	All	Revision 2	May 11, 1999.

This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Honeywell International, Inc. (formerly AlliedSignal, Inc. and Textron Lycoming), Attn: Data Distribution, M/S 64–3/2101–201, P.O. Box 29003, Phoenix, AZ 85038–9003; telephone: (602) 365–2493; fax: (602) 365–5577. Copies may be inspected, by appointment, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

Effective Date

(g) This amendment becomes effective on March 21, 2002.

Issued in Burlington, Massachusetts, on February 4, 2002.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 02–3310 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NE–02–AD; Amendment 39–12460; AD 2002–02–12]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc RB211–524G and –524H Series Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD) that is applicable to Rolls-Royce plc (RR) RB211–524G and –524H series turbofan engines. That AD currently requires initial and repetitive ultrasonic inspections for cracks in fan blade dovetail roots, and, if necessary, replacement with serviceable parts. That action also provides the options of installing improved design fan blades or reworking current fan blades to the improved configuration as terminating action for the inspections. This amendment requires initial inspection at lower thresholds, using either the blade root probe method or the surface wave probe method. This amendment also removes the option of reworking blades as terminating action for the inspections. Lastly, this amendment adds the model RB211–524H–T–36 engine to the applicability of this AD. This amendment is prompted by two additional reports of fan blade cracks found during inspections performed in accordance with the current AD. The actions specified in this AD are intended to detect cracked fan blades, which could result in an uncontained engine failure and damage to the airplane.

DATES: Effective March 1, 2002. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of March 1, 2002.

Comments for inclusion in the Rules Docket must be received on or before April 15, 2002.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 2000–NE–02–AD, 12 New England Executive Park, Burlington, MA 01803–5299. Comments may be inspected at this location, by appointment, between 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. Comments may also be sent via the Internet using the following address: ''9-ane-adcomment@faa.gov''. Comments sent via the Internet must contain the docket number in the subject line.

The service information referenced in this AD may be obtained from Rolls-Royce plc, PO Box 31, Derby, England; telephone: 011 44 1332–249428; fax: 011 44 1332–249223. This information may be examined at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Keith Mead, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7744 fax (781) 238–7199.

SUPPLEMENTARY INFORMATION: The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom (UK), had notified the Federal Aviation Administration (FAA) in March of 2000, that an unsafe condition may exist on certain Rolls-Royce plc (RR) RB211–524 series turbofan engines. The CAA had received reports of three fan blade failures up to that time. Subsequent inspections of the dovetail root area on other fan blades revealed the existence of dovetail root cracks in the same region as the failed blades.

The FAA issued AD 2000–05–12 to require initial and repetitive ultrasonic inspections for cracks in fan blade dovetail roots, and, if necessary, replacement with serviceable parts. That action also provided the options of installing improved design fan blades or reworking current fan blades to the improved configuration as terminating action for the inspections. Since that AD was published, two additional reports of fan blades found cracked have been received. The FAA has determined through information provided by RR

that the fan blade inspection requirements and rejection criteria need to be changed. This condition, if not corrected, could result in possible multiple fan blade failures, which could result in an uncontained engine failure and damage to the aircraft.

Manufacturer's Service Information

Rolls-Royce plc has issued mandatory service bulletin (MSB) No. RB.211–72–C818, Revision 5, dated March 30, 2001, that specifies lower initial inspection thresholds, and repetitive ultrasonic inspections for cracks in fan blade dovetail roots, using either the blade root probe method, or the surface wave probe method. However, fan blades part numbers (P/N's) UL38052 and UL38628, are restricted to the root probe method only. Investigation by the manufacturer has shown that the surface wave probe method on these fan blades does not routinely detect cracking of this blade root design configuration. Also, this MSB Revision 5 adds the model RB211–524H–T–36 engine to the applicability.

Bilateral Airworthiness Agreement

These engine models are manufactured in the United Kingdom (UK) and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the UK has kept the FAA informed of the situation described above. The FAA has examined the findings of the UK, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

FAA's Determination of an Unsafe Condition and Required Actions

Although none of these affected engine models are used on any airplanes that are registered in the United States, the possibility exists that the engine models could be used on airplanes that are registered in the United States in the future. Since an unsafe condition has been identified that is likely to exist or develop on other Rolls-Royce plc RB211–524G series and RB211–524H series turbofan engines of the same type design, this AD is being issued to detect cracked fan blades, which could result in an uncontained engine failure and damage to the airplane. This AD requires initial ultrasonic inspection at lower thresholds, and repetitive ultrasonic inspections, for cracks in fan blade dovetail roots, using either the blade root probe method or the surface wave probe method. This AD also adds the model RB211–524H–T–36 engine to the applicability. The actions are required to be done in accordance with the mandatory service bulletin described previously.

Immediate Adoption of This AD

Since there are currently no domestic operators of these engine models, notice and opportunity for prior public comment are unnecessary. Therefore, a situation exists that allows the immediate adoption of this regulation.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES**. All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2000–NE–02–AD.'' The postcard will be date stamped and returned to the commenter.

Regulatory Analysis

This final rule does not have federalism implications, as defined in Executive Order 13132, because 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. Accordingly, the FAA has not consulted with state authorities prior to publication of this final rule.

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing Amendment 39–11622 (65 FR 14207, March 16, 2000) and adding a new airworthiness directive, Amendment 39–12460, to read as follows:

2002–02–12 Rolls-Royce plc: Amendment 39–12460. Docket No. 2000–NE–02–AD. Supersedes AD 2000–05–12, Amendment 39–11622.

Applicability: This airworthiness directive (AD) is applicable to Rolls-Royce plc (RR) models RB211–524G2–19, RB211–524G2–T–19, RB211–524G3–19, RB211–524G3–T–19, RB211–524H2–19, RB211–524H2–T–19, RB211–524H–36, and RB211–524H–T–36 turbofan engines, with fan blades part numbers (P/N's) UL23061, UL25772, UL27253, UL29561, UL29573, UL30533, UL36245, UL38009, UL38052, or UL38628, installed. These engines are installed on, but not limited to Boeing 747–400 series and 767 series airplanes.

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

Compliance: Compliance with this AD is required as indicated, unless already done.

To detect cracked fan blades, which could result in an uncontained engine failure and damage to the airplane, do the following:

Initial Inspection

(a) Ultrasonically inspect for cracks in the dovetail slots of the fan blades using the Initial Inspection cycles-since-new (CSN) for Root Probe Method or Wave Probe Method, in accordance with EITHER paragraph 3.E. (Root Probe Method) OR 3.F. (Wave Probe Method) of the Accomplishment Instructions of RR service bulletin (SB) RB.211–72–C818, Revision 5, dated March 30, 2001 and using Table 1 of this AD:

TABLE 1.—INITIAL AND REPETITIVE INSPECTION COMPLIANCE TIMES

Fan blade P/N's	For root probe method		For wave probe method	
	Initial inspection	Repetitive inspection	Initial inspection	Repetitive inspection
(1) UL23061, UL25772, UL27253, UL29561, UL29573, UL30533.	Within 6,500 CSN	Within 330 cycles-since-last-inspection (CSLI).	Within 6,500 CSN	Within 270 CSLI.
(2) UL36245, UL38009	Within 1,150 CSN	Within 290 CSLI	Within 1,150 CSN	Within 250 CSLI.
(3) UL38052, UL38628	Within 1,150 CSN	Within 290 CSLI	Not Allowed	Not Allowed.

(b) For fan blades P/N's UL38052 or UL38628 initially inspected using paragraph 3.F. of the Accomplishment Instructions of RR SB RB.211–72–C818, Revision 4, dated June 23, 2000, inspect the blades for cracks in accordance with paragraph 3.E. of the Accomplishment Instructions of RR SB RB.211–72–C818, Revision 5, dated March 30, 2001 using the cycles-since-last-inspection (CSLI) times specified in Table 2 of this AD:

TABLE 2.—INSPECTION CSLI FOR FAN BLADES INSPECTED USING RR SB RB.211–72–C818, REVISION 4, DATED JUNE 23, 2000

Number of CSLI	Inspection interval after the effective date of this AD
(1) 290 to 500 CSLI	Within 100 cycles-in-service (CIS).
(2) 501 to 750 CSLI	Within 50 CIS.
(3) More than 750 CSLI	Within 25 CIS.

Additional Requirement When Both Engines of the Same Boeing 767 Airplane Have One or More Fan Blades P/N's UL38052 or UL38628 Installed

(c) For fan blades, P/N's UL38052 and UL38628 that are installed in both engines of the same Boeing 767 airplane, and that have accumulated more than 290 CSLI, ultrasonic-inspect blades of one engine for cracks within 25 CIS after the effective date of this AD in accordance with paragraph 3.E. of the Accomplishment Instructions of RR SB RB.211–72–C818, Revision 5, dated March 30, 2001.

Repetitive Inspections

(d) Thereafter, ultrasonically inspect for cracks in the dovetail slots of the fan blades using the Repetitive Inspection CSLI for Root Probe Method or Wave Probe Method, in accordance with EITHER paragraph 3.E. OR 3.F. of the Accomplishment Instructions of RR SB RB.211–72–C818, Revision 5, dated March 30, 2001 and using Table 1 of this AD.

Dispositioning of Cracked Fan Blades

(e) Before further flight, replace any fan blade that does not meet the acceptance criteria specified in paragraph 3.E or 3.F. of the Accomplishment Instructions of SB RR SB RB.211–72–C818, Revision 5, dated March 30, 2001.

Terminating Action

(f) Removal from service of fan blades P/N's UL23061, UL25772, UL27253, UL29561, UL29573, UL30533, UL36245, UL38009, UL38052, and UL38628, and replacement with serviceable fan blades with P/N's other than these P/N's constitutes terminating action for the inspection requirements of this AD.

Alternative Methods of Compliance

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

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

Special Flight Permits

(h) Special flight permits may be issued in accordance with §§ 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be done.

Documents That Have Been Incorporated By Reference

(i) The inspections must be done in accordance with Rolls-Royce plc Mandatory Service Bulletin No. RB.211–72–C818, Revision 5, dated March 30, 2001. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Rolls-Royce plc, PO Box 31, Derby, England; telephone: 011 44 1332–249428; fax: 011 44 1332–249223. Copies may be inspected, by appointment, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

Effective Date

(j) This amendment becomes effective on March 1, 2002.

Issued in Burlington, Massachusetts, on February 1, 2002.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 02–3162 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–114–AD; Amendment 39–12647; AD 2002–03–06]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model DC–9–81, –82, –83, and –87 Series Airplanes, Model MD–88 Airplanes, and Model MD–90–30 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to certain McDonnell Douglas Model DC–9–81, –82, –83, and –87 series airplanes, Model MD–88 airplanes, and Model MD–90–30 series airplanes, that currently requires a revision to the applicable Airplane Flight Manual (AFM) to provide the flightcrew with the appropriate landing distance and flap positions, if applicable, for wet or icy runways. That AD also provides for an optional terminating action for the applicable AFM revision. For certain airplanes, this action requires accomplishment of the previously optional terminating action. The actions specified by this AD are intended to prevent the flightcrew from performing a scheduled landing on a runway of potentially insufficient length due to failure of the weight-on-wheels spoiler lockout mechanism system and possible inactivation of the autospoiler actuator, which could result in the airplane overrunning the end of the runway during landing on a wet or icy runway.

DATES: Effective March 21, 2002.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of March 21, 2002.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Aircraft Group, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Albert Lam, Aerospace Engineer, Systems and Equipment Branch, ANM–130L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5346; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 2001–07–10, amendment 39–12176 (66 FR 18870, April 12, 2001), which is applicable to certain McDonnell Douglas Model DC–9–81, –82, –83, and –87 series airplanes, Model MD–88 airplanes, and Model MD–90–30 series airplanes, was published in the **Federal Register** on June 29, 2001 (66 FR 34593). The action proposed to continue to require a revision to the applicable Airplane Flight Manual (AFM) to provide the flightcrew with the appropriate landing distance and flap positions, if applicable, for wet or icy runways. That action also proposed to continue to provide for an optional terminating action for the applicable AFM revision. For certain airplanes, that action also proposed to require accomplishment of the previously optional terminating action.

Comments

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

Request To Approve Previous Alternative Methods of Compliance (AMOCs)

One commenter requests that AMOCs approved for AD 2001–07–10 (amendment 39–12176) remain valid for the purposes of the the proposed rule. The commenter notes that, since the proposed rule merely requires compliance with a previously optional terminating action, the existing AMOCs should also be given credit in the proposed rule.

The FAA agrees with the commenter's request, and has revised paragraph (e) of the final rule to reflect credit for the accomplishment of AMOCs in accordance with AD 2001–07–10.

Request To Clarify the Requirements of Paragraph (d) of the Proposed Rule

One commenter notes that paragraph (d) of the proposed rule (which is applicable to Model MD–90 series airplanes) refers to doing the actions specified in paragraphs (c)(1) and (c)(2) of the AD (which applies to Model MD–80 series airplanes). To eliminate any confusion, the commenter requests that paragraph (d) of the proposed rule be revised to clearly specify the actions required for the MD–90 series airplanes, rather than refering to paragraph (c) of the proposed rule.

The FAA acknowledges that clarification is needed. We have revised paragraph (d) of the final rule to add new paragraphs (d)(1) and (d)(2) to clarify the actions required for Model MD–90 series airplanes.

Conclusion

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes previously described.

Cost Impact

There are approximately 224 Model DC–9–81, –82, –83, and –87 series airplanes, Model MD–88 airplanes, and Model MD–90–30 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 67 airplanes of U.S. registry will be affected by this AD.

The AFM revisions that are currently required by AD 2001–07–10, and retained in this AD, take approximately 1 work hour per airplane to accomplish, at an average labor rate of $60 per work hour. Based on these figures, the cost impact of the currently required actions on U.S. operators is estimated to be $4,020, or $60 per airplane.

For certain airplanes, the new terminating action that is required by this AD will take approximately 22 work hours per airplane to accomplish, at an average labor rate of $60 per work hour. The manufacturer has committed previously to its customers that it will bear the cost of replacement parts. Based on these figures, the cost impact of these requirements on U.S. operators of Model MD–90–30 series airplanes is estimated to be $1,320 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Should an operator of Model DC–9–81, –82, –83, and –87 series airplanes, and Model MD–88 airplanes elect to accomplish the optional terminating action that will be provided by this AD action, it will take approximately 22 work hours to accomplish it, at an average labor rate of $60 per work hour. The manufacturer has committed previously to its customers that it will bear the cost of replacement parts. Based on these figures, the cost impact of the optional terminating action will be $1,320 per airplane.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between

the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing amendment 39–12176 (66 FR 18870, April 12, 2001), and by adding a new airworthiness directive (AD), amendment 39–12647, to read as follows:

2002–03–06 McDonnell Douglas: Amendment 39–12647. Docket 2001–NM–114–AD. Supersedes AD 2001–07–10, Amendment 39–12176.

Applicability: Models identified in Table 1 of this AD, certificated in any category; excluding those airplanes on which the modification specified in the applicable service bulletin listed in Table 1 of this AD has been done. Table 1 is as follows:

TABLE 1—APPLICABILITY

Model	As listed in
DC–9–81, –82, –83, and –87 series airplanes, and MD–88 airplanes	Boeing Alert Service Bulletin MD80–27A359, Revision 01, dated March 26, 2001.
MD–90–30 series airplanes	Boeing Alert Service Bulletin MD90–27A031, Revision 01, dated March 26, 2001.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent the flightcrew from performing a scheduled landing on a runway of potentially insufficient length due to failure of the weight-on-wheels spoiler lockout mechanism system and possible inactivation of the autospoiler actuator, which could result in the airplane overrunning the end of the runway during landing on a wet or icy runway, accomplish the following:

Restatement of Requirements of AD 2001–07–10

Airplane Flight Manual Revisions

(a) For Model DC–9–81, –82, –83, and –87 series airplanes, and MD–88 airplanes: Within 48 clock hours after April 27, 2001 (the effective date AD 2001–07–10, amendment 39–12176), revise the Performance Section of the FAA-approved Airplane Flight Manual (AFM) to include the following statement. This may be done by inserting a copy of this AD in the AFM.

''In-flight Spoiler Lockout Mechanism Installed and Activated, and Automatic Ground Spoiler System Operated.

When the in-flight spoiler lockout mechanism is installed and activated, the wet or icy runway landing field length, which is determined from the appropriate Landing Field Length and Speed Chart, must be increased by 1,720 feet under either of the following conditions:

a. The weight-on-wheels unlocking feature is not installed; or

b. The weight-on-wheels unlocking feature is installed, but inoperative.

When the in-flight spoiler lockout mechanism is deactivated, the above landing field length is not required.''

(b) For Model MD–90–30 series airplanes: Within 48 clock hours after April 27, 2001, do the actions specified in either paragraph (b)(1) or (b)(2) of this AD.

(1) Revise the Performance Section of the FAA-approved AFM to include the following statement. This may be done by inserting a copy of this AD in the AFM.

''Landing Field Length for A Wet or Icy Runway.

Increase landing field length, which is determined from the Basic Manual, by 1,800 feet (549 meters) for a wet or icy runway with 28-degree and 40-degree flaps.

There is no landing field length penalty for a dry runway.

In-flight spoiler lockout mechanism may NOT be deactivated, as indicated in the Master Minimum Equipment List (MMEL).''

(2) Revise the Performance Section of the FAA-approved AFM by inserting a copy of Appendix 3E, Section 4, of MD–90 AFM MDC–91K0930, dated March 14, 2001, into the AFM.

Note 2: The MD–90 Master Minimum Equipment List (MMEL), system and sequence number 65–02, and the second proviso of system and sequence number 65–03, currently specifies that, for 10 days, the in-flight spoiler lockout mechanism system may be deactivated. Where differences exist between the current specification of the MMEL and the requirements of this AFM limitation, the AFM limitation prevails.

Optional Terminating Modifications

(c) For Model DC–9–81, –82, –83, and –87 series airplanes, and MD–88 airplanes: Accomplishment of the actions specified in paragraphs (c)(1) and (c)(2) of this AD, per Boeing Alert Service Bulletin MD80–27A359, dated January 29, 2001, or Revision 01, dated March 26, 2001, terminates the AFM revision requirements of paragraph (a) of this AD. After doing those actions, the AFM revision required by paragraph (a) of this AD may be removed from the AFM:

(1) Install the spoiler support bracket assemblies and relays; and

(2) Revise the spoiler lockout relay wiring.

New Actions Required by This AD

Terminating Modification for Model MD–90–30 Series Airplanes

(d) For Model MD–90–30 series airplanes: Within 18 months after the effective date of this AD, do the actions specified in paragraphs (d)(1) and (d)(2) of this AD, per Boeing Alert Service Bulletin MD90–27A031, dated January 29, 2001, or Revision 01, dated March 26, 2001. Accomplishment of those actions terminates the AFM revision

requirements of paragraph (b) of this AD. After doing those actions, the AFM revision required by paragraph (b) of this AD may be removed from the AFM:

(1) Install the spoiler support bracket assemblies and relays, and

(2) Revise the spoiler lockout relay wiring.

Alternative Methods of Compliance

(e)(1) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Los Angeles ACO.

(2) Alternative methods of compliance, approved previously in accordance with AD 2001–07–10, amendment 39–12176, are approved as alternative methods of compliance with this AD.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Los Angeles ACO.

Special Flight Permits

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

Incorporation by Reference

(g) The actions required by paragraph shall be done in accordance with Boeing Alert Service Bulletin MD90–27A031, dated January 29, 2001, or Boeing Alert Service Bulletin MD90–27A031, Revision 01, dated March 26, 2001. The optional terminating modification specified in paragraph (c) of this AD, if accomplished, shall be done in accordance with Boeing Alert Service Bulletin MD80–27A359, dated January 29, 2001, or Boeing Alert Service Bulletin MD80–27A359, Revision 01, dated March 26, 2001. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Aircraft Group, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(h) This amendment becomes effective on March 21, 2002.

Issued in Renton, Washington, on February 5, 2002.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–3289 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NM–350–AD; Amendment 39–12512; AD 2001–23–13]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; correction.

SUMMARY: This document corrects information in an existing airworthiness directive (AD) that applies to certain Boeing Model 747 series airplanes. That AD currently requires an inspection of the flap drive transmission of the trailing edge flaps at positions 2 and 7 to determine if a discrepant torque brake is installed; and corrective action, if necessary. That AD also imposes certain restrictions on the installation of affected spare parts. This document corrects and clarifies that the spares requirement in paragraph (b) of the final rule applies to only positions 2 and 7 of the trailing edge flaps, as identified in the Boeing service bulletin. This correction is necessary to ensure that operators are made aware that the spares requirement does not apply to positions 4 and 5 of the trailing edge flaps.

DATES: Effective December 31, 2001.

The incorporation by reference of certain publications listed in the regulations was approved previously by the Director of the Federal Register as of December 31, 2001 (66 FR 58918, November 26, 2001).

FOR FURTHER INFORMATION CONTACT: Barbara Mudrovich, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2983; fax (425) 227–1181.

SUPPLEMENTARY INFORMATION: On November 15, 2001, the Federal Aviation Administration (FAA) issued AD 2001–23–13, amendment 39–12512 (66 FR 58918, November 26, 2001), which applies to certain Boeing Model 747 series airplanes. That AD requires an inspection of the flap drive transmission of the trailing edge flaps at positions 2 and 7 to determine if a discrepant torque brake is installed; and corrective action, if necessary. That AD also imposes certain restrictions on the installation of affected spare parts. The actions required by that AD are intended to prevent damage to the flap system, adjacent systems, or structural components; or excessive skew of the trailing edge flap, which could result in flap asymmetry and consequent reduced controllability of the airplane.

Need for the Correction

Information obtained recently by the FAA indicates that the spares requirement in paragraph (b) of the final rule needs to be clarified and corrected.

As published, paragraph (b) of the final rule states that ''no person shall install on any airplane any transmission or torque brake assembly identified in the ''Existing Part Number'' column of Paragraph 2.E. of Boeing Service Bulletin 747–27–2374, dated November 18, 1999.''

Although paragraph (b) of the final rule did not limit the spares requirement to only positions 2 and 7 of the trailing edge flaps of the flap drive transmission, as indicated in the ''Summary'' of the final rule, and as clearly described in the ''Differences'' paragraph in the Notice of Proposed Rulemaking, it was the FAA's intent to do so.

The FAA has determined that a correction to AD 2001–23–13 is necessary to correct and clarify the spares requirement. This correction will specify that the spares requirement in paragraph (b) of this AD is limited to the transmission or torque brake assembly of the trailing edge flaps at positions 2 and 7.

Correction of Publication

This document corrects the error in AD 2001–23–13 and correctly adds the AD as an amendment to section 39.13 of the Federal Aviation Regulations (14 CFR 39.13).

The AD is reprinted in its entirety for the convenience of affected operators. The effective date of the AD remains December 31, 2001.

Since this action only clarifies and corrects a current requirement, it has no adverse economic impact and imposes no additional burden on any person. Therefore, the FAA has determined that notice and public procedures are unnecessary.

List of Subjects in 14 CFR Part 39

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

Adoption of the Correction

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Corrected]

2. Section 39.13 is amended by correctly adding the following airworthiness directive (AD):

2001–23–13 Boeing: Amendment 39–12512. Docket 2000–NM–350–AD.

Applicability: Model 747 series airplanes, line numbers 0001 through 1207, certificated in any category; excluding the airplanes having line number 1174 and Model 747SP series airplanes.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent damage to the flap system, adjacent systems, or structural components; or excessive skew of the trailing edge flap; which could result in flap asymmetry and consequent reduced controllability of the airplane, accomplish the following:

Part Verification/Replacement/Modification

(a) Within 18 months or 7,500 flight hours after December 31, 2001, whichever occurs later: Inspect the flap drive transmission of the trailing edge flaps at positions 2 and 7 to determine if a discrepant (''Belleville'' spring design) torque brake is installed in the transmission, by verifying the transmission part number, per Boeing Service Bulletin 747–27–2374, dated November 18, 1999. Then do the actions specified in paragraphs (a)(1) and (a)(2) of this AD, as applicable.

(1) If the part number of the flap drive transmission shows that no discrepant torque brake is installed, no further action is required by this AD.

(2) If the part number of the flap drive transmission shows that a discrepant torque brake may be installed, within the compliance time required by paragraph (a) of this AD: Inspect the part number of the torque brake to verify whether it is a discrepant torque brake, per the Accomplishment Instructions of the service bulletin.

(i) If the part number of the torque brake shows that it is not a discrepant torque brake, no further action is required by this AD.

(ii) If the part number of the torque brake shows that it is a discrepant torque brake: Within the compliance time required by paragraph (a) of this AD either replace the transmission with a new, improved transmission or rework the existing transmission by replacing the torque brake with a new or reworked torque brake having the part number specified in the service bulletin; per the Accomplishment Instructions of the service bulletin.

Spares

(b) As of December 31, 2001, no person shall install on any airplane any transmission or torque brake assembly of the trailing edge flaps at positions 2 or 7, as identified in the ''Existing Part Number'' column of Paragraph 2.E. of Boeing Service Bulletin 747–27–2374, dated November 18, 1999.

Alternative Methods of Compliance

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

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

Special Flight Permit

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

Incorporation by Reference

(e) The actions shall be done in accordance with Boeing Service Bulletin 747–27–2374, dated November 18, 1999. This incorporation by reference was approved previously by the Director of the Federal Register as of December 31, 2001 (66 FR 58918, November 26, 2001). Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(f) The effective date of this amendment remains December 31, 2001.

Issued in Renton, Washington, on February 7, 2002.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–3588 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

Oral Dosage Form New Animal Drugs; Carprofen

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Pfizer, Inc. The supplemental NADA provides for a once daily, 2-milligram per pound (mg/lb) dosage of carprofen, by oral chewable tablet, for the relief of pain and inflammation associated with osteoarthritis in dogs.

DATES: This rule is effective February 14, 2002.

FOR FURTHER INFORMATION CONTACT: Melanie R. Berson, Center for Veterinary Medicine (HFV–110), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–7540, e-mail: mberson@cvm.fda.gov.

SUPPLEMENTARY INFORMATION: Pfizer, Inc., 235 East 42d St., New York, NY 10017–5755, filed a supplement to approved NADA 141–111 that provides for veterinary prescription use of RIMADYL (carprofen) Chewable Tablets for the relief of pain and inflammation associated with osteoarthritis in dogs. The supplemental NADA provides for a once daily, 2-mg/lb dosage for the oral chewable tablet dosage form. The supplemental application is approved as of November 26, 2001, and the regulations are amended in 21 CFR 520.309 to reflect the approval. The basis of approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of 21 CFR part 20 and 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9

a.m. and 4 p.m., Monday through Friday.

The agency has determined under 21 CFR 25.33(d)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 520

Animal drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 520 is amended as follows:

PART 520–ORAL DOSAGE FORM NEW ANIMAL DRUGS

1. The authority citation for 21 CFR part 520 continues to read as follows:

Authority: 21 U.S.C. 360b.

2. Section 520.309 is amended in paragraph (a) by removing ''of'' and by revising paragraph (d)(1) to read as follows:

§ 520.309 Carprofen.

* * * * *

(d) * * *

(1) *Amount.* 2 mg per pound (/lb) of body weight once daily or 1 mg/lb twice daily.

* * * * *

Dated: February 5, 2002.

Stephen F. Sundlof,

Director, Center for Veterinary Medicine.

[FR Doc. 02–3682 Filed 2–13–02; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 522

Implantation or Injectable Dosage Form New Animal Drugs; Florfenicol

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Schering-Plough Animal Health Corp. The supplement provides for changing a pathogen genus from *Pasteurella* to *Mannheimia* on labeling of florfenicol injectable solution.

DATES: This rule is effective February 14, 2002.

FOR FURTHER INFORMATION CONTACT: Naba K. Das, Center for Veterinary Medicine (HFV–133), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–7569, e-mail: ndas@cvm.fda.gov.

SUPPLEMENTARY INFORMATION: Schering-Plough Animal Health Corp., 1095 Morris Ave., P.O. Box 3182, Union, NJ 07083, is the sponsor of NADA 141–063 that provides for use of NUFLOR (florfenicol) Injectable Solution in cattle. Schering-Plough Animal Health Corp. filed a supplemental NADA providing for changing a pathogen genus from *Pasteurella* to *Mannheimia* on product labeling. The NADA is approved as of November 8, 2001, and the regulations are amended in § 522.955 (21 CFR 522.955) to reflect the approval. Section 522.955 is also being amended to reflect an updated format. Approval of this supplemental NADA did not require review of safety or effectiveness data; therefore, a freedom of information summary is not required.

The agency has determined under 21 CFR 25.33(a)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 522

Animal drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 522 is amended as follows:

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

1. The authority citation for 21 CFR part 522 continues to read as follows:

Authority: 21 U.S.C. 360b.

2. Section 522.955 is amended by revising the section heading and by revising paragraphs (a), (d)(1)(i), (d)(1)(ii), and (d)(1)(iii) to read as follows:

§ 522.955 Florfenicol.

(a) *Specifications.* Each milliliter of solution contains 300 milligrams (mg) of florfenicol.

* * * * *

(d) * * *

(1) * * *

(i) *Amount.* 20 mg per kilogram (/kg) of body weight as an intramuscular injection. A second dose should be administered 48 hours later.

(A) *Indications for use.* For treatment of bovine respiratory disease (BRD) associated with *Mannheimia (Pasteurella) haemolytica*,*P. multocida*, and *Haemophilus somnus*. For treatment of bovine interdigital phlegmon (foot rot, acute interdigital necrobacillosis, infectious pododermatitis) associated with *Fusobacterium necrophorum* and*Bacteroides melaninogenicus*.

(B) [Reserved]

(ii) *Amount.* 40 mg/kg body weight as a single subcutaneous injection.

(A) *Indications for use.* As in paragraph (d)(1)(i)(A) of this section; for control of respiratory disease in cattle at high risk of developing BRD associated with *M. (Pasteurella) haemolytica*, *P. multocida*, and *H. somnus*.

(B) [Reserved]

(iii) *Limitations.* Do not slaughter within 28 days of last intramuscular treatment or within 38 days of subcutaneous treatment. Do not use in female dairy cattle 20 months of age or older. Use may cause milk residues. A withdrawal period has not been established in preruminating calves. Do not use in calves to be processed for veal. Federal law restricts this drug to use by or on the order of a licensed veterinarian.

* * * * *

Dated: January 31, 2002.

Claire M. Lathers,

Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

[FR Doc. 02–3680 Filed 2–13–02; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 522 and 556

Implantation or Injectable Dosage Form New Animal Drugs; Zeranol

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule, technical amendment.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a new animal drug application (NADA) filed by Schering-Plough Animal Health Corp. The NADA provides for use of a subcutaneous ear implant containing zeranol in pasture cattle for increased rate of weight gain. FDA is also amending the regulations to add the acceptable daily intake (ADI) for total residues of zeranol.

DATES: This rule is effective February 14, 2002.

FOR FURTHER INFORMATION CONTACT: Daniel A. Benz, Center for Veterinary Medicine (HFV–126), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–0223, e-mail: dbenz@cvm.fda.gov.

SUPPLEMENTARY INFORMATION: Schering-Plough Animal Health Corp., 1095 Morris Ave., P.O. Box 3182, Union, NJ 07083, filed NADA 141–192 for RALGRO LA (zeranol), a subcutaneous ear implant containing 138 milligrams (mg) zeranol. The implants are used for increased rate of weight gain for up to 210 days in pasture cattle (slaughter, stocker, and feeder steers, and heifers). The application is approved as of November 1, 2001, and the regulations are amended in § 522.2680 (21 CFR 522.2680) to reflect the approval. The basis of approval is discussed in the freedom of information summary.

Section 522.2680 is also being amended to reflect a current format for regulations pertaining to cattle ear implants. This action is being taken to improve the clarity and readability of the regulations. In addition, the regulations are amended in 21 CFR 556.760 by adding the previously established ADI for total residues of zeranol, and editorially, to reflect current format.

In accordance with the freedom of information provisions of 21 CFR part 20 and 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

Under section 512(c)(2)(F)(ii) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(c)(2)(F)(ii)), this approval for food-producing animals qualifies for 3 years of marketing exclusivity beginning November 1, 2001, because the application contains substantial evidence of the effectiveness of the drug involved, any studies of animal safety, or, in the case of food-producing animals, human food safety studies (other than bioequivalence or residue studies) required for the approval and conducted or sponsored by the applicant.

The agency has carefully considered the potential environmental impact of this action and has concluded that the action will not have a significant impact on the human environment and that an environmental impact statement is not required. FDA's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects

21 CFR Part 522

Animal drugs.

21 CFR Part 556

Animal drugs, Foods.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 522 and 556 are amended as follows:

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

1. The authority citation for 21 CFR part 522 continues to read as follows:

Authority: 21 U.S.C. 360b.

2. Section 522.2680 is amended by revising paragraphs (a), (d)(1)(i), (d)(2)(i), (d)(3)(i), and (d)(3)(ii), and by adding paragraph (d)(4) to read as follows:

§ 522.2680 Zeranol.

(a) *Specifications*. Each pellet contains 12, 18, or 20 milligrams (mg) zeranol.

* * * * *

(d) *Conditions of use*—(1) *Beef cattle*—(i) *Amount*. 36 mg zeranol (one implant consisting of 3 pellets, each pellet containing 12 mg zeranol) per implant dose.

* * * * *

(2) *Feedlot lambs*—(i) *Amount*. 12 mg zeranol (one implant consisting of 1 pellet containing 12 mg zeranol) per implant dose.

* * * * *

(3) *Steers fed in confinement for slaughter*—(i) *Amount*. 72 mg zeranol (one implant consisting of 6 pellets, each pellet containing 12 mg zeranol) per implant dose.

(ii) *Indications for use*. For increased rate of weight gain and improved feed efficiency.

* * * * *

(4) *Pasture cattle (slaughter, stocker, feeder steers, and heifers)*—(i) *Amount*. 138 mg zeranol (one implant consisting of 7 pellets, each of 6 pellets containing 20 mg zeranol and a seventh pellet containing 18 mg zeranol) per implant dose.

(ii) *Indications for use*. For increased rate of weight gain.

(iii) *Limitations*. Implant subcutaneously in ear only.

PART 556—TOLERANCES FOR RESIDUES OF NEW ANIMAL DRUGS IN FOOD

3. The authority citation for 21 CFR part 556 continues to read as follows:

Authority: 21 U.S.C. 342, 360b, 371.

4. Section 556.760 is amended by redesignating paragraphs (a) and (b) as paragraphs (b)(1), and (b)(2), respectively, by revising newly redesignated paragraph (b)(1), and by adding paragraph (a) to read as follows:

§ 556.760 Zeranol.

(a) *Acceptable daily intake (ADI)*. The ADI for total residues of zeranol is 0.00125 milligrams per kilogram of body weight per day.

(b) *Tolerances*—(1) *Cattle*. Tolerances for residues of zeranol in edible tissues are not needed.

* * * * *

Dated: February 1, 2002.

Stephen F. Sundlof,

Director, Center for Veterinary Medicine.

[FR Doc. 02–3681 Filed 2–13–02; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 558

New Animal Drugs for Use in Animal Feeds; Bacitracin Methylene Disalicylate and Zoalene

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Alpharma, Inc. The supplemental NADA provides for using approved single-ingredient bacitracin methylene disalicylate and zoalene Type A medicated articles to make two-way combination drug Type C medicated feeds used for the management of necrotic enteritis and coccidiosis in replacement and broiler chickens.

DATES: This rule is effective February 14, 2002.

FOR FURTHER INFORMATION CONTACT: Steven D. Vaughn, Center for Veterinary Medicine (HFV–130), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–7580, e-mail: svaughn@cvm.fda.gov.

SUPPLEMENTARY INFORMATION: Alpharma, Inc., One Executive Dr., P.O. Box 1399, Fort Lee, NJ 07024, filed supplemental NADA 141–085 that provides for combining approved BMD (10, 25, 30, 40, 50, 60, or 75 grams per pound (g/lb) bacitracin methylene disalicylate) and ZOAMIX (113.5 g/lb zoalene) Type A medicated articles to make two-way combination drug Type C medicated chicken feeds containing 50 or 100 to 200 g/ton bacitracin methylene disalicylate and 36.3 to 113.5 or 113.5 g/ton zoalene. The combination Type C feeds containing 50 g/ton bacitracin methylene disalicylate and 36.3 to 113.5 g/ton zoalene are used as an aid in the prevention of necrotic enteritis caused or complicated by *Clostridium* spp. or other organisms susceptible to bacitracin and for the development of active immunity to coccidiosis in replacement chickens. The combination Type C feeds containing 100 to 200 g/ton bacitracin methylene disalicylate and 36.3 to 113.5 g/ton zoalene are used as an aid in the control of necrotic enteritis caused or complicated by *Clostridium* spp. or other organisms susceptible to bacitracin and for the development of active immunity to coccidiosis in replacement chickens. The combination Type C feeds containing 50 g/ton bacitracin methylene disalicylate and 113.5 g/ton zoalene are used as an aid in the prevention of necrotic enteritis caused or complicated by *Clostridium* spp. or other organisms susceptible to bacitracin and for the prevention and control of coccidiosis in broiler chickens. The combination Type C feeds containing 100 to 200 g/ton bacitracin methylene disalicylate and 113.5 g/ton zoalene are used as an aid in the control of necrotic enteritis caused or complicated by *Clostridium* spp. or other organisms susceptible to bacitracin and for the prevention and control of coccidiosis in broiler chickens. The supplemental NADA is approved as of November 30, 2001, and the regulations are amended in 21 CFR 558.680 to reflect the approval. The basis of approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of 21 CFR part 20 and 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

FDA has determined under 21 CFR 25.33(a)(2) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 558

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 558 is amended as follows:

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

1. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: 21 U.S.C. 360b, 371.

2. Section 558.680 is amended by redesignating paragraphs (a), (b), and (c) as paragraphs (b), (c), and (d), respectively; by adding new paragraph (a); by revising newly redesignated paragraph (b); and in the table in paragraph (d)(1) by adding in item (i) after the entry for ''Arsanilic acid 90 (0.01%) plus penicillin 2.4 to 50'' the entries for ''Bacitracin methylene disalicylate 50'' and ''Bacitracin methylene disalicylate 100 to 200'', and by adding in item (ii) after the entry for ''Bacitracin 4 to 50 plus roxarsone 22.7 to 45.4 (0.0025% to 0.005%)'' the entries for ''Bacitracin methylene disalicylate 50'' and ''Bacitracin methylene disalicylate 100 to 200'' to read as follows:

§ 558.680 Zoalene.

(a) *Specifications.* Type A medicated article containing 25 percent zoalene.

(b) *Approvals.* See No. 046573 in § 510.600(c) of this chapter.

* * * * *

(d) * * *

(1) * * *

Zoalene in grams/ton	Combination in grams/ton	Indications for use	Limitations
* *	* *	* *	*
(i) 36.3–113.5 (0.004–0.0125%)	* * *	* * *	* * *
	Bacitracin methylene disalicylate 50	Replacement chickens; development of active immunity to coccidiosis; as an aid in the prevention of necrotic enteritis caused or complicated by *Clostridium* spp. or other organisms susceptible to bacitracin.	Feed continuously as sole ration as in subtable in this item (i); grower ration not to be fed to birds over 14 weeks of age. Bacitracin methylene disalicylate as provided by 046573 in § 510.600(c) of this chapter.

Zoalene in grams/ton	Combination in grams/ton	Indications for use	Limitations
	Bacitracin methylene di salicylate 100 to 200	Replacement chickens; development of active immunity to coccidiosis; as an aid in the control of necrotic enteritis caused or complicated by *Clostridium* spp. or other organisms susceptible to bacitracin.	Feed continuously as sole ration as in subtable in this item (i). To control necrotic enteritis, start medication at first clinical signs of disease; vary bacitracin dosage based on the severity of infection; administer continuously for 5 to 7 days or as long as clinical signs persist, then reduce bacitracin to prevention level (50 grams/ton). Bacitracin methylene disalicylate as provided by 046573 in § 510.600(c) of this chapter.
* *	* *	* *	*
(ii) 113.5 (0.0125%)	* * *	* * *	* * *
	Bacitracin methylene di salicylate 50	Broiler chickens; prevention and control of coccidiosis; as an aid in the prevention of necrotic enteritis caused or complicated by *Clostridium* spp. or other organisms susceptible to bacitracin.	Feed continuously as sole ration. Bacitracin methylene disalicylate as provided by 046573 in § 510.600(c) of this chapter.
	Bacitracin methylene di salicylate 100 to 200	Broiler chickens; prevention and control of coccidiosis; as an aid in the control of necrotic enteritis caused or complicated by *Clostridium* spp. or other organisms susceptible to bacitracin.	Feed continuously as sole ration. To control necrotic enteritis, start medication at first clinical signs of disease; vary bacitracin dosage based on the severity of infection; administer continuously for 5 to 7 days or as long as clinical signs persist, then reduce bacitracin to prevention level (50 grams/ton). Bacitracin methylene disalicylate as provided by 046573 in § 510.600(c) of this chapter.
* *	* *	* *	*

* * * * *

Dated: February 1, 2002.

Claire M. Lathers,

Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

[FR Doc. 02–3614 Filed 2–13–02; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF TRANSPORTATION

Saint Lawrence Seaway Development Corporation

33 CFR Part 402

[Docket No. SLSDC 2002–11529]

RIN 2135–AA14

Tariff of Tolls

AGENCY: Saint Lawrence Seaway Development Corporation, DOT.

ACTION: Final rule.

SUMMARY: The Saint Lawrence Seaway Development Corporation (SLSDC) and the St. Lawrence Seaway Management Corporation (SLSMC) of Canada, under international agreement, jointly publish and presently administer the St. Lawrence Seaway Tariff of Tolls in their respective jurisdictions. The Tariff sets forth the level of tolls assessed on all commodities and vessels transiting the facilities operated by the SLSDC and the SLSMC. The SLSDC is revising its regulations to reflect the fees and charges charged by the SLSMC in Canada starting in the 2002 navigation season, which are effective only in Canada.

DATES: This rule is effective on March 18, 2002.

FOR FURTHER INFORMATION CONTACT: Marc C. Owen, Chief Counsel, Saint Lawrence Seaway Development Corporation, 400 Seventh Street, SW, Washington, DC 20590, (202) 366–6823.

SUPPLEMENTARY INFORMATION: The Saint Lawrence Seaway Development Corporation (SLSDC) and the St. Lawrence Seaway Management Corporation (SLSMC) of Canada, under international agreement, jointly publish and presently administer the St. Lawrence Seaway Tariff of Tolls in their respective jurisdictions. (The Tariff is called the Schedule of Fees and Charges in Canada.) The amendments are described in the following summary.

The Tariff sets forth the level of tolls assessed on all commodities and vessels transiting the facilities operated by the SLSDC and the SLSMC. The SLSDC is revising § 402.8, ''Schedule of tolls'', to reflect the fees and charges charged by the SLSMC in Canada starting in the 2002 navigation season. The changes affect the tolls for commercial vessels and are applicable only in Canada as the collection of the U.S. portion of tolls for commercial vessels is waived by law (33 U.S.C. 988a(a)).

Regulatory Evaluation

This regulation involves a foreign affairs function of the United States and therefore Executive Order 12866 does not apply. This regulation has also been evaluated under the Department of Transportation's Regulatory Policies and Procedures and the regulation is not considered significant under those procedures and its economic impact is expected to be so minimal that a full economic evaluation is not warranted.

Regulatory Flexibility Act Determination

The Saint Lawrence Seaway Development Corporation certifies that this regulation will not have a significant economic impact on a substantial number of small entities. The St. Lawrence Seaway Tariff of Tolls primarily relates to commercial users of the Seaway, the vast majority of whom are foreign vessel operators. Therefore, any resulting costs will be borne mostly by foreign vessels.

Environmental Impact

This regulation does not require an environmental impact statement under the National Environmental Policy Act (49 U.S.C. 4321, *et seq.*) because it is not a major federal action significantly affecting the quality of human environment.

Federalism

The Corporation has analyzed this rule under the principles and criteria in Executive Order 13132, dated August 4, 1999, and has determined that the rule does not have sufficient federalism implications to warrant a Federalism Assessment.

Unfunded Mandates

The Corporation has analyzed this rule under title II of the Unfunded Mandates Reform Act of 1995 (Public Law 104–4, 109 Stat. 48) and determined that it does not impose unfunded mandates on State, local, and tribal governments and the private sector requiring a written statement of economic and regulatory alternatives.

Paperwork Reduction Act

This regulation has been analyzed under the Paperwork Reduction Act of 1995 and does not contain new or modified information collection requirements subject to the Office of Management and Budget review.

List of Subjects in 33 CFR Part 402

Vessels, Waterways.

Accordingly, the Saint Lawrence Seaway Development Corporation amends 33 CFR part 402, Tariff of Tolls, as follows:

PART 402—TARIFF OF TOLLS

1. The authority citation for part 402 continues to read as follows:

Authority: 33 U.S.C. 983(a), 984(a)(4), and 988, as amended; 49 CFR 1.52.

2. § 402.8 is revised to read as follows:

§ 402.8 Schedule of tolls.

Item No. and description of charges	Rate ($) Montreal to or from Lake Ontario (5 locks)	Rate ($) Welland Canal—Lake Ontario to or from Lake Erie (8 locks)
1. Subject to item 3, for complete transit of the Seaway, a composite toll, comprising:		
(1) a charge per gross registered ton of the ship, applicable whether the ship is wholly or partially laden, or is in ballast, and the gross registered tonnage being calculated according to prescribed rules for measurement in the United States or under the International Convention on Tonnage Measurement of Ships, 1969, as amended from time to time.	0.0883	0.1436
(2) a charge per metric ton of cargo as certified on the ship's manifest or other document, as follows:		
(*a*) bulk cargo	0.9164	0.6072
(*b*) general cargo	2.2081	0.9717
(*c*) steel slab	1.9984	0.6956
(*d*) containerized cargo	0.9164	0.6072
(*e*) government aid cargo	N/a	N/a
(*f*) grain	0.5630	0.6072
(*g*) coal	0.5410	0.6072
(3) a charge per passenger per lock	1.3028	1.3028
(4) a charge per lock for transit of the Welland Canal in either direction by cargo ships:		
(*a*) loaded	N/a	484.93
(*b*) in ballast	N/a	358.29
2. Subject to item 3, for partial transit of the Seaway	20 per cent per lock of the applicable charge under items 1 (1) and (2) plus the applicable charge under items 1 (3) and (4).	13 per cent per lock of the applicable charge under items 1(1) and (2) plus the applicable charge under items 1 (3) and (4)
3. Minimum charge per ship per lock transited for full or partial transit of the Seaway.	16.24	16.24
4. A rebate applicable for the 2001 navigation season to the rates of item 1 to 3.	Rebate of 1.5%	Rebate of 1.5%
5. A charge per pleasure craft per lock transited for full or partial transit of the Seaway, including applicable federal taxes[1].	20.00	20.00

[1] The applicable charge at the Saint Lawrence Seaway Development Corporation's locks (Eisenhower, Snell) is $20 U.S. or $30 Canadian per lock. The other amounts are in Canadian dollars and are for the Canadian share of tolls. The collection of the U.S. portion of tolls for commercial vessels is waived by law (33 U.S.C. 988a(a)).

Issued at Washington, DC on February 8, 2002.

Saint Lawrence Seaway Development Corporation.

Albert S. Jacquez,

Administrator.

[FR Doc. 02–3559 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–61–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AK87

Claims Based on Exposure to Ionizing Radiation

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends VA regulations governing the establishment of service connection for polycythemia vera due to radiation exposure in service. This amendment clarifies that although VA does not consider polycythemia vera to be a ''radiogenic disease'' under its adjudication regulations, a veteran is not precluded from claiming service connection for this condition on a direct-incurrence basis due to exposure to ionizing

radiation in service. This final rule simply reflects legislative changes and case law requirements.

DATES: *Effective Date:* February 14, 2002.

FOR FURTHER INFORMATION CONTACT: Beth McCoy, Consultant, Regulations Staff, Compensation and Pension Service (211A), Department of Veterans Affairs, 575 N. Pennsylvania St., Suite 309, Indianapolis, IN 46237, (317) 226–5209 extension 3058.

SUPPLEMENTARY INFORMATION: In the ''Veterans' Dioxin and Radiation Exposure Compensation Standards Act,'' Public Law 98–542, Congress concluded that VA had no specific guidelines, standards, or criteria for use in deciding claims for entitlement to disability benefits based on exposure to ionizing radiation. Thus, Congress required VA to undertake rulemaking to specify, among other things, which diseases result from exposure to ionizing radiation in service and the circumstances under which VA would award benefits to veterans on the basis of claimed radiation-related disabilities.

The Act established the ''Veterans Advisory Committee on Environmental Hazards'' and required VA to consult with this Committee in the development of the new regulations. Section 5 of the Act specifically required VA to determine whether service connection could be granted based on exposure to ionizing radiation for the following diseases: soft tissue sarcoma, porphyria cutanea tarda, chloracne, leukemia, malignancies of the thyroid, female breast, lung, bone, liver and skin, and polycythemia vera. Based on the advice of the Committee, VA concluded that service connection can be granted for all of these diseases except polycythemia vera and implemented the provisions of the governing statute by publishing 38 CFR 3.311b.

Although over the years VA added several conditions to the list, VA treated the list of radiogenic diseases in § 3.311b (later recodified as § 3.311) as an exclusive list and generally denied service connection based on radiation exposure for any disease not included on that list. However, the U.S. Court of Appeals for the Federal Circuit in *Combee* v. *Brown*, 34 F.3d 1039 (Fed. Cir. 1994), held that Public Law 98–542 did not authorize VA to establish an exclusive list of radiogenic diseases for which a claimant might establish entitlement to direct service connection under § 3.311. Following the Combee decision, Congress amended 38 U.S.C. 1113(b) to provide that nothing in section 5 of Public Law 98–542 shall be construed to prevent granting of service connection for any disease or disorder shown by sound judgment to have been incurred in or aggravated by active duty service.

VA subsequently amended § 3.311 (60 FR 9627, February 21, 1995) to permit consideration of service connection for any disease other than polycythemia vera if a claimant cites or submits competent scientific or medical evidence that the claimed disease may be induced by ionizing radiation.

The list of radiogenic diseases in § 3.311(b)(2) is not an exclusive list. The fact that VA has determined that polycythemia vera is not a radiogenic disease does not deprive claimants of the opportunity to cite or submit evidence showing that polycythemia vera may be induced by exposure to ionizing radiation. We are amending § 3.311(b) to indicate that if a claimant cites or submits evidence showing polycythemia vera may be induced by exposure to ionizing radiation, VA will obtain a dose estimate, forward the claim for review by the Under Secretary for Benefits, and request an advisory medical opinion from the Under Secretary for Health under the provisions of § 3.311.

This final rule simply reflects legislative changes and case law requirements. Thus, there is a basis for dispensing with prior notice and comment and delayed effective date provisions of 5 U.S.C. 552 and 553.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3520).

Executive Order 12866

This document has been reviewed by the Office of Management and Budget Under Executive Order 12866.

Regulatory Flexibility Act

Because no notice of proposed rule making was required in connection with the adoption of this final rule, no regulatory flexibility analysis is required under the Regulatory Flexibility Act (5 U.S.C. 601–612). Even so, the Secretary hereby certifies that this regulatory amendment will not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final flexibility analysis requirements of sections 603 and 604.

The Catalog of Federal Domestic Assistance numbers are 64.102, 64.109 and 64.110.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Approved: October 30, 2001.

Anthony J. Principi,

Secretary of Veterans Affairs.

For the reasons set forth in the preamble, 38 CFR part 3 is amended as follows:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. In § 3.311, paragraphs (b)(3) and (b)(4) are revised to read as follows:

§ 3.311 Claims based on exposure to ionizing radiation.

* * * * *

(b) * * *

(3) Public Law 98–542 requires VA to determine whether sound medical and scientific evidence supports establishing a rule identifying polycythemia vera as a radiogenic disease. VA has determined that sound medical and scientific evidence does not support including polycythemia vera on the list of known radiogenic diseases in this regulation. Even so, VA will consider a claim based on the assertion that polycythemia vera is a radiogenic disease under the provisions of paragraph (b)(4) of this section. (Authority: Pub. L. 98–542, section 5(b)(2)(A)(i), (iii)).

(4) If a claim is based on a disease other than one of those listed in paragraph (b)(2) of this section, VA shall nevertheless consider the claim under the provisions of this section provided that the claimant has cited or submitted competent scientific or medical evidence that the claimed condition is a radiogenic disease.

* * * * *

[FR Doc. 02–3676 Filed 2–13–02; 8:45 am]

BILLING CODE 8320–01–U

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 3 and Part 4

RIN 2900–AK66

Special Monthly Compensation for Women Veterans Who Lose a Breast as a Result of a Service-Connected Disability

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs adjudication regulations to provide for payment of special monthly compensation for a woman veteran who loses one or both breasts as a result of service-connected disability. The intended effect of this amendment is to implement legislation authorizing VA to provide this benefit.

DATES: *Effective Date:* This amendment is effective March 18, 2002.

FOR FURTHER INFORMATION CONTACT: Caroll McBrine, M.D., Consultant, Policy and Regulations Staff (211A), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 273–7230.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of July 20, 2001 (66 FR 37940–37941), we published a proposal to implement section 302 of the Veterans Benefits and Health Care Improvement Act of 2000, Public Law 106–419, 114 Stat. 1822, 1853 which amended 38 U.S.C. 1114(k) by providing entitlement to special monthly compensation (SMC) if a woman veteran suffers the anatomical loss of one or both breasts (including loss by mastectomy) as a result of service-connected disability. We proposed to amend 38 CFR 3.350(a), which is titled ''Special monthly compensation ratings,'' by adding new paragraph (7) to define ''anatomical loss of a breast'' for purposes of this benefit as requiring ''complete surgical removal of breast tissue (or the equivalent loss of breast tissue due to injury).'' This includes radical mastectomy, modified radical mastectomy, and simple (or total) mastectomy, but not wide local excision (including partial mastectomy, lumpectomy, tylectomy, segmentectomy, and quadrantectomy).

We received 19 comments on the proposed regulation, one from the Vietnam Veterans of America, one from the Disabled American Veterans, and 17 from individuals. Fifteen commenters supported the proposal, many very strongly.

Three commenters, while supporting the proposal, felt that men should also receive SMC for a mastectomy. Public Law 106–419, Section 302, 114 Stat. at 1853, authorizes this benefit only ''in the case of a woman veteran,'' and we therefore have no legal authority to award SMC to male veterans based on anatomical loss of one or both breasts.

One commenter inquired about whether this rulemaking would encourage women veterans to choose mastectomy over lumpectomy. We do not believe that payment of this additional benefit for complete surgical removal of breast tissue will influence a woman's decision about what procedure to undergo in order to rid her body of cancer. Rather, we believe that this decision, like other medical decisions, will be based on many factors and will be made in consultation with her physician. Moreover, VA has statutory authority to award SMC only for anatomical loss of one or both breasts and a lumpectomy clearly does not constitute such loss.

The same commenter inquired about the rationale for paying SMC for a mastectomy. The commenter asked whether a mastectomy impinges on an individual's ability to do a job and whether SMC is intended to negate mental anguish. The commenter also asked whether there is disability, i.e., restricted ability to earn income, after an individual's recovery from a mastectomy is complete. Another commenter objected to payment of SMC based on anatomical loss of a breast because a mastectomy does not interfere with the ability to hold a job or earn a living.

Generally, basic rates of wartime disability compensation are based on the average impairment in earning capacity resulting from a particular disability, as set forth in the Schedule for Rating Disabilities. 38 U.S.C. 1155. Congress, however, has authorized payment of SMC based on noneconomic factors resulting from a service-connected disability such as personal inconvenience, social inadaptability, or the profound nature of the disability. See S. Rep. No. 82–1681, at 2, 130–31 (1952); H.R. Rep. No. 89–6, at 4 (1965). Congress has authorized SMC for anatomical loss of a breast, and VA is obligated to carry out 38 U.S.C. 1114(k), as amended by Public Law 106–419.

One commenter felt that anatomical loss of a breast is not a service-connected disability and that SMC should be paid only if the breast surgery took place on active duty. Another commenter inquired about whether a veteran must develop the condition that results in loss of a breast or breasts while on active duty. Another commenter opposed paying this benefit at all because there is no evidence that anything in service could have caused breast cancer.

New 38 U.S.C. 1114(k) provides SMC if the loss of one or both breasts occurred ''as the result of a service-connected disability.'' ''Service connected'' means that a disability was incurred or aggravated in line of duty in the active military, naval, or air service. 38 U.S.C. 101(16). ''Line of duty'' means that, at the time the injury or disease causing the disability occurred, the veteran was in active military, naval, or air service and that the injury or disease was not the result of the veteran's own willful misconduct or abuse of alcohol or drugs. 38 U.S.C. 105(a). Thus, a disability need not be the result of exposure to contaminants, chemicals, or drugs during service, as one of the commenters suggested, in order to be service connected. Further, if a woman veteran contracts breast cancer while on active duty, any disability resulting from the cancer would be service connected and SMC would be payable for a resulting mastectomy, irrespective of when the operation occurred. If a veteran is diagnosed with breast cancer after service, any resulting disability would be service connected, and SMC would be payable for a resulting mastectomy, if the evidence establishes that the cancer was incurred during service or during a post-service presumptive period. 38 CFR 3.303(a). The statute entitles women who have anatomical loss of one or both breasts to this benefit, and VA is obligated to pay the benefit as directed by Congress. Again, if the disability causing the mastectomy is service connected, a woman veteran would be entitled to SMC, irrespective of when her surgery occurred.

One commenter asked whether SMC would be paid for prophylactic mastectomies. We will pay SMC for any mastectomy that is medically determined to be secondary to, or necessary to treat, a service-connected condition.

Two commenters objected to restricting this benefit to those who have had a complete mastectomy, rather than including those with less extensive breast surgery such as wide local excision that they maintain can result in ''significant'' anatomical loss. They feel that VA's definition of the statutory term ''anatomical loss'' in new section 3.350(a)(7) as requiring loss of all breast tissue is contrary to 38 U.S.C. 1114(k) and Congress' intent. 38 U.S.C. 1114(k), to which Congress added loss of one or both breasts as a basis for SMC, clearly

distinguishes between anatomical loss and loss of use of a body part. Section 1114(k) provides SMC if a veteran, as a result of a service-connected disability, ''has suffered the anatomical loss or loss of use of one or more creative organs, or one foot, or one hand, or both buttocks,'' or, in the case of a woman veteran, ''the anatomical loss of one or both breasts.'' Anatomical loss for purposes of section 1114(k) in each case means loss of the entire body part, although less than complete anatomical loss may qualify as ''loss of use''. For example, when VA pays SMC due to less than complete removal of a testicle, it is paid on the basis of loss of use, rather than anatomical loss, of the affected organ. (See 38 CFR 3.350(a)(1).) Given the plain language of section 302 of Public Law 106–419, providing SMC for ''anatomical loss of one or both breasts (including loss by mastectomy),'' we believe that the definition of this phrase in new section 3.350(a)(7), requiring complete removal of a breast in order to receive SMC, is in accord with 38 U.S.C. 1114(k).

One of these commenters noted that, in the preamble to the proposed rule, VA chose complete peroneal nerve paralysis as an analogous situation to anatomical loss of one or both breasts and said that a much better analogy is loss of use of a testicle, where SMC is awarded based on a reduction in the size of the organ.

SMC is payable under 38 U.S.C. 1114(k) for ''the anatomical loss or loss of use of one or more creative organs.'' Consistent with section 1114(k), 38 CFR 3.350(a)(1)(i) states that loss of a creative organ (such as a testicle) means acquired absence of the organ. Section 3.350(a)(1)(i)(a) and (b) also define loss of use of one testicle as the situation where either the diameters of the affected testicle are reduced to one-third of the corresponding diameters of the paired normal testicle, or the diameters of the affected testicle are reduced to one-half or less of the corresponding normal testicle and there is alteration of consistency so that the affected testicle is considerably harder or softer than the corresponding normal testicle. We believe that defining ''anatomical loss'' of a breast as ''complete surgical removal of breast tissue'' is consistent with defining loss of a creative organ to mean ''acquired absence'' of the organ. Since Congress provided no statutory authority to pay SMC for loss of use of one or both breasts, we make no change based on this comment.

One of the commenters also said that VA requirements for finding ''anatomical loss'' of other body parts present even more compelling evidence that it has not approached this rulemaking fairly and objectively because under 38 CFR 4.71a, diagnostic codes 5126 to 5131, VA considers the amputation of four or five fingers to constitute anatomical loss of a hand. The footnotes under these diagnostic codes state ''Entitled to [SMC]'' but do not indicate whether SMC is based on anatomical loss of a hand or loss of use of a hand. The language of 38 CFR 3.350(a)(2)(i), dealing with SMC ratings for loss of use of a hand, however, makes it clear that the situations cited in diagnostic codes 5126 to 5131 constitute loss of use of a hand for purposes of SMC. Section 3.350(a)(2)(i) states that ''[l]oss of use of a hand . . . will be held to exist when no effective function remains other than that which would be equally well served by an amputation stump at the site of election below elbow . . . with use of a suitable prosthetic appliance.'' We therefore make no change based on these comments.

VA appreciates the comments submitted in response to the proposed rule, which is now adopted without change.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3520).

Regulatory Flexibility Act

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. The reason for this certification is that this amendment would not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Order 12866

This final rule has been reviewed by the Office of Management and Budget under Executive Order 12866.

The Catalog of Federal Domestic Assistance program numbers are 64.104 and 64.109.

List of Subjects

38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Veterans, Vietnam.

38 CFR Part 4

Disability benefits, Individuals with disabilities, Pensions, Veterans.

Approved: January 9, 2002.

Anthony J. Principi,

Secretary of Veterans Affairs.

For the reasons set out in the preamble, 38 CFR part 3 is amended as set forth below:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. In § 3.350, paragraph (a) introductory text, the first sentence is revised; and a new paragraph (a)(7) is added immediately following the authority citation for paragraph (a)(6), to read as follows:

§ 3.350 Special monthly compensation ratings.

* * * * *

(a) * * * Special monthly compensation under 38 U.S.C. 1114(k) is payable for each anatomical loss or loss of use of one hand, one foot, both buttocks, one or more creative organs, blindness of one eye having only light perception, deafness of both ears, having absence of air and bone conduction, complete organic aphonia with constant inability to communicate by speech or, in the case of a woman veteran, the anatomical loss of one or both breasts (including loss by mastectomy).* * *

* * * * *

(7) Anatomical loss of a breast exists when there is complete surgical removal of breast tissue (or the equivalent loss of breast tissue due to injury). As defined in 38 CFR 4.116, radical mastectomy, modified radical mastectomy, and simple (or total) mastectomy result in anatomical loss of a breast, but wide local excision, with or without significant alteration of size or form, does not.

(Authority: 38 U.S.C. 501, 1114(k))

* * * * *

PART 4—SCHEDULE FOR RATING DISABILITIES

Subpart B—Disability Ratings

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

Authority: 38 U.S.C. 1155, unless otherwise noted.

4. Section 4.116, Note 2 is amended by removing ''one or more creative organs,'' and adding, in its place, ''one or more creative organs or anatomical loss of one or both breasts,'.

5. Diagnostic code 7626 in 38 CFR 4.116 is revised to read as follows:

§ 4.116 Schedule of ratings—gynecological conditions and disorders of the breast.

	Rating
* * * * *	
7626 Breast, surgery of:	
Following radical mastectomy:	
Both	[1]80
One	[1]50
Following modified radical mastectomy:	
Both	[1]60
One	[1]40
Following simple mastectomy or wide local excision with significant alteration of size or form:	
Both	[1]50
One	[1]30
Following wide local excision without significant alteration of size or form:	
Both or one	0
Note: For VA purposes:	

[1] *Radical mastectomy* means removal of the entire breast, underlying pectoral muscles, and regional lymph nodes up to the coracoclavicular ligament.

[2] *Modified radical mastectomy* means removal of the entire breast and axillary lymph nodes (in continuity with the breast). Pectoral muscles are left intact.

[3] *Simple (or total) mastectomy* means removal of all of the breast tissue, nipple, and a small portion of the overlying skin, but lymph nodes and muscles are left intact.

[4] *Wide local excision* (including partial mastectomy, lumpectomy, tylectomy, segmentectomy, and quadrantectomy) means removal of a portion of the breast tissue.

* * * * *

[FR Doc. 02–3677 Filed 2–13–02; 8:45 am]

BILLING CODE 8320–01–U

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AK89

Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA)

AGENCY: Department of Veterans Affairs

ACTION: Interim final rule; Correction.

SUMMARY: In a document published in the **Federal Register** on January 30, 2002 (67 FR 4357), VA amended its medical regulations concerning the ''Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA)'' That interim final rule implemented the provisions of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 and the Veterans' Survivor Benefits Improvements Act of 2001. This document makes a correction in § 17.274(c)(ii) by changing the reference to the effective date of the reduced cost-sharing catastrophic cap from January 1, 2001 to January 1, 2002 to reflect the correct date established by statute.

EFFECTIVE DATE: This document is effective on February 14, 2002.

FOR FURTHER INFORMATION CONTACT: Susan Schmetzer, Chief, Policy & Compliance Division, VA Health Administration Center, P.O. Box 65020, Denver, CO 80206–9020, telephone (303) 331–7552.

In rule FR Doc. 02–2206 published on January 30, 2002 (67 FR 4357), make the following correction: on page 4359, in paragraph (c)(ii), third column, ''January 1, 2001'' is amended to read ''January 1, 2002''.

Approved: February 7, 2002.

Thomas O. Gessel,

Director, Office of Regulations Management, Office of General Counsel, Department of Veterans Affairs.

[FR Doc. 02–3675 Filed 2–13–02; 8:45 am]

BILLING CODE 8320–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 82

RIN 0920–ZA00

Methods for Radiation Dose Reconstruction Under the Energy Employees Occupational Illness Compensation Act of 2000

AGENCY: Department of Health and Human Services.

ACTION: Interim Final Rule; Reopening of Comment Period.

SUMMARY: The Department of Health and Human Services (DHHS), is reopening the comment period for the interim final rule for dose reconstruction for certain claims for cancer under the Energy Employees Occupational Illness Program Act (EEOICPA) that was published in the **Federal Register** on Friday, October 5, 2001. After considering these comments, comments previously received, and comments from the Advisory Board on Radiation and Worker Health (ABRWH) DHHS will publish a final rule.

DATES: Public written comments must be received on or before Friday, March 1, 2002.

ADDRESSES: Submit written comments to: Attention—Dose Reconstruction Comments, Department of Health and Human Services, National Institute for Occupational Safety and Health (NIOSH), Robert A. Taft Laboratories, MS–C34, 4676 Columbia Parkway, Cincinnati, OH 45226, Telephone: (513) 533–8450, Fax: (513) 533–8285, email: *NIOCINDOCKET@CDC.GOV.*

FOR FURTHER INFORMATION CONTACT: Larry Elliott, Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health, 4676 Columbia Parkway, Cincinnati, OH 45226, Telephone (513) 841–4498 (this is not a toll free number). Information requests may also be submitted by e-mail to *OCAS@CDC.GOV.*

SUPPLEMENTARY INFORMATION: On October 5, 2001, HHS published an interim final rule establishing methods for radiation dose reconstruction to be conducted for certain cancer claims filed under EEOICPA, Public Law 106–398 [See FR Vol. 66, No. 194, 50978]. The notice included a public comment period that ended November 5, 2001. However, DHHS requested the ABRWH to conduct a review of its dose reconstruction methods.

The ABRWH held its first meeting in Washington, DC on January 22–23, 2002. Due to the ABRWH's intensive work on the statutorily required technical review of the proposed probability of causation rule, the ABRWH was unable to complete the requested review of the interim final rule. Public comments, both written and oral, were accepted for inclusion in the docket on both the interim final rule and proposed rulemaking prior to and during the ABRWH meeting. The public comment period closed on the last day of the ABRWH meeting, January 23, 2002.

To allow the ABRWH ample opportunity to complete their review of and comments on the interim final rule, the public comment period for the interim final rule on dose reconstruction will be re-opened until Friday, March 1, 2002. This will allow the ABRWH to have at least one more meeting to prepare their comments on the interim final rule, and to accept further written and oral comments from the general public at its next meeting.

All written comments on the interim final rule for dose reconstruction must be received at the Docket Office on or before Friday, March 1, 2002. Written and oral comments made during the meeting(s) of the ABRWH prior to Friday, March 1, 2002 will also be included in the docket for the interim final rule.

Dated: February 12, 2002.

Tommy G. Thompson,

Secretary.

[FR Doc. 02–3809 Filed 2–12–02; 3:00 pm]

BILLING CODE 4160–17–U

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

45 CFR Part 2553

RIN 3045–AA31

Retired and Senior Volunteer Program; Amendments

AGENCY: Corporation for National and Community Service.

ACTION: Final rule.

SUMMARY: The amendments to the Regulation governing the Retired and Senior Volunteer Program include: improving access of persons with limited English speaking proficiency; and increasing sponsor flexibility to use project resources as needed.

DATES: These regulations take effect February 14, 2002.

FOR FURTHER INFORMATION CONTACT: John B. Keller, 202–606–5000, ext. 285.

SUPPLEMENTARY INFORMATION: The Corporation published a notice of proposed rulemaking (NPRM) for the Retired and Senior Volunteer Program 45 CFR part 2553 in the **Federal Register** at 66 FR 56793, November 13, 2001.

Summary of Main Comments

In response to the Corporation's invitation in the NPRM, the Corporation received 41 letter and/or email responses. Of these, 30 were in full support of the proposed rule, 3 sought clarification, and 8 opposed the proposed rule. The eight opposing the proposed rule voiced specific objection to the following Section:

Section 2553.72 (e), How much of the grant must be budgeted to pay volunteer expenses or cost reimbursements?

Comments: The eight opposing the proposed rule to eliminate the requirement that cost reimbursements for RSVP volunteers be an amount equal to at least 25 percent of the Corporation funds, objected because they feared it would permit the sponsor to use RSVP funds for purposes unrelated to RSVP.

Response: The Corporation response is that all funds approved in the grant award must be used for purposes set forth in the grant application, and may not be used for purposes unrelated to RSVP.

Impact of Various Acts and Executive Orders

After carefully reviewing the changes implemented by this amendment, it has been determined that (1) This is not a significant regulatory action under section 3(f)(4) of Executive Order 12866, ''Regulatory Planning and Review''; and (2) The Regulatory Flexibility Act does not apply because there is no ''significant economic impact on a substantial number of small entities''; (3) The Unfunded Mandates Act of 1995 does not apply because the amendment does not result in any annual expenditures of $100 million by State, local, Indian Tribal governments or the private sector; (4) The Paperwork Reduction Act does not apply because the amendments do not impose any additional reporting or record-keeping requirements; (5) The Small Business Regulatory Enforcement Fairness Act of 1996 does not apply because it is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, and would not result in an annual effect on the economy of $100 million or more; result in an increase in cost or prices; or have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets; and (6) Executive Order 13132: Federalism does not apply because it would not have substantial direct effects on the States or the relationship between the national government and the States.

List of Subjects in 45 CFR Part 2553

Aged, Grant programs—social programs, Volunteers.

For the reasons set forth in the preamble, 45 CFR Part 2553 is revised to read as follows:

PART 2553—THE RETIRED AND SENIOR VOLUNTEER PROGRAM

1. The authority citation for part 2553 continues to read as follows:

Authority: 42 U.S.C. 4950 *et seq.*

2. Revise § 2553.23(c)(2)(iv) to read as follows:

§ 2553.23 What are a sponsor's program responsibilities?

* * * * *

(c) * * *

(2) * * *

(iv) That states the station assures it will not discriminate against RSVP volunteers or in the operation of its program on the basis of race; color; national origin, including individuals with limited English proficiency; sex; age; political affiliation; religion; or on the basis of disability, if the participant or member is a qualified individual with a disability; and

* * * * *

§ 2553.72 [Amended]

3. In § 2553.72, remove paragraph (e).

4. Revise § 2553.73(i) to read as follows:

§ 2553.73 What are grants management requirements?

* * * * *

(i) Written Corporation State Office approval/concurrence is required for a change in the approved service area.

Dated: February 8, 2002.

Tess Scannell,

Director, National Senior Service Corps.

[FR Doc. 02–3601 Filed 2–13–02; 8:45 am]

BILLING CODE 6050–$$–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 02–241, MM Docket No. 01–1, RM–10013]

Digital Television Broadcast Service; Macon, GA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Gannett Georgia, L.P., licensee of station WMAZ–TV, substitutes DTV channel 4 for DTV channel 45 at Macon, Georgia. *See* 66 FR 2396, January 11, 2001. DTV channel 4 can be allotted to Macon, Georgia, in compliance with the principle community coverage requirements of Section 73.625(a) at reference coordinates (32–45–10 N. and 83–33–32 W.) with a power of 5.0, HAAT of 238 meters and with a DTV service population of 683 thousand.

With is action, this proceeding is terminated.

DATES: Effective March 25, 2002.

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Mass Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 01–1, adopted February 1, 2002, and released February 6, 2002. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th

Street, SW., Room CY–A257, Washington, DC. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., CY–B402, Washington, DC, 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

List of Subjects in 47 CFR Part 73

Television, Digital television broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

47 CFR Part 73—[Amended]

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

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622 [Amended]

2. Section 73.622(b), the Table of Digital Television Allotments under Georgia, is amended by removing DTV channel 45 and adding DTV channel 4 at Macon.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Services Division, Mass Media Bureau.

[FR Doc. 02–3572 Filed 2–13–02; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 02–242, MM Docket No. 00–117 , RM–9810]

Digital Television Broadcast Service; Salem, OR

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Paxson Salem License, Inc., licensee of station KPXG(TV), substitutes DTV channel 4 for DTV channel 20 at Salem, Oregon. *See* 65 FR 41620, July 6, 2000. DTV channel 4 can be allotted to Salem in compliance with the principle community coverage requirements of section 73.625(a) at reference coordinates 45–30–58 N. 122–43–59 W. with a power of 17, HAAT of 455 meters and with a DTV service population of 2040 thousand. Since the community of Salem is located within 400 kilometers of the U.S.-Canadian border, concurrence by the Canadian government has been obtained for this allotment. With this action, this proceeding is terminated.

DATES: Effective March 25, 2002.

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Mass Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 00–117, adopted February 1, 2002, and released February 6, 2002. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., CY–B402, Washington, DC, 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

List of Subjects in 47 CFR Part 73

Television, Digital television broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

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

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622 [Amended]

2. Section 73.622(b), the Table of Digital Television Allotments under Oregon, is amended by removing DTV channel 20 and adding DTV channel 4 at Salem.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Services Division, Mass Media Bureau.

[FR Doc. 02–3573 Filed 2–13–02; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 02–256, MM Docket No. 01–301, RM–10207]

Digital Television Broadcast Service; Mississippi State, MS

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Mississippi Authority for Educational Television, licensee of noncommercial station WMAB–TV, Mississippi State, Mississippi, substitutes DTV channel *10 for DTV channel *38. *See* 66 FR 54190, October 26, 2001. DTV channel *10 can be allotted to Mississippi State in compliance with the principle community coverage requirements of Section 73.625(a) at reference coordinates (33–21–14 N. and 89–09–00 W.) with a power of 4.3, HAAT of 349 meters and with a DTV service population of 330 thousand. With this action, this proceeding is terminated.

DATES: Effective March 25, 2002.

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Mass Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 01–301, adopted February 1, 2002, and released February 7, 2002. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

List of Subjects in 47 CFR Part 73

Television, Digital television broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

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

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622 [Amended]

2. Section 73.622(b), the Table of Digital Television Allotments under Mississippi, is amended by removing DTV channel *38 and adding DTV channel *10 at Mississippi State.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Services Division, Mass Media Bureau.

[FR Doc. 02–3575 Filed 2–13–02; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 02–61]

Radio Broadcasting Services; Various Locations

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, on its own motion, editorially amends the Table of FM Allotments to specify the actual classes of channels allotted to various communities. The changes in channel classifications have been authorized in response to applications filed by licensees and permittees operating on these channels. This action is taken pursuant to *Revision of Section 73.3573(a)(1) of the Commission's Rules Concerning the Lower Classification of an FM Allotment,* 4 FCC Rcd 2413 (1989), and the *Amendment of the Commission's Rules to permit FM Channel and Class Modifications [Upgrades] by Applications,* 8 FCC Rcd 4735 (1993).

DATES: Effective February 14, 2002.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, adopted January 2, 2002, and released January 11, 2002. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC, 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

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

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Arkansas, is amended by removing Channel 293A and adding Channel 293C3 at Horseshoe Bend.

3. Section 73.202(b), the Table of FM Allotments under Illinois, is amended by removing Channel 258B and adding Channel 258C1 at Quincy.

4. Section 73.202(b), the Table of FM Allotments under New York, is amended by removing Channel 292C3 and adding Channel 292C2 at Saranac Lake.

5. Section 73.202(b), the Table of FM Allotments under Oregon, is amended by removing Channel 259C3 and adding Channel 259C2 at Bend.

6. Section 73.202(b), the Table of FM Allotments under Texas, is amended by removing Channel 263C2 and adding Channel 236C2 at College Station.[1]

7. Section 73.202(b), the Table of FM Allotments under Utah, is amended by removing Channel 244C1 and adding Channel 244C at Levan.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 02–3622 Filed 2–13–02; 8:45 am]

BILLING CODE 6712–01–P

[1] This action corrects the FM Table of Allotments to show the allotment of Channel 236C2 at College Station in lieu of Channel 263C2. MM Docket No. 91–58 substituted Channel 236C2 for Channel 297C3 at College Station. *See* 60 FR 35512, July 10, 1995.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 011129286-2022-02; I.D. 110601B]

RIN 0648-AP65

Fisheries of the Northeastern United States; Summer Flounder, Scup, and Black Sea Bass; Quota Counting Procedures

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

ACTION: Final rule and technical amendment.

SUMMARY: NMFS issues this final rule to establish cut-off dates for using landings data from the commercial summer flounder, scup, and black sea bass fisheries to calculate quota overages. The establishment of landings cut-off dates for these fisheries will enable NMFS to establish final adjusted quotas before the beginning of each fishing year on January 1. This final rule also removes regulatory language that specifies publication dates for proposed annual summer flounder, scup, and black sea bass fishing measures and makes a technical change to the regulations to clarify the annual exploitation target for scup.

DATES: Effective February 14, 2002.

ADDRESSES: Copies of the Environmental Assessment (EA) and Regulatory Impact Review (RIR) are available at the following address: National Marine Fisheries Service, One Blackburn Drive, Gloucester, MA 01930-2298. This document is also accessible via the Internet at http://www.nero.nmfs.gov.

FOR FURTHER INFORMATION CONTACT: Allison Ferreira, Fishery Management Specialist, 978-281-9103, or by e-mail at Allison.Ferreira@noaa.gov.

SUPPLEMENTARY INFORMATION:

Background

The Fishery Management Plan for the Summer Flounder, Scup, and Black Sea Bass Fisheries (FMP) requires that NMFS compile all landings information on summer flounder, scup, and black sea bass and compare these landings to the quotas allocated to those fisheries. Landings in excess of quota allocations (overages) are required to be deducted from the quota allocations for the following year. The annual quota allocations are specified through a process that culminates in the publication of final specifications, which are to be published prior to January 1 each year. However, because the fishing year for these fisheries does not end until December 31, it is impossible to have a final accounting of annual landings at the time the annual specifications are published for the fishing year beginning January 1. As a result, NMFS has had to make overage adjustments during the fishing year, when overages were identified.

This regulatory amendment to the FMP resolves the timing problems associated with the overage provisions of the FMP by establishing a cut-off date of October 31 for commercial summer flounder, scup, and black sea bass landings data to be used in setting quotas for the upcoming fishing year. Therefore, this final rule will enable NMFS to compile landings information, determine quota overages, and publish final adjusted annual fishing quotas for these fisheries prior to January 1. If, during the fishing year, NMFS discovers that any overage deduction was made in error, e.g., based on calculated landings that exceeded actual landings for the period concerned, NMFS will restore all

or part of the overage to the appropriate quota allocation and announce the restoration by publishing a notification in the **Federal Register**.

This final rule also removes the regulatory language in §§ 648.100(d), 648.120(c), and 648.140(c) that specifies publication dates for proposed annual summer flounder, scup, and black sea bass fishing measures. The data required to conduct the analyses necessary for developing proposed measures are not available in time to allow publication by the current specified dates of October 15 for proposed annual fishing measures and of February 15 for proposed recreational measures.

The measures contained in this final rule are unchanged from those published in the proposed rule (66 FR 64392, December 13, 2001). A complete discussion of the development of this regulatory amendment appeared in the preamble of the proposed rule and is not repeated here.

As stated previously, this final rule establishes a landings cut-off date of October 31. Landings data for the full fishing year 2000 were used to calculate overages and make necessary adjustments in 2001. This measure is being phased in for the 2002 fishery; only landings from January through October 2001 are being used to determine 2001 overages for purposes of the 2002 quotas. The quota overages reflected in the final 2002 specifications for the summer flounder, scup, and black sea bass fisheries (66 FR 66348, December 26, 2001) are based on landings from January 1 - October 31, 2001. However, the quota adjustments were noted as preliminary in the final rule for 2002 specifications because the proposed rule for this regulatory amendment was still under public comment (66 FR 64392, December 13, 2001). This final rule notifies the public that the preliminary quota adjustments made in the final rule establishing the 2002 specifications for the summer flounder, scup, and black sea bass fisheries are final. For the 2003 fishery and subsequent years, implementation will occur as described below.

Summer Flounder

During November of a given year, all available landings data for January 1 - October 31 of that year will be compiled and compared to that year's state quota allocations. Any overages will be determined and required deductions will be made to state allocations for the upcoming fishing year in the final rule that establishes those measures (to be published by December 31). If any further overage deductions are necessary as a result of landings made during November - December, or as a result of late data submitted for January 1 - October 31, those overages will be applied to the quota allocations for the next fishing year.

Table 1 provides an example of how the quota counting procedures established by this final rule will function with respect to the establishment of the 2002 and 2003 annual summer flounder quota allocations.

TABLE 1. CALCULATION OF SUMMER FLOUNDER QUOTA OVERAGES

Summer Flounder Quotas	2001 Fishing Year		2002 Fishing Year	
	Jan-Oct	Nov-Dec	Jan-Oct	Nov-Dec
2002 quotas adjusted for overages in final 2002 specifications based on:				
2001 Jan-Oct landings compared to annual 2001 quotas	x	.....	.....	.....
2003 quotas adjusted for overages in final 2003 specifications based on:				
2002 Jan-Oct landings compared to annual 2002 quotas	.....	.....	X	.....
2001 Nov-Dec landings compiled during 2002	.....	X	.....	.....
2001 Jan-Oct landings received in 2002 (late reports)	X	.....	.....	.....

Scup

During November of each year, all available landings data for that year for January 1 - October 31 will be compiled and compared to that year's Winter I (Jan-Apr) and Summer (May-Oct) quota allocations. Any overages will be determined and required deductions will be made to the Winter I and/or Summer allocations for the upcoming fishing year in the final rule that establishes those measures (to be published by December 31).

By June 30 of the following year, all available landings data for the prior year's Winter II quota period (November-December) will be compiled and compared to the Winter II quota allocation for that year. Any overages will then be determined and required deductions will be made to the Winter II allocation for the current fishing year. The public will be informed of this adjustment in a **Federal Register** notification published in July of the current fishing year. Any further overages identified as the result of late data submitted for any of a given year's quota periods will be applied to the quota allocations for the next fishing year.

Table 2 provides an example of how the quota counting procedures established in this final rule will function with respect to the establishment of the 2002 and 2003 annual scup quota allocations.

TABLE 2. CALCULATION OF SCUP QUOTA OVERAGES

Scup Quotas	2001 Fishing Year		2002 Fishing Year	
	Jan-Oct	Nov-Dec	Jan-Oct	Nov-Dec
2002 quotas for Winter I and Summer quota periods adjusted for overages in final 2002 specifications based on:				
2001 Jan-Oct landings compared to annual 2001 Winter I and Summer quotas	x	.....	.....	.....

TABLE 2. CALCULATION OF SCUP QUOTA OVERAGES—Continued

Scup Quotas	2001 Fishing Year		2002 Fishing Year	
	Jan-Oct	Nov-Dec	Jan-Oct	Nov-Dec
2002 quota for Winter II quota period adjusted for overages in FEDERAL REGISTER notice published July 2002, based on:				
2001 Nov-Dec landings compared to 2001 Winter II quota	.....	X	.....	.....
2003 quotas for Winter I and Summer quota periods adjusted for overages in final 2003 specifications based on:				
2002 Jan-Oct landings compared to 2002 Winter I and Summer quotas	.....	.....	X	.....
Additional 2001 Jan-Dec landings compiled during 2002 (late reports)	X	X	.....	.....
2003 quota for Winter II adjusted for overages in FEDERAL REGISTER notice published in July 2003, based on:				
2002 Nov-Dec landings compared to 2002 Winter II quota	.....	.....	.....	X

Black Sea Bass

During November of each year, all available landings data for that year for Quarters 1-3 (January 1 - September 30) received by the cut-off date of October 31 will be compiled and compared to that year's quota allocations for Quarters 1, 2 and 3. Any overages will be determined and required deductions will be made to the Quarter 1, 2 or 3 quota allocations for the upcoming fishing year in the final rule that establishes those measures (to be published by December 31).

By June 30 of the following year, all available landings data for the prior year's Quarter 4 quota period (October-December) will be compiled and compared to the Quarter 4 allocation for that year. Any overage will be determined and required deductions will be made to the Quarter 4 allocation for the current fishing year. The public will be informed of this adjustment in a **Federal Register** notification published in July of the current fishing year. Any further overages identified as the result of late data submitted for any of a given year's quota periods will be applied to the quota allocations for the next fishing year.

Table 3 provides an example of how the quota counting procedures established in this final rule will function with respect to the establishment of the 2002 and 2003 annual black sea bass quota allocations.

TABLE 3. CALCULATION OF BLACK SEA BASS QUOTA OVERAGES

Black Sea Bass Quotas	2001 Fishing Year		2002 Fishing Year	
	Jan-Sept	Oct-Dec	Jan-Sept	Oct-Dec
2002 quotas for Quarters 1-3 adjusted for overages in final 2002 specifications based on:				
2001 Jan-Sep landings received by October 31 and compared to annual 2001 Quarter 1-3 quotas	x	.....	.....	.....
2002 quota for Quarter 4 adjusted for overages in FEDERAL REGISTER notice published July 2002, based on:				
2001 Oct-Dec landings compared to 2001 Quarter 4 quota	.....	X	.....	.....
2003 quotas for Quarters 1-3 adjusted for overages in final 2003 specifications based on:				
2002 Jan-Sept landings received by Oct 31 and compared to 2002 Quarter 1-3 quotas	.....	.....	X	.....
Additional 2001 Jan-Dec landings compiled during 2002 (late reports)	X	X	.....	.....
2003 quota for Quarter 4 adjusted for overages in FEDERAL REGISTER notice published in July 2003, based on:				
2002 Oct-Dec landings compared to 2002 Quarter 4 quota	.....	.....	.....	X

Comments and Responses

One comment was received in support of the proposed measures, which NMFS is implementing through this final rule. The commentor stated its support for the proposed means of calculating quota overages for the summer flounder, scup, and black sea bass fisheries, and also supported the removal of the regulatory language specifying publication dates for annual management measures for these fisheries. The commentor felt that this regulatory amendment would address many of their concerns regarding the timing of annual specifications for the summer flounder, scup, and black sea bass fisheries.

Response: Comment is acknowledged.

Changes From the Proposed Rule

This final rule makes a technical amendment to § 648.120(a), which specifies the annual exploitation targets

for scup. In Amendment 8 to the FMP the exploitation target specified for 2002 and thereafter was Fmax. The value of F_{max} estimated in Amendment 8 corresponded to an exploitation rate of 19 percent and thus § 648.120(a) included that value. However, the F_{max} estimate has changed and the 19-percent figure currently contained in the regulatory text is no longer correct. Therefore, the regulatory text is revised to clarify that the annual target exploitation rate is associated with F_{max}, rather than a fixed percentage. There are no other changes from the proposed rule.

Classification

This final rule has been determined to be not significant for purposes of Executive Order 12866.

In accordance with 5 U.S.C. 553(b)(B), the Administrator finds that advance notice and public comment on the portion of this rule that implements the technical change in the regulations for specifying the annual target exploitation rate for scup are not necessary. This technical change is not substantive. It merely modifies the regulations by incorporating a reference to F(max) instead of the numerical value of the exploitation rate associated with a specific value of F(max) since F(max) is not a constant and may change slightly over time. This modification is consistent with the FMP. Further, this technical change corrects a previous NMFS action that inadvertently removed this text from the Code of Federal Regulations and reinserted the numerical value of the exploitation rate associated with a previous estimate of F(max) that is no longer correct. This inadvertent revision was inconsistent with the FMP. The application of the exploitation rate associated with the current value of F(max) during the specification process resulted in a negligible change to the quota calculation. Any change to the overall quota would be further minimized and dispersed as the quota is allocated into the three quota periods. Any impacts that would be experienced by individual fishermen as a consequence of a change in the overall quota would be de minimus.

This final rule's removal of publication date requirements for proposed annual fishing measures for these fisheries and modification of the procedure for tabulating landings in order to calculate quota overages are not substantive. These changes merely inform the public of the change in the agency's process for tabulating landings data in order to calculate overages for the upcoming and subsequent fishing year. This process does not change the proposition that all landings in excess of a state or period quota during a fishing year constitute an overage. As is currently the practice, changes to annual quotas to reflect the impacts of landings on the summer flounder, scup and black sea bass stocks would be made pursuant to future rulemakings. Because none of the measures in this final rule is substantive, the 30-day delay in effectiveness required by 5 U.S.C. 553(d) does not apply.

This final rule does not contain policies with federalism implications, as that term is defined in Executive Order 13132.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that the proposed rule for this action would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was published within the proposed rule. No comments were received regarding the economic impacts of this action. As a result no regulatory flexibility analysis was prepared.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

February 7, 2002.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 648.100, the first sentence of paragraph (d) introductory text, and paragraph (d)(1)(ii) are revised to read as follows:

§ 648.100 Catch quotas and other restrictions.

* * * * *

(d) After such review, the Regional Administrator will publish a proposed rule in the **Federal Register** to implement a coastwide commercial quota, a recreational harvest limit, and additional management measures for the commercial fishery. * * *

(1) * * *

(ii) All summer flounder landed for sale in a state shall be applied against that state's annual commercial quota, regardless of where the summer flounder were harvested. Any landings in excess of the commercial quota in any state will be deducted from that state's annual quota for the following year in the final rule that establishes the annual state-by-state quotas. The overage deduction will be based on landings for the current year through October 31, and on landings for the previous calendar year that were not included when the overage deduction was made in the final rule that established the annual quota for the current year. If the Regional Administrator determines during the fishing year that any part of an overage deduction was based on erroneous landings data that were in excess of actual landings for the period concerned, he/she will restore the overage that was deducted in error to the appropriate quota allocation. The Regional Administrator will publish a notice in the **Federal Register** announcing such restoration.

* * * * *

3. In § 648.120, paragraphs (d)(4), (d)(5), and (d)(6) are removed; paragraphs (a) and (c) are revised; and paragraph (d)(3) is added to read as follows:

§ 648.120 Catch quotas and other restrictions.

(a) *Annual review.* The Scup Monitoring Committee shall review the following data, subject to availability, on or before August 15 of each year: Commercial, recreational and research data; current estimates of fishing mortality; stock status; recent estimates of recruitment; virtual population analysis results; levels of noncompliance by fishermen or individual states; impact of size/mesh regulations; impact of gear on the mortality of scup; and any other relevant information. This review will be conducted to determine the allowable levels of fishing and other restrictions necessary to achieve the F that produces the maximum yield per recruit (F_{max}).

* * * * *

(c) *Annual fishing measures.* The Demersal Species Committee shall review the recommendations of the Scup Monitoring Committee. Based on these recommendations and any public comment, the Demersal Species Committee shall recommend to the MAFMC measures necessary to assure that the specified exploitation rate will not be exceeded. The MAFMC's recommendation must include supporting documentation, as appropriate, concerning the environmental and economic impacts of

the recommendations. The Regional Administrator shall review these recommendations and any recommendations of the Commission. After such review, NMFS will publish a proposed rule to implement a commercial quota in the **Federal Register**, specifying the amount of quota allocated to each of the three periods, landings limits for the Winter I and Winter II periods, the percentage of landings attained during the Winter I fishery at which the landing limits will be reduced, a recreational harvest limit, and additional management measures for the commercial fishery. If the Regional Administrator determines that additional recreational measures are necessary to assure that the specified exploitation rate will not be exceeded, he or she will publish a proposed rule in the **Federal Register** to implement additional management measures for the recreational fishery. After considering public comment, the Regional Administrator will publish a final rule in the **Federal Register** to implement annual measures.

(d) * * *

(3) All scup landed for sale in any state during a quota period shall be applied against the coastwide commercial quota for that period, regardless of where the scup were harvested. Any current year landings in excess of the commercial quota in any quota period will be deducted from that quota period's annual quota in the following year as prescribed below:

(i) For the Winter I and Summer quota periods, landings in excess of the allocation will be deducted from the appropriate quota period for the following year in the final rule that establishes the annual quota. The overage deduction will be based on landings for the current year through October 31, and on landings for the previous calendar year that were not included when the overage deduction was made in the final rule that established the period quotas for the current year. If the Regional Administrator determines during the fishing year that any part of an overage deduction was based on erroneous landings data that were in excess of actual landings for the period concerned, he/she will restore the overage that was deducted in error to the appropriate quota allocation. The Regional Administrator will publish a notice in the **Federal Register** announcing the restoration.

(ii) For the Winter II quota period, landings in excess of the allocation will be deducted from the Winter II period for the following year in a notice published in the **Federal Register** during July of the following year. The overage deduction will be based on landings information available for the Winter II period as of June 30 of the following year. If the Regional Administrator determines during the fishing year that any part of an overage deduction was based on erroneous landings data that were in excess of actual landings for the period concerned, he/she will restore the overage that was deducted in error to the appropriate quota allocation. The Regional Administrator will publish a notice in the **Federal Register** announcing the restoration.

* * * * *

4. In § 648.140, paragraphs (c) and (d)(2) are revised and paragraphs (d)(3) and (d)(4) are added to read as follows:

§ 648.140 Catch quotas and other restrictions.

* * * * *

(c) *Annual fishing measures.* The Demersal Species Committee shall review the recommendations of the Black Sea Bass Monitoring Committee. Based on these recommendations and any public comment, the Demersal Species Committee shall make its recommendations to the Council with respect to the measures necessary to assure that the target exploitation rate specified in paragraph (a) of this section is not exceeded. The Council shall review these recommendations and, based on the recommendations and public comment, make recommendations to the Regional Administrator with respect to the measures necessary to assure that the target exploitation rate specified in paragraph (a) of this section is not exceeded. Included in the recommendation will be supporting documents, as appropriate, concerning the environmental and economic impacts of the final rule. The Regional Administrator will review these recommendations and any recommendations of the Commission. After such review, the Regional Administrator will publish a proposed rule in the **Federal Register** to implement a commercial quota, a recreational harvest limit, and additional management measures for the commercial fishery. If the Regional Administrator determines that additional recreational measures are necessary to assure that the target exploitation rate specified in paragraph (a) of this section will not be exceeded, he or she will publish a proposed rule in the **Federal Register** to implement additional management measures for the recreational fishery. After considering public comment, the Regional Administrator will publish a final rule in the **Federal Register** to implement the measures necessary to assure that the target exploitation rate specified in paragraph (a) of this section is not exceeded.

(d) * * *

(2) All black sea bass landed for sale in the states from North Carolina through Maine by a vessel with a moratorium permit issued under § 648.4(a)(7) shall be applied against that quarter's commercial quota, regardless of where the black sea bass were harvested. All black sea bass harvested north of 35°15.3′ N. lat., and landed for sale in the states from North Carolina through Maine by any vessel without a moratorium permit and fishing exclusively in state waters will be counted against the quota by the state in which it is landed pursuant to the Fishery Management Plan for the Black Sea Bass Fishery adopted by the Commission. The Regional Administrator will determine the date on which the quarterly quota will have been harvested; the EEZ north of 35°15.3′ N. lat. will be closed on that date. The Regional Administrator will publish a notice in the **Federal Register** advising that, upon, and after, that date, no vessel may possess black sea bass in the EEZ north of 35°15.3′ N. lat. during a closure, nor may vessels issued a moratorium permit land black sea bass during the closure. Individual states will have the responsibility to close their ports to landings of black sea bass during a closure pursuant to the Fishery Management Plan for the Black Sea Bass Fishery adopted by the Commission.

(3) For the Quarter 1 through Quarter 3 quota periods, landings in excess of the quarterly allocations will be deducted from the appropriate quota period allocation for the following year in the final rule that establishes the annual quota. The overage deduction will be based on landings for the current year through September 30, and landings for the previous calendar year that were not included when the overage deduction was made in the final rule that established the quarterly quotas for the current year. If the Regional Administrator determines during the fishing year that any part of an overage deduction was based on erroneous landings data that were in excess of actual landings for the period concerned, he/she will restore the overage that was deducted in error to the appropriate quota allocation. The Regional Administrator will publish a notice in the **Federal Register** announcing the restoration.

(4) For the Quarter 4 quota period, landings in excess of the quarterly allocation will be deducted from the Quarter 4 period allocation for the following year in a notice published in the **Federal Register** during July of the following year. The overage deduction will be based on landings information available for the Quarter 4 period as of June 30 of the following year. If the Regional Administrator determines during the fishing year that any part of an overage deduction was based on erroneous landings data that were in excess of actual landings for the period concerned, he/she will restore the overage that was deducted in error to the appropriate quota allocation. The Regional Administrator will publish a notice in the **Federal Register** announcing the restoration.

* * * * *

[FR Doc. 02–3667 Filed 2–13–02; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 011218304–1304–01; I.D. 021102A]

Fisheries of the Exclusive Economic Zone Off Alaska; Atka Mackerel in the Central Aleutian District

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

ACTION: Closure.

SUMMARY: NMFS is prohibiting directed fishing for Atka mackerel in the Central Aleutian District of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the A season allowance of Atka mackerel total allowable catch (TAC) in this area.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), February 11, 2002, until 1200 hrs, A.l.t., September 1, 2002.

FOR FURTHER INFORMATION CONTACT: Andrew Smoker, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The A season allowance of Atka mackerel TAC in the Central Aleutian District of the BSAI is 11,008 metric tons (mt) as established by an emergency rule implementing 2002 harvest specifications and associated management measures for the groundfish fisheries off Alaska (67 FR 956, January 8, 2002).

In accordance with § 679.20 (d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the A season allowance of the Atka mackerel TAC in the Central Aleutian District will be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 10,008 mt, and is setting aside the remaining 1,000 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20 (d)(1)(iii), the Regional Administrator finds that this directed fishing allowance will be reached. Consequently, NMFS is prohibiting directed fishing for Atka mackerel in the Central Aleutian District of the BSAI.

Maximum retainable bycatch amounts may be found in the regulations at § 679.20(e) and (f).

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, finds that the need to immediately implement this action to prevent exceeding the amount of the A season allowance of Atka mackerel TAC in the Central Aleutian District of the BSAI constitutes good cause to waive the requirement to provide prior notice opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553 (b)(3)(B) and 50 CFR 679.20 (b)(3)(iii)(A), as such procedures would be unnecessary and contrary to the public interest. Similarly, the need to implement these measures in a timely fashion to prevent exceeding the A season allowance of Atka mackerel TAC in the Central Aleutian District of the BSAI constitutes good cause to find that the effective date of this action cannot be delayed for 30 days. Accordingly, under 5 U.S.C. 553 (d), a delay in the effective date is hereby waived.

This action is required by §§ 679.20 and 679.22 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: February 11, 2002.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 02–3652 Filed 2–11–02; 3:54 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 67, No. 31
Thursday, February 14, 2002

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.

FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 114, and 117

[Notice 2002–2]

The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations

AGENCY: Federal Election Commission.

ACTION: Notice of Public Hearing.

SUMMARY: The Federal Election Commission is announcing a public hearing on proposed changes to its regulations to clarify the status of campaign-related Internet activity conducted by individuals, and of hyperlinks and endorsement press releases on Internet Web sites established by corporations and labor organizations.

DATES: The hearing will be held at 10 a.m. on Wednesday, March 20, 2002. Requests to testify must be received on or before March 1, 2002. Persons requesting to testify also must submit written comments by March 1, 2002, if they have not previously filed written comments on the proposed rules.

ADDRESSES: Requests to testify and any accompanying comments should be addressed to Rosemary C. Smith, Assistant General Counsel, and must be submitted in either written or electronic form. Written comments should be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. Faxed comments should be sent to (202) 219–3923, with printed copy follow-up to insure legibility. Electronic mail comments should be sent to internetnprm@fec.gov. Persons sending requests and comments by electronic mail must include their full name, electronic mail address and postal service address within the text of the request or comments. Commission hearings are held in the Commission's ninth floor meeting room, 999 E Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Rosemary C. Smith, Assistant General Counsel, or Richard T. Ewell, Staff Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: On October 3, 2001, the Commission published a Notice of Proposed Rulemaking [''NPRM''] addressing three issues relating to the use of the Internet for campaign-related activity: (1) The application of the volunteer exemption in 2 U.S.C. 431(8)(B)(i) and (ii) to Internet activity by individuals; (2) The status of hyperlinks placed on corporate and labor organization Web sites; and (3) The status of corporate and labor organization press releases that announce candidate endorsements and are made available to the general public on the corporation or labor organization's Web site. 66 FR 50358, *et seq.* (Oct. 3, 2001). The comment period for the NPRM ended on December 3, 2001. Twenty-four comments were received by the Commission in response to the NPRM. Two commenters requested to testify at a public hearing if one is held.

After considering these requests and the other comments received to date in response to the NPRM, the Commission believes a public hearing would be helpful in considering the issues raised in the rulemaking. The hearing will be held at 10 a.m. on March 20, 2002.

Dated: February 8, 2002.

David M. Mason,

Chairman, Federal Election Commission.

[FR Doc. 02–3632 Filed 2–13–02; 8:45 am]

BILLING CODE 6715–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–SW–52–AD]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Model EC120B Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes adopting a new airworthiness directive (AD) for Eurocopter France (ECF) Model EC120B helicopters. This proposal would require inspecting the attachment of the bolted assemblies of the cyclic pitch flight control torque tube (torque tube) for an appropriate locking device. If a bolted assembly is single-locked, the proposed AD would require, if necessary, tightening the self-locking nuts at certain intervals and modifying the torque tube after a certain time. This proposal is prompted by the discovery that some of the attachments of the torque tube were fastened with a single-locking device instead of the intended double-locking device. The actions specified by this proposed AD are intended to prevent separation of the cyclic pitch stick yokes from the torque tube, loss of cyclic control, and subsequent loss of control of the helicopter.

DATES: Comments must be received on or before April 15, 2002.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 2001–SW–52–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137. You may also send comments electronically to the Rules Docket at the following address: *9-asw-adcomments@faa.gov.* Comments may be inspected at the Office of the Regional Counsel between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Richard Monschke, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Rotorcraft Standards Staff, Fort Worth, Texas 76193–0110, telephone (817) 222–5116, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments will be considered before taking action on the proposed rule. The proposals contained in this document may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic,

environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their mailed comments submitted in response to this proposal must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 2001–SW–52–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 2001–SW–52–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

Discussion

The Direction Generale De L'Aviation Civile (DGAC), the airworthiness authority for France, notified the FAA that an unsafe condition may exist on ECF Model EC120B helicopters. The DGAC advises that the design fails to provide double-locking of the attachment pins of the cyclic pitch stick yokes to the torque tube.

ECF has issued Alert Service Bulletin No. 67A003, dated August 2, 2001 (ASB), which specifies inspecting single-locking devices within 50 hours time-in-service (TIS) and modifying single-locking devices to make them double locking within 500 hours TIS or 24 months, whichever occurs first. The DGAC classified this ASB as mandatory and issued AD 2001–373–008(A), dated August 22, 2001, to ensure the continued airworthiness of these helicopters in France.

This helicopter model is manufactured in France and is type certificated for operation in the United States under the provisions of 14 CFR 21.29 and the applicable bilateral agreement. Pursuant to the applicable bilateral agreement, the DGAC has kept the FAA informed of the situation described above. The FAA has examined the findings of the DGAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

This unsafe condition is likely to exist or develop on other helicopter models of the same type design registered in the United States. Therefore, the proposed AD would require determining whether the attachment of the bolted assembly of the torque tube is a single or double-locking device. If the bolted assembly is single-locked, the proposed AD would require repetitively inspecting and, if necessary, tightening the self-locking nuts to a specified torque. The proposed AD would also require modifying the torque tube to provide double locking for the attachment pins of the cyclic pitch stick yokes to the torque tube after a specified time interval. The actions would be required to be accomplished in accordance with the ASB described previously except for the compliance time allowed before the torque tube modification is required. The DGAC and the manufacturer specify modifying the torque tube within 500 hours time-in-service (TIS) or 24 months, whichever occurs first. However, the FAA has determined that, due to the seriousness of this unsafe condition, the torque tube must be modified within the next 250 hours TIS or 12 months, whichever occurs first.

The FAA estimates that 44 helicopters of U.S. registry would be affected by this proposed AD, that it would take approximately 5 work hours per helicopter to accomplish the proposed actions, and that the average labor rate is $60 per work hour. Required parts would cost approximately $195. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $21,780.

The regulations proposed herein 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, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

Eurocopter France: Docket No. 2001–SW–52–AD.

Applicability: Model EC120B helicopters, serial numbers 1001 through 1029 inclusive, certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent separation of the cyclic pitch stick yokes from the cyclic pitch flight control torque tube (torque tube), loss of cyclic control, and subsequent loss of control of the helicopter, accomplish the following:

(a) Within 50 hours time-in-service (TIS), determine whether each attachment of the bolted assembly of the torque tube (attachment) has a single or double-locking device in accordance with the Accomplishment Instructions, paragraph 2.B.1., of Eurocopter France Alert Service Bulletin No. 67A003, dated August 2, 2001 (ASB).

(1) If the attachment has a double-locking device (a castellated self-locking nut with a cotter pin), no further action is required by this AD.

(2) If the attachment has a single-locking device (castellated nut without a cotter pin or a self-locking nut only), in accordance with the Accomplishment Instructions, paragraph 2.B.1., of the ASB, before further flight:

(i) Torque each nut to 0.4 to 0.5 mdaN (36 to 44 inch-lbs), and

(ii) Apply a slippage mark on the nut and torque tube.

(b) At intervals not to exceed 50 hours TIS, inspect the attachment for movement of the locking device indicated by a misalignment of the slippage mark.

(1) If no movement has occurred, record the inspection.

(2) If movement has occurred, replace, retorque, and reapply the slippage mark to the nut in accordance with the Accomplishment Instructions, paragraph 2.B.2., of the ASB.

(c) Within 250 hours TIS or 12 months, whichever occurs first, modify the torque tube in accordance with the Accomplishment Instructions, paragraph 2.B.3., of the ASB.

(d) Modifying the torque tube in accordance with paragraph (c) of this AD is terminating action for the requirements of this AD.

(e) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Regulations Group, Rotorcraft Directorate, FAA. Operators shall submit their requests through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Regulations Group.

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

(f) Special flight permits may be issued in accordance with 14 CFR 21.197 and 21.199 to operate the helicopter to a location where the requirements of this AD can be accomplished.

Note 3: The subject of this AD is addressed in Direction Generale De L'Aviation Civile, (France) AD 2001–373–008(A), dated August 22, 2001.

Issued in Fort Worth, Texas, on January 29, 2002.

Larry M. Kelly,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 02–3580 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–SW–47–AD]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Model AS332C, L, L1, and Model SA330F, G, and J Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes superseding an existing airworthiness directive (AD) for Eurocopter France (ECF) Model AS332C, L, and L1 and Model SA330F, G, and J helicopters. That AD currently requires an inspection to determine the angular play of the tail rotor gearbox (gearbox) at specified intervals. This action would change the measurement limits and the load to be applied to a tail rotor blade (blade) when determining the angular play. This proposal is prompted by a review of design data and a determination that the amount of play can be increased with an increase in the amount of applied load during the inspection. The actions specified by the proposed AD are intended to detect excessive angular play and to prevent failure of a gearbox, loss of tail rotor drive, and subsequent loss of control of the helicopter.

DATES: Comments must be received on or before April 15, 2002.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 2001–SW–47–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137. You may also send comments electronically to the Rules Docket at the following address: *9-asw-adcomments@faa.gov.* Comments may be inspected at the Office of the Regional Counsel between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Uday Garadi, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Rotorcraft Standards Staff, Fort Worth, Texas 76193–0110, telephone (817) 222–5123, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments will be considered before taking action on the proposed rule. The proposals contained in this document may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their mailed comments submitted in response to this proposal must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 2001–SW–47–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 2001–SW–47–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

Discussion

On June 18, 1998, the FAA issued AD 98–06–04, Amendment 39–10633 (63 FR 34790, June 26, 1998) to require an inspection to determine the angular play of the gearbox at specified intervals depending on the amount of play detected. That AD was prompted by an accident involving a Model SA330 helicopter that lost tail rotor drive. An investigation determined that the loss of tail rotor drive was caused by excessive play between the gearbox bevel wheel and the tail rotor driveshaft. The requirements of that AD are intended to prevent failure of the gearbox, loss of tail rotor drive, and subsequent loss of control of the helicopter.

Since the issuance of that AD, ECF has issued Alert Service Bulletin Nos. 05.00.44 and 05.86, both dated January 11, 2001, specifying a check of the angular play of certain gearboxes and to introduce new lower minimum and higher maximum angular play values.

The Direction Generale De L'Aviation Civile (DGAC), which is the airworthiness authority for France, classified these service bulletins as mandatory and issued ADs 1997–332–067(A) R2 and 1997–323–079(A) R2, both dated February 21, 2001, to ensure the continued airworthiness of these helicopters in France.

The DGAC notified the FAA that an unsafe condition may exist on Model AS332 and SA330 helicopters. The DGAC advises of the accident of a Model SA330 helicopter due to loss of the tail rotor drive due to worn splines on the bevel wheel and on the tail rotor drive shaft. The bevel wheel is the output bevel gear in the tail rotor

gearbox. The play is measured between the splines of the bevel gear and the tail rotor driveshaft.

These helicopter models are manufactured in France and are type certificated for operation in the United States under the provisions of 14 CFR 21.29 and the applicable bilateral agreement. Pursuant to the applicable bilateral agreement, France has kept the FAA informed of the situation described above. The FAA has examined the findings of the DGAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

We have identified an unsafe condition that is likely to exist or develop on other helicopters of the same type designs. Therefore, the proposed AD would supersede AD 98–06–04 to change the measurement limits and inspection intervals.

The FAA estimates that 4 helicopters of U.S. registry would be affected by this proposed AD, that it would take approximately 3 work hours per helicopter to accomplish the proposed actions, and that the average labor rate is $60 per work hour. Creating measurement tools would cost approximately $100 per helicopter and it would cost $45,000 to replace a gearbox. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $1120, assuming no gearbox would need to be replaced.

The regulations proposed herein 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, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing Amendment 39–10633 (63 FR 34790, June 26, 1998), and by adding a new airworthiness directive (AD), to read as follows:

Eurocopter France: Docket No. 2001–SW–47–AD. Supersedes AD 98–06–04, Amendment 39–10633, Docket No. 98–SW–11–AD.

Applicability: Model AS332C, L, and L1 and Model SA330F, G, and J helicopters, with tail rotor gearbox (gearbox), part number (P/N) 332A33–0001–all dash numbers, 330A33–0000–all dash numbers, 330A33–0011–all dash numbers (for AS332 models), or 330A33–9109–all dash numbers (for SA330 models), installed, certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To detect excessive angular play in the gearbox and to prevent failure of a gearbox, loss of tail rotor drive, and subsequent loss of control of the helicopter, accomplish the following:

(a) Within 25 hours time-in-service (TIS) for any gearbox with 495 or more hours TIS, inspect each gearbox for play between the splines of the gearbox bevel gear and tail rotor driveshaft in accordance with the Accomplishment Instructions, paragraphs 2.A. through 2.B.4. of Eurocopter France Alert Service Bulletin No. 05.00.44 for the Model AS332 helicopters or No. 05.86 for the Model SA330 helicopters, both Revision 1 and both dated January 11, 2001.

(1) Thereafter, reinspect the gearbox for play:

(i) At intervals not to exceed 520 hours TIS, if the play measurement is 0.30 millimeter (mm) (0.0118 inch) or less for Model SA330 helicopters or 0.44mm (0.0173 inch) or less for Model AS332 helicopters, or

(ii) At intervals not to exceed 100 hours TIS, if the play measurement is greater than 0.30mm and less than 0.65mm (0.0255 inch) for Model SA330 helicopters or greater than 0.44mm and less than 0.75mm (0.0295 inch) for the Model AS332 helicopters.

(2) Before further flight, remove any gearbox if the play measurement is equal to or greater than 0.65mm for Model SA330 helicopters or 0.75mm for Model AS332 helicopters.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Regulations Group, Rotorcraft Directorate, FAA. Operators shall submit their requests through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Regulations Group.

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

(c) Special flight permits will not be issued.

Note 3: The subject of this AD is addressed in Direction Generale De L'Aviation Civile, (France) ADs 1997–322–067(A) R2 and 1997–323–079(A) R2, both dated February 21, 2001.

Issued in Fort Worth, Texas, on February 6, 2002.

David A. Downey,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 02–3581 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–SW–68–AD]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Model EC120B Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes adopting a new airworthiness directive (AD) for Eurocopter France (ECF) Model EC120B helicopters. This proposal would require installing front and side covers to protect the yaw control. This proposal is prompted by the report of a mobile phone falling between the

windshield canopy (canopy) and the cabin floor jamming the yaw control pedal. The actions specified by this proposed AD are intended to prevent an object from sliding between the canopy and the cabin floor, loss of yaw control, and subsequent loss of control of the helicopter.

DATES: Comments must be received on or before April 15, 2002.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 2001–SW–68–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137. You may also send comments electronically to the Rules Docket at the following address: *9-asw-adcomments@faa.gov.* Comments may be inspected at the Office of the Regional Counsel between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Richard Monschke, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Rotorcraft Standards Staff, Fort Worth, Texas 76193–0110, telephone (817) 222–5116, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments will be considered before taking action on the proposed rule. The proposals contained in this document may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their mailed comments submitted in response to this proposal must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 2001–SW–68–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 2001–SW–68–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

Discussion

The Direction General De L'Aviation Civile (DGAC), the airworthiness authority for France, notified the FAA that an unsafe condition may exist on this model helicopter. The DGAC advises of a report of a yaw control jamming caused by an object that slid between the canopy and the cabin floor.

ECF has issued Alert Service Bulletin No. 67A005, dated July 30, 2001 (ASB), which specifies installing a front and side protection on the cabin floor to protect the yaw control. The DGAC classified this ASB as mandatory and issued AD No. 2001–386–007(A), dated September 5, 2001, to ensure the continued airworthiness of these helicopters in France.

This helicopter model is manufactured in France and is type certificated for operation in the United States under the provisions of 14 CFR 21.29 and the applicable bilateral agreement. Pursuant to the applicable bilateral agreement, the DGAC has kept the FAA informed of the situation described above. The FAA has examined the findings of the DGAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

This unsafe condition is likely to exist or develop on other helicopter models of the same type design registered in the United States. Therefore, the proposed AD would require installing front and side covers to protect the yaw control. The actions would be required to be accomplished in accordance with the ASB described previously.

The FAA estimates that 44 helicopters of U.S. registry would be affected by this proposed AD, that it would take approximately 2 work hours per helicopter to accomplish the proposed actions, and that the average labor rate is $60 per work hour. Required parts would cost approximately $851. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $42,724.

The regulations proposed herein 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, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

Eurocopter France: Docket No. 2001–SW–68–AD.

Applicability: Model EC120B helicopters, serial numbers 1001 through 1278, inclusive, certificated in any category.

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

Compliance: Required within 90 days, unless accomplished previously.

To prevent an object from sliding between the canopy and the cabin floor, loss of yaw control, and subsequent loss of control of the helicopter, accomplish the following:

(a) Install front and side covers (protections) to protect the yaw control in accordance with the Accomplishment Instructions, paragraph 2.B., Alert Service Bulletin No. 67A005, dated July 30, 2001 (ASB) except the correct reference to the Aircraft Maintenance Manual in subparagraph 2.B.2 of the ASB is 20–10–00, 3–8. If the helicopter has flight controls at both the pilot and co-pilot stations, front and side protections are required at both stations.

Note 2: Figure 1 of the ASB depicts the right-hand side of the cockpit.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Regulations Group, Rotorcraft Directorate, FAA. Operators shall submit their requests through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Regulations Group.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Regulations Group.

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

Note 4: The subject of this AD is addressed in Direction Generale De L'Aviation Civile (DGAC) 2001–386–007(A), dated September 15, 2001.

Issued in Fort Worth, Texas, on February 6, 2002.

David A. Downey,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 02–3582 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–ANE–48–AD]

RIN 2120–AA64

Airworthiness Directives; Pratt & Whitney JT8D Series Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Supplemental notice of proposed rulemaking; reopening of comment period.

SUMMARY: This notice revises an earlier proposed airworthiness directive (AD), applicable to Pratt & Whitney JT8D series turbofan engines, that would have required revisions to the Time Limits Section (TLS) of the manufacturer's Engine Manuals (EMs) to include required enhanced inspection of selected critical life-limited parts at each piece-part exposure. This proposal would modify the airworthiness limitations section of the manufacturer's manual and an air carrier's approved continuous airworthiness maintenance program to incorporate additional inspection requirements. An FAA study of in-service events involving uncontained failures of critical rotating engine parts indicated the need for mandatory inspections. The mandatory inspections are needed to identify those critical rotating parts with conditions, which if allowed to continue in service, could result in uncontained failures. This action revises the proposed rule by correcting the applicability to Pratt & Whitney (PW) JT8D–1, –1A, –1B, –7, –7A, –7B, –9, –9A, –11, –15, –15A, –17, –17A, –17R, and –17AR series turbofan engines, installed on but not limited to Boeing 727 and 737 series, and McDonnell Douglas DC–9 series airplanes. The actions specified by this proposed AD are intended to prevent critical life-limited rotating engine part failure, which could result in an uncontained engine failure and damage to the airplane.

DATES: Comments must be received by April 15, 2002.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 98–ANE–48–AD, 12 New England Executive Park, Burlington, MA 01803–5299. Comments may be inspected at this location, by appointment, between 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. Comments may also be sent via the Internet using the following address: ''*9-ane-adcomment@faa.gov*.'' Comments sent via the Internet must contain the docket number in the subject line.

FOR FURTHER INFORMATION CONTACT: Christopher Spinney, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7175, fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 98–ANE–48–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRM's

Any person may obtain a copy of this NPRM by submitting a request to the FAA, New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 98–ANE–48–AD, 12 New England Executive Park, Burlington, MA 01803–5299.

Discussion

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to supersede airworthiness directive (AD) 2000–21–08, Amendment 39–11940 (65 FR 65731, November 2, 2000), applicable to JT8D engines, was published as a notice of proposed rulemaking (NPRM) in the **Federal Register** on January 7, 2002 (67 FR 697). That NPRM would have required revisions to the Time Limits Section (TLS) of the manufacturer's Engine Manuals (EMs) to include required enhanced inspection of selected critical life-limited parts at each piece-part exposure. An FAA study of in-service events involving uncontained failures of critical rotating engine parts indicated the need for mandatory inspections. The mandatory inspections are needed to identify those critical rotating parts with conditions, which if allowed to continue in service, could result in uncontained failures. The actions specified by this proposed AD are intended to prevent critical life-limited rotating engine part failure, which could

result in an uncontained engine failure and damage to the airplane.

Since the issuance of that NPRM, the FAA discovered that the Applicability Section of the proposal was incorrect. This Supplmental NPRM corrects that error. The correct applicability is as follows: Pratt & Whitney (PW) JT8D–1, –1A, –1B, –7, –7A, –7B, –9, –9A, –11, –15, –15A, –17, –17A, –17R, and –17AR series turbofan engines, installed on but not limited to Boeing 727 and 737 series, and McDonnell Douglas DC–9 series airplanes.

Since this change expands the scope of the originally proposed rule, the FAA has determined that it is necessary to reopen the comment period to provide additional opportunity for public comment.

Economic Analysis

The FAA estimates that 5821 engines installed on airplanes of US registry would be affected by this proposed AD, that it would take approximately 8 work hours per engine to perform the enhanced inspection for the first stage HP turbine disks. The average labor rate is $60 per work hour. The cost impact of the added inspections per engine is approximately $480 per year, with the approximate total cost for the US fleet of $2,794,080 per year.

Regulatory Impact

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

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing Amendment 39–11940 (65 FR 65731, November 2, 2000 and by adding a new airworthiness directive, to read as follows:

Pratt & Whitney: Docket No. 98–ANE–48–AD: Supersedes AD 2000–21–08, Amendment 39–11940.

Applicability: Pratt & Whitney (PW) JT8D–1, –1A, –1B, –7, –7A, –7B, –9, –9A, –11, –15, –15A, –17, –17A, –17R, and –17AR series turbofan engines, installed on but not limited to Boeing 727 and 737 series, and McDonnell Douglas DC–9 series airplanes.

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

Compliance: Required as indicated, unless already done.

To prevent critical life-limited rotating engine part failure, which could result in an uncontained engine failure and damage to the airplane, accomplish the following:

Inspections

(a) Within the next 30 days after the effective date of this AD, revise the Time Limits Section (TLS) of the JT8D–1, –1A, –1B, –7, –7A, –7B, –9, –9A, –11, –15, –15A, –17, –17A, –17R, and –17AR Turbofan Engine Manual, part number, 481672, and for air carrier operations revise the approved continuous airworthiness maintenance program, by adding the following:

''Critical Life Limited Part Inspection

A. Inspection Requirements:

(1) This section has the definitions for individual engine piece parts and the inspection procedures which are necessary when these parts are removed from the engine.

(2) It is necessary to do the inspection procedures of the piece parts in paragraph B when:

(a) The part is removed from the engine and disassembled to the level specified in paragraph B and

(b) The part has accumulated more than 100 cycles since the last piece part inspection, provided that the part was not damaged or related to the cause for its removal from the engine.

(3) The inspections specified in this paragraph do not replace or make not necessary other recommended inspections for these parts or other parts.

B. Parts Requiring Inspection:

Note: Piece part is defined as any of the listed parts with all the blades removed.

Description	Section	Inspection
Hub (Disk), 1st Stage Compressor:		
Hub Detail—All P/N's	72–33–31	–02, –03, –04
Hub Assembly—All P/N's	72–33–31	–02, –03, –04
2nd Stage Compressor:		
Disk—All P/N's	72–33–33	–02
Disk Assembly—All P/N's	72–33–33	–02
Disk, 13th Stage Compressor: All P/N's	72–36–47	–02
HP Turbine Disk, First Stage w/integral Shaft: All P/N's	72–52–04	–03
HP Turbine, First Stage, w/ Separable shaft:		
Rotor Assembly—All P/N's	72–52–02	–04
Disk—All P/N's	72–52–02	–03
Disk, 2nd Stage Turbine: All P/N's	72–53–16	–02
Disk, 3rd Stage Turbine: All P/N's	72–53–17	–02
Disk (Separable), 4th Stage Turbine: All P/N's	72–53–15	–02
Disk (Integral Disk/Hub), 4th Stage Turbine: All P/N's	72–53–18	–02''

(b) Except as provided in paragraph (c) of this AD, and notwithstanding contrary provisions in section 43.16 of the Federal Aviation Regulations (14 CFR 43.16), these mandatory inspections must be performed using the TLS of the PW JT8D–200 Turbofan Engine Manual.

Alternative Methods of Compliance

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

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

Special Flight Permits

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

Continuous Airworthiness Maintenance Program

(e) FAA-certificated air carriers that have an approved continuous airworthiness maintenance program in accordance with the record keeping requirement of § 121.369 (c) of the Federal Aviation Regulations (14 CFR 121.369 (c)) of this chapter must maintain records of the mandatory inspections that result from revising the TLS of the PW JT8D/09200 Turbofan Engine Manual, and the air carrier's continuous airworthiness program. Alternatively, certificated air carriers may establish an approved system of record retention that provides a method for preservation and retrieval of the maintenance records that include the inspections resulting from this AD, and include the policy and procedures for implementing this alternate method in the air carrier's maintenance manual required by § 121.369 (c) of the Federal Aviation Regulations (14 CFR 121.369 (c)); however, the alternate system must be accepted by the appropriate PMI and require the maintenance records be maintained either indefinitely or until the work is repeated. Records of the piece-part inspections are not required under § 121.380 (a) (2) (vi) of the Federal Aviation Regulations (14 CFR 121.380 (a) (2) (vi)). All other operators must maintain the records of mandatory inspections required by the applicable regulations governing their operations.

Note 3: The requirements of this AD have been met when the engine manual changes are made and air carriers have modified their continuous airworthiness maintenance plans to reflect the requirements in the PW JT8D–200 Turbofan Engine Manual.

Issued in Burlington, Massachusetts, on February 7, 2002.

Francis A. Favara,

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

[FR Doc. 02–3669 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99–NE–32–AD]

RIN 2120–AA64

Airworthiness Directives; Pratt & Whitney Models JT8D–209, –217, –217A, –217C and –219 Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The Federal Aviation Administration (FAA) proposes to supersede an existing airworthiness directive (AD), that is applicable to Pratt & Whitney JT8D models –209, –217, –217A, –217C and –219 turbofan engines. That AD currently requires initial and repetitive fluorescent magnetic particle inspections or fluorescent penetrant inspections of the combustion chamber outer case (CCOC) for cracks, and, if necessary, replacement with serviceable parts. Also, that AD requires a one-time boss material verification, and, if necessary, replacement with serviceable parts. Finally, that AD requires replacement of CCOC's with welded-on bosses with improved, one-piece CCOC's. This proposal would require lower initial inspection thresholds for all CCOC's installed in any JT8D model –209, –217, –217A, –217C or –219 turbofan engine. This proposal is prompted by reports of cracked CCOC's that had accumulated fewer cycles in service than the initial inspection thresholds required by the current AD. Also, a CCOC part number was discovered with incorrect material not identified by serial number in PW JT8D ASB 6359. The actions specified by the proposed AD are intended to prevent uncontained failure of the CCOC, which could cause release of debris, damage to the airplane, or fire.

DATES: Comments must be received by April 15, 2002.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 99–NE–32–AD, 12 New England Executive Park, Burlington, MA 01803–5299. Comments may be inspected at this location, by appointment, between 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. Comments may also be sent via the Internet using the following address: *9-ane-adcomment@faa.gov.* Comments sent via the Internet must contain the docket number in the subject line.

The service information referenced in the proposed rule may be obtained from Pratt & Whitney, 400 Main St., East Hartford, CT 06108; telephone (860) 565–8770, fax (860) 565–4503. This information may be examined, by appointment, at the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA.

FOR FURTHER INFORMATION CONTACT: Christopher Spinney, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7175, fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 99–NE–32–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRM's

Any person may obtain a copy of this NPRM by submitting a request to the FAA, New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 99–NE–32–AD, 12 New England Executive Park, Burlington, MA 01803–5299.

Discussion

On December 8, 1999, the Federal Aviation Administration (FAA) issued airworthiness directive (AD) 99–26–06, Amendment 39–11465 (64 FR 71280, December 21, 1999), to require initial and repetitive fluorescent magnetic particle inspections or fluorescent penetrant inspections of the combustion chamber outer case (CCOC) for cracks, and, if necessary, replacement with serviceable parts. Also, that AD requires a one-time boss material verification, and, if necessary, replacement with serviceable parts. Finally, that AD requires replacement of CCOC's with welded-on bosses with improved, one-piece CCOC's. That action was prompted by a report of an uncontained engine failure caused by fatigue cracks originating at the weld joining the drain boss to the CCOC. That condition, if not corrected, could result in CCOC cracks, which could result in an uncontained engine failure and damage to the airplane.

Since that AD was issued, the FAA has received reports of cracked CCOC's that had accumulated fewer cycles in service than the initial inspection thresholds defined in PW JT8D ASB 6359. Also, a CCOC part number (P/N), 797707, was found with incorrect material that was not identified by serial number in PW ASB JT8D ASB 6359. As a result, PW JT8D ASB 6359 was revised on July 31, 2000, to lower the initial inspection threshold from 15,000 cycles in service (CIS) for P/N 500238–01; 18,000 CIS for all other P/N's installed in JT8D–209, –217, –217A, and –217C engines; and 15,000 CIS for all other P/N's installed in JT8D–219 engines to 12,000 CIS for all P/N's installed in any engine. Also, the revision to PW ASB JT8D ASB A6359 expands the serial number list of P/N 797707 cases to include all CCOC's manufactured with that part number. Some minor editorial revisions to PW JT8D ASB A6359, Revision 1, were subsequently made on August 31, 2001. PW JT8D SB 6291, Revision 2, was also revised to reflect the lower thresholds for inspection and replacement of CCOC's.

Manufacturer's Service Information

The FAA has reviewed and approved the technical contents of PW JT8D ASB No. A6359, Revision 2, dated July 31, 2000; and PW JT8D ASB A6359, Revision 3, dated August 31, 2001, that describe procedures and intervals for inspecting CCOC's for cracks and incorrect material, and PW Service Bulletin (SB) No. 6291, Revision 3, dated August 31, 2001, that describes procedures for installation of CCOC P/N 815556.

FAA's Determination of an Unsafe Condition and Proposed Actions

Since an unsafe condition has been identified that is likely to exist or develop on other Pratt & Whitney JT8D models –209, –217, –217A, –217C and –219 turbofan engines of this same type design, the proposed AD would supersede AD 99–26–06 to require, for PW models JT8D–209, –217, –217A, –217C and –219 engines, inspections and replacement of CCOC's at the lower inspection thresholds and the expanded serial number lists outlined in PW JT8D ASB 6359, Revision 3, dated August 31, 2001; and SB 6291, Revision 2, dated August 31, 2001. The actions are required to be done in accordance with the service bulletins described previously.

Economic Analysis

There are approximately 2,624 engines of the affected design in the worldwide fleet. The FAA estimates that 1,280 engines installed on airplanes of U.S. registry are affected by the current AD and that number would remain the same under this proposed AD. The FAA also estimates that it takes approximately 2.5 work hours per engine to accomplish the required inspections, that the average labor rate is $60 per work hour, and those estimates would not change for the proposed AD. The cost of the required parts has increased since the current AD was issued, and would now cost approximately $46,910 per engine. Based on these figures, the updated total cost impact of the proposed superseding AD on U.S. operators is estimated to be $60,236,800.

Regulatory Analysis

This proposed rule does not have federalism implications, as defined in Executive Order 13132, because 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. Accordingly, the FAA has not consulted with state authorities prior to publication of this proposed rule.

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing Amendment 39–11465, (64 FR 71280), and by adding a new airworthiness directive:

Pratt & Whitney: Docket No. 99–NE–32–AD. Supersedes AD 99–26–06, Amendment 39–11465.

Applicability

This airworthiness directive (AD) is applicable to Pratt & Whitney (PW) models JT8D–209, –217, –217A, –217C, and –219 turbofan engines with combustion chamber outer case (CCOC), part numbers (P/N's) 5000238–01, 797707, 807684, and 815830 installed. These engines are installed on but not limited to McDonnell Douglas MD–80 series airplanes.

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

eliminated, the request should include specific proposed actions to address it.

Compliance

Compliance with this AD is required as indicated, unless already done.

To prevent uncontained failure of the CCOC, which could cause release of debris, damage to the airplane, or fire, do the following:

Inspections

(a) Perform initial and repetitive fluorescent magnetic particle inspections (FMPI) or fluorescent penetrant inspections (FPI) of drain bosses and Ps4 bosses of the CCOC for cracks, and, if necessary, replace with serviceable parts before further flight, in accordance with the procedures and intervals specified in paragraph 1.A. of the Accomplishment Instructions of PW JT8D Alert Service Bulletin (ASB) A6359, Revision 3, dated August 31, 2001.

(b) For all CCOC's P/N 797707 inspect for proper Ps4 and drain boss material, and, if necessary, replace with serviceable parts before further flight, in accordance with the procedures and intervals specified in paragraph 1.B. of the Accomplishment Instructions of PW JT8D ASB A6359, Revision 3, dated August 31, 2001.

Effective Date for Computing Compliance Intervals

(c) Use the effective date of this AD for computing compliance intervals whenever PW JT8D ASB A6359, Revision 3, dated August 31, 2001, refers to the publication date of the ASB.

Terminating Action

(d) At the next part accessibility after the effective date of this AD when the CCOC has accumulated cycles-in-service greater than the initial inspection threshold specified in Table 1 of PW JT8D ASB A6359, Revision 3, dated August 31, 2001, replace the CCOC with a one-piece machined CCOC assembly, P/N 815556, in accordance with PW JT8D Service Bulletin (SB) 6291, dated May 20, 1997, or Revision 1 dated July 9, 1997, or Revision 2, dated August 27,1999, or Revision 3 dated August 31, 2001. Installation of an improved, one-piece CCOC, P/N 815556, constitutes terminating action to the inspections required by this AD.

Definition

(e) For the purpose of this AD, part accessibility is defined as an engine disassembly in which the CCOC is removed from the engine.

Alternative Methods of Compliance

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

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

Special Flight Permits

(g) Special flight permits may be issued in accordance with §§ 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be done.

Issued in Burlington, Massachusetts, on February 7, 2002.

Francis A Favara,

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

[FR Doc. 02–3668 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 382

[OST Docket No. 2002–11473]

RIN 2105–AD04

Reporting Requirements for Disability-Related Complaints

AGENCY: Office of the Secretary, Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to require most certificated U.S. air carriers and foreign air carriers operating to and from the U.S. that conduct passenger-carrying service to record and categorize complaints that they receive alleging inadequate accessibility or discrimination on the basis of disability according to the type of disability and nature of complaint, prepare a summary report of those complaints, submit the report annually to the Department of Transportation's (Department or DOT) Aviation Consumer Protection Division, and retain copies of correspondence and record of action taken on disability-related complaints for three years. Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval to collect information from the public, Federal agencies must solicit public comment on proposed collections of information.

DATES: Interested persons are invited to submit comments regarding this proposal and comments must be received on or before April 15, 2002.

ADDRESSES: Comments on this notice of proposed rulemaking must refer to the docket and notice numbers cited at the beginning of this document and be submitted to the Docket Management Facility of the Office of the Secretary (OST), located on the Plaza Level of the Nassif Building at the U.S. Department of Transportation, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001. The DOT Docket Facility is open to the public from 9 am to 5 pm, Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Blane A. Workie, Office of the General Counsel, Department of Transportation, 400 7th Street, SW., Room 4116, Washington, DC, 20590, 202–366–9342 (voice), (202) 366–0511 (TTY), 202–366–7152 (fax), or *blane.workie@ost.dot.gov* (e-mail). Arrangements to receive this document in an alternative format may be made by contacting the above named individual.

SUPPLEMENTARY INFORMATION:

Background

The Air Carrier Access Act (ACAA, 49 U.S.C. 41705) prohibits discriminatory treatment of persons with disabilities in air transportation. The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (''AIR–21''; Public Law 106–181), signed into law on April 5, 2000, extended the requirements of the Air Carrier Access Act to cover foreign air carriers and required, among other things, that the Secretary of Transportation ''regularly review all complaints received by air carriers alleging discrimination on the basis of disability'' and ''report annually to Congress on the results of such review.'' The only practical way the Department can implement the statutory requirement to review disability complaints received by air carriers and report annually to Congress on the results of the review is by requiring carriers to record and submit disability-related complaint data to the Department.

The NPRM

In an effort to implement the statutory requirements of AIR–21, the Department proposes to require most U.S. air carriers and foreign air carriers to record disability-related complaints that they receive and categorize them in specific groups, submit these data annually to the Department, and retain copies of the disability-related complaints and a record of action for a period of time. The NPRM has six main components on which we specifically solicit comment: (1) The scope/coverage of the rule; (2) the definition of a disability-related complaint; (3) the categories of data collected; (4) the frequency of data reporting; (5) the procedures for submission of data; and (6) the period of record retention.

A. Scope

Under the proposed rule, certificated air carriers that conduct passenger-carrying service would be required to

record, categorize, and submit disability-related complaint data. A certificated air carrier means a U.S. direct air carrier holding a certificate issued under 49 U.S.C. 41102 to conduct passenger and/or cargo and mail operations, or holding an exemption to conduct direct passenger operation under 49 U.S.C. 40109. By definition, a certificated air carrier does not include air taxi operators or commuter air carriers operating under 14 CFR part 298. Some air carriers that would be eligible for air taxi or commuter status have voluntarily chosen to become certificated for operational, legal or public relations reasons.

The proposed rule would not apply to any flights performed by a commuter air carrier, air taxi operator, or certificated air carrier operating only ''small aircraft'' (aircraft with 60 or fewer seats) under 14 CFR part 298. However, if an airline operates both large aircraft (aircraft with more than 60 seats) and small aircraft, then all flights of that airline are covered regardless of the size of the aircraft used on a particular flight. Currently, there are approximately 123 certificated air carriers that hold authority to conduct passenger-carrying service, of which 64 operate large aircraft and 59 operate only small aircraft.

The Department is proposing to apply the rule only to carriers operating larger than 60-seat aircraft, i.e., excluding all commuter carriers and certificated carriers operating only small aircraft, because large certificated air carriers carry 85 percent of the domestic traffic and the Regulatory Flexibility Act encourages agencies to consider flexible approaches to the regulation of small businesses and other small entities that take into account their special needs and problems. The approach taken in this NPRM of exempting carriers operating only small aircraft is consistent with the Department's policy of exempting small entities from regulations when possible. However, we specifically request comment as to whether the Department should expand coverage of the rule to include certificated air carriers operating only aircraft with 60 or fewer seats, commuter carriers, or even air taxi operators.

This NPRM also proposes to require foreign air carriers operating to and from the United States that conduct passenger-carrying service to record, categorize and submit disability-related complaint data. The proposed rule would not apply to flights of foreign airlines between two foreign points. A foreign air carrier means a direct air carrier that is not a citizen of the United States as defined in 49 U.S.C. 40102(a) that holds a foreign air carrier permit issued under 49 U.S.C. 41302 or an exemption issued under 49 U.S.C. 40109 authorizing direct foreign air transportation. The proposed rule would exempt foreign air carriers that are operating only small aircraft (i.e., aircraft designed to have a maximum passenger capacity of 60 or fewer seats or a maximum payload capacity of not more than 18,000 pounds). These airlines are primarily trans-border air taxis operating between the U.S. and Canada, and to a lesser extent between the U.S. and Mexico and the U.S. and the Caribbean. If a foreign airline, such as Air Canada, operates both large and small airplanes, the flights on the small airplanes would still be covered because the airline holds authority to fly large airplanes. The foreign air carriers that we propose to cover are as similar as possible to U.S. air carriers that we propose to cover considering the different legal authority applicable to foreign operators.

Currently, there are 306 foreign air carriers that hold effective economic authority from the Department to serve the United States under 49 U.S.C. 41301 and/or 40109. Of these, 231 hold authority to operate large aircraft using their own aircraft and crews. See OST Docket 2001–10416, DOT Order 2001–8–15. The other 75 are either foreign air carriers that operate only small aircraft or foreign air carriers that conduct U.S. operations by wet lease, in which both an aircraft and crew are leased from a U.S. carrier or from a foreign carrier whose government aviation authority is in compliance with International Civil Aviation Organization (ICAO) standards. This NPRM proposes to cover the 231 foreign air carriers that operate large aircraft using their own aircraft and crews, and the small number of foreign air carriers that operate large aircraft under a wet-lease arrangement with an acceptable carrier to enable their airlines to fly into the United States. Under the wet-lease arrangement, it is the operating carrier (lessee) and not the airline that is providing the aircraft and crew (lessor) that is responsible for recording disability-related complaint data and submitting such data to the Department in an annual report.

B. Definition of Disability-Related Complaint

Because this proposed rule would require covered carriers to record, categorize, and submit disability-related complaint data, it is important that the phrase ''disability-related complaint'' be defined. For purposes of this NPRM, a disability-related complaint is a specific expression of dissatisfaction received from, or submitted on behalf of, an individual with a disability against a covered air carrier or foreign air carrier concerning a difficulty associated with the person's disability, which the person experienced when using or attempting to use the carrier's services. A complaint may be made by letter, comment card, e-mail, telephone call, or in person.

A given contact (e.g., a letter, e-mail message, or phone call) might express more than one complaint. Each disability-related complaint contained in a given contact must be categorized and reported. Service-related complaints (e.g., a late flight, a delayed refund) that have nothing to do with an individual's disability should not be reported to the Department simply because they were made by, or on behalf of, an individual with a disability. When an individual with a disability complains about disability-related matters as well as matters that are not related to his or her disability, the disability-related complaint(s) must be categorized and reported; the complaint(s) that are not related to the disability are not to be categorized or reported under the proposed rule.

In circumstances where a flight that is the subject of a disability-related complaint was a code-sharing flight, the determination of which carrier must report the complaint is driven by passenger perception of the identity of the carrier responsible for the problem. For example, if a passenger flies with ABC Airways from Charlottesville to Washington, DC with a connection from Washington to New York on XYZ Airways (ABC's code-sharing partner), and the passenger has disability-related problems on the ABC Airways portion of the journey but sends a complaint to XYZ Airways, XYZ Airways must record and categorize the complaint and report that complaint. When an individual with a disability complains to a carrier about a disability-related difficulty encountered in connection with service provided by that carrier's code-sharing partner, the carrier that received the complaint should report the complaint since the passenger perceives that carrier as being ultimately responsible for the difficulty.

In a code sharing situation, we are proposing to require that the carrier that receives the complaint from the passenger report the complaint because code-share flights are often marketed by U.S. carriers as their own service. Code sharing is a common industry practice in which one airline offers service in its

own name to a particular city, but some or all of the transportation is provided by another carrier. The two-character airline designator code that is used to identify these flights in schedules and on tickets is the code of the carrier whose name is used rather than that of the carrier actually providing the service. It is important to keep in mind that we are not proposing, in circumstances where a carrier receives a complaint involving another carrier with whom it does not have a code-sharing relationship, that the carrier that received the complaint report that complaint to DOT. In such situations, the carrier would simply forward the complaint to the carrier that is responsible for the airline service.

Disability-related complaints must also be recorded and reported without regard to the carrier's perception of the validity of the complaint—i.e., carriers must record and report complaints that they believe are not justified, as well as complaints about disability-related incidents that do not constitute a violation of the Department's rule on air travel by passengers with disabilities. The proposed rule would require that all disability-related complaint data, regardless of the manner in which a disability-related complaint is submitted or the validity of the complaint, be recorded and categorized by the covered carriers so that the Department can monitor disability complaints received by carriers and report annually to Congress. The Department seeks comments on all of these proposed procedures and definitions.

C. Categories of Data Collected

We propose to require covered carriers to record and categorize disability-related complaints that they receive in a manner similar to the way disability-related complaints are recorded and categorized by the Department's Aviation Consumer Protection Division (ACPD). That division maintains a database covering all of the service-related air travel complaints received by the Department against airlines, including disability-related complaints. Disability-related complaints have two core elements: the nature of the passenger's disability and the nature of the alleged discrimination or service problem related to the disability. ACPD uses the following 13 categories to identify the nature of a passenger's disability: vision impaired, hearing impaired, vision and hearing impaired, mentally impaired, communicable disease, allergies (e.g., food allergies, chemical sensitivity), paraplegic, quadriplegic, other wheelchair, oxygen, stretcher, other assistive device (cane, respirator, etc.), and other disability. ACPD also categorizes the alleged discrimination or service problems related to the disability in the following 12 areas: refusal to board, refusal to board without an attendant, security issues concerning disability, aircraft not accessible, airport not accessible, advance-notice dispute, seating accommodation, failure to provide adequate or timely assistance, problem with storage/damage/delay relating to assistive device, service animal problem, unsatisfactory information, and ''other.'' We are proposing that carriers use the Department's complaint categories to identify the types of complaints that they receive according to the passenger's disability and the nature of the grievance.

It is important to keep in mind that a contact from a passenger may express more than one complaint (i.e., more than one service problem) and a passenger may have more than one disability. We are proposing that in recording and categorizing complaints, carriers treat each disability-related problem as a separate incident, determine the type of service problem for each incident, and then settle on the primary disability that needed to be accommodated for each incident. For instance, consider the example of Jane, who is deaf and a wheelchair user. Jane sends a complaint to ABC Airlines alleging that there was a failure to provide her with ground personnel to assist in pushing the wheelchair at three of the airports through which she traveled and she missed her flight at the fourth airport because the gate agent did not let her know when she should board the aircraft. The carrier should count these disability-related problems as four separate incidents (i.e., four complaints) and should categorize each of them as ''Failure to Provide Assistance.'' In this hypothetical, the carrier should determine that the primary disability that needed to be accommodated for three of the incidents (failure to provide personnel to assist in pushing the wheelchair at three airports) is Jane's mobility impairment, and the primary disability that needed to be accommodated for the other incident (failure to inform Jane about the boarding for her flight) is Jane's deafness. In some cases, it could be more difficult to determine how to select among the 13 categories identifying the passenger's disability and the 12 areas identifying the service problem. We would expect carriers to use reasonableness as a standard in making these determinations. Clearly, the failure to record complaints would be more problematic than would be the occasional failure to properly categorize a complaint because of the judgmental issues involved. We request comment as to whether we should include additional categories for types of disabilities and/or nature of complaints.

D. Frequency of Data Reporting

The proposed rule would require the covered carriers to group disability-related complaints that they receive in specific categories. We estimate that air carriers receive about fifty times more disability-related complaints directly from passengers than the Department receives. During the discovery phase of a private lawsuit against one major air carrier, it was revealed that the carrier, for the period between January 1993 and November 1996, received a total of 5,072 disability-related complaints while DOT received a total of only 142 such complaints against that carrier. Enforcing the Civil Rights of Air Travelers with Disabilities: Recommendations for the Department of Transportation and Congress, National Council on Disability, February 26, 1999, p. 68. In other words, this airline received about 35 disability-related complaints directly from passengers for every disability-related complaint received by DOT against that airline. However, the disability complaint data received by DOT during its own enforcement investigations suggest that air carriers may receive up to a hundred times more disability complaints directly from passengers than the Department receives. Based on complaint data produced by one airline during the discovery phase of litigation and airline complaint data gathered by the Department during its enforcement investigations, our best estimate is that air carriers receive about fifty disability-related complaint for every disability-related complaint received by the Department.

During the 2000 calendar year, the ACPD received a total of 661 disability-related air travel complaints. Assuming that carriers receive about fifty times more disability-related complaints than the Department, we deduce that carriers receive a total of approximately 33,050 disability-related complaints each calendar year. The proposed rule would require the covered carriers to categorize each of these projected 33,050 disability-related complaints according to the passenger's disability and the alleged discrimination or service problem related to the disability. We solicit comments as to the reasonableness of the Department's

estimate of the number of disability-related complaints carriers receive each year.

The NPRM also proposes that carriers annually submit a report summarizing the disability-related complaint data to the Department of Transportation. We are proposing that the first report summarizing disability-related complaint data to the Department of Transportation be submitted by January 26, 2004, for complaints received by carriers during the calendar year 2003. All subsequent submissions will be due on the last Monday in January and would cover data from the prior calendar year. We request comments as to whether annual submission of disability-related complaint data is appropriate or if there are reasons to increase the reporting frequency, e.g. require biannual or quarterly reports. Commenters suggesting increased reporting frequency should include cost estimates.

E. Procedures for Submission of Data

Another important provision of the NPRM concerns the procedure for reporting the disability-related complaint information. The NPRM proposes to require carriers to report a summary of the disability-related complaint data to ACPD in a particular manner, using a disability-related complaint data form identical to the one in the proposed new section 382.70 rather than allowing each airline to develop its own data collection form. In addition, the proposed rule would mandate that carriers submit this disability-related complaint data via a form on the World Wide Web rather than submitting paper copies, disks, or e-mail. The NPRM does provide for limited exceptions in situations where the carrier can demonstrate that it would suffer undue hardship if it were not permitted to submit paper copies or disks of the disability-related complaint data form, or to e-mail the data.

To ensure that using the Web to submit disability complaint information would be easy, reliable, and secure, a specific web page with a registration system and the disability-related complaint data form would be established and its web address would be furnished to the covered carriers. Each carrier would only have to register once. Registering would consist of inputting the name and mailing address of the carrier; the name, telephone number, and e-mail address of a contact person for that carrier; a login name; and a password. Upon providing this information, carriers would receive an automatic computerized acknowledgment that their request for registration has been received. Shortly thereafter, officials from the Department would validate the information received and the carrier would be informed that the registration process has been completed. Each carrier would use its login name and password to access the disability-related complaint data form, fill out and edit the form, and submit the form to the Department.

We believe that completing the disability complaint data form, like registering, would not be a difficult task for the carriers. To complete the form, each carrier would insert the total number of disability-related incidents for each specific category. For example, if a covered carrier receives a total of 5 contacts about 8 separate incidents (8 complaints) of failure to provide bulkhead seating for passengers who have a fused knee, then the carrier would insert the number ''8'' in the box where the ''Seating Accommodation'' row intersects the ''Other Disability'' column. In a similar fashion, the carrier would add up the total number of incidents for the other categories and insert the appropriate number in each of the boxes. Every box in the form should have a number in it. If the carrier does not have any incidents to report in a particular area, the carrier should insert the number ''0''. The proposed rule would also require the covered carrier to include on the form the name and mailing address of the carrier, information about the contact person for the carrier, the telephone number for the contact person, the submission date for the form, the period of data collection, the total number of incidents/complaints for the period covered, and a certification that all entries made by the authorized representative of the carrier are true and correct.

F. Retention of Records

The NPRM proposes to require the covered carriers to retain copies of the disability-related complaints for three years. Currently, the Department's regulations in 14 CFR 249.20 require only certificated U.S. air carriers to retain correspondence and record of action taken on all consumer complaints for three years. This NPRM proposes to require that foreign air carriers operating to and from the United States that conduct passenger-carrying service with large aircraft also retain correspondence and record of action taken on all disability-related complaints related to their U.S. service for three years. In addition, we propose to require the covered carriers make these records available for review by Department of Transportation officials at their request.

Regulatory Analysis and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

This proposal, if adopted as a final rule, would not be ''significant'' under Executive Order 12866 or the Department of Transportation Regulatory Policies and Procedures because the cost resulting from this action would be minimal since most air carriers already record and categorize data about disability related complaints that they receive. The primary cost imposed by this notice of proposed rulemaking (NPRM) is the time to read, categorize, and record the disability complaint correspondence that the carriers receive. While we believe that the carriers are already performing these functions, we have included these expenses in the regulatory analysis.

In the year 2000, ACPD received complaints for 661 incidents from people with disabilities concerning airline service difficulties. We estimate that there were approximately 33,050 disability incidents in 2000 based on our assumption that airlines receive 50 disability complaints for each disability complaint received by ACPD. Some of the air carriers may receive only one complaint a year while some of the larger operators could receive 4000 annual complaints. Using a zero base review, we estimate that on average it will take 15 minutes per complaint to read or listen to the complaint and properly categorize the incident or incidents. We expect that it would take 8,262 hours to review all of the complaints. (15 minutes × 33,050 complaints). We have assigned an annual industry cost of $206,550 ($25 dollars per hour × 8,262 hours) for this burden.

The carriers that receive a high volume of disability related complaints will most likely set up a computerized program to automate their data collection. Of the 661 incidents mentioned above, 84% of them were against 10 carriers. As a result, we estimate that 10 to 15 carriers will expend a one time total of 2 hours to program an automated system. For those carriers that set up an automated system to record the complaints, we estimate an industry cost of $2,000 to $3,000. This estimate is based on an assumption of $100 for each programming hour ($100 × 20 to 30 hours). This would be a one-time only expense.

The one-time cost for the industry to register on the web is estimated to range from $1,844 to $2,313, based on our estimate that it will take approximately 15 minute to register on the web for the

295 to 370 respondents at a cost of $25 per hour ($25 × 15 minutes × 295 to 370 air carriers). In order to register, carriers would need to input the following information: carrier name, carrier address, contact person, telephone number of contact person, e-mail address of contact person, login name, and password.

The industry's annual cost to key punch its reports onto the web based form is estimated to range from $3,688 to $4,625. Once again we used a $25 per burden hour estimate and calculate it will take 30 minutes to type in the 156 data items ($25 × 30 minutes × 295 to 370 air carriers).

The annual cost for foreign carriers to comply with the record retention requirement is estimated to range from $28,875 to $38,250. This estimation is based on our expectation that this requirement will place a one hour annual burden on each foreign air carrier, storage fees of $100 dollars per carrier, and a $25 per carrier hour filing expense {($100 + $25) × 1 hour × 231 to 306 air carriers}.

As a result, the first year total cost to the industry of the rule proposed in this NPRM will range from $242,957 to $254,738. After the first year, the annual cost should range from $239,113 to $249,425. The average annual cost per carrier should be approximately $674 ($249,425 divided by 370 air carriers). However, the carrier cost range would run from a low of $25 for a carrier with a very small complaint total to a high of slightly over $10,000 for those carriers receiving 4,000 annual complaints.

This NPRM, if adopted, would benefit passengers with disabilities partly because, in addition to reporting annually to Congress, the Department expects to make the data on complaints received by carriers alleging discrimination on the basis of disability available to the general public. Passengers with disabilities will be able to compare carrier complaints related to the type of disabilities that they may have. Also, the data will provide the Department useful information to monitor air carrier compliance with the Air Carrier Access Act (ACAA, 49 U.S.C. 41705), which prohibits discriminatory treatment of persons with disabilities in air transportation. While the benefits of the rulemaking are intangible, it is our belief these benefits outweigh the minimal reporting costs. The Office of the Secretary has prepared and placed in the docket a regulatory evaluation for the proposed rule, which explains the costs and benefits of the rule in more detail.

Executive Order 13132 (Federalism)

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). This notice of proposed rulemaking would not (1) have a substantial direct effect on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government; (2) impose substantial direct compliance costs on state and local governments; or (3) preempt state law. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

Executive Order 13084

This notice of proposed rulemaking has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 (''Consultation and Coordination with Indian Tribal Governments''). Because this NPRM does not significantly or uniquely affect the communities of the Indian tribal governments and does not impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13084 do not apply.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant impact on a substantial number of small entities. We hereby certify that the rule proposed in this notice of proposed rulemaking will not have a significant economic impact on a substantial number of small entities. A direct air carrier or a foreign air carrier is a small business if it provides air transportation only with small aircraft. See 14 CFR 399.73. The proposed rule does not apply to U.S. and foreign air carriers that are operating only a small aircraft (i.e., aircraft designed to have a maximum passenger capacity of not more than 60 seats or a maximum payload capacity of not more than 18,000 pounds). Moreover, the economic impact of the proposed rule is minimal.

Paperwork Reduction Act

This NPRM contains information collections that are subject to review by OMB under the Paperwork Reduction Act of 1995 (Public Law 104–13). Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it must publish a document in the **Federal Register** providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information.

Interested parties are invited to send comments regarding any aspect of this information collection, including: (1) The necessity and utility of the information collection; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the collected information; and (4) ways to minimize the collection burden without reducing the quality of the collected information. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection.

This NPRM proposes three information collection requirements: (1) A proposal for carriers to record and categorize disability-related complaints that they receive according to type of disability and nature of complaint on a standard form; (2) a proposal for each covered carrier to submit an annual report summarizing the disability-related complaint data; and (3) a proposal for carriers to retain correspondence and record of action taken for all disability-related complaints. The Department will use the data submitted by carriers to report annually to Congress on the results of its review as required by law.

The title, description, and respondent description of the information collections and an estimate of the annual recordkeeping and periodic reporting burden are stated below.

(1) Requirement to read, record and categorize each disability related complaint from a passenger or on behalf of a passenger.

Respondents: Certificated U.S. air carriers and foreign air carriers operating to and from the United States that conduct passenger-carrying service with large aircraft.

Estimated Annual Burden on Respondents: 15 minutes to 1,000 hours a year for each respondent (time to record and categorize one complaint [15 minutes] multiplied by the number of complaints respondents receive [1 complaint a year to 4,000 annual complaints a year]. The number of complaints received by carriers varies greatly. In the year 2000, ACPD received complaints for 661 incidents from people with disabilities involving airline service difficulties. The10 carriers that received the most complaints accounted for 84% of the total complaints received by ACPD. Carriers are estimated to receive 50 complaints for each one ACPD receives.

Estimated Total Annual Burden: 8,262 hours for all respondents (time to

record and categorize one complaint [15 minutes] multiplied by the total number of complaints for all respondents [33,050])

Frequency: 1 to 4,000 complaints per year for each respondent (Some of the air carriers may receive only one complaint a year while some of the larger operators could receive 4,000 annual complaints based on our assumption that airlines receive 50 disability complaints for each disability complaint received by ACPD).

(2) Requirement to submit a report to DOT summarizing the disability-related complaint data (key-punching web-based matrix report).

Respondents: Certificated U.S. air carriers and foreign air carriers operating to and from the United States that conduct passenger-carrying service with large aircraft.

Estimated Annual Burden on Respondents: 30 minutes a year for each respondent to type in the 156 items (matrix consists of 13 disabilities and 12 service problems).

Estimated Total Annual Burden: 148 to 185 hours for all respondents (annual burden [30 minutes] multiplied by the total number respondents [295 to 370])

Frequency: 1 report to DOT per year for each respondent

(3) Requirement to retain correspondence and record of action taken on all disability-related complaints for three years.

Respondents: Foreign air carriers operating to and from the United States that conduct passenger carrying service with large aircraft.

Estimated Annual Burden on Respondents: 1 hour a year for each respondent

Estimated Total Annual Burden: 231 to 306 hours for all respondents (annual burden [1 hour] multiplied by the total number respondents [231 to 306])

Frequency: 1 to 4,000 complaints per year for each respondent

Unfunded Mandates Reform Act

The Department has determined that the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply to this rulemaking.

List of Subjects in 14 CFR Part 382

Air carriers, Civil rights, Consumer protection, Individuals with disabilities, Reporting and recordkeeping requirements.

Issued this 1st day of February, 2002, at Washington, DC.

Norman Y. Mineta,

Secretary of Transportation.

For the reasons set forth in the preamble, the Department proposes to amend 14 CFR Part 382 as follows:

PART 382—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN AIR TRAVEL

1. The authority citation for 14 CFR part 382 is revised to read as follows:

Authority: 49 U.S.C. 41702, 41705, and 41712.

2. A new § 382.70 is proposed to be added to read as follows:

§ 382.70 Disability-related complaints received by carriers.

(a) For the purposes of this section, a disability-related complaint means a specific expression of dissatisfaction received from, or submitted on behalf, of an individual with a disability concerning a difficulty associated with the person's disability, which the person experienced when using or attempting to use an air carrier's or foreign air carrier's services.

(b) This section applies to certificated U.S. carriers and foreign air carriers operating to, from, and in the United States, conducting passenger operations with at least one aircraft having a designed seating capacity of more than 60 passengers. Foreign air carriers are covered by this section only with respect to disability-related complaints dealing with service to and from the United States.

(c) Carriers shall categorize disability-related complaints that they receive according to the type of disability and nature of complaint. Data concerning a passenger's disability must be recorded separately in the following areas: vision impaired, hearing impaired, vision and hearing impaired, mentally impaired, communicable disease, allergies (e.g., food allergies, chemical sensitivity), paraplegic, quadriplegic, other wheelchair, oxygen, stretcher, other assistive device (cane, respirator, etc.), and other disability. Data concerning the alleged discrimination or service problem related to the disability must be separately recorded in the following areas: refusal to board, refusal to board without an attendant, security issues concerning disability, aircraft not accessible, airport not accessible, advance notice dispute, seating accommodation, failure to provide adequate or timely assistance, problem with storage/damage/delay of assistive device, service animal problem, unsatisfactory information, and other.

(d) Carriers shall submit an annual report summarizing the disability-related complaints that they received during the prior calendar year using the form specified in Appendix A to this part. The first report shall cover complaints received during calendar year 2003 and shall be submitted to the Department of Transportation by January 26, 2004. Carriers shall submit all subsequent reports on the last Monday in January of that year for the prior calendar year. All submissions must be made through the World Wide Web except for situations where the carrier can demonstrate that it would suffer undue hardship if it were not permitted to submit the data via paper copies, disks, or e-mail, and DOT has approved an exception. All fields in the form must be completed; carriers are to enter ''0'' where there were no complaints in a given category. Each annual report must contain the following certification signed by an authorized representative of the carrier: ''I, the undersigned, do certify that this report has been prepared under my direction in accordance with the regulations in 14 CFR part 382. I affirm that, to the best of my knowledge and belief, this is a true, correct, and complete report.'' Electronic signatures will be accepted.

(e) Carriers shall retain correspondence and record of action taken on all disability-related complaints for three years after receipt of the complaint or creation of the record of action taken. Carriers must make these records available to Department of Transportation officials at their request.

(f) Each carrier shall comply with paragraphs (c) through (e) of this section for covered complaints it receives from or on behalf of passengers as well as complaints forward by another carrier or governmental agency with respect to difficulties encountered in connection with service it provides. Each carrier shall also comply with paragraphs (c) through (e) of this section for covered complaints it receives from or on behalf of passengers with respect to difficulties encountered in connection with service provided by a code sharing partner.

(g) Carriers that do not submit their data via the Web shall use the disability-related complaint data form specified in Appendix A when filing their annual report summarizing the disability-related complaints they received. The report shall be mailed, by the dates specified in paragraph (d) of this section, to the following address:

U.S. Department of Transportation, Aviation Consumer Protection Division, 400 7th Street, SW., Room 4107, C–75, Washington, DC 20590.

3. A new Appendix A is proposed to be added to part 382 to read as follows:

Appendix A to Part 382—Disability Complaint Reporting Form

BILLING CODE 4910–62–P

Disability Complaint Reporting Form

Name of Carrier: _____ Submission Date: _____

Contact Person: Period of Data Collection: _____

Name: _____
Telephone # (include country code if outside the U.S.): _____
Email address: _____
Mailing address: _____

Total number of complaints (i.e., incidents): _____

REPORT OF DISABILITY-RELATED COMPLAINT DATA

	Vision Impaired	Hearing Impaired	Vision & Hearing Impaired	Paraplegic	Quadriplegic	Other wheelchair	Oxygen	Stretcher	Other Disability	Other Assistive Device	Mentally Impaired	Communicable Disease	Allergies
Refusal To Board Passenger													
Refusal to Board w/o Attendant													
Security issues: Disability													
Aircraft Not Accessible													
Airport Not Accessible													
Advance Notice Dispute													

Seating Accomm-odation													
Failure to Provide Assistance													
Assistive Device													
Service Animal Problem													
Unsatisfa-ctory Info													
Other													

Certification Statement: I, the undersigned, do certify that this report has been prepared under my direction in accordance with the regulations in 14 CFR Part 382. I affirm that, to the best of my knowledge and belief, this is a true, correct, and complete report

Signature: _____

[FR Doc. 02–3216 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–62–C

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 334

United States Navy Restricted Area, Kennebec River, Bath Iron Works Shipyard, ME

AGENCY: United States Army Corps of Engineers, DoD.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: The U.S. Army Corps of Engineers is proposing regulations to establish a restricted area on the west side of the Kennebec River in the vicinity of the Bath Iron Works (BIW) Shipyard from just south of the Carlton (Route 1) highway bridge to the southern end of the Bath Iron Works Shipyard facility in Bath, Maine. These regulations will enable the Navy to enhance security around vessels constructed, moored and launched at the facility. The regulations will safeguard military vessels and United States government contractor facilities from sabotage and other subversive acts, accidents, or incidents of similar nature. These regulations are also necessary to protect the public from potentially hazardous conditions that may exist as a result of Navy use of the area and its security measures.

DATES: Written comments must be submitted on or before March 18, 2002.

ADDRESSES: U. S. Army Corps of Engineers, ATTN: CECW–OR, 441 G Street, NW., Washington, DC 20314–1000.

FOR FURTHER INFORMATION CONTACT: Mr. Frank Torbett, Headquarters Regulatory Branch, Washington, DC at (202) 761–4618, or Mr. Richard Roach, Corps of Engineers, New England District, at (978) 318–8211 or (800) 343–4789.

SUPPLEMENTARY INFORMATION: Pursuant to its authorities in section 7 of the Rivers and Harbors Act of 1917 (40 Stat 266; 33 U.S.C. 1) and Chapter XIX, of the Army Appropriations Act of 1919 (40 Stat 892; 33 U.S.C. 3) the Corps proposes to amend the restricted area regulations in 33 CFR part 334 by adding Section 334.45 which establishes a restricted area in the Kennebec River, off of the Bath Iron Worksshipyard on the western shore of the Kennebec River South of the Route 1 highway bridge in Bath, Maine. The public currently is restricted from using the area by Coast Guard Regulations under the Port Safety Act. To better protect vessels and personnel stationed at the facility and the general public, The Navy, Supervisor of Shipbuilding, Conversion and Repair at BATH Iron Works has requested the Corps of Engineers establish a Restricted Area. This will enable the Navy to keep persons and vessels out of the area at all times, except with the permission of the Navy Supervisor of Shipbuilding at Bath Iron Works.

Procedural Requirements

(a) Review Under Executive Order 12866

This proposed rule is issued with respect to a military function of the Defense Department and the provisions of Executive Order 12866 do not apply.

(b) Review Under the Regulatory Flexibility Act

These proposed rules have been reviewed under the Regulatory Flexibility Act (Public Law 96–354) which requires the preparation of a regulatory flexibility analysis for any regulation that will have a significant economic impact on a substantial number of small entities (i.e., small businesses and small Governments). The Corps of Engineers expects that the economic impact of the establishment of this restricted area would have practically no impact on the public, no anticipated navigational hazard or interference with existing waterway traffic and accordingly, certifies that this proposal if adopted, will have no significant economic impact on small entities.

(c) Review Under the National Environmental Policy Act

An environmental assessment has been prepared for this action. We have concluded, based on the minor nature of the proposed additional restricted area regulations, that this action, if adopted, will not have a significant impact to the quality of the human environment, and preparation of an environmental impact statement is not required. The environmental assessment may be reviewed at the District office listed at the end of the **FOR FURTHER INFORMATION CONTACT,** paragraph.

(d) Unfunded Mandates Act

This proposed rule does not impose an enforceable duty among the private sector and, therefore, is not a Federal private sector mandate and is not subject to the requirements of section 202 or 205 of the Unfunded Mandates Act. We have also found under section 203 of the Act, that small Governments will not be significantly and uniquely affected by this rulemaking.

List of Subjects in 33 CFR Part 334

Danger zones, Marine safety, Restricted areas, Waterways.

For the reasons set out in the preamble, the Corps of Engineers proposes to amend 33 CFR part 334 as follows:

PART 334–DANGER ZONE AND RESTRICTED AREA REGULATIONS

1. The authority citation for Part 334 continues to read as follows:

Authority: 40 Stat. 266 (33 U.S.C. 1) and 40 Stat. 892 (33 U.S.C. 3)

2. Section 334. 25 is added to read as follows:

§ 334. 25 Kennebec River, Bath Iron Works Shipyard, Bath, Maine, Restricted Area.

(a) *The area.* The waters within an area beginning on the western shore at latitude 43°54′40.7″ N, longitude 69° 48′ 44.8 ″ W; thence easterly to latitude 43°54′40.7 ″ N, longitude 69°48′ 36.8″ W; thence southeasterly to latitude 43° 54′ 10.4″ N, longitude 069° 48′ 34.7″ W; thence southwesterly to latitude 43° 53′ 55.1 ″ N, longitude 69° 48′ 39.1 ″ W; thence westerly to latitude 43° 53′ 55.1 ″ N, longitude 69° 48′ 51.8 ″ W; thence northerly along the westerly shoreline to the point of origin.

(b) *The regulations.* No persons, swimmers, vessels, or other craft, except: those vessels under the supervision or contract to local military or Naval authority, vessels of the United States Coast Guard, and local or state law enforcement vessels, may pass through the restricted area unless specific authorization is granted by the Supervisor of Shipbuilding, United States Navy, Bath, Maine, or other persons or agencies as he/she may designate.

(c) *Enforcement.* (1) The regulation in this section, promulgated by the United States Army Corps of Engineers, shall be enforced by the Supervisor of Shipbuilding, Bath IronWorks, Bath, Maine, and/or other persons or agencies as he/she may designate.

(2) Federal and State Law enforcement vessels and personnel may enter the restricted area at any time to enforce their respective laws.

Dated: January 14, 2002.

Charles M. Hess,

Chief, Operations Division, Directorate of Civil Works.

[FR Doc. 02–3557 Filed 2–13–02; 8:45 am]

BILLING CODE 3710–92–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 51

[CC Docket Nos. 99–272, 92–105, 92–237; FCC 01–384]

The Use of N11 Codes and Other Abbreviated Dialing Arrangements; Administration of the North American Numbering Plan

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this *Notice of Proposed Rulemaking* (*NPRM*) the Federal Communications Commission (FCC or Commission) seeks comment on proposed methods to promote further competition and choice in the retail directory assistance (DA) market, in accordance with the pro-competitive, de-regulatory national policy framework set forth in the Telecommunications Act of 1996 (The Act), and consistent with the Commission's statements in the *Local Competition Second Report and Order*. This *NPRM* seeks comment on the directory assistance presubscription issue, as raised in a proposal filed by Telegate, Inc. (Telegate), a competing DA provider. This *NPRM* also seeks comment on other proposals to promote competition in the retail DA market.

DATES: Comments are due on or before April 1, 2002. Reply comments are due on or before April 30, 2002.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Room TW–B204F, Washington, DC, 20554.

FOR FURTHER INFORMATION CONTACT: Rodney McDonald, 202/418–77513, Fax 202/418–2345, TTY 202/418–0484, rlmcdona@fcc.gov, Network Services Division, Common Carrier Bureau.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rulemaking, CC Docket Nos. 99–273, 92–105, 92–237, FCC 01–384* (*NPRM*), adopted December 21, 2001 and released January 9, 2002. The full text of the *NPRM* is available for inspection and copying during the weekday hours of 9 a.m. to 4:30 p.m. in the FCC Reference Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554, or copies may be purchased from the Commission's copy contractor, Qualex International, 445 12th Street, SW., Suite CY–B402, Washington, DC 20554, phone (202) 863–2893.

Synopsis of the Further Notice of Proposed Rulemaking CC Docket Nos. 99–273, 92–105, 92–237

1. On September 9, 1999, the Commission released the *SLI/DA Order and Notice of Proposed Rulemaking* (*SLI/DA Order and NPRM*), 64 FR 51910 (September 27, 1999). In the *SLI/DA Order and NPRM*, the Commission tentatively concluded that competition in the directory assistance market is in the public interest. The Commission also tentatively concluded that competitive directory assistance providers are unable fully to compete without equal access to the local exchange carriers' (LECs) local directory assistance databases. The Commission invited comment on whether certain competitive directory assistance providers are providers of telephone exchange service or telephone toll service and thus entitled to nondiscriminatory access to those databases pursuant to section 251(b)(3) of the Act. The Commission also sought comment on whether competitive directory assistance providers that are not providers of telephone exchange service or telephone toll service also are entitled to nondiscriminatory access to directory assistance, including access to directory assistance databases.

2. On October 13, 1999, Telegate filed comments in response to the *SLI/DA Order and NPRM*. In its comments, Telegate argued that full competition in the DA market could not exist until LECs no longer have exclusive possession of the 411 code. Telegate proposed opening up 411 to competition by allowing customers to choose by presubscription their provider of directory assistance service, just as they can presubscribe to their primary interexchange carrier (IXC) for long distance services. None of the reply comments substantively addressed this portion of Telegate's comments.

3. On February 9, 2000, Telegate met with Common Carrier Bureau (Bureau) staff members to discuss further the 411 presubscription proposal. On March 10, 2000, at the Bureau's request, Telegate filed an ex parte memorandum illustrating Telegate's 411 presubscription proposal in further detail. On April 27, 2000, the Bureau issued a public notice seeking comment on Telegate's proposal. In the *Telegate Public Notice*, the Bureau solicited comments on Telegate's proposal to enhance competition in the directory assistance market by requiring LECs to implement presubscription for the 411 abbreviated dialing code, specifically soliciting comments on the technical feasibility and economic viability of requiring LECs to implement presubscription to N11 abbreviated dialing codes in general. This included presubscription to 411 in the directory assistance proceeding, as well as presubscription to other N11 codes, particularly to 711 for access to Telecommunications Relay Service (TRS).

4. On January 23, 2001, the Commission released the *SLI/DA First Report and Order*, 66 FR 10965 (February 21, 2001) and concluded that LECs must provide competing DA providers that qualify under section 251(b)(3) of the Act with nondiscriminatory access to the LECs' local directory assistance databases, and must do so at nondiscriminatory and reasonable rates. To the extent that such DA providers qualify under section 251(b)(3), the Commission found that a LEC's failure to provide such access might also violate section 201(b). In the *SLI/DA First Report and Order*, the Commission also explained that the competitive provision of directory assistance is a necessary element of a competitive local telecommunications market, and noted that Congress recognized it as such in section 251. The Commission also concluded that LECs are not required to grant competing directory assistance providers nondiscriminatory access to non-local directory assistance databases. Finally, in the *SLI/DA First Report and Order*, the Commission concluded that the language in section 222(e) concerning directory publishing ''in any format'' applies to telephone directories on the Internet, but that section 222(e) does not apply to orally provided directory listing information. Telegate's proposal was not addressed in that order.

5. In this *NPRM*, the Commission solicits comment on Telegate's proposal. Specifically, we seek comment Telegate's proposal to enhance competition in the DA market by requiring LECs to implement presubscription to 411. Central to Telegate's proposal is the argument that presubscription to the 411 code for access to DA services is necessary to ensure that full competition will develop in the retail DA market. We also seek comment on whether alternative dialing methods of providing access to DA services would provide a more level playing field for all DA providers to enter the retail DA market, and whether the elimination of the 411 dialing code is a necessary prerequisite for the success of such alternative dialing methods. On February 5, 2002, the Common Carrier Bureau released an *Order* extending the comment cycle for this proceeding. Comments are due on

or before April 1, 2002. Reply are comments due on or before April 30, 2002.

Initial Regulatory Flexibility Analysis

6. As required by the Regulatory Flexibility Act (RFA), the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this *NRPM.* 5 U.S.C. 603. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NRPM.* The Commission will send a copy of the *NRPM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). 5 U.S.C. 603(a).

Need for, and Objectives of, the Proposed Rules

7. The Commission is issuing this *NRPM* to seek comment on whether to modify the Commission's rules to permit presubscription to directory assistance services in order to promote competition and choice in the retail DA market. Additionally, the Commission seeks input concerning other methods of providing DA and their impact on consumers and providers. In the *Local Competition Second Report and Order,* 61 FR 47284 (September 6, 1996), the Commission anticipated that presubscription for particular services ultimately would be defined by technological, economic and marketing considerations, and noted its intent to monitor developments in this area and issue a *Further Notice of Proposed Rulemaking* to address these long range considerations so that end users would be able to preselect alternative providers for a multitude of services, including directory assistance. In the five years since the release of the *Local Competition Second Report and Order,* DA has grown from a simple method of obtaining a telephone number to a sophisticated voice-based portal that potentially can offer the consumer a wide spectrum of high quality services at competitive prices. We solicit comments as to whether the market for the competitive provision of directory assistance has developed to the point that additional steps must now be taken to ensure that all competitors have the same opportunity for access to customers and whether the directory assistance market is sufficiently open to competition that further regulatory action is unnecessary.

Legal Basis

8. The proposed action is authorized under sections 1, 2, 3, 4, 201, 202, 222, and 251 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 153, 154, 201, 202, 222, and 251.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

9. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. 5 U.S.C. 604(a)(3). The RFA defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' 5 U.S.C. 604(a)(3). In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. 5. U.S.C. 601(3). A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. 15 U.S.C. 632. A small organization is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' 5 U.S.C. 601(4). Nationwide, as of 1992, there were approximately 275,801 small organizations. ''Small governmental jurisdiction'' generally means ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.'' 5 U.S.C. 601(5). As of 1992, there were approximately 85,006 such governmental entities in the United States. This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96%, have populations of fewer than 50,000. The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (96%) are small entities.

10. Below, we further describe and estimate the number of small entity licensees and regulatees that may be affected by these rules. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the numbers of commercial wireless entities, appears to be data the Commission publishes annually in its Telecommunications Provider Locator report, regarding FCC Form 499–A.

11. Total Number of Telephone Companies Affected. The decisions and rules adopted herein may have a significant effect on a substantial number of the small telephone companies identified by SBA. The Census Bureau reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year. These firms include a variety of different categories of carriers, including LECs, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator services providers, pay telephone operators, personal communications service (PCS) providers, covered specialized mobile radio providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities because they are not ''independently owned and operated.'' For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms that may be affected by this *NRPM.* Since 1992, however, many new carriers have entered the telephone services marketplace. At least some of these new entrants may be small entities that are affected by this *NRPM.*

12. Wireline Carriers and Service Providers. The SBA has developed a definition of small entities for telephone communications companies except radiotelephone (wireless) companies. The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992. According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons. All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small ILECs. We do not have data specifying the number of these carriers that are not independently owned and operated, and thus are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer

than 2,295 small telephone communications companies other than radiotelephone companies are small entities or small incumbent LECs.

13. We have included small incumbent LECs in this present RFA analysis. As noted above, a ''small business'' under the RFA is one that, inter alia, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and is not dominant in its field of operation. 15 U.S.C. 632. The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not ''national'' in scope. We have therefore included small incumbent LECs in this RFA analyses, although we emphasize that this RFA action has no effect on FCC analyses and determination in other, non-RFA contexts.

14. Interexchange Carriers (IXCs). Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Reporting Worksheet, FCC Form 499–A. According to our most recent data, 229 companies reported that they were engaged in the provision of interexchange services. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 229 small entity IXCs that may be affected by the decisions and rules adopted in this *NRPM.*

15. Competitive Access Providers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Reporting Worksheet, FCC Form 499–A. According to our most recent data, 532 companies reported that they were engaged in the provision of competitive access services. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 532 small entity CAPs that may be affected by the decisions and rules adopted in this *NRPM.*

16. Operator Service Providers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of operator services providers nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Reporting Worksheet, FCC Form 499–A. According to our most recent data, 22 companies reported that they were engaged in the provision of operator services. Although it seems certain that some of these companies are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of operator services providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 22 small entity operator services providers that may be affected by the decisions and rules adopted in this *NRPM.*

17. Payphone Providers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to payphone providers. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of payphone providers nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Reporting Worksheet, FCC Form 499–A. According to our most recent data, 936 companies reported that they were engaged in the provision of pay telephone services. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of payphone providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 936 small entity payphone providers that may be affected by this *NRPM.*

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

18. Future rules may require carriers to submit status reports concerning the technologies they will use to provide DA services. Any costs incurred in generating such reports should be nominal for all carriers, including small entities. Costs incurred as a result of this proceeding on the entities affected, including any small businesses, will vary depending on the method of DA provision utilized and its underlying implementation costs. This proceeding may allow some small businesses to participate in the DA market for the first time, which would involve initial start-up costs. These costs, however, could be offset by future profits upon entering the market.

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

19. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. 6 U.S.C. 603(c).

20. This *NRPM* offers several possible methods of opening the local DA market up to competition. Each of these methods will have a different impact on small businesses. One alternative involves eliminating the 411 code for DA services. This alternative would provide expanded opportunities for small businesses to enter the market; however, the cost of market entry appears significant. This alternative is discussed in paragraph 45 of the *NRPM.* While this alternative provides a level playing field for all entities, it could also be the most technologically advanced requirement and the alternative with the greatest cost. A

second alternative considered herein explores the possibility of using alternative dialing schemes (such as 555 numbers and abbreviated 411XX dialing codes). National 555 numbers were created to provide a variety of information and telecommunications services. In addition, 555 numbers and 411XX codes could be used instead of the alternative of 411 presubscription. Further comment on these thoughts is included in paragraphs 47 through 52 of the *NRPM.* These alternatives could be easier to implement and less costly for small businesses to enter the market. Both of these alternatives are designed to open the local DA market to competition. Our belief is that by enhancing competition, we have created a space for small businesses to enter the market.

Federal Rules That May Duplicate, or Conflict With the Proposed Rules

20. None.

Report to Congress

21. The Commission will send a copy of this *NRPM,* including a copy of this IRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. In addition, the *NRPM* and this IRFA will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the **Federal Register**.

Ordering Clauses

22. Pursuant to the authority contained in sections 1, 2, 3, 4, 201, 202, 222, and 251 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 153, 154, 201,202, 222, and 251 the *NRPM* is hereby *adopted.*

23. The Commission's Consumer Information Bureau, Reference Information Center, *shall send* a copy of this *NRPM,* including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of Small Business Administration.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 02–3623 Filed 2–13–02; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 02–255, MM Docket No. 02–20, RM–10368]

Digital Television Broadcast Service; Traverse City, MI

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Central Michigan University proposing the allotment of DTV channel 23, reserved for noncommercial use, to Traverse City, Michigan. DTV Channel *23 can be allotted to Traverse City, Michigan, in compliance with the geographic spacing criteria of section 73.623(d) and the principle community coverage requirements of section 73.625(a) at reference coordinates (45–10–40 N. and 85–05–57 W.). Since the community of Traverse City is located within 400 kilometers of the U.S.-Canadian border, concurrence from the Canadian government must be obtained for this allotment.

DATES: Comments must be filed on or before April 1, 2002, and reply comments on or before April 16, 2002.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Room TW–A325, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Todd D. Gray, Dow, Lohnes & Albertson, PLLC, 1200 New Hampshire Avenue, NW., Suite 800, Washington, DC (Counsel for Central Michigan University).

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Mass Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 02–20, adopted February 1, 2002, and released February 7, 2001. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via-e-mail *qualexint@aol.com.*

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420. List of Subjects in 47 CFR Part 73

Television, Digital television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—TELEVISION BROADCAST SERVICES

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

Authority: 47 U.S.C. 154, 303, 334, and 336.

§ 73.622 [Amended]

2. Section 73.622(b), the Table of Digital Television Allotments under Michigan is amended by adding, DTV Channel *23 Traverse City.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Services Division, Mass Media Bureau.

[FR Doc. 02–3574 Filed 2–13–02; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 67, No. 31
Thursday, February 14, 2002

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.

FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 114, and 117

[Notice 2002–2]

The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations

AGENCY: Federal Election Commission.

ACTION: Notice of Public Hearing.

SUMMARY: The Federal Election Commission is announcing a public hearing on proposed changes to its regulations to clarify the status of campaign-related Internet activity conducted by individuals, and of hyperlinks and endorsement press releases on Internet Web sites established by corporations and labor organizations.

DATES: The hearing will be held at 10 a.m. on Wednesday, March 20, 2002. Requests to testify must be received on or before March 1, 2002. Persons requesting to testify also must submit written comments by March 1, 2002, if they have not previously filed written comments on the proposed rules.

ADDRESSES: Requests to testify and any accompanying comments should be addressed to Rosemary C. Smith, Assistant General Counsel, and must be submitted in either written or electronic form. Written comments should be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. Faxed comments should be sent to (202) 219–3923, with printed copy follow-up to insure legibility. Electronic mail comments should be sent to internetnprm@fec.gov. Persons sending requests and comments by electronic mail must include their full name, electronic mail address and postal service address within the text of the request or comments. Commission hearings are held in the Commission's ninth floor meeting room, 999 E Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Rosemary C. Smith, Assistant General Counsel, or Richard T. Ewell, Staff Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: On October 3, 2001, the Commission published a Notice of Proposed Rulemaking [''NPRM''] addressing three issues relating to the use of the Internet for campaign-related activity: (1) The application of the volunteer exemption in 2 U.S.C. 431(8)(B)(i) and (ii) to Internet activity by individuals; (2) The status of hyperlinks placed on corporate and labor organization Web sites; and (3) The status of corporate and labor organization press releases that announce candidate endorsements and are made available to the general public on the corporation or labor organization's Web site. 66 FR 50358, *et seq.* (Oct. 3, 2001). The comment period for the NPRM ended on December 3, 2001. Twenty-four comments were received by the Commission in response to the NPRM. Two commenters requested to testify at a public hearing if one is held.

After considering these requests and the other comments received to date in response to the NPRM, the Commission believes a public hearing would be helpful in considering the issues raised in the rulemaking. The hearing will be held at 10 a.m. on March 20, 2002.

Dated: February 8, 2002.

David M. Mason,

Chairman, Federal Election Commission.

[FR Doc. 02–3632 Filed 2–13–02; 8:45 am]

BILLING CODE 6715–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–SW–52–AD]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Model EC120B Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes adopting a new airworthiness directive (AD) for Eurocopter France (ECF) Model EC120B helicopters. This proposal would require inspecting the attachment of the bolted assemblies of the cyclic pitch flight control torque tube (torque tube) for an appropriate locking device. If a bolted assembly is single-locked, the proposed AD would require, if necessary, tightening the self-locking nuts at certain intervals and modifying the torque tube after a certain time. This proposal is prompted by the discovery that some of the attachments of the torque tube were fastened with a single-locking device instead of the intended double-locking device. The actions specified by this proposed AD are intended to prevent separation of the cyclic pitch stick yokes from the torque tube, loss of cyclic control, and subsequent loss of control of the helicopter.

DATES: Comments must be received on or before April 15, 2002.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 2001–SW–52–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137. You may also send comments electronically to the Rules Docket at the following address: *9-asw-adcomments@faa.gov.* Comments may be inspected at the Office of the Regional Counsel between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Richard Monschke, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Rotorcraft Standards Staff, Fort Worth, Texas 76193–0110, telephone (817) 222–5116, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments will be considered before taking action on the proposed rule. The proposals contained in this document may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic,

environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their mailed comments submitted in response to this proposal must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 2001–SW–52–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 2001–SW–52–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

Discussion

The Direction Generale De L'Aviation Civile (DGAC), the airworthiness authority for France, notified the FAA that an unsafe condition may exist on ECF Model EC120B helicopters. The DGAC advises that the design fails to provide double-locking of the attachment pins of the cyclic pitch stick yokes to the torque tube.

ECF has issued Alert Service Bulletin No. 67A003, dated August 2, 2001 (ASB), which specifies inspecting single-locking devices within 50 hours time-in-service (TIS) and modifying single-locking devices to make them double locking within 500 hours TIS or 24 months, whichever occurs first. The DGAC classified this ASB as mandatory and issued AD 2001–373–008(A), dated August 22, 2001, to ensure the continued airworthiness of these helicopters in France.

This helicopter model is manufactured in France and is type certificated for operation in the United States under the provisions of 14 CFR 21.29 and the applicable bilateral agreement. Pursuant to the applicable bilateral agreement, the DGAC has kept the FAA informed of the situation described above. The FAA has examined the findings of the DGAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

This unsafe condition is likely to exist or develop on other helicopter models of the same type design registered in the United States. Therefore, the proposed AD would require determining whether the attachment of the bolted assembly of the torque tube is a single or double-locking device. If the bolted assembly is single-locked, the proposed AD would require repetitively inspecting and, if necessary, tightening the self-locking nuts to a specified torque. The proposed AD would also require modifying the torque tube to provide double locking for the attachment pins of the cyclic pitch stick yokes to the torque tube after a specified time interval. The actions would be required to be accomplished in accordance with the ASB described previously except for the compliance time allowed before the torque tube modification is required. The DGAC and the manufacturer specify modifying the torque tube within 500 hours time-in-service (TIS) or 24 months, whichever occurs first. However, the FAA has determined that, due to the seriousness of this unsafe condition, the torque tube must be modified within the next 250 hours TIS or 12 months, whichever occurs first.

The FAA estimates that 44 helicopters of U.S. registry would be affected by this proposed AD, that it would take approximately 5 work hours per helicopter to accomplish the proposed actions, and that the average labor rate is $60 per work hour. Required parts would cost approximately $195. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $21,780.

The regulations proposed herein 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, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

Eurocopter France: Docket No. 2001–SW–52–AD.

Applicability: Model EC120B helicopters, serial numbers 1001 through 1029 inclusive, certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent separation of the cyclic pitch stick yokes from the cyclic pitch flight control torque tube (torque tube), loss of cyclic control, and subsequent loss of control of the helicopter, accomplish the following:

(a) Within 50 hours time-in-service (TIS), determine whether each attachment of the bolted assembly of the torque tube (attachment) has a single or double-locking device in accordance with the Accomplishment Instructions, paragraph 2.B.1., of Eurocopter France Alert Service Bulletin No. 67A003, dated August 2, 2001 (ASB).

(1) If the attachment has a double-locking device (a castellated self-locking nut with a cotter pin), no further action is required by this AD.

(2) If the attachment has a single-locking device (castellated nut without a cotter pin or a self-locking nut only), in accordance with the Accomplishment Instructions, paragraph 2.B.1., of the ASB, before further flight:

(i) Torque each nut to 0.4 to 0.5 mdaN (36 to 44 inch-lbs), and

(ii) Apply a slippage mark on the nut and torque tube.

(b) At intervals not to exceed 50 hours TIS, inspect the attachment for movement of the locking device indicated by a misalignment of the slippage mark.

(1) If no movement has occurred, record the inspection.

(2) If movement has occurred, replace, retorque, and reapply the slippage mark to the nut in accordance with the Accomplishment Instructions, paragraph 2.B.2., of the ASB.

(c) Within 250 hours TIS or 12 months, whichever occurs first, modify the torque tube in accordance with the Accomplishment Instructions, paragraph 2.B.3., of the ASB.

(d) Modifying the torque tube in accordance with paragraph (c) of this AD is terminating action for the requirements of this AD.

(e) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Regulations Group, Rotorcraft Directorate, FAA. Operators shall submit their requests through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Regulations Group.

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

(f) Special flight permits may be issued in accordance with 14 CFR 21.197 and 21.199 to operate the helicopter to a location where the requirements of this AD can be accomplished.

Note 3: The subject of this AD is addressed in Direction Generale De L'Aviation Civile, (France) AD 2001–373–008(A), dated August 22, 2001.

Issued in Fort Worth, Texas, on January 29, 2002.

Larry M. Kelly,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 02–3580 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–SW–47–AD]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Model AS332C, L, L1, and Model SA330F, G, and J Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes superseding an existing airworthiness directive (AD) for Eurocopter France (ECF) Model AS332C, L, and L1 and Model SA330F, G, and J helicopters. That AD currently requires an inspection to determine the angular play of the tail rotor gearbox (gearbox) at specified intervals. This action would change the measurement limits and the load to be applied to a tail rotor blade (blade) when determining the angular play. This proposal is prompted by a review of design data and a determination that the amount of play can be increased with an increase in the amount of applied load during the inspection. The actions specified by the proposed AD are intended to detect excessive angular play and to prevent failure of a gearbox, loss of tail rotor drive, and subsequent loss of control of the helicopter.

DATES: Comments must be received on or before April 15, 2002.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 2001–SW–47–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137. You may also send comments electronically to the Rules Docket at the following address: *9-asw-adcomments@faa.gov.* Comments may be inspected at the Office of the Regional Counsel between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Uday Garadi, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Rotorcraft Standards Staff, Fort Worth, Texas 76193–0110, telephone (817) 222–5123, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments will be considered before taking action on the proposed rule. The proposals contained in this document may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their mailed comments submitted in response to this proposal must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 2001–SW–47–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 2001–SW–47–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

Discussion

On June 18, 1998, the FAA issued AD 98–06–04, Amendment 39–10633 (63 FR 34790, June 26, 1998) to require an inspection to determine the angular play of the gearbox at specified intervals depending on the amount of play detected. That AD was prompted by an accident involving a Model SA330 helicopter that lost tail rotor drive. An investigation determined that the loss of tail rotor drive was caused by excessive play between the gearbox bevel wheel and the tail rotor driveshaft. The requirements of that AD are intended to prevent failure of the gearbox, loss of tail rotor drive, and subsequent loss of control of the helicopter.

Since the issuance of that AD, ECF has issued Alert Service Bulletin Nos. 05.00.44 and 05.86, both dated January 11, 2001, specifying a check of the angular play of certain gearboxes and to introduce new lower minimum and higher maximum angular play values.

The Direction Generale De L'Aviation Civile (DGAC), which is the airworthiness authority for France, classified these service bulletins as mandatory and issued ADs 1997–332–067(A) R2 and 1997–323–079(A) R2, both dated February 21, 2001, to ensure the continued airworthiness of these helicopters in France.

The DGAC notified the FAA that an unsafe condition may exist on Model AS332 and SA330 helicopters. The DGAC advises of the accident of a Model SA330 helicopter due to loss of the tail rotor drive due to worn splines on the bevel wheel and on the tail rotor drive shaft. The bevel wheel is the output bevel gear in the tail rotor

gearbox. The play is measured between the splines of the bevel gear and the tail rotor driveshaft.

These helicopter models are manufactured in France and are type certificated for operation in the United States under the provisions of 14 CFR 21.29 and the applicable bilateral agreement. Pursuant to the applicable bilateral agreement, France has kept the FAA informed of the situation described above. The FAA has examined the findings of the DGAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

We have identified an unsafe condition that is likely to exist or develop on other helicopters of the same type designs. Therefore, the proposed AD would supersede AD 98–06–04 to change the measurement limits and inspection intervals.

The FAA estimates that 4 helicopters of U.S. registry would be affected by this proposed AD, that it would take approximately 3 work hours per helicopter to accomplish the proposed actions, and that the average labor rate is $60 per work hour. Creating measurement tools would cost approximately $100 per helicopter and it would cost $45,000 to replace a gearbox. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $1120, assuming no gearbox would need to be replaced.

The regulations proposed herein 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, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing Amendment 39–10633 (63 FR 34790, June 26, 1998), and by adding a new airworthiness directive (AD), to read as follows:

Eurocopter France: Docket No. 2001–SW–47–AD. Supersedes AD 98–06–04, Amendment 39–10633, Docket No. 98–SW–11–AD.

Applicability: Model AS332C, L, and L1 and Model SA330F, G, and J helicopters, with tail rotor gearbox (gearbox), part number (P/N) 332A33–0001–all dash numbers, 330A33–0000–all dash numbers, 330A33–0011–all dash numbers (for AS332 models), or 330A33–9109–all dash numbers (for SA330 models), installed, certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To detect excessive angular play in the gearbox and to prevent failure of a gearbox, loss of tail rotor drive, and subsequent loss of control of the helicopter, accomplish the following:

(a) Within 25 hours time-in-service (TIS) for any gearbox with 495 or more hours TIS, inspect each gearbox for play between the splines of the gearbox bevel gear and tail rotor driveshaft in accordance with the Accomplishment Instructions, paragraphs 2.A. through 2.B.4. of Eurocopter France Alert Service Bulletin No. 05.00.44 for the Model AS332 helicopters or No. 05.86 for the Model SA330 helicopters, both Revision 1 and both dated January 11, 2001.

(1) Thereafter, reinspect the gearbox for play:

(i) At intervals not to exceed 520 hours TIS, if the play measurement is 0.30 millimeter (mm) (0.0118 inch) or less for Model SA330 helicopters or 0.44mm (0.0173 inch) or less for Model AS332 helicopters, or

(ii) At intervals not to exceed 100 hours TIS, if the play measurement is greater than 0.30mm and less than 0.65mm (0.0255 inch) for Model SA330 helicopters or greater than 0.44mm and less than 0.75mm (0.0295 inch) for the Model AS332 helicopters.

(2) Before further flight, remove any gearbox if the play measurement is equal to or greater than 0.65mm for Model SA330 helicopters or 0.75mm for Model AS332 helicopters.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Regulations Group, Rotorcraft Directorate, FAA. Operators shall submit their requests through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Regulations Group.

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

(c) Special flight permits will not be issued.

Note 3: The subject of this AD is addressed in Direction Generale De L'Aviation Civile, (France) ADs 1997–322–067(A) R2 and 1997–323–079(A) R2, both dated February 21, 2001.

Issued in Fort Worth, Texas, on February 6, 2002.

David A. Downey,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 02–3581 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–SW–68–AD]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Model EC120B Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes adopting a new airworthiness directive (AD) for Eurocopter France (ECF) Model EC120B helicopters. This proposal would require installing front and side covers to protect the yaw control. This proposal is prompted by the report of a mobile phone falling between the

windshield canopy (canopy) and the cabin floor jamming the yaw control pedal. The actions specified by this proposed AD are intended to prevent an object from sliding between the canopy and the cabin floor, loss of yaw control, and subsequent loss of control of the helicopter.

DATES: Comments must be received on or before April 15, 2002.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 2001–SW–68–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137. You may also send comments electronically to the Rules Docket at the following address: *9-asw-adcomments@faa.gov.* Comments may be inspected at the Office of the Regional Counsel between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Richard Monschke, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Rotorcraft Standards Staff, Fort Worth, Texas 76193–0110, telephone (817) 222–5116, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments will be considered before taking action on the proposed rule. The proposals contained in this document may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their mailed comments submitted in response to this proposal must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 2001–SW–68–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 2001–SW–68–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

Discussion

The Direction General De L'Aviation Civile (DGAC), the airworthiness authority for France, notified the FAA that an unsafe condition may exist on this model helicopter. The DGAC advises of a report of a yaw control jamming caused by an object that slid between the canopy and the cabin floor.

ECF has issued Alert Service Bulletin No. 67A005, dated July 30, 2001 (ASB), which specifies installing a front and side protection on the cabin floor to protect the yaw control. The DGAC classified this ASB as mandatory and issued AD No. 2001–386–007(A), dated September 5, 2001, to ensure the continued airworthiness of these helicopters in France.

This helicopter model is manufactured in France and is type certificated for operation in the United States under the provisions of 14 CFR 21.29 and the applicable bilateral agreement. Pursuant to the applicable bilateral agreement, the DGAC has kept the FAA informed of the situation described above. The FAA has examined the findings of the DGAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

This unsafe condition is likely to exist or develop on other helicopter models of the same type design registered in the United States. Therefore, the proposed AD would require installing front and side covers to protect the yaw control. The actions would be required to be accomplished in accordance with the ASB described previously.

The FAA estimates that 44 helicopters of U.S. registry would be affected by this proposed AD, that it would take approximately 2 work hours per helicopter to accomplish the proposed actions, and that the average labor rate is $60 per work hour. Required parts would cost approximately $851. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $42,724.

The regulations proposed herein 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, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

Eurocopter France: Docket No. 2001–SW–68–AD.

Applicability: Model EC120B helicopters, serial numbers 1001 through 1278, inclusive, certificated in any category.

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

Compliance: Required within 90 days, unless accomplished previously.

To prevent an object from sliding between the canopy and the cabin floor, loss of yaw control, and subsequent loss of control of the helicopter, accomplish the following:

(a) Install front and side covers (protections) to protect the yaw control in accordance with the Accomplishment Instructions, paragraph 2.B., Alert Service Bulletin No. 67A005, dated July 30, 2001 (ASB) except the correct reference to the Aircraft Maintenance Manual in subparagraph 2.B.2 of the ASB is 20–10–00, 3–8. If the helicopter has flight controls at both the pilot and co-pilot stations, front and side protections are required at both stations.

Note 2: Figure 1 of the ASB depicts the right-hand side of the cockpit.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Regulations Group, Rotorcraft Directorate, FAA. Operators shall submit their requests through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Regulations Group.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Regulations Group.

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

Note 4: The subject of this AD is addressed in Direction Generale De L'Aviation Civile (DGAC) 2001–386–007(A), dated September 15, 2001.

Issued in Fort Worth, Texas, on February 6, 2002.

David A. Downey,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 02–3582 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–ANE–48–AD]

RIN 2120–AA64

Airworthiness Directives; Pratt & Whitney JT8D Series Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Supplemental notice of proposed rulemaking; reopening of comment period.

SUMMARY: This notice revises an earlier proposed airworthiness directive (AD), applicable to Pratt & Whitney JT8D series turbofan engines, that would have required revisions to the Time Limits Section (TLS) of the manufacturer's Engine Manuals (EMs) to include required enhanced inspection of selected critical life-limited parts at each piece-part exposure. This proposal would modify the airworthiness limitations section of the manufacturer's manual and an air carrier's approved continuous airworthiness maintenance program to incorporate additional inspection requirements. An FAA study of in-service events involving uncontained failures of critical rotating engine parts indicated the need for mandatory inspections. The mandatory inspections are needed to identify those critical rotating parts with conditions, which if allowed to continue in service, could result in uncontained failures. This action revises the proposed rule by correcting the applicability to Pratt & Whitney (PW) JT8D–1, –1A, –1B, –7, –7A, –7B, –9, –9A, –11, –15, –15A, –17, –17A, –17R, and –17AR series turbofan engines, installed on but not limited to Boeing 727 and 737 series, and McDonnell Douglas DC–9 series airplanes. The actions specified by this proposed AD are intended to prevent critical life-limited rotating engine part failure, which could result in an uncontained engine failure and damage to the airplane.

DATES: Comments must be received by April 15, 2002.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 98–ANE–48–AD, 12 New England Executive Park, Burlington, MA 01803–5299. Comments may be inspected at this location, by appointment, between 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. Comments may also be sent via the Internet using the following address: ''*9-ane-adcomment@faa.gov*.'' Comments sent via the Internet must contain the docket number in the subject line.

FOR FURTHER INFORMATION CONTACT: Christopher Spinney, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7175, fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 98–ANE–48–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRM's

Any person may obtain a copy of this NPRM by submitting a request to the FAA, New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 98–ANE–48–AD, 12 New England Executive Park, Burlington, MA 01803–5299.

Discussion

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to supersede airworthiness directive (AD) 2000–21–08, Amendment 39–11940 (65 FR 65731, November 2, 2000), applicable to JT8D engines, was published as a notice of proposed rulemaking (NPRM) in the **Federal Register** on January 7, 2002 (67 FR 697). That NPRM would have required revisions to the Time Limits Section (TLS) of the manufacturer's Engine Manuals (EMs) to include required enhanced inspection of selected critical life-limited parts at each piece-part exposure. An FAA study of in-service events involving uncontained failures of critical rotating engine parts indicated the need for mandatory inspections. The mandatory inspections are needed to identify those critical rotating parts with conditions, which if allowed to continue in service, could result in uncontained failures. The actions specified by this proposed AD are intended to prevent critical life-limited rotating engine part failure, which could

result in an uncontained engine failure and damage to the airplane.

Since the issuance of that NPRM, the FAA discovered that the Applicability Section of the proposal was incorrect. This Supplmental NPRM corrects that error. The correct applicability is as follows: Pratt & Whitney (PW) JT8D–1, –1A, –1B, –7, –7A, –7B, –9, –9A, –11, –15, –15A, –17, –17A, –17R, and –17AR series turbofan engines, installed on but not limited to Boeing 727 and 737 series, and McDonnell Douglas DC–9 series airplanes.

Since this change expands the scope of the originally proposed rule, the FAA has determined that it is necessary to reopen the comment period to provide additional opportunity for public comment.

Economic Analysis

The FAA estimates that 5821 engines installed on airplanes of US registry would be affected by this proposed AD, that it would take approximately 8 work hours per engine to perform the enhanced inspection for the first stage HP turbine disks. The average labor rate is $60 per work hour. The cost impact of the added inspections per engine is approximately $480 per year, with the approximate total cost for the US fleet of $2,794,080 per year.

Regulatory Impact

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

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing Amendment 39–11940 (65 FR 65731, November 2, 2000 and by adding a new airworthiness directive, to read as follows:

Pratt & Whitney: Docket No. 98–ANE–48–AD: Supersedes AD 2000–21–08, Amendment 39–11940.

Applicability: Pratt & Whitney (PW) JT8D–1, –1A, –1B, –7, –7A, –7B, –9, –9A, –11, –15, –15A, –17, –17A, –17R, and –17AR series turbofan engines, installed on but not limited to Boeing 727 and 737 series, and McDonnell Douglas DC–9 series airplanes.

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

Compliance: Required as indicated, unless already done.

To prevent critical life-limited rotating engine part failure, which could result in an uncontained engine failure and damage to the airplane, accomplish the following:

Inspections

(a) Within the next 30 days after the effective date of this AD, revise the Time Limits Section (TLS) of the JT8D–1, –1A, –1B, –7, –7A, –7B, –9, –9A, –11, –15, –15A, –17, –17A, –17R, and –17AR Turbofan Engine Manual, part number, 481672, and for air carrier operations revise the approved continuous airworthiness maintenance program, by adding the following:

''Critical Life Limited Part Inspection

A. Inspection Requirements:

(1) This section has the definitions for individual engine piece parts and the inspection procedures which are necessary when these parts are removed from the engine.

(2) It is necessary to do the inspection procedures of the piece parts in paragraph B when:

(a) The part is removed from the engine and disassembled to the level specified in paragraph B and

(b) The part has accumulated more than 100 cycles since the last piece part inspection, provided that the part was not damaged or related to the cause for its removal from the engine.

(3) The inspections specified in this paragraph do not replace or make not necessary other recommended inspections for these parts or other parts.

B. Parts Requiring Inspection:

Note: Piece part is defined as any of the listed parts with all the blades removed.

Description	Section	Inspection
Hub (Disk), 1st Stage Compressor:		
Hub Detail—All P/N's	72–33–31	–02, –03, –04
Hub Assembly—All P/N's	72–33–31	–02, –03, –04
2nd Stage Compressor:		
Disk—All P/N's	72–33–33	–02
Disk Assembly—All P/N's	72–33–33	–02
Disk, 13th Stage Compressor: All P/N's	72–36–47	–02
HP Turbine Disk, First Stage w/integral Shaft: All P/N's	72–52–04	–03
HP Turbine, First Stage, w/ Separable shaft:		
Rotor Assembly—All P/N's	72–52–02	–04
Disk—All P/N's	72–52–02	–03
Disk, 2nd Stage Turbine: All P/N's	72–53–16	–02
Disk, 3rd Stage Turbine: All P/N's	72–53–17	–02
Disk (Separable), 4th Stage Turbine: All P/N's	72–53–15	–02
Disk (Integral Disk/Hub), 4th Stage Turbine: All P/N's	72–53–18	–02''

(b) Except as provided in paragraph (c) of this AD, and notwithstanding contrary provisions in section 43.16 of the Federal Aviation Regulations (14 CFR 43.16), these mandatory inspections must be performed using the TLS of the PW JT8D–200 Turbofan Engine Manual.

Alternative Methods of Compliance

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

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

Special Flight Permits

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

Continuous Airworthiness Maintenance Program

(e) FAA-certificated air carriers that have an approved continuous airworthiness maintenance program in accordance with the record keeping requirement of § 121.369 (c) of the Federal Aviation Regulations (14 CFR 121.369 (c)) of this chapter must maintain records of the mandatory inspections that result from revising the TLS of the PW JT8D/09200 Turbofan Engine Manual, and the air carrier's continuous airworthiness program. Alternatively, certificated air carriers may establish an approved system of record retention that provides a method for preservation and retrieval of the maintenance records that include the inspections resulting from this AD, and include the policy and procedures for implementing this alternate method in the air carrier's maintenance manual required by § 121.369 (c) of the Federal Aviation Regulations (14 CFR 121.369 (c)); however, the alternate system must be accepted by the appropriate PMI and require the maintenance records be maintained either indefinitely or until the work is repeated. Records of the piece-part inspections are not required under § 121.380 (a) (2) (vi) of the Federal Aviation Regulations (14 CFR 121.380 (a) (2) (vi)). All other operators must maintain the records of mandatory inspections required by the applicable regulations governing their operations.

Note 3: The requirements of this AD have been met when the engine manual changes are made and air carriers have modified their continuous airworthiness maintenance plans to reflect the requirements in the PW JT8D–200 Turbofan Engine Manual.

Issued in Burlington, Massachusetts, on February 7, 2002.

Francis A. Favara,

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

[FR Doc. 02–3669 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99–NE–32–AD]

RIN 2120–AA64

Airworthiness Directives; Pratt & Whitney Models JT8D–209, –217, –217A, –217C and –219 Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The Federal Aviation Administration (FAA) proposes to supersede an existing airworthiness directive (AD), that is applicable to Pratt & Whitney JT8D models –209, –217, –217A, –217C and –219 turbofan engines. That AD currently requires initial and repetitive fluorescent magnetic particle inspections or fluorescent penetrant inspections of the combustion chamber outer case (CCOC) for cracks, and, if necessary, replacement with serviceable parts. Also, that AD requires a one-time boss material verification, and, if necessary, replacement with serviceable parts. Finally, that AD requires replacement of CCOC's with welded-on bosses with improved, one-piece CCOC's. This proposal would require lower initial inspection thresholds for all CCOC's installed in any JT8D model –209, –217, –217A, –217C or –219 turbofan engine. This proposal is prompted by reports of cracked CCOC's that had accumulated fewer cycles in service than the initial inspection thresholds required by the current AD. Also, a CCOC part number was discovered with incorrect material not identified by serial number in PW JT8D ASB 6359. The actions specified by the proposed AD are intended to prevent uncontained failure of the CCOC, which could cause release of debris, damage to the airplane, or fire.

DATES: Comments must be received by April 15, 2002.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 99–NE–32–AD, 12 New England Executive Park, Burlington, MA 01803–5299. Comments may be inspected at this location, by appointment, between 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. Comments may also be sent via the Internet using the following address: *9-ane-adcomment@faa.gov.* Comments sent via the Internet must contain the docket number in the subject line.

The service information referenced in the proposed rule may be obtained from Pratt & Whitney, 400 Main St., East Hartford, CT 06108; telephone (860) 565–8770, fax (860) 565–4503. This information may be examined, by appointment, at the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA.

FOR FURTHER INFORMATION CONTACT: Christopher Spinney, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7175, fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 99–NE–32–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRM's

Any person may obtain a copy of this NPRM by submitting a request to the FAA, New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 99–NE–32–AD, 12 New England Executive Park, Burlington, MA 01803–5299.

Discussion

On December 8, 1999, the Federal Aviation Administration (FAA) issued airworthiness directive (AD) 99–26–06, Amendment 39–11465 (64 FR 71280, December 21, 1999), to require initial and repetitive fluorescent magnetic particle inspections or fluorescent penetrant inspections of the combustion chamber outer case (CCOC) for cracks, and, if necessary, replacement with serviceable parts. Also, that AD requires a one-time boss material verification, and, if necessary, replacement with serviceable parts. Finally, that AD requires replacement of CCOC's with welded-on bosses with improved, one-piece CCOC's. That action was prompted by a report of an uncontained engine failure caused by fatigue cracks originating at the weld joining the drain boss to the CCOC. That condition, if not corrected, could result in CCOC cracks, which could result in an uncontained engine failure and damage to the airplane.

Since that AD was issued, the FAA has received reports of cracked CCOC's that had accumulated fewer cycles in service than the initial inspection thresholds defined in PW JT8D ASB 6359. Also, a CCOC part number (P/N), 797707, was found with incorrect material that was not identified by serial number in PW ASB JT8D ASB 6359. As a result, PW JT8D ASB 6359 was revised on July 31, 2000, to lower the initial inspection threshold from 15,000 cycles in service (CIS) for P/N 500238–01; 18,000 CIS for all other P/N's installed in JT8D–209, –217, –217A, and –217C engines; and 15,000 CIS for all other P/N's installed in JT8D–219 engines to 12,000 CIS for all P/N's installed in any engine. Also, the revision to PW ASB JT8D ASB A6359 expands the serial number list of P/N 797707 cases to include all CCOC's manufactured with that part number. Some minor editorial revisions to PW JT8D ASB A6359, Revision 1, were subsequently made on August 31, 2001. PW JT8D SB 6291, Revision 2, was also revised to reflect the lower thresholds for inspection and replacement of CCOC's.

Manufacturer's Service Information

The FAA has reviewed and approved the technical contents of PW JT8D ASB No. A6359, Revision 2, dated July 31, 2000; and PW JT8D ASB A6359, Revision 3, dated August 31, 2001, that describe procedures and intervals for inspecting CCOC's for cracks and incorrect material, and PW Service Bulletin (SB) No. 6291, Revision 3, dated August 31, 2001, that describes procedures for installation of CCOC P/N 815556.

FAA's Determination of an Unsafe Condition and Proposed Actions

Since an unsafe condition has been identified that is likely to exist or develop on other Pratt & Whitney JT8D models –209, –217, –217A, –217C and –219 turbofan engines of this same type design, the proposed AD would supersede AD 99–26–06 to require, for PW models JT8D–209, –217, –217A, –217C and –219 engines, inspections and replacement of CCOC's at the lower inspection thresholds and the expanded serial number lists outlined in PW JT8D ASB 6359, Revision 3, dated August 31, 2001; and SB 6291, Revision 2, dated August 31, 2001. The actions are required to be done in accordance with the service bulletins described previously.

Economic Analysis

There are approximately 2,624 engines of the affected design in the worldwide fleet. The FAA estimates that 1,280 engines installed on airplanes of U.S. registry are affected by the current AD and that number would remain the same under this proposed AD. The FAA also estimates that it takes approximately 2.5 work hours per engine to accomplish the required inspections, that the average labor rate is $60 per work hour, and those estimates would not change for the proposed AD. The cost of the required parts has increased since the current AD was issued, and would now cost approximately $46,910 per engine. Based on these figures, the updated total cost impact of the proposed superseding AD on U.S. operators is estimated to be $60,236,800.

Regulatory Analysis

This proposed rule does not have federalism implications, as defined in Executive Order 13132, because 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. Accordingly, the FAA has not consulted with state authorities prior to publication of this proposed rule.

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing Amendment 39–11465, (64 FR 71280), and by adding a new airworthiness directive:

Pratt & Whitney: Docket No. 99–NE–32–AD. Supersedes AD 99–26–06, Amendment 39–11465.

Applicability

This airworthiness directive (AD) is applicable to Pratt & Whitney (PW) models JT8D–209, –217, –217A, –217C, and –219 turbofan engines with combustion chamber outer case (CCOC), part numbers (P/N's) 5000238–01, 797707, 807684, and 815830 installed. These engines are installed on but not limited to McDonnell Douglas MD–80 series airplanes.

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

eliminated, the request should include specific proposed actions to address it.

Compliance

Compliance with this AD is required as indicated, unless already done.

To prevent uncontained failure of the CCOC, which could cause release of debris, damage to the airplane, or fire, do the following:

Inspections

(a) Perform initial and repetitive fluorescent magnetic particle inspections (FMPI) or fluorescent penetrant inspections (FPI) of drain bosses and Ps4 bosses of the CCOC for cracks, and, if necessary, replace with serviceable parts before further flight, in accordance with the procedures and intervals specified in paragraph 1.A. of the Accomplishment Instructions of PW JT8D Alert Service Bulletin (ASB) A6359, Revision 3, dated August 31, 2001.

(b) For all CCOC's P/N 797707 inspect for proper Ps4 and drain boss material, and, if necessary, replace with serviceable parts before further flight, in accordance with the procedures and intervals specified in paragraph 1.B. of the Accomplishment Instructions of PW JT8D ASB A6359, Revision 3, dated August 31, 2001.

Effective Date for Computing Compliance Intervals

(c) Use the effective date of this AD for computing compliance intervals whenever PW JT8D ASB A6359, Revision 3, dated August 31, 2001, refers to the publication date of the ASB.

Terminating Action

(d) At the next part accessibility after the effective date of this AD when the CCOC has accumulated cycles-in-service greater than the initial inspection threshold specified in Table 1 of PW JT8D ASB A6359, Revision 3, dated August 31, 2001, replace the CCOC with a one-piece machined CCOC assembly, P/N 815556, in accordance with PW JT8D Service Bulletin (SB) 6291, dated May 20, 1997, or Revision 1 dated July 9, 1997, or Revision 2, dated August 27,1999, or Revision 3 dated August 31, 2001. Installation of an improved, one-piece CCOC, P/N 815556, constitutes terminating action to the inspections required by this AD.

Definition

(e) For the purpose of this AD, part accessibility is defined as an engine disassembly in which the CCOC is removed from the engine.

Alternative Methods of Compliance

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

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

Special Flight Permits

(g) Special flight permits may be issued in accordance with §§ 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be done.

Issued in Burlington, Massachusetts, on February 7, 2002.

Francis A Favara,

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

[FR Doc. 02–3668 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 382

[OST Docket No. 2002–11473]

RIN 2105–AD04

Reporting Requirements for Disability-Related Complaints

AGENCY: Office of the Secretary, Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to require most certificated U.S. air carriers and foreign air carriers operating to and from the U.S. that conduct passenger-carrying service to record and categorize complaints that they receive alleging inadequate accessibility or discrimination on the basis of disability according to the type of disability and nature of complaint, prepare a summary report of those complaints, submit the report annually to the Department of Transportation's (Department or DOT) Aviation Consumer Protection Division, and retain copies of correspondence and record of action taken on disability-related complaints for three years. Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval to collect information from the public, Federal agencies must solicit public comment on proposed collections of information.

DATES: Interested persons are invited to submit comments regarding this proposal and comments must be received on or before April 15, 2002.

ADDRESSES: Comments on this notice of proposed rulemaking must refer to the docket and notice numbers cited at the beginning of this document and be submitted to the Docket Management Facility of the Office of the Secretary (OST), located on the Plaza Level of the Nassif Building at the U.S. Department of Transportation, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001. The DOT Docket Facility is open to the public from 9 am to 5 pm, Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Blane A. Workie, Office of the General Counsel, Department of Transportation, 400 7th Street, SW., Room 4116, Washington, DC, 20590, 202–366–9342 (voice), (202) 366–0511 (TTY), 202–366–7152 (fax), or *blane.workie@ost.dot.gov* (e-mail). Arrangements to receive this document in an alternative format may be made by contacting the above named individual.

SUPPLEMENTARY INFORMATION:

Background

The Air Carrier Access Act (ACAA, 49 U.S.C. 41705) prohibits discriminatory treatment of persons with disabilities in air transportation. The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (''AIR–21''; Public Law 106–181), signed into law on April 5, 2000, extended the requirements of the Air Carrier Access Act to cover foreign air carriers and required, among other things, that the Secretary of Transportation ''regularly review all complaints received by air carriers alleging discrimination on the basis of disability'' and ''report annually to Congress on the results of such review.'' The only practical way the Department can implement the statutory requirement to review disability complaints received by air carriers and report annually to Congress on the results of the review is by requiring carriers to record and submit disability-related complaint data to the Department.

The NPRM

In an effort to implement the statutory requirements of AIR–21, the Department proposes to require most U.S. air carriers and foreign air carriers to record disability-related complaints that they receive and categorize them in specific groups, submit these data annually to the Department, and retain copies of the disability-related complaints and a record of action for a period of time. The NPRM has six main components on which we specifically solicit comment: (1) The scope/coverage of the rule; (2) the definition of a disability-related complaint; (3) the categories of data collected; (4) the frequency of data reporting; (5) the procedures for submission of data; and (6) the period of record retention.

A. Scope

Under the proposed rule, certificated air carriers that conduct passenger-carrying service would be required to

record, categorize, and submit disability-related complaint data. A certificated air carrier means a U.S. direct air carrier holding a certificate issued under 49 U.S.C. 41102 to conduct passenger and/or cargo and mail operations, or holding an exemption to conduct direct passenger operation under 49 U.S.C. 40109. By definition, a certificated air carrier does not include air taxi operators or commuter air carriers operating under 14 CFR part 298. Some air carriers that would be eligible for air taxi or commuter status have voluntarily chosen to become certificated for operational, legal or public relations reasons.

The proposed rule would not apply to any flights performed by a commuter air carrier, air taxi operator, or certificated air carrier operating only ''small aircraft'' (aircraft with 60 or fewer seats) under 14 CFR part 298. However, if an airline operates both large aircraft (aircraft with more than 60 seats) and small aircraft, then all flights of that airline are covered regardless of the size of the aircraft used on a particular flight. Currently, there are approximately 123 certificated air carriers that hold authority to conduct passenger-carrying service, of which 64 operate large aircraft and 59 operate only small aircraft.

The Department is proposing to apply the rule only to carriers operating larger than 60-seat aircraft, i.e., excluding all commuter carriers and certificated carriers operating only small aircraft, because large certificated air carriers carry 85 percent of the domestic traffic and the Regulatory Flexibility Act encourages agencies to consider flexible approaches to the regulation of small businesses and other small entities that take into account their special needs and problems. The approach taken in this NPRM of exempting carriers operating only small aircraft is consistent with the Department's policy of exempting small entities from regulations when possible. However, we specifically request comment as to whether the Department should expand coverage of the rule to include certificated air carriers operating only aircraft with 60 or fewer seats, commuter carriers, or even air taxi operators.

This NPRM also proposes to require foreign air carriers operating to and from the United States that conduct passenger-carrying service to record, categorize and submit disability-related complaint data. The proposed rule would not apply to flights of foreign airlines between two foreign points. A foreign air carrier means a direct air carrier that is not a citizen of the United States as defined in 49 U.S.C. 40102(a) that holds a foreign air carrier permit issued under 49 U.S.C. 41302 or an exemption issued under 49 U.S.C. 40109 authorizing direct foreign air transportation. The proposed rule would exempt foreign air carriers that are operating only small aircraft (i.e., aircraft designed to have a maximum passenger capacity of 60 or fewer seats or a maximum payload capacity of not more than 18,000 pounds). These airlines are primarily trans-border air taxis operating between the U.S. and Canada, and to a lesser extent between the U.S. and Mexico and the U.S. and the Caribbean. If a foreign airline, such as Air Canada, operates both large and small airplanes, the flights on the small airplanes would still be covered because the airline holds authority to fly large airplanes. The foreign air carriers that we propose to cover are as similar as possible to U.S. air carriers that we propose to cover considering the different legal authority applicable to foreign operators.

Currently, there are 306 foreign air carriers that hold effective economic authority from the Department to serve the United States under 49 U.S.C. 41301 and/or 40109. Of these, 231 hold authority to operate large aircraft using their own aircraft and crews. See OST Docket 2001–10416, DOT Order 2001–8–15. The other 75 are either foreign air carriers that operate only small aircraft or foreign air carriers that conduct U.S. operations by wet lease, in which both an aircraft and crew are leased from a U.S. carrier or from a foreign carrier whose government aviation authority is in compliance with International Civil Aviation Organization (ICAO) standards. This NPRM proposes to cover the 231 foreign air carriers that operate large aircraft using their own aircraft and crews, and the small number of foreign air carriers that operate large aircraft under a wet-lease arrangement with an acceptable carrier to enable their airlines to fly into the United States. Under the wet-lease arrangement, it is the operating carrier (lessee) and not the airline that is providing the aircraft and crew (lessor) that is responsible for recording disability-related complaint data and submitting such data to the Department in an annual report.

B. Definition of Disability-Related Complaint

Because this proposed rule would require covered carriers to record, categorize, and submit disability-related complaint data, it is important that the phrase ''disability-related complaint'' be defined. For purposes of this NPRM, a disability-related complaint is a specific expression of dissatisfaction received from, or submitted on behalf of, an individual with a disability against a covered air carrier or foreign air carrier concerning a difficulty associated with the person's disability, which the person experienced when using or attempting to use the carrier's services. A complaint may be made by letter, comment card, e-mail, telephone call, or in person.

A given contact (e.g., a letter, e-mail message, or phone call) might express more than one complaint. Each disability-related complaint contained in a given contact must be categorized and reported. Service-related complaints (e.g., a late flight, a delayed refund) that have nothing to do with an individual's disability should not be reported to the Department simply because they were made by, or on behalf of, an individual with a disability. When an individual with a disability complains about disability-related matters as well as matters that are not related to his or her disability, the disability-related complaint(s) must be categorized and reported; the complaint(s) that are not related to the disability are not to be categorized or reported under the proposed rule.

In circumstances where a flight that is the subject of a disability-related complaint was a code-sharing flight, the determination of which carrier must report the complaint is driven by passenger perception of the identity of the carrier responsible for the problem. For example, if a passenger flies with ABC Airways from Charlottesville to Washington, DC with a connection from Washington to New York on XYZ Airways (ABC's code-sharing partner), and the passenger has disability-related problems on the ABC Airways portion of the journey but sends a complaint to XYZ Airways, XYZ Airways must record and categorize the complaint and report that complaint. When an individual with a disability complains to a carrier about a disability-related difficulty encountered in connection with service provided by that carrier's code-sharing partner, the carrier that received the complaint should report the complaint since the passenger perceives that carrier as being ultimately responsible for the difficulty.

In a code sharing situation, we are proposing to require that the carrier that receives the complaint from the passenger report the complaint because code-share flights are often marketed by U.S. carriers as their own service. Code sharing is a common industry practice in which one airline offers service in its

own name to a particular city, but some or all of the transportation is provided by another carrier. The two-character airline designator code that is used to identify these flights in schedules and on tickets is the code of the carrier whose name is used rather than that of the carrier actually providing the service. It is important to keep in mind that we are not proposing, in circumstances where a carrier receives a complaint involving another carrier with whom it does not have a code-sharing relationship, that the carrier that received the complaint report that complaint to DOT. In such situations, the carrier would simply forward the complaint to the carrier that is responsible for the airline service.

Disability-related complaints must also be recorded and reported without regard to the carrier's perception of the validity of the complaint—i.e., carriers must record and report complaints that they believe are not justified, as well as complaints about disability-related incidents that do not constitute a violation of the Department's rule on air travel by passengers with disabilities. The proposed rule would require that all disability-related complaint data, regardless of the manner in which a disability-related complaint is submitted or the validity of the complaint, be recorded and categorized by the covered carriers so that the Department can monitor disability complaints received by carriers and report annually to Congress. The Department seeks comments on all of these proposed procedures and definitions.

C. Categories of Data Collected

We propose to require covered carriers to record and categorize disability-related complaints that they receive in a manner similar to the way disability-related complaints are recorded and categorized by the Department's Aviation Consumer Protection Division (ACPD). That division maintains a database covering all of the service-related air travel complaints received by the Department against airlines, including disability-related complaints. Disability-related complaints have two core elements: the nature of the passenger's disability and the nature of the alleged discrimination or service problem related to the disability. ACPD uses the following 13 categories to identify the nature of a passenger's disability: vision impaired, hearing impaired, vision and hearing impaired, mentally impaired, communicable disease, allergies (e.g., food allergies, chemical sensitivity), paraplegic, quadriplegic, other wheelchair, oxygen, stretcher, other assistive device (cane, respirator, etc.), and other disability. ACPD also categorizes the alleged discrimination or service problems related to the disability in the following 12 areas: refusal to board, refusal to board without an attendant, security issues concerning disability, aircraft not accessible, airport not accessible, advance-notice dispute, seating accommodation, failure to provide adequate or timely assistance, problem with storage/damage/delay relating to assistive device, service animal problem, unsatisfactory information, and ''other.'' We are proposing that carriers use the Department's complaint categories to identify the types of complaints that they receive according to the passenger's disability and the nature of the grievance.

It is important to keep in mind that a contact from a passenger may express more than one complaint (i.e., more than one service problem) and a passenger may have more than one disability. We are proposing that in recording and categorizing complaints, carriers treat each disability-related problem as a separate incident, determine the type of service problem for each incident, and then settle on the primary disability that needed to be accommodated for each incident. For instance, consider the example of Jane, who is deaf and a wheelchair user. Jane sends a complaint to ABC Airlines alleging that there was a failure to provide her with ground personnel to assist in pushing the wheelchair at three of the airports through which she traveled and she missed her flight at the fourth airport because the gate agent did not let her know when she should board the aircraft. The carrier should count these disability-related problems as four separate incidents (i.e., four complaints) and should categorize each of them as ''Failure to Provide Assistance.'' In this hypothetical, the carrier should determine that the primary disability that needed to be accommodated for three of the incidents (failure to provide personnel to assist in pushing the wheelchair at three airports) is Jane's mobility impairment, and the primary disability that needed to be accommodated for the other incident (failure to inform Jane about the boarding for her flight) is Jane's deafness. In some cases, it could be more difficult to determine how to select among the 13 categories identifying the passenger's disability and the 12 areas identifying the service problem. We would expect carriers to use reasonableness as a standard in making these determinations. Clearly, the failure to record complaints would be more problematic than would be the occasional failure to properly categorize a complaint because of the judgmental issues involved. We request comment as to whether we should include additional categories for types of disabilities and/or nature of complaints.

D. Frequency of Data Reporting

The proposed rule would require the covered carriers to group disability-related complaints that they receive in specific categories. We estimate that air carriers receive about fifty times more disability-related complaints directly from passengers than the Department receives. During the discovery phase of a private lawsuit against one major air carrier, it was revealed that the carrier, for the period between January 1993 and November 1996, received a total of 5,072 disability-related complaints while DOT received a total of only 142 such complaints against that carrier. Enforcing the Civil Rights of Air Travelers with Disabilities: Recommendations for the Department of Transportation and Congress, National Council on Disability, February 26, 1999, p. 68. In other words, this airline received about 35 disability-related complaints directly from passengers for every disability-related complaint received by DOT against that airline. However, the disability complaint data received by DOT during its own enforcement investigations suggest that air carriers may receive up to a hundred times more disability complaints directly from passengers than the Department receives. Based on complaint data produced by one airline during the discovery phase of litigation and airline complaint data gathered by the Department during its enforcement investigations, our best estimate is that air carriers receive about fifty disability-related complaint for every disability-related complaint received by the Department.

During the 2000 calendar year, the ACPD received a total of 661 disability-related air travel complaints. Assuming that carriers receive about fifty times more disability-related complaints than the Department, we deduce that carriers receive a total of approximately 33,050 disability-related complaints each calendar year. The proposed rule would require the covered carriers to categorize each of these projected 33,050 disability-related complaints according to the passenger's disability and the alleged discrimination or service problem related to the disability. We solicit comments as to the reasonableness of the Department's

estimate of the number of disability-related complaints carriers receive each year.

The NPRM also proposes that carriers annually submit a report summarizing the disability-related complaint data to the Department of Transportation. We are proposing that the first report summarizing disability-related complaint data to the Department of Transportation be submitted by January 26, 2004, for complaints received by carriers during the calendar year 2003. All subsequent submissions will be due on the last Monday in January and would cover data from the prior calendar year. We request comments as to whether annual submission of disability-related complaint data is appropriate or if there are reasons to increase the reporting frequency, e.g. require biannual or quarterly reports. Commenters suggesting increased reporting frequency should include cost estimates.

E. Procedures for Submission of Data

Another important provision of the NPRM concerns the procedure for reporting the disability-related complaint information. The NPRM proposes to require carriers to report a summary of the disability-related complaint data to ACPD in a particular manner, using a disability-related complaint data form identical to the one in the proposed new section 382.70 rather than allowing each airline to develop its own data collection form. In addition, the proposed rule would mandate that carriers submit this disability-related complaint data via a form on the World Wide Web rather than submitting paper copies, disks, or e-mail. The NPRM does provide for limited exceptions in situations where the carrier can demonstrate that it would suffer undue hardship if it were not permitted to submit paper copies or disks of the disability-related complaint data form, or to e-mail the data.

To ensure that using the Web to submit disability complaint information would be easy, reliable, and secure, a specific web page with a registration system and the disability-related complaint data form would be established and its web address would be furnished to the covered carriers. Each carrier would only have to register once. Registering would consist of inputting the name and mailing address of the carrier; the name, telephone number, and e-mail address of a contact person for that carrier; a login name; and a password. Upon providing this information, carriers would receive an automatic computerized acknowledgment that their request for registration has been received. Shortly thereafter, officials from the Department would validate the information received and the carrier would be informed that the registration process has been completed. Each carrier would use its login name and password to access the disability-related complaint data form, fill out and edit the form, and submit the form to the Department.

We believe that completing the disability complaint data form, like registering, would not be a difficult task for the carriers. To complete the form, each carrier would insert the total number of disability-related incidents for each specific category. For example, if a covered carrier receives a total of 5 contacts about 8 separate incidents (8 complaints) of failure to provide bulkhead seating for passengers who have a fused knee, then the carrier would insert the number ''8'' in the box where the ''Seating Accommodation'' row intersects the ''Other Disability'' column. In a similar fashion, the carrier would add up the total number of incidents for the other categories and insert the appropriate number in each of the boxes. Every box in the form should have a number in it. If the carrier does not have any incidents to report in a particular area, the carrier should insert the number ''0''. The proposed rule would also require the covered carrier to include on the form the name and mailing address of the carrier, information about the contact person for the carrier, the telephone number for the contact person, the submission date for the form, the period of data collection, the total number of incidents/complaints for the period covered, and a certification that all entries made by the authorized representative of the carrier are true and correct.

F. Retention of Records

The NPRM proposes to require the covered carriers to retain copies of the disability-related complaints for three years. Currently, the Department's regulations in 14 CFR 249.20 require only certificated U.S. air carriers to retain correspondence and record of action taken on all consumer complaints for three years. This NPRM proposes to require that foreign air carriers operating to and from the United States that conduct passenger-carrying service with large aircraft also retain correspondence and record of action taken on all disability-related complaints related to their U.S. service for three years. In addition, we propose to require the covered carriers make these records available for review by Department of Transportation officials at their request.

Regulatory Analysis and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

This proposal, if adopted as a final rule, would not be ''significant'' under Executive Order 12866 or the Department of Transportation Regulatory Policies and Procedures because the cost resulting from this action would be minimal since most air carriers already record and categorize data about disability related complaints that they receive. The primary cost imposed by this notice of proposed rulemaking (NPRM) is the time to read, categorize, and record the disability complaint correspondence that the carriers receive. While we believe that the carriers are already performing these functions, we have included these expenses in the regulatory analysis.

In the year 2000, ACPD received complaints for 661 incidents from people with disabilities concerning airline service difficulties. We estimate that there were approximately 33,050 disability incidents in 2000 based on our assumption that airlines receive 50 disability complaints for each disability complaint received by ACPD. Some of the air carriers may receive only one complaint a year while some of the larger operators could receive 4000 annual complaints. Using a zero base review, we estimate that on average it will take 15 minutes per complaint to read or listen to the complaint and properly categorize the incident or incidents. We expect that it would take 8,262 hours to review all of the complaints. (15 minutes × 33,050 complaints). We have assigned an annual industry cost of $206,550 ($25 dollars per hour × 8,262 hours) for this burden.

The carriers that receive a high volume of disability related complaints will most likely set up a computerized program to automate their data collection. Of the 661 incidents mentioned above, 84% of them were against 10 carriers. As a result, we estimate that 10 to 15 carriers will expend a one time total of 2 hours to program an automated system. For those carriers that set up an automated system to record the complaints, we estimate an industry cost of $2,000 to $3,000. This estimate is based on an assumption of $100 for each programming hour ($100 × 20 to 30 hours). This would be a one-time only expense.

The one-time cost for the industry to register on the web is estimated to range from $1,844 to $2,313, based on our estimate that it will take approximately 15 minute to register on the web for the

295 to 370 respondents at a cost of $25 per hour ($25 × 15 minutes × 295 to 370 air carriers). In order to register, carriers would need to input the following information: carrier name, carrier address, contact person, telephone number of contact person, e-mail address of contact person, login name, and password.

The industry's annual cost to key punch its reports onto the web based form is estimated to range from $3,688 to $4,625. Once again we used a $25 per burden hour estimate and calculate it will take 30 minutes to type in the 156 data items ($25 × 30 minutes × 295 to 370 air carriers).

The annual cost for foreign carriers to comply with the record retention requirement is estimated to range from $28,875 to $38,250. This estimation is based on our expectation that this requirement will place a one hour annual burden on each foreign air carrier, storage fees of $100 dollars per carrier, and a $25 per carrier hour filing expense {($100 + $25) × 1 hour × 231 to 306 air carriers}.

As a result, the first year total cost to the industry of the rule proposed in this NPRM will range from $242,957 to $254,738. After the first year, the annual cost should range from $239,113 to $249,425. The average annual cost per carrier should be approximately $674 ($249,425 divided by 370 air carriers). However, the carrier cost range would run from a low of $25 for a carrier with a very small complaint total to a high of slightly over $10,000 for those carriers receiving 4,000 annual complaints.

This NPRM, if adopted, would benefit passengers with disabilities partly because, in addition to reporting annually to Congress, the Department expects to make the data on complaints received by carriers alleging discrimination on the basis of disability available to the general public. Passengers with disabilities will be able to compare carrier complaints related to the type of disabilities that they may have. Also, the data will provide the Department useful information to monitor air carrier compliance with the Air Carrier Access Act (ACAA, 49 U.S.C. 41705), which prohibits discriminatory treatment of persons with disabilities in air transportation. While the benefits of the rulemaking are intangible, it is our belief these benefits outweigh the minimal reporting costs. The Office of the Secretary has prepared and placed in the docket a regulatory evaluation for the proposed rule, which explains the costs and benefits of the rule in more detail.

Executive Order 13132 (Federalism)

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). This notice of proposed rulemaking would not (1) have a substantial direct effect on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government; (2) impose substantial direct compliance costs on state and local governments; or (3) preempt state law. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

Executive Order 13084

This notice of proposed rulemaking has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 (''Consultation and Coordination with Indian Tribal Governments''). Because this NPRM does not significantly or uniquely affect the communities of the Indian tribal governments and does not impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13084 do not apply.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant impact on a substantial number of small entities. We hereby certify that the rule proposed in this notice of proposed rulemaking will not have a significant economic impact on a substantial number of small entities. A direct air carrier or a foreign air carrier is a small business if it provides air transportation only with small aircraft. See 14 CFR 399.73. The proposed rule does not apply to U.S. and foreign air carriers that are operating only a small aircraft (i.e., aircraft designed to have a maximum passenger capacity of not more than 60 seats or a maximum payload capacity of not more than 18,000 pounds). Moreover, the economic impact of the proposed rule is minimal.

Paperwork Reduction Act

This NPRM contains information collections that are subject to review by OMB under the Paperwork Reduction Act of 1995 (Public Law 104–13). Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it must publish a document in the **Federal Register** providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information.

Interested parties are invited to send comments regarding any aspect of this information collection, including: (1) The necessity and utility of the information collection; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the collected information; and (4) ways to minimize the collection burden without reducing the quality of the collected information. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection.

This NPRM proposes three information collection requirements: (1) A proposal for carriers to record and categorize disability-related complaints that they receive according to type of disability and nature of complaint on a standard form; (2) a proposal for each covered carrier to submit an annual report summarizing the disability-related complaint data; and (3) a proposal for carriers to retain correspondence and record of action taken for all disability-related complaints. The Department will use the data submitted by carriers to report annually to Congress on the results of its review as required by law.

The title, description, and respondent description of the information collections and an estimate of the annual recordkeeping and periodic reporting burden are stated below.

(1) Requirement to read, record and categorize each disability related complaint from a passenger or on behalf of a passenger.

Respondents: Certificated U.S. air carriers and foreign air carriers operating to and from the United States that conduct passenger-carrying service with large aircraft.

Estimated Annual Burden on Respondents: 15 minutes to 1,000 hours a year for each respondent (time to record and categorize one complaint [15 minutes] multiplied by the number of complaints respondents receive [1 complaint a year to 4,000 annual complaints a year]. The number of complaints received by carriers varies greatly. In the year 2000, ACPD received complaints for 661 incidents from people with disabilities involving airline service difficulties. The10 carriers that received the most complaints accounted for 84% of the total complaints received by ACPD. Carriers are estimated to receive 50 complaints for each one ACPD receives.

Estimated Total Annual Burden: 8,262 hours for all respondents (time to

record and categorize one complaint [15 minutes] multiplied by the total number of complaints for all respondents [33,050])

Frequency: 1 to 4,000 complaints per year for each respondent (Some of the air carriers may receive only one complaint a year while some of the larger operators could receive 4,000 annual complaints based on our assumption that airlines receive 50 disability complaints for each disability complaint received by ACPD).

(2) Requirement to submit a report to DOT summarizing the disability-related complaint data (key-punching web-based matrix report).

Respondents: Certificated U.S. air carriers and foreign air carriers operating to and from the United States that conduct passenger-carrying service with large aircraft.

Estimated Annual Burden on Respondents: 30 minutes a year for each respondent to type in the 156 items (matrix consists of 13 disabilities and 12 service problems).

Estimated Total Annual Burden: 148 to 185 hours for all respondents (annual burden [30 minutes] multiplied by the total number respondents [295 to 370])

Frequency: 1 report to DOT per year for each respondent

(3) Requirement to retain correspondence and record of action taken on all disability-related complaints for three years.

Respondents: Foreign air carriers operating to and from the United States that conduct passenger carrying service with large aircraft.

Estimated Annual Burden on Respondents: 1 hour a year for each respondent

Estimated Total Annual Burden: 231 to 306 hours for all respondents (annual burden [1 hour] multiplied by the total number respondents [231 to 306])

Frequency: 1 to 4,000 complaints per year for each respondent

Unfunded Mandates Reform Act

The Department has determined that the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply to this rulemaking.

List of Subjects in 14 CFR Part 382

Air carriers, Civil rights, Consumer protection, Individuals with disabilities, Reporting and recordkeeping requirements.

Issued this 1st day of February, 2002, at Washington, DC.

Norman Y. Mineta,

Secretary of Transportation.

For the reasons set forth in the preamble, the Department proposes to amend 14 CFR Part 382 as follows:

PART 382—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN AIR TRAVEL

1. The authority citation for 14 CFR part 382 is revised to read as follows:

Authority: 49 U.S.C. 41702, 41705, and 41712.

2. A new § 382.70 is proposed to be added to read as follows:

§ 382.70 Disability-related complaints received by carriers.

(a) For the purposes of this section, a disability-related complaint means a specific expression of dissatisfaction received from, or submitted on behalf, of an individual with a disability concerning a difficulty associated with the person's disability, which the person experienced when using or attempting to use an air carrier's or foreign air carrier's services.

(b) This section applies to certificated U.S. carriers and foreign air carriers operating to, from, and in the United States, conducting passenger operations with at least one aircraft having a designed seating capacity of more than 60 passengers. Foreign air carriers are covered by this section only with respect to disability-related complaints dealing with service to and from the United States.

(c) Carriers shall categorize disability-related complaints that they receive according to the type of disability and nature of complaint. Data concerning a passenger's disability must be recorded separately in the following areas: vision impaired, hearing impaired, vision and hearing impaired, mentally impaired, communicable disease, allergies (e.g., food allergies, chemical sensitivity), paraplegic, quadriplegic, other wheelchair, oxygen, stretcher, other assistive device (cane, respirator, etc.), and other disability. Data concerning the alleged discrimination or service problem related to the disability must be separately recorded in the following areas: refusal to board, refusal to board without an attendant, security issues concerning disability, aircraft not accessible, airport not accessible, advance notice dispute, seating accommodation, failure to provide adequate or timely assistance, problem with storage/damage/delay of assistive device, service animal problem, unsatisfactory information, and other.

(d) Carriers shall submit an annual report summarizing the disability-related complaints that they received during the prior calendar year using the form specified in Appendix A to this part. The first report shall cover complaints received during calendar year 2003 and shall be submitted to the Department of Transportation by January 26, 2004. Carriers shall submit all subsequent reports on the last Monday in January of that year for the prior calendar year. All submissions must be made through the World Wide Web except for situations where the carrier can demonstrate that it would suffer undue hardship if it were not permitted to submit the data via paper copies, disks, or e-mail, and DOT has approved an exception. All fields in the form must be completed; carriers are to enter ''0'' where there were no complaints in a given category. Each annual report must contain the following certification signed by an authorized representative of the carrier: ''I, the undersigned, do certify that this report has been prepared under my direction in accordance with the regulations in 14 CFR part 382. I affirm that, to the best of my knowledge and belief, this is a true, correct, and complete report.'' Electronic signatures will be accepted.

(e) Carriers shall retain correspondence and record of action taken on all disability-related complaints for three years after receipt of the complaint or creation of the record of action taken. Carriers must make these records available to Department of Transportation officials at their request.

(f) Each carrier shall comply with paragraphs (c) through (e) of this section for covered complaints it receives from or on behalf of passengers as well as complaints forward by another carrier or governmental agency with respect to difficulties encountered in connection with service it provides. Each carrier shall also comply with paragraphs (c) through (e) of this section for covered complaints it receives from or on behalf of passengers with respect to difficulties encountered in connection with service provided by a code sharing partner.

(g) Carriers that do not submit their data via the Web shall use the disability-related complaint data form specified in Appendix A when filing their annual report summarizing the disability-related complaints they received. The report shall be mailed, by the dates specified in paragraph (d) of this section, to the following address:

U.S. Department of Transportation, Aviation Consumer Protection Division, 400 7th Street, SW., Room 4107, C–75, Washington, DC 20590.

3. A new Appendix A is proposed to be added to part 382 to read as follows:

Appendix A to Part 382—Disability Complaint Reporting Form

BILLING CODE 4910–62–P

Disability Complaint Reporting Form

Name of Carrier: _____ Submission Date: _____

Contact Person: Period of Data Collection: _____

Name: _____
Telephone # (include country code if outside the U.S.): _____
Email address: _____
Mailing address: _____

Total number of complaints (i.e., incidents): _____

REPORT OF DISABILITY-RELATED COMPLAINT DATA

	Vision Impaired	Hearing Impaired	Vision & Hearing Impaired	Paraplegic	Quadriplegic	Other wheelchair	Oxygen	Stretcher	Other Disability	Other Assistive Device	Mentally Impaired	Communicable Disease	Allergies
Refusal To Board Passenger													
Refusal to Board w/o Attendant													
Security issues: Disability													
Aircraft Not Accessible													
Airport Not Accessible													
Advance Notice Dispute													

Seating Accomm-odation													
Failure to Provide Assistance													
Assistive Device													
Service Animal Problem													
Unsatisfa-ctory Info													
Other													

Certification Statement: I, the undersigned, do certify that this report has been prepared under my direction in accordance with the regulations in 14 CFR Part 382. I affirm that, to the best of my knowledge and belief, this is a true, correct, and complete report

Signature: _____

[FR Doc. 02–3216 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–62–C

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 334

United States Navy Restricted Area, Kennebec River, Bath Iron Works Shipyard, ME

AGENCY: United States Army Corps of Engineers, DoD.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: The U.S. Army Corps of Engineers is proposing regulations to establish a restricted area on the west side of the Kennebec River in the vicinity of the Bath Iron Works (BIW) Shipyard from just south of the Carlton (Route 1) highway bridge to the southern end of the Bath Iron Works Shipyard facility in Bath, Maine. These regulations will enable the Navy to enhance security around vessels constructed, moored and launched at the facility. The regulations will safeguard military vessels and United States government contractor facilities from sabotage and other subversive acts, accidents, or incidents of similar nature. These regulations are also necessary to protect the public from potentially hazardous conditions that may exist as a result of Navy use of the area and its security measures.

DATES: Written comments must be submitted on or before March 18, 2002.

ADDRESSES: U. S. Army Corps of Engineers, ATTN: CECW–OR, 441 G Street, NW., Washington, DC 20314–1000.

FOR FURTHER INFORMATION CONTACT: Mr. Frank Torbett, Headquarters Regulatory Branch, Washington, DC at (202) 761–4618, or Mr. Richard Roach, Corps of Engineers, New England District, at (978) 318–8211 or (800) 343–4789.

SUPPLEMENTARY INFORMATION: Pursuant to its authorities in section 7 of the Rivers and Harbors Act of 1917 (40 Stat 266; 33 U.S.C. 1) and Chapter XIX, of the Army Appropriations Act of 1919 (40 Stat 892; 33 U.S.C. 3) the Corps proposes to amend the restricted area regulations in 33 CFR part 334 by adding Section 334.45 which establishes a restricted area in the Kennebec River, off of the Bath Iron Worksshipyard on the western shore of the Kennebec River South of the Route 1 highway bridge in Bath, Maine. The public currently is restricted from using the area by Coast Guard Regulations under the Port Safety Act. To better protect vessels and personnel stationed at the facility and the general public, The Navy, Supervisor of Shipbuilding, Conversion and Repair at BATH Iron Works has requested the Corps of Engineers establish a Restricted Area. This will enable the Navy to keep persons and vessels out of the area at all times, except with the permission of the Navy Supervisor of Shipbuilding at Bath Iron Works.

Procedural Requirements

(a) Review Under Executive Order 12866

This proposed rule is issued with respect to a military function of the Defense Department and the provisions of Executive Order 12866 do not apply.

(b) Review Under the Regulatory Flexibility Act

These proposed rules have been reviewed under the Regulatory Flexibility Act (Public Law 96–354) which requires the preparation of a regulatory flexibility analysis for any regulation that will have a significant economic impact on a substantial number of small entities (i.e., small businesses and small Governments). The Corps of Engineers expects that the economic impact of the establishment of this restricted area would have practically no impact on the public, no anticipated navigational hazard or interference with existing waterway traffic and accordingly, certifies that this proposal if adopted, will have no significant economic impact on small entities.

(c) Review Under the National Environmental Policy Act

An environmental assessment has been prepared for this action. We have concluded, based on the minor nature of the proposed additional restricted area regulations, that this action, if adopted, will not have a significant impact to the quality of the human environment, and preparation of an environmental impact statement is not required. The environmental assessment may be reviewed at the District office listed at the end of the **FOR FURTHER INFORMATION CONTACT,** paragraph.

(d) Unfunded Mandates Act

This proposed rule does not impose an enforceable duty among the private sector and, therefore, is not a Federal private sector mandate and is not subject to the requirements of section 202 or 205 of the Unfunded Mandates Act. We have also found under section 203 of the Act, that small Governments will not be significantly and uniquely affected by this rulemaking.

List of Subjects in 33 CFR Part 334

Danger zones, Marine safety, Restricted areas, Waterways.

For the reasons set out in the preamble, the Corps of Engineers proposes to amend 33 CFR part 334 as follows:

PART 334–DANGER ZONE AND RESTRICTED AREA REGULATIONS

1. The authority citation for Part 334 continues to read as follows:

Authority: 40 Stat. 266 (33 U.S.C. 1) and 40 Stat. 892 (33 U.S.C. 3)

2. Section 334. 25 is added to read as follows:

§ 334. 25 Kennebec River, Bath Iron Works Shipyard, Bath, Maine, Restricted Area.

(a) *The area.* The waters within an area beginning on the western shore at latitude 43°54′40.7″ N, longitude 69° 48′ 44.8 ″ W; thence easterly to latitude 43°54′40.7 ″ N, longitude 69°48′ 36.8″ W; thence southeasterly to latitude 43° 54′ 10.4″ N, longitude 069° 48′ 34.7″ W; thence southwesterly to latitude 43° 53′ 55.1 ″ N, longitude 69° 48′ 39.1 ″ W; thence westerly to latitude 43° 53′ 55.1 ″ N, longitude 69° 48′ 51.8 ″ W; thence northerly along the westerly shoreline to the point of origin.

(b) *The regulations.* No persons, swimmers, vessels, or other craft, except: those vessels under the supervision or contract to local military or Naval authority, vessels of the United States Coast Guard, and local or state law enforcement vessels, may pass through the restricted area unless specific authorization is granted by the Supervisor of Shipbuilding, United States Navy, Bath, Maine, or other persons or agencies as he/she may designate.

(c) *Enforcement.* (1) The regulation in this section, promulgated by the United States Army Corps of Engineers, shall be enforced by the Supervisor of Shipbuilding, Bath IronWorks, Bath, Maine, and/or other persons or agencies as he/she may designate.

(2) Federal and State Law enforcement vessels and personnel may enter the restricted area at any time to enforce their respective laws.

Dated: January 14, 2002.

Charles M. Hess,

Chief, Operations Division, Directorate of Civil Works.

[FR Doc. 02–3557 Filed 2–13–02; 8:45 am]

BILLING CODE 3710–92–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 51

[CC Docket Nos. 99–272, 92–105, 92–237; FCC 01–384]

The Use of N11 Codes and Other Abbreviated Dialing Arrangements; Administration of the North American Numbering Plan

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this *Notice of Proposed Rulemaking* (*NPRM*) the Federal Communications Commission (FCC or Commission) seeks comment on proposed methods to promote further competition and choice in the retail directory assistance (DA) market, in accordance with the pro-competitive, de-regulatory national policy framework set forth in the Telecommunications Act of 1996 (The Act), and consistent with the Commission's statements in the *Local Competition Second Report and Order*. This *NPRM* seeks comment on the directory assistance presubscription issue, as raised in a proposal filed by Telegate, Inc. (Telegate), a competing DA provider. This *NPRM* also seeks comment on other proposals to promote competition in the retail DA market.

DATES: Comments are due on or before April 1, 2002. Reply comments are due on or before April 30, 2002.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Room TW–B204F, Washington, DC, 20554.

FOR FURTHER INFORMATION CONTACT: Rodney McDonald, 202/418–77513, Fax 202/418–2345, TTY 202/418–0484, rlmcdona@fcc.gov, Network Services Division, Common Carrier Bureau.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rulemaking, CC Docket Nos. 99–273, 92–105, 92–237, FCC 01–384* (*NPRM*), adopted December 21, 2001 and released January 9, 2002. The full text of the *NPRM* is available for inspection and copying during the weekday hours of 9 a.m. to 4:30 p.m. in the FCC Reference Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554, or copies may be purchased from the Commission's copy contractor, Qualex International, 445 12th Street, SW., Suite CY–B402, Washington, DC 20554, phone (202) 863–2893.

Synopsis of the Further Notice of Proposed Rulemaking CC Docket Nos. 99–273, 92–105, 92–237

1. On September 9, 1999, the Commission released the *SLI/DA Order and Notice of Proposed Rulemaking* (*SLI/DA Order and NPRM*), 64 FR 51910 (September 27, 1999). In the *SLI/DA Order and NPRM*, the Commission tentatively concluded that competition in the directory assistance market is in the public interest. The Commission also tentatively concluded that competitive directory assistance providers are unable fully to compete without equal access to the local exchange carriers' (LECs) local directory assistance databases. The Commission invited comment on whether certain competitive directory assistance providers are providers of telephone exchange service or telephone toll service and thus entitled to nondiscriminatory access to those databases pursuant to section 251(b)(3) of the Act. The Commission also sought comment on whether competitive directory assistance providers that are not providers of telephone exchange service or telephone toll service also are entitled to nondiscriminatory access to directory assistance, including access to directory assistance databases.

2. On October 13, 1999, Telegate filed comments in response to the *SLI/DA Order and NPRM*. In its comments, Telegate argued that full competition in the DA market could not exist until LECs no longer have exclusive possession of the 411 code. Telegate proposed opening up 411 to competition by allowing customers to choose by presubscription their provider of directory assistance service, just as they can presubscribe to their primary interexchange carrier (IXC) for long distance services. None of the reply comments substantively addressed this portion of Telegate's comments.

3. On February 9, 2000, Telegate met with Common Carrier Bureau (Bureau) staff members to discuss further the 411 presubscription proposal. On March 10, 2000, at the Bureau's request, Telegate filed an ex parte memorandum illustrating Telegate's 411 presubscription proposal in further detail. On April 27, 2000, the Bureau issued a public notice seeking comment on Telegate's proposal. In the *Telegate Public Notice*, the Bureau solicited comments on Telegate's proposal to enhance competition in the directory assistance market by requiring LECs to implement presubscription for the 411 abbreviated dialing code, specifically soliciting comments on the technical feasibility and economic viability of requiring LECs to implement presubscription to N11 abbreviated dialing codes in general. This included presubscription to 411 in the directory assistance proceeding, as well as presubscription to other N11 codes, particularly to 711 for access to Telecommunications Relay Service (TRS).

4. On January 23, 2001, the Commission released the *SLI/DA First Report and Order*, 66 FR 10965 (February 21, 2001) and concluded that LECs must provide competing DA providers that qualify under section 251(b)(3) of the Act with nondiscriminatory access to the LECs' local directory assistance databases, and must do so at nondiscriminatory and reasonable rates. To the extent that such DA providers qualify under section 251(b)(3), the Commission found that a LEC's failure to provide such access might also violate section 201(b). In the *SLI/DA First Report and Order*, the Commission also explained that the competitive provision of directory assistance is a necessary element of a competitive local telecommunications market, and noted that Congress recognized it as such in section 251. The Commission also concluded that LECs are not required to grant competing directory assistance providers nondiscriminatory access to non-local directory assistance databases. Finally, in the *SLI/DA First Report and Order*, the Commission concluded that the language in section 222(e) concerning directory publishing ''in any format'' applies to telephone directories on the Internet, but that section 222(e) does not apply to orally provided directory listing information. Telegate's proposal was not addressed in that order.

5. In this *NPRM*, the Commission solicits comment on Telegate's proposal. Specifically, we seek comment Telegate's proposal to enhance competition in the DA market by requiring LECs to implement presubscription to 411. Central to Telegate's proposal is the argument that presubscription to the 411 code for access to DA services is necessary to ensure that full competition will develop in the retail DA market. We also seek comment on whether alternative dialing methods of providing access to DA services would provide a more level playing field for all DA providers to enter the retail DA market, and whether the elimination of the 411 dialing code is a necessary prerequisite for the success of such alternative dialing methods. On February 5, 2002, the Common Carrier Bureau released an *Order* extending the comment cycle for this proceeding. Comments are due on

or before April 1, 2002. Reply are comments due on or before April 30, 2002.

Initial Regulatory Flexibility Analysis

6. As required by the Regulatory Flexibility Act (RFA), the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this *NRPM.* 5 U.S.C. 603. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NRPM.* The Commission will send a copy of the *NRPM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). 5 U.S.C. 603(a).

Need for, and Objectives of, the Proposed Rules

7. The Commission is issuing this *NRPM* to seek comment on whether to modify the Commission's rules to permit presubscription to directory assistance services in order to promote competition and choice in the retail DA market. Additionally, the Commission seeks input concerning other methods of providing DA and their impact on consumers and providers. In the *Local Competition Second Report and Order,* 61 FR 47284 (September 6, 1996), the Commission anticipated that presubscription for particular services ultimately would be defined by technological, economic and marketing considerations, and noted its intent to monitor developments in this area and issue a *Further Notice of Proposed Rulemaking* to address these long range considerations so that end users would be able to preselect alternative providers for a multitude of services, including directory assistance. In the five years since the release of the *Local Competition Second Report and Order,* DA has grown from a simple method of obtaining a telephone number to a sophisticated voice-based portal that potentially can offer the consumer a wide spectrum of high quality services at competitive prices. We solicit comments as to whether the market for the competitive provision of directory assistance has developed to the point that additional steps must now be taken to ensure that all competitors have the same opportunity for access to customers and whether the directory assistance market is sufficiently open to competition that further regulatory action is unnecessary.

Legal Basis

8. The proposed action is authorized under sections 1, 2, 3, 4, 201, 202, 222, and 251 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 153, 154, 201, 202, 222, and 251.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

9. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. 5 U.S.C. 604(a)(3). The RFA defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' 5 U.S.C. 604(a)(3). In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. 5. U.S.C. 601(3). A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. 15 U.S.C. 632. A small organization is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' 5 U.S.C. 601(4). Nationwide, as of 1992, there were approximately 275,801 small organizations. ''Small governmental jurisdiction'' generally means ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.'' 5 U.S.C. 601(5). As of 1992, there were approximately 85,006 such governmental entities in the United States. This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96%, have populations of fewer than 50,000. The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (96%) are small entities.

10. Below, we further describe and estimate the number of small entity licensees and regulatees that may be affected by these rules. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the numbers of commercial wireless entities, appears to be data the Commission publishes annually in its Telecommunications Provider Locator report, regarding FCC Form 499–A.

11. Total Number of Telephone Companies Affected. The decisions and rules adopted herein may have a significant effect on a substantial number of the small telephone companies identified by SBA. The Census Bureau reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year. These firms include a variety of different categories of carriers, including LECs, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator services providers, pay telephone operators, personal communications service (PCS) providers, covered specialized mobile radio providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities because they are not ''independently owned and operated.'' For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms that may be affected by this *NRPM.* Since 1992, however, many new carriers have entered the telephone services marketplace. At least some of these new entrants may be small entities that are affected by this *NRPM.*

12. Wireline Carriers and Service Providers. The SBA has developed a definition of small entities for telephone communications companies except radiotelephone (wireless) companies. The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992. According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons. All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small ILECs. We do not have data specifying the number of these carriers that are not independently owned and operated, and thus are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer

than 2,295 small telephone communications companies other than radiotelephone companies are small entities or small incumbent LECs.

13. We have included small incumbent LECs in this present RFA analysis. As noted above, a ''small business'' under the RFA is one that, inter alia, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and is not dominant in its field of operation. 15 U.S.C. 632. The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not ''national'' in scope. We have therefore included small incumbent LECs in this RFA analyses, although we emphasize that this RFA action has no effect on FCC analyses and determination in other, non-RFA contexts.

14. Interexchange Carriers (IXCs). Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Reporting Worksheet, FCC Form 499–A. According to our most recent data, 229 companies reported that they were engaged in the provision of interexchange services. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 229 small entity IXCs that may be affected by the decisions and rules adopted in this *NRPM.*

15. Competitive Access Providers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Reporting Worksheet, FCC Form 499–A. According to our most recent data, 532 companies reported that they were engaged in the provision of competitive access services. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 532 small entity CAPs that may be affected by the decisions and rules adopted in this *NRPM.*

16. Operator Service Providers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of operator services providers nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Reporting Worksheet, FCC Form 499–A. According to our most recent data, 22 companies reported that they were engaged in the provision of operator services. Although it seems certain that some of these companies are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of operator services providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 22 small entity operator services providers that may be affected by the decisions and rules adopted in this *NRPM.*

17. Payphone Providers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to payphone providers. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of payphone providers nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Reporting Worksheet, FCC Form 499–A. According to our most recent data, 936 companies reported that they were engaged in the provision of pay telephone services. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of payphone providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 936 small entity payphone providers that may be affected by this *NRPM.*

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

18. Future rules may require carriers to submit status reports concerning the technologies they will use to provide DA services. Any costs incurred in generating such reports should be nominal for all carriers, including small entities. Costs incurred as a result of this proceeding on the entities affected, including any small businesses, will vary depending on the method of DA provision utilized and its underlying implementation costs. This proceeding may allow some small businesses to participate in the DA market for the first time, which would involve initial start-up costs. These costs, however, could be offset by future profits upon entering the market.

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

19. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. 6 U.S.C. 603(c).

20. This *NRPM* offers several possible methods of opening the local DA market up to competition. Each of these methods will have a different impact on small businesses. One alternative involves eliminating the 411 code for DA services. This alternative would provide expanded opportunities for small businesses to enter the market; however, the cost of market entry appears significant. This alternative is discussed in paragraph 45 of the *NRPM.* While this alternative provides a level playing field for all entities, it could also be the most technologically advanced requirement and the alternative with the greatest cost. A

second alternative considered herein explores the possibility of using alternative dialing schemes (such as 555 numbers and abbreviated 411XX dialing codes). National 555 numbers were created to provide a variety of information and telecommunications services. In addition, 555 numbers and 411XX codes could be used instead of the alternative of 411 presubscription. Further comment on these thoughts is included in paragraphs 47 through 52 of the *NRPM.* These alternatives could be easier to implement and less costly for small businesses to enter the market. Both of these alternatives are designed to open the local DA market to competition. Our belief is that by enhancing competition, we have created a space for small businesses to enter the market.

Federal Rules That May Duplicate, or Conflict With the Proposed Rules

20. None.

Report to Congress

21. The Commission will send a copy of this *NRPM,* including a copy of this IRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. In addition, the *NRPM* and this IRFA will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the **Federal Register**.

Ordering Clauses

22. Pursuant to the authority contained in sections 1, 2, 3, 4, 201, 202, 222, and 251 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 153, 154, 201,202, 222, and 251 the *NRPM* is hereby *adopted.*

23. The Commission's Consumer Information Bureau, Reference Information Center, *shall send* a copy of this *NRPM,* including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of Small Business Administration.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 02–3623 Filed 2–13–02; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 02–255, MM Docket No. 02–20, RM–10368]

Digital Television Broadcast Service; Traverse City, MI

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Central Michigan University proposing the allotment of DTV channel 23, reserved for noncommercial use, to Traverse City, Michigan. DTV Channel *23 can be allotted to Traverse City, Michigan, in compliance with the geographic spacing criteria of section 73.623(d) and the principle community coverage requirements of section 73.625(a) at reference coordinates (45–10–40 N. and 85–05–57 W.). Since the community of Traverse City is located within 400 kilometers of the U.S.-Canadian border, concurrence from the Canadian government must be obtained for this allotment.

DATES: Comments must be filed on or before April 1, 2002, and reply comments on or before April 16, 2002.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Room TW–A325, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Todd D. Gray, Dow, Lohnes & Albertson, PLLC, 1200 New Hampshire Avenue, NW., Suite 800, Washington, DC (Counsel for Central Michigan University).

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Mass Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 02–20, adopted February 1, 2002, and released February 7, 2001. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via-e-mail *qualexint@aol.com.*

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420. List of Subjects in 47 CFR Part 73

Television, Digital television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—TELEVISION BROADCAST SERVICES

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

Authority: 47 U.S.C. 154, 303, 334, and 336.

§ 73.622 [Amended]

2. Section 73.622(b), the Table of Digital Television Allotments under Michigan is amended by adding, DTV Channel *23 Traverse City.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Services Division, Mass Media Bureau.

[FR Doc. 02–3574 Filed 2–13–02; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register

Vol. 67, No. 31

Thursday, February 14, 2002

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

Forest Service

White Pass Ski Area Expansion, Okanogan-Wenatchee and Gifford Pinchot National Forests, Yakima and Lewis Counties, Washington

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Forest Service, USDA, will prepare an environmental impact statement (EIS) to analyze and disclose the environmental impacts of a site-specific proposal to modify the present special use permit of the White Pass Company, current operator of the White Pass Ski Area. This modification would authorize expansion into approximately 300 acres in Pigtail Basin, located between the current permit area and Hogback Basin, for the purpose of providing additional skiing opportunities. This action is proposed in response to an application by the White Pass Company to expand the permit area on the Cowlitz Valley Ranger District of the Gifford Pinchot National Forest. The Naches Ranger District of the Okanogan-Wenatchee National Forests administers the current White Pass Company permit. The proposed action is at White Pass, Washington, approximately 50 miles west of the city of Yakima. The purpose of the EIS will be to develop and evaluate a range of alternatives, including a No Action alternative and possible additional alternatives, to respond to issues identified during the scoping process. The proposed project will be in compliance with the direction in the Wenatchee and Gifford Pinchot National Forest Land and Resource Management Plans (1990), as amended by the Northwest Forest Pan (1994), which provide the overall guidance for management of the area. The Agency invites written comments on the scope of this project. In addition, the agency gives notice of this analysis so that interested and affected people are aware of how they may participate and contribute to the final decision.

ADDRESSES: Submit written comments and suggestions to Sonny J. O'Neal, Forest Supervisor, Okanogan-Wenatchee National Forests, 215 Melody Lane, Wenatchee, Washington 98801, Attn: White Pass Ski Area Expansion.

FOR FURTHER INFORMATION CONTACT: Questions and comments about this EIS should be directed to Randall Shepard, District Ranger, Naches Ranger District, 10061 Highway 12, Naches, WA 98937; Phone 509–653–2205.

SUPPLEMENTARY INFORMATION: The Okanogan-Wenatchee National Forests are initiating this action in response to an ongoing request by the White Pass Company to expand their current ski area permit boundary.

This is White Pass Company's third request to expand the skiing opportunities at White Pass. The first proposal was submitted after passage of the Washington Wilderness Act of 1984, which withdrew the area in question from Wilderness for the express purpose of study for its ski development potential. Subsequent litigation regarding the Forest's decision to authorize the expansion, in combination with concerns regarding new wildlife information, led to withdrawal of that decision by the Wenatchee National Forest Supervisor in 1992.

In 1998, the analysis for a second, smaller scale proposal for expansion was documented in an Environmental Impact Statement and a Record of Decision authorizing the expansion was issued. In a subsequent lawsuit, the U.S. District Court, Western District of Washington, rules against the Forest Service on two grounds and the ROD was again withdrawn.

This current proposal has been developed following (1) a review and understanding of the issues raised during the previous EIS attempt; (2) the review of current and updated environmental standards such as the amended Northwest Forest Plan direction, Aquatic Conservation Strategy, and the Interim Direction for Roadless Area Protection; (3) recent discussions with interested groups regarding the proposed action and alternatives; and (4) the continued search for an expansion location that best fits into the social, cultural, environmental and skier needs.

A range of alternatives will be considered, including a No Action Alternative. Other alternatives will be developed in response to issues received during scoping. Preliminary issues that have been identified include the potential effects on the following: Inventoried roadless area, riparian areas, Pacific Crest Trail, backcountry winter recreation opportunities, scenery, heritage resources, wildlife habitat, air quality, socioeconomics, and the cumulative effects of the proposed action on existing uses within the current permit area.

Continued public participation will be especially important at several points during the analysis. The Forest Service will be seeking information, comments, and assistance from Federal, State, and local agencies, Tribes, and other organizations and individuals who may be interested in or affected by the proposed actions. This information will be used in preparation of the draft EIS. The scoping process includes:

1. Identifying potential issues.
2. Identifying issues to be analyzed in depth.
3. Eliminating insignificant issues or issues which have been covered by a relevant previous environmental process.
4. Exploring additional alternatives.
5. Identifying potential environmental effects of the proposed action and alternatives (i.e., direct, indirect and cumulative effects and connected actions).
6. Determining potential cooperating agencies and task assignments.

Comments received in response to this notice, including names and addresses of those who comment, will be considered part of the public record on this Proposed Action and will be available for public inspection. Comments submitted anonymously will be accepted and considered; however, those who submit anonymous comments will not have standing to appeal the subsequent decision under 36 CFR part 215. Additionally, pursuant to 7 CFR 1.27(d), any person may request the agency to withhold a submission from the public record by showing how the Freedom of Information Act (FOIA) permits such confidentiality. Persons requesting such confidentiality should be aware that

under the FOIA, confidentiality may be granted in only very limited circumstances, such as to protect trade secrets. The Forest Service will inform the requester of the agency's decision regarding the request for confidentiality, and where the request is denied, the agency will return the submission and notify the requester that the comments may be resubmitted with or without name and address within a specified number of days.

The draft EIS is expected to be filed with the Environmental Protection Agency (EPA) and to be available for review in June 2002. The EPA will publish a notice of availability of the draft EIS in the **Federal Register**. The comment period on the draft EIS will be 45 days from the date the EPA notice appears in the **Federal Register**. At that time, copies of the draft EIS will be distributed to interested and affected agencies, organizations, Tribes, and members of the public for their review and comment. It is very important that those interested in the management of the Okanogan-Wenatchee and Gifford Pinchot National Forests participate at that time.

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 of a draft EIS 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 connections. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft EIS stage, but that are not raised until after completion of the final EIS may be waived or dismissed by the courts. *City of Angoon* v. *Hodel,* 803 F.2d 1016, 1022 (9th Cir. 1986) and *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 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 in the final EIS.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft EIS should be as specified as possible. It is also helpful if comments refer to specific pages or chapters of the draft EIS. Comments may also address the adequacy of the draft EIS or the merits of the alternatives formulated and discussed in the statement. 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.

The final EIS is scheduled to be completed no later than September 2002. In the final EIS, the Forest Service is required to respond to comments and responses received during the comment period that pertain to the environmental consequences discussed in the draft EIS and applicable laws, regulations and policies considered in making the decision regarding this proposal.

Sonny J. O'Neal, Forest Supervisor, Okanogan-Wenatchee National Forests, and Claire Lavendel, Forest Supervisor, Gilfford Pinchot National Forest, are the responsible officials. As the responsible officials, they will document the decision and reasons for the decision in the record of decision. That decision will be subject to Forest Service appeal regulation (36 CFR part 215).

Dated: January 25, 2002.

Sonny J. O'Neal,

Forest Supervisor, Okanogan-Wenatchee National Forests.

[FR Doc. 02–3604 Filed 2–13–02; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Colville Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Colville Resource Advisory Council will meet on Thursday, February 28, 2002 at the Spokane Community College, Colville Campus Dominion Room at 985 S. Elm Street, Colville, Washington. The meeting will begin at 9 a.m. and conclude at 4 p.m.

Agenda items include: review, modify and approve minutes from January meeting; review, modify and approve RAC bylaws; review and evaluate sample project selection processes and choose a process for future use; review and discuss submitted projects and determine needs for further information or presentations; agenda for next meeting scheduled for March 21, 2002; RAC budget & expenses immediate needs for public communication; and Public Forum.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding this meeting to designated federal official, Nora Rasure or Cynthia Reichelt, Public Affairs Officer, Colville National Forest, 765 S. Main, Colville, Washington 99114: (509) 684–7000.

Dated: February 7, 2002.

Nora B. Rasure,

Forest Supervisor.

[FR Doc. 02–3593 Filed 2–13–02; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Olympic Peninsula Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Olympic Peninsula Resource Advisory Committee (RAC) will hold its next meeting on March 6, 2002. The meeting will be held at the Jamestown S'Klallam Tribal Center's conference room, 1033 Old Blyn Highway, Blyn, Washington. The meeting will begin at 9:30 am and end at approximately 3:30 pm. Agenda topics are: Introductions; Approval of minutes of previous meeting; Bylaw update; Update on Title III Projects; Review and select process for applications; Presentation of project proposals; Selection of recommended projects and priorities; Public comments; and Identify next meeting date and location.

All Olympic Peninsula Resource Advisory Committee Meetings are open to the public. Interested citizens are encouraged to attend.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding this meeting to Ken Eldredge, RAC Liaison, USDA, Olympic National Forest Headquarters, 1835 Black Lake Blvd., Olympia, WA 98512–5623, (360) 956–2323 or Dale Hom, Forest Supervisor and Designated Federal Official, at (360) 956–2301.

Dated: February 6, 2002.

Dale Hom,

Forest Supervisor, Olympic National Forest.

[FR Doc. 02–3590 Filed 2–13–02; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Tehama County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Tehama County Resource Advisory Committee (RAC) will hold its second meeting.

DATES: The meeting will be held on March 14, 2002, and will begin at 9:00 a.m. and end at approximately 12:00 p.m.

ADDRESSES: The meeting will be held at the Lincoln Street School, PDC Room, 1135 Lincoln Street, Red Bluff, CA.

FOR FURTHER INFORMATION CONTACT: Bobbin Gaddini, Committee Coordinator, USDA, Mendocino National Forest, Grindstone Ranger District, P.O. Box 164, Elk Creek, CA 95939. (530) 968–5329; e-mail *ggaddini@fs.fed.us.*

SUPPLEMENTARY INFORMATION: Agenda items to be covered include: (1) Introductions of all committee members, alternate members and Forest Service personnel. (2) Consideration of a Vice-Chair. (3) Project Proposals Mendocino, Shasta-Trinity, Lassen. (4) Member Presentations (5) Individual Presentations (6) Project Applications (7) General Discussion (8) Public Comment. The meeting is open to the public. Public input opportunity will be provided and individuals will have the opportunity to address the Committee at that time.

Dated: February 5, 2002.

James F. Giachino,

Designated Federal Officer.

[FR Doc. 02–3591 Filed 2–13–02; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Glenn/Colusa County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Glenn/Colusa County Resource Advisory Committee (RAC) will hold its second meeting.

DATES: The meeting will be held on March 7, 2002, and will begin at 1:30 p.m. until approximately 6 p.m.

ADDRESSES: The meeting will be held at the Mendocino National Forest Supervisor's Office, 825 N. Humboldt Ave., Willows, CA.

FOR FURTHER INFORMATION CONTACT: Bobbin Gaddini, Committee Coordinator, USDA, Mendocino National Forest, Grindstone Ranger District, P.O. Box 164, Elk Creek, CA 95939. (530) 968–5329; e-mail *ggaddini@fs.fed.us.*

SUPPLEMENTARY INFORMATION: Agenda items to be covered include: (1) Select Chairperson, (2) Operating Guidelines. (3) Recommendation and Agreement Process, (4) Forest Service Project Proposals/Opportunities w/Nepa Completed. (5) Glenn County Project Idea (6) Next Agenda and (7) Public Comment. The meeting is open to the public. Public input opportunity will be provided and individuals will have the opportunity to address the Committee at that time.

Dated: February 4, 2002.

James F. Giachino,

Designated Federal Officer.

[FR Doc. 02–3592 Filed 2–13–02; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Central Idaho Resource Advisory Committee Meeting; Salmon-Challis National Forest Butte, Custer, and Lemhi Counties, ID

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting of the Resource Advisory Committee.

SUMMARY: The Central Idaho Resource Advisory Committee will meet at 3:30 p.m., February 22, 2002 at the Challis High School cafeteria, 100 High Street, Challis, Idaho. The 15-member committee will establish procedures for evaluating proposed projects and discuss preliminary project proposals for 2002. The meeting is open to the public and time will be scheduled for public comments.

The Central Idaho Resource Advisory Committee was established by the Secretary of Agriculture under Title II of the Secure Rural Schools and Community Self-Determination Act of 2000 to work collaboratively with the Salmon-Challis National Forest to provide advice and recommendations consistent with the purposes of the Act.

Dated: February 5, 2002.

George Matejko,

Forest Supervisor, Salmon-Challis National Forest, Designated Federal Officer, Central Idaho Resource Advisory Committee.

[FR Doc. 02–3599 Filed 2–13–02; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Winema and Fremont National Forests Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Winema and Fremont Resource Advisory Committee will hold its second meeting on Monday, February 25, 2002. The meeting will be held in the Gearhart Room of the Lakeview Interagency Office, 1301 South G Street, in Lakeview, Oregon. The meeting will begin at 9:30 am and end at approximately 3:30 pm. The agenda will include a final review and approval of bylaws and operating guidelines, consideration of Title II project proposals submitted by the public and other agencies, and final recommendations for funding of fiscal year 2002 projects.

All Winema and Fremont Resource Advisory Committee Meetings are open to the public. There will be a time for public input and comment. Interested citizens are encouraged to attend.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding this meeting to Bill Aney, Designated Federal Official, USDA, Paisley Ranger District, Fremont National Forest, P.O. Box 67, Paisley, OR 97636 (541) 943–4401 or Chuck Graham, Forest Supervisor at (541) 947–2151 or 883–6714.

Dated: February 7, 2002.

Charles Graham,

Forest Supervisor, Winema and Fremont National Forests.

[FR Doc. 02–3603 Filed 2–13–02; 8:45 am]

BILLING CODE 3410–11–M

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Nevada 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 Nevada Advisory Committee to the Commission will convene at 10:00 a.m. and adjourn at 12:00 p.m. on Friday, March 1, 2002, at the Crowne Plaza Hotel, 4255 South Paradise Road, Las Vegas, Nevada 89109. The purpose of the meeting is the orientation of new members and briefing by employment complainants.

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, February 8, 2002.

Ivy L. Davis,

Chief, Regional Programs Coordination Unit.

[FR Doc. 02–3664 Filed 2–13–02; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the West Virginia 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 West Virginia Advisory Committee to the Commission will convene at 11:30 a.m. and adjourn at 3:30 p.m. on March 5, 2002, at the Charleston Job Corps Center, 1000 Kennawa Drive, Charleston, West Virginia 25311. The Committee will hold a planning meeting to discuss its draft report based on three community forums held between 1998 and 2000, coordinate information gathered from newly elected officials, and plan future projects.

Persons desiring additional information, or planning a presentation to the Committee, should contact Chairperson Gregory T. Hinton, 304–367–4244, or Ki-Taek Chun, Director of the Eastern Regional Office, 202–376–7533 (TDD 202–376–8116). Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least ten (10) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, February 8, 2002.

Ivy L. Davis,

Chief, Regional Programs Coordination Unit.

[FR Doc. 02–3665 Filed 2–13–02; 8:45 am]

BILLING CODE 6335–01–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Information Collection; Submission for OMB Review; Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (hereinafter the ''Corporation'') has submitted a public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paper Reduction Act of 1995, Public Law 104–13, (44 U.S.C. Chapter 35). Copies of this ICR, with applicable supporting documentation, may be obtained by calling the Corporation for National and Community Service, Bruce Kellogg, at (202) 606–5000, extension 526. Individuals who use a telecommunications device for the deaf (TTY–TDD) may call (800) 833–3722 between the hours of 9 a.m. and 5 p.m. Eastern Standard Time, Monday through Friday.

Comments should be sent to the Office of Information and Regulatory Affairs, Attn: Ms. Brenda Aguilar, OMB Desk Officer for the Corporation for National and Community Service, Office of Management and Budget, Room 10235, Washington, DC 20503, within 30 days from the date of publication in this **Federal Register**.

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Propose ways to enhance the quality, utility and clarity of the information to be collected; and
- Propose ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

An ICR document has been submitted to OMB for consideration concerning two forms, each a proposed revision to an earlier OMB-approved form. They are:

(1) The *Forbearance Request Form* (OMB #3045–0030), and

(2) the *Interest Accrual Form* (OMB #3045–0053).

These are the documents by which AmeriCorps members first request postponement, during their term of service, of their obligation to make payments on qualified student loans and then access the interest payment benefit that they have earned by successfully completing their service. Both forms are important for AmeriCorps members who have outstanding qualified student loans during their period of national service.

The document was published in the **Federal Register** on November 14, 2001, for a 60-day pre-clearance public comment period. Only one organization, a loan servicing organization, requested a copy of the document. Four of its suggestions concerning the Interest Accrual Form were incorporated into the version now being presented to OMB for consideration. Three other suggestions were not incorporated, mainly due to space considerations and the Corporation's belief that the time allotted for forwarding the form will not cause undue delay.

Each form will be individually discussed below.

A. Forebearance Request Form

Type of Review: Renewal.

Agency: Corporation for National and Community Service.

Title: Forbearance Request Form.

OMB Number: OMB #3045–0030.

Agency Number: None.

Affected Public: AmeriCorps members and the holders of their qualified student loans.

Total Respondents: 6,500 annually.

Frequency: Average of once per year of national service per loan.

Average Time Per Response: Ten minutes for the AmeriCorps member to complete the form.

Estimated Total Burden Hours: 1083 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Description

AmeriCorps members may request a suspension of their obligation to repay most qualified student loans not in default during their service period. The purpose of the forbearance is to accommodate the minimal living allowance they receive while they complete their term of service, although interest continues to accrue during this period.

Currently, AmeriCorps members use an OMB approved form entitled *Forbearance Request for National Service* to obtain certification that they are in an approved national service position. The form also serves as the borrower's official request to the loan companies for forbearance. Since forbearance is granted by the loan holder and not the Corporation, the form requests of the loan holder that a forbearance be approved for the national service. The Corporation's role is to verify that the borrower is an AmeriCorps member and is eligible for

this mandatory forbearance on qualified student loans. An AmeriCorps member completes one part of the form and sends it to the office of the National Service Trust. The Trust provides written verification that the borrower is in an approved national service position, then forwards the form to the loan holder at the address provided by the AmeriCorps member. The loan holder will act upon the request.

This form has been adopted by many of the larger loan holders (*e.g.,* Sallie Mae) and is given to their borrowers with the loan holders' own logos at the top of the form. Indeed, the form was originally developed with the assistance of Sallie Mae and representatives of several student loan associations. Having a separate form for forbearance based on AmeriCorps service clearly distinguishes it from forbearance requests based on one of the other conditions for which a borrower may be eligible (*e.g.,* military service, employment in certain low income areas, student status).

Several other loan holders have chosen to modify their own existing forbearance request forms by including an additional option— ''AmeriCorps service'' or ''national service'' —to the choices already available. The Corporation verifies national service participation using all types of forms presented to it, on a loan holder's unique form as well as the OMB approved form.

The form needs some minor revisions to clarify certain sections and to facilitate processing of the information; for example, to add loans made by a state agency to the list of qualified loans, add a statement of purpose to the member's section, identify the service dates as mandatory, limit the form to a single loan holder each, and add the National Service Trust's toll-free number.

The Corporation seeks to continue using this particular form, albeit in a slightly revised version. This is a voluntary form. It is one way to provide verification to a loan holder that one of its borrowers is eligible for the mandatory forbearance, while at the same time allowing the borrower to request the forbearance from the loan company. The Corporation will continue its policy of verifying AmeriCorps participation on any form the loan holder wishes to use. The current form is due to expire March 31, 2002.

Analysis of Comments Received During the Public Comment Period

One comment was received from a loan servicing organization. It concerned the proposed change to require a separate forbearance request form for each lender. It commented favorably that although the change appeared to increase the burden on the borrower it was likely to have the opposite effect. The loan servicer noted that when all loan holders were listed on one form, as before, some loan holders may not have received the form timely or at all; and some of the borrower's loans may have become delinquent as a consequence.

B. Interest Accrual Form

Type of Review: Renewal.

Agency: Corporation for National and Community Service.

Title: Interest Accrual Form.

OMB Number: OMB #3045–0053.

Agency Number: None.

Affected Public: AmeriCorps members and the holders of their qualified student loans.

Total Respondents: 6,500 annually.

Frequency: Average of once per year of national service per loan

Average Time Per Response: 10 minutes, total (three minutes for the AmeriCorps member to complete the form and seven minutes for the loan holder).

Estimated Total Burden Hours: 1083 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Description

The Corporation pays all or a portion of the interest that accrues during a period of national service for those who successfully complete their service and have had their loans in forbearance during the service. Using the current form, AmeriCorps members complete the top section and indicate their dates of service. Then they mail the form to the loan holder who indicates the total amount of interest that accrued during the service period, or indicates a daily accrual rate. The loan holder also adds the address where the payment should be sent and returns the form to the National Service Trust. When the Corporation receives this information, it is reviewed for accuracy and is either paid or returned to the loan holder or lender for additional information.

The revisions address the most common causes for delays in processing interest payments. The changes modify the title for consistency, reduce the number of days prior to completion of service for submitting the form, more clearly identify the member's address information, identify the service dates as essential, add loans made by a state agency to the list of qualified loans, request loan type information and if more than one loan is cited request loan numbers, clarify the language regarding grace period information, add to the lender's certification a statement that the loans cited are in forbearance, and add a space for the lender's fax number. The current form is due to expire March 31, 2002.

Analysis of Comments Received During the Public Comment Period

One response was received from a loan servicing organization. It suggested a different wording for the lender's certification and for the identification of a grace period, which wording the Corporation agreed was clearer and incorporated into the form. It objected to changing the daily interest rate from a dollar amount to a percentage as a complication. We agreed, and we also accepted a recommendation to restore the list of examples of qualified student loans.

The loan servicer argued that decreasing the number of days prior to the member's completion date for sending in the form from 90 to 30 could delay payment until some time after the completion of service. In fact, payment cannot be made until the member's education award is in place. The purpose of this change is simply to decrease the number of forms that cannot be processed because the education award has not yet been granted. However, because most awards are now processed electronically much faster than before, we do not expect this change to cause any appreciable delay in making interest payments.

Another comment questioned giving the loan type and payoff amount in the space available, if the borrower has multiple eligible loan types. It was also thought a statement of purpose for this information would be useful. We concur but are constrained by space limitations. With the addition of loans made to members by state agencies, verification of qualified loan types becomes more subject to scrutiny, and a statement of the loan type will facilitate processing of the payment request. Similarly, providing the payoff amount, as is routinely done on the Voucher and Payment Request Form, should help avoid the delays caused by awaiting confirmation of that figure.

Dated: February 7, 2002.

Charlene Dunn,

Director, National Service Trust.

[FR Doc. 02–3600 Filed 2–13–02; 8:45 am]

BILLING CODE 6050–$$–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0031]

Federal Acquisition Regulation; Information Collection; Contractor Use of Government Supply Sources

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.

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 contractor use of Government supply sources. The clearance currently expires on April 30, 2002.

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: Submit comments on or before April 15, 2002.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the General Services Administration, FAR Secretariat (MVP), 1800 F Street, NW., Room 4035, Washington, DC 20405. Please cite OMB Control No. 9000–0031, Contractor Use of Government Supply Sources, in all correspondence.

FOR FURTHER INFORMATION CONTACT: Linda Nelson, Acquisition Policy Division, GSA (202) 501–1900.

SUPPLEMENTARY INFORMATION:

A. Purpose

When it is in the best interest of the Government and when supplies and services are required by a Government contract, contracting officers may authorize contractors to use Government supply sources in performing certain contracts.

The information informs the schedule contractor that the ordering contractor is authorized to use this Government supply source and fills the ordering contractor's order under the terms of the Government contract.

B. Annual Reporting Burden

Respondents: 300.
Responses Per Respondent: 7.
Annual Responses: 2,100.
Hours Per Response: .25.
Total Burden Hours: 525.

Obtaining Copies of Proposals:

Requesters may obtain a copy of the information collection document from the General Services Administration, FAR Secretariat (MVP), Room 4035, 1800 F Street, NW., Washington, DC 20405, telephone (202) 501–4775. Please cite OMB Control No. 9000–0031, Contractor Use of Government Supply Sources, in all correspondence.

Dated: February 5, 2002.

Al Matera,

Director, Acquisition Policy Division.

[FR Doc. 02–3594 Filed 2–13–02; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0032]

Federal Acquisition Regulation; Information Collection; Contractor Use of Interagency Motor Pool Vehicles

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 clearance.

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 contractor use of interagency motor pool vehicles. The clearance currently expires on April 30, 2002.

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: Submit comments on or before April 15, 2002.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the General Services Administration, FAR Secretariat (MVP), 1800 F Street, NW, Room 4035, Washington, DC 20405. Please cite OMB Control No. 9000–0032, Contractor Use of Interagency Motor Pool Vehicles, in all correspondence.

FOR FURTHER INFORMATION CONTACT: Linda Klein, Acquisition Policy Division, GSA (202) 501–3775.

SUPPLEMENTARY INFORMATION:

A. Purpose

If it is in the best interest of the Government, the contracting officer may authorize cost-reimbursement contractors to obtain, for official purposes only, interagency motor pool vehicles and related services. Contractors' requests for vehicles must obtain two copies of the agency authorization, the number of vehicles and related services required and period of use, a list of employees who are authorized to request the vehicles, a listing of equipment authorized to be serviced, and billing instructions and address.

A written statement that the contractor will assume, without the right of reimbursement from the Government, the cost or expense of any use of the motor pool vehicles and services not related to the performance of the contract is necessary before the contracting officer may authorize cost-reimbursement contractors to obtain interagency motor pool vehicles and related services.

The information is used by the Government to determine that it is in

the Government's best interest to authorize a cost-reimbursement contractor to obtain, for official purposes only, interagency motor pool vehicles and related services, and to provide those vehicles.

B. Annual Reporting Burden

Respondents: 70.
Responses Per Respondent: 2.
Annual Responses: 140.
Hours Per Response: .5.
Total Burden Hours: 70.

Obtaining Copies of Proposals

Requesters may obtain a copy of the information collection document from the General Services Administration, FAR Secretariat (MVP), Room 4035, 1800 F Street, NW, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0032, Contractor Use of Interagency Motor Pool Vehicles, in all correspondence.

Dated: February 5, 2002.

Al Matera,

Director, Acquisition Policy Division.

[FR Doc. 02–3595 Filed 2–13–02; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE
GENERAL SERVICES ADMINISTRATION
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0035]

Federal Acquisition Regulation; Submission for OMB Review; Claims and Appeals

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.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation

(FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning claims and appeals. A request for public comments was published at 66 FR 59782, November 30, 2001. No comments were received.

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: Submit comments on or before March 18, 2002.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (MVP), 1800 F Street,NW., Room 4035, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Rhonda Cundiff, Acquisition Policy Division, GSA (202) 501–0044.

SUPPLEMENTARY INFORMATION:

A. Purpose

It is the Government's policy to try to resolve all contractual issues by mutual agreement at the contracting officer's level without litigation. Contractor's claims must be submitted in writing to the contracting officer for a decision.

Claims exceeding $100,000 must be accompanied by a certification that (1) the claim is made in good faith; (2) supporting data are accurate and complete; and (3) the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable. Contractors may appeal the contracting officer's decision by submitting written appeals to the appropriate officials.

B. Annual Reporting Burden

Respondents: 4,500.
Responses Per Respondent: 3.
Annual Responses: 13,500.
Hours Per Response: 1.
Total Burden Hours: 13,500.

Obtaining Copies of Proposals: Requesters may obtain a copy of the proposal from the General Services Administration, FAR Secretariat (MVP), Room 4035, 1800 F Street, NW., Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0035, Claims and Appeals, in all correspondence.

Dated: February 5, 2002.

Al Matera,

Director, Acquisition Policy Division.

[FR Doc. 02–3596 Filed 2–13–02; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0065]

Federal Acquisition Regulation; Submission for OMB Review; Overtime

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 (9000–0065).

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning overtime. A request for public comments was published at 66 FR 58455, November 21, 2001. No comments were received.

DATES: Submit comments on or before March 18, 2002.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (MVP), 1800 F Streets, NW., Room 4035, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Linda Nelson, Acquisition Policy Division, GSA (202) 501–1900.

SUPPLEMENTARY INFORMATION:

A. Purpose

Federal solicitations normally do not specify delivery schedules that will require overtime at the Government's expense. However, when overtime is required under a contract and it exceeds the dollar ceiling established during negotiations, the contractor must request approval from the contracting officer for overtime. With the request, the contractor must provide information regarding the need for overtime.

B. Annual Reporting Burden

Respondents: 1,270.
Responses Per Respondent: 1.
Total Responses: 1,270.
Hours Per Response: .25.

Total Burden Hours: 318.

Obtaining Copies of Proposals: Requester may obtain a copy of the proposal from the General Services Administration, FAR Secretariat (MVP), Room 4035, 1800 F Street, NW., Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0065, Overtime, in all correspondence.

Dated: February 5, 2002.

Al Matera,

Director, Acquisition Policy Division.

[FR Doc. 02–3597 Filed 2–13–02; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0004]

Federal Acquisition Regulation; Submission for OMB Review; Architect-Engineer and Related Services Questionnaire (SF 254)

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 (9000–0004).

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning Architect-Engineer and Related Services Questionnaire (SF 254). A request for public comments was published at 66 FR 58454, November 21, 2001. No comments were received.

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: Submit comments on or before March 18, 2002.

ADDRESSES: Submit comments including suggestions for reducing this burden to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (MVP), 1800 F Street, NW, Room 4035, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Cecelia Davis, Acquisition Policy Division, GSA (202) 219–0202.

SUPPLEMENTARY INFORMATION:

A. Purpose

Standard Form 254 is used by all Executive agencies to obtain uniform information about a firm's experience in architect-engineering (A–E) projects. The form is submitted annually as required by 40 U.S.C. 541–544 by firms wishing to be considered for Government A–E contracts. The information obtained on this form is used to determine if a firm should be solicited for A–E projects.

B. Annual Reporting Burden

Respondents: 5,000.
Responses Per Respondent: 7.
Total Responses: 35,000.
Hours Per Response: 1.
Total Burden Hours: 35,000.

Obtaining Copies of Proposals

Requester may obtain a copy of the proposal from the General Services Administration, FAR Secretariat (MVP), Room 4035, 1800 F Street, NW, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0004, Architect-Engineer and Related Services Questionnaire (SF 254), in all correspondence.

Dated: February 5, 2002.

Al Matera,

Director, Acquisition Policy Division.

[FR Doc. 02–3598 Filed 2–13–02; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Correction notice.

SUMMARY: On February 7, 2002, an emergency notice inviting comment from the public was published for ''Application for New Grants—State Program Improvement Grants for Children with Disabilities'' in the **Federal Register** (Volume 67, Number 26) dated February 7, 2002. In the Preamble, under **DATES**, the second sentence should read, ''Approval by the Office of Management and Budget (OMB) has been requested by February 11, 2002''. The Leader, Regulatory Information Management, Office of the Chief Information Officer, hereby issues a correction notice as required by the Paperwork Reduction Act of 1995.

Dated: February 8, 2002.

John D. Tressler,

Leader, Regulatory Information Management Group, Office of the Chief Information Officer.

[FR Doc. 02–3589 Filed 2–13–02; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER02–565–000]

Duke Energy Enterprise, L.L.C.; Notice of Issuance of Order

February 8, 2002.

Duke Energy Enterprise, L.L.C. (Duke Enterprise) submitted for filing a tariff under which Duke Enterprise will engage in the sale of energy, capacity, and/or ancillary service at market-based rates. Duke Enterprise also requested waiver of various Commission regulations. In particular, Duke Enterprise requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by Duke Enterprise.

On January 30, 2002, pursuant to delegated authority, the Director, Office of Markets, Tariffs and Rates-East, granted requests for blanket approval under part 34, subject to the following:

Acceptance of Duke Enterprise's market-based rate tariff is subject to any tariff condition adopted by the Commission in Docket No. EL01–118–000.

Any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Duke Enterprise 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 to be heard in opposition within this period, Duke Enterprise is authorized to issue securities and assume 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 Duke Enterprise, 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 Enterprise'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 March 1, 2002.

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). Comments, protests, and interventions 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.

Magalie R. Salas,

Secretary.

[FR Doc. 02–3644 Filed 2–13–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP01–384–000 and CP01–387–000]

Islander East Pipeline Company, L.L.C., Algonquin Gas Transmission Company; Notice of Site Visit

February 8, 2002.

On February 20, 2002, the staff of the Office of Energy Projects (OEP) will conduct a pre-certification site visit of Islander East Pipeline Company's Islander East Pipeline Project in New Haven County, Connecticut. Selected alternatives in Connecticut will be inspected by automobile and on foot, as appropriate. The site visit will start at 1:30 P.M. at the lobby of the Islander East Pipeline Company's Office at 454 East Main Street, Route 1, Branford, Connecticut. Representatives of Islander East will accompany the OEP staff.

All interested parties may attend. Those planning to attend must provide their own transportation. For additional information, contact the Commission's Office of External Affairs at (202) 208–1088.

Magalie R. Salas,

Secretary.

[FR Doc. 02–3640 Filed 2–13–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP98–53–024]

Kinder Morgan Interstate Gas Transmission L.L.C., et al.; Notice of Offer of Settlement

February 8, 2002.

Take notice that on January 24, 2002, Kinder Morgan Interstate Gas Transmission L.L.C. (KMIGT), on behalf of itself and Signatory Parties,[1] filed an Offer of Settlement (Settlement) under Rule 602 of the Commission's Rules of Practice and Procedure in the captioned docket. The Settlement is designed to: (1) Extinguish the liability of all working interest owners whose aggregate total liability (principle and interest) as of September 30, 2001 is $80,000 or less; (2) establish the liabilities of the remaining 30 working interest owners, and then reduce such liabilities by the greater of $80,000 or 25%; and (3) extinguish the liability of royalty owners to working interest owners participating in the settlement for refunds of *ad valorem* taxes, due to the Commission's implementation of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Public Service Company of Colorado*.[2] A copy of the Settlement is on file with the Commission and is available for public inspection in the Public Reference Room. The Settlement may be viewed on the web at *http://www.ferc.fed.us/online/rims.htm* (call 202–208–2222 for assistance).

The Settlement is structured as an agreement among all working interest owners, regardless of their status as a Signatory Party. The Settlement provides the opportunity for every working interest owner to affirmatively opt-out of the settlement, with KMIGT and other parties, including the Commission, retaining the right to pursue any claims against those working interest owners which elect not to accept the terms of the settlement, or to defend against any claims by such working interest owners with respect to Kansas ad valorem taxes.

In accordance with section 385.602(f), initial comments are due by February 13, 2002, and any reply comments are due by February 25, 2002.

Magalie R. Salas,

Secretary.

[FR Doc. 02–3646 Filed 2–13–02; 8:45 am]

BILLING CODE 6717–01–P

[1] Other than KMIGT, Signatory Parties include Amoco Production Company, Anadarko Petroleum Corporation, George A. Angle d/b/a Frontier Oil Company, Atlantic Richfield Company, Benson Mineral Group, Inc., Beren Corporation and associated working interests, Chevron U.S.A. Inc., Dominion Oklahoma Texas Exploration and Production, Inc., Eastman Dillon Oil & Gas Associates, Ensign Operating Company, Finney-Kearney County Gas Venture, Russell Freeman, Graham-Michaelis Corporation, Griggs Oil Inc., Hallador Petroleum Company, Helmerich & Payne Inc., Hummon Corporation, IBEX Partnership, Ltd., IMC Global, Inc., Kaiser-Francis Oil Company, The Kansas Corporation Commission, Kansas Natural Gas, Inc., Kansas Petroleum, Inc., Kinder Morgan, Inc., D. R. Lauck Oil Company, John P. Lockridge, John P. Lockridge Operator, Inc. and related working interests, Midwest Energy, Inc., Mobil Oil Corporation, Mountain Petroleum Corporation, Northwestern Public Service, a Division of NorthWestern Corporation, OXY USA Inc., Pickrell Drilling Company, Inc., Pioneer Natural Resources USA, Inc., Public Service Company of Colorado, Reliant Energy Minnegasco, a Division of Reliant Energy Resources Corporation, RME Petroleum Corporation, Wanda Smith, Texas Exploration and Production Inc., UtiliCorp United, Inc., Westgate Greenland, L.P., and Williams Production RMT Company.

[2] *Public Service Co. of Colorado, et al.*, 80 FERC¶ 61,264 (1997), *reh'g denied*, 82 FERC ¶ 61,058 (1998). Appeal pending. *Anadarko Petroleum Corporation* v. *FERC*, Case No. 98–1227 et al.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP02–66–000]

Louisville Gas and Electric Company; Notice of Application

February 8, 2002.

Take notice that on January 14, 2002, Louisville Gas and Electric Company (Louisville) filed an application pursuant to section 7 of the Natural Gas Act (NGA) and 18 CFR 284.224 for a limited-jurisdiction blanket certificate of public convenience and necessity authorizing Louisville to offer open access firm and interruptible storage services in interstate commerce at market-based rates. Louisville includes with its application a Market Power Analysis which, it maintains, demonstrates that Louisville does not have market power in the relevant market for its proposed services. Louisville also submits with its filing an operational statement. Louisville states that it will offer the storage service by displacement through the two interstate pipelines serving Louisville—Texas Gas

Transmission Corporation and Tennessee Gas Pipeline Company.

Louisville states that questions concerning this filing may be directed to James F. Bowe, Jr., Dewey Ballantine LLP, at (202) 429–1444 (fax (202) 429–1579, email jbowe@deweyballantine.com).

Any person desiring to be heard or to protest this 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 sections 385.211 and 384.214 of the Commission's rules of practices and procedures. All such motions or protests must be filed not later than March 8, 2002. 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 this filing are on file with the Commission and are available for public inspection in the Public Reference Room. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions 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 under the ''e-Filing'' link.

Take further notice that, pursuant to the authority contained in a subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the NGA and the Commission's rules of practice and procedures, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein ir if the Commission on its own review of the matter finds that a grant of the subject authorization is required by the public convenience and necessity. If a motion for leave to intervene is timely filed or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Louisville to appear or to be represented at the hearing.

Magalie R. Salas,

Secretary.

[FR Doc. 02–3641 Filed 2–13–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER02–537–000]

Shady Hills Power Company L.L.C.; Notice of Issuance of Order

February 8, 2002.

Shady Hills Power Company L.L.C (Shady Hills) submitted for filing a tariff under which Shady Hills will engage in the sale of energy, capacity, and /or ancillary service at market-based rates. Shady Hills also requested waiver of various Commission regulations. In particular, Shady Hills requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by Shady Hills.

On January 30, 2002, pursuant to delegated authority, the Director, Office of Markets, Tariffs and Rates-East, granted requests for blanket approval under Part 34, subject to the following:

Acceptance of Shady Hill's market-based rate tariff is subject to any tariff condition adopted by the Commission in Docket No. EL01–118–000.

Any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Shady Hills 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 to be heard in opposition within this period, Shady Hills is authorized to issue securities and assume 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 Shady Hills, 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 Shady Hills' 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 March 1, 2002.

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). Comments, protests, and interventions 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.

Magalie R. Salas,

Secretary.

[FR Doc. 02–3643 Filed 2–13–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97–71–030]

Transcontinental Gas Pipe Line Corporation; Notice of ICTS Revenue Sharing Refund Report

February 7, 2002.

Take notice that on January 31, 2002, Transcontinental Gas Pipe Line Corporation (Transco) tendered for filing a refund report showing that on January 18, 2002, Transco submitted ICTS revenue sharing refunds (total principal and interest amount of $6,890.98) to all affected shippers in Docket Nos. RP97–71 and RP97–312.

Transco states that Section 7 of Transco's Rate Schedule ICTS provides that, during the effectiveness of the Docket No. RP97–71 rate period, which began on May 1, 1997, Transco shall refund annually 75% of the fixed cost component of all revenues collected associated with Rate Schedule ICTS interconnect transfer service charges to maximum rate firm transportation and maximum rate interruptible transportation Buyers (collectively, Eligible Shippers). Transco states that it has calculated that the refund amount for the annual period from May 1, 1999 through April 30, 2000 equals $6,890.98.

Pursuant to Section 7 of Rate Schedule ICTS, Transco states that it has refunded that amount to Eligible Shippers based on each Eligible Shipper's actual fixed cost contribution as a percentage of the total fixed cost contribution of all such Eligible Shippers (exclusive of the fixed cost contribution pertaining to service purchased by Seller from third parties).

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and

Regulations. All such protests must be filed on or before February 14, 2002. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions 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 under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. 02–3638 Filed 2–13–02; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP02–157–000]

Transwestern Pipeline Company; Notice of Proposed Changes in FERC Gas Tariff

February 8, 2002.

Take notice that on February 1, 2002, Transwestern Pipeline Company (Transwestern), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets, proposed to be effective March 4, 2002:

7th Revised Sheet No. 14
4th Revised Sheet No. 15
4th Revised Sheet No. 16
8th Revised Sheet No. 24
10th Revised Sheet No. 25
7th Revised Sheet No. 25A
11th Revised Sheet No. 33
6th Revised Sheet No. 34
6th Revised Sheet No. 35
1st Revised Sheet No. 37C
19th Revised Sheet No. 48
7th Revised Sheet No. 51B
8th Revised Sheet No. 72
3rd Revised Sheet No. 72A
4th Revised Sheet No. 72B
4th Revised Sheet No. 95B.01
6th Revised Sheet No. 95D

Transwestern states that the above tariff sheets are being filed to provide for electronic contracting for service under Transwestern's Rate Schedules FTS–1, FTS–2, LFT, EFBH, FTS–3, ITS–1, and PNR, and Operator Balancing Agreements to be implemented on the Transwestern system during March, 2002. Transwestern states that it currently has electronic contracting for capacity release available on its system. Concurrent with these tariff changes Transwestern is implementing a new contracting system that will, among other things, enable Transwestern and its shippers to comply with GISB timelines and the Commission's policies on contracting. Transwestern anticipates that this electronic contracting capability will replace current facsimile and mail methods for exchange of contractual documents.

Transwestern states that it has begun working with its shippers to transition to the new system and will continue to accept written requests, contracts and amendments during the transition period. The proposed tariff modifications permit shippers to request service and execute service agreements electronically on Transwestern's Web site located at www.tw.enron.com. The instant filing also includes minor corrections, as well as changes to update or clarify certain tariff provisions in conformance with the electronic processes provided for herein.

Transwestern further states that copies of the filing have been mailed to each of its customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions 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 under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. 02–3647 Filed 2–13–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER02–476–000]

Troup Electric Membership Corporation; Notice of Issuance of Order

February 8, 2002.

Troup Electric Membership Corporation (Troup EMC) submitted for filing a tariff under which Troup EMC will engage in the sale of energy and capacity at market-based rates. Troup EMC also requested waiver of various Commission regulations. In particular, Troup EMC requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by Troup EMC.

On January 30, 2002, pursuant to delegated authority, the Director, Office of Markets, Tariffs and Rates-East, granted requests for blanket approval under Part 34, subject to the following:

Acceptance of Troup EMC's market-based rate tariff is subject to any tariff condition adopted by the Commission in Docket No. EL01–118–000.

Any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Troup EMC 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 to be heard in opposition within this period, Troup EMC is authorized to issue securities and assume 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 Troup EMC, 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 Troup EMC'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 March 1, 2002.

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). Comments, protests, and interventions 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.

Magalie R. Salas,

Secretary.

[FR Doc. 02–3642 Filed 2–13–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER99–705–001, et al.]

Golden Spread Electric Cooperative, Inc., et al.; Electric Rate and Corporate Regulation Filings

February 7, 2002.

Take notice that the following filings have been made with the Commission. Any comments should be submitted in accordance with Standard Paragraph E at the end of this notice.

1. Golden Spread Electric Cooperative, Inc.

[Docket No. ER99–705–001]

Take notice that on January 31, 2002 Golden Spread Electric Cooperative, Inc. (Golden Spread) tendered for filing with the Federal Energy Regulatory Commission (Commission) its triennial updated market analysis (Triennial Analysis) in accordance with the Commission's January 14, 1999 Order in Docket No. ER99–705–000, which authorized Golden Spread to sell power at market-based rates. Golden Spread also has filed a motion for leave to file its Triennial Analysis out-of-time.

Comment Date: February 21, 2002.

2. Puget Sound Energy, Inc.

[Docket No. ER99–845–003]

Take notice that on January 29, 2002, Puget Sound Energy, Inc. (Puget) filed with the Federal Energy Regulatory Commission its three-year updated market analysis. Puget is an investor-owned public utility established and organized under the laws of the State of Washington, with its principal offices located in Bellevue, Washington. Puget engages in, among other things, generating, transmitting, and marketing electric power.

Comment Date: February 19, 2002.

3. American Electric Power Service Corporation

[Docket No. ER01–2215–001]

Take notice that on February 1, 2002, the American Electric Power Service Corporation (AEPSC) tendered for filing an executed amended Interconnection and Operation Agreement between Indiana Michigan Power Company and Duke Energy Vigo, LLC. The agreement is pursuant to the AEP Companies' Open Access Transmission Service Tariff (OATT) that has been designated as the Operating Companies of the American Electric Power System FERC Electric Tariff Second Revised Volume No. 6, effective June 15, 2000.

AEP requests an effective date of August 2, 2001. A copy of the filing was served upon the Indiana Utility Regulatory Commission and the Michigan Public Service Commission.

Comment Date: February 22, 2002.

4. GWF, LLC

[Docket Nos. ER02–42–002]

Take notice that on January 29, 2002, GWF Energy LLC filed a refund report in compliance with the Commission's Order published at 97 FERC ¶ 61,297 (December 19, 2001) related to revenues collected prior to the Effective Date of the long-term power sales agreement between GWF Energy LLC and the California Department of Water Resources.

Comment Date: February 19, 2002.

5. Split Rock Energy LLC

[Docket No. ER02–349–001]

Take notice that on January 31, 2002, Split Rock Energy LLC submitted revised Pricing Methodology—Energy Transfer Pricing and Capacity Cost-Sharing Principles for Split Rock Energy LLC.

Comment Date: February 21, 2002.

6. Southwestern Electric Power Company

[Docket No. ER02–381–001]

Take notice that on January 31, 2002 Southwestern Electric Power Company (SWEPCO) submitted for filing in compliance with the requirements of the Commission's January 16, 2002 ''Order Accepting, as Modified, Restated Agreement'' in Docket No. ER02–381–000 revisions to the Restated and Amended Power Supply Agreement between SWEPCO and Northeast Texas Electric Cooperatives, Inc.

SWEPCO states that a copy of this filing has been served on each person designated on the official service list in Docket No. ER02–381–000 and the Public Utility Commission of Texas.

Comment Date: February 21, 2002.

7. Midwest Independent Transmission System Operator, Inc.

[Docket No. ER02–484–001]

Take notice that on January 31, 2002, the Midwest Independent Transmission System Operator, Inc., (Midwest ISO) and the Midwest ISO Transmission Owners jointly submitted for filing a substitute page of the Midwest ISO Agreement regarding the implementation of the revenue distribution for revenues from the Regional Through and Out Rate surcharge. The substitute page states the percentages for revenue distribution without rounding to the next full percentage point.

The Midwest ISO seeks waiver of the Commission's regulations, 18 CFR 385.2010 (2001), with respect to service on all parties on the official service list in this proceeding. The Midwest ISO has electronically served a copy of this filing, with attachments, upon all Midwest ISO Members, Member representatives of Transmission Owners and Non-Transmission Owners, the Midwest ISO Advisory Committee participants, Policy Subcommittee participants, as well as all state commissions within the region. In addition, the filings has been electronically posted on the Midwest ISO's website at *www.midwestiso.org* under the heading ''Filings to FERC'' for other interested parties in this matter. The Midwest ISO will provide hard copies to any interested parties upon request.

Comment Date: February 21, 2002.

8. The Dayton Power and Light Company

[Docket No. ER02–504–001]

Take notice that on February 4, 2002, The Dayton Power and Light Company (Dayton) submitted to the Federal Energy Regulatory Commission (Commission) service agreements establishing The Dayton Power & Light Company (Energy Services) as customers under the terms of Dayton's Open Access Transmission Tariff.

Dayton requests an effective date of one day subsequent to this filing for the service agreements. Accordingly, Dayton requests waiver of the Commission's notice requirements. Copies of this filing were served upon Energy Services and the Public Utilities Commission of Ohio.

Comment Date: February 25, 2002.

9. California Independent System Operator Corporation

[Docket No. ER02–599–001]

Take notice that on January 30, 2002, the California Independent System

Operator Corporation (ISO), submitted a revised informational filing as to its transmission Access Charge rates. The ISO states that the revised filing was necessary because Pacific Gas and Electric Company and San Diego Gas and Electric Company submitted revised data to the Commission which affects the Access Charge formula rates. The ISO has requested that the revised rates be effective as of January 1, 2002.

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 with effective Scheduling Coordinator Agreements under the ISO Tariff, as well as the parties listed on the Commission's service list.

Comment Date: February 20, 2002.

10. Consolidated Edison Company of New York, Inc.

[Docket No. ER02–729–001]

Take notice that on January 29, 2002, Consolidated Edison Company of New York, Inc. (Con Edison) tendered for filing an amendment to its filing of a Supplement to its Rate Schedule FERC 117, an agreement to provide interconnection and transmission service to the Long Island Power Authority (LIPA).

Con Edison states that a copy of this filing has been served by mail upon LIPA.

Comment Date: February 19, 2002.

11. Wolverine Power Supply Cooperative, Inc.

[Docket No. ER02–791–001]

Take notice that on January 29, 2002, Wolverine Power Supply Cooperative, Inc., amended its January 17, 2002 filing of four Amended and Consolidated Wholesale Power Contracts (Contract) between Wolverine Power Supply Cooperative, Inc. (Wolverine) and Cherryland Electric Cooperative (Cherryland), HomeWorks Tri-County Electric Cooperative (HomeWorks), Great Lakes Energy Cooperative (Great Lakes), Presque Isle Electric and Gas Co-op, Inc. (Presque Isle) by submitting attachments that were inadvertently excluded from the initial Contract filing. Wolverine requests an effective date of March 15, 2002 for these Contracts.

Wolverine states that a copy of this filing has been served upon its member cooperatives: Cherryland Electric Cooperative, Great Lakes Energy, Presque Isle Electric & Gas Cooperative, HomeWorks Tri-County Electric Cooperative, Wolverine Power Marketing Cooperative, and the Michigan Public Service Commission.

Comment Date: February 19, 2002.

12. Entergy Services, Inc.

[Docket No. ER02–819–001]

Take notice that on January 31, 2002, Entergy Services, Inc. (Entergy Services), on behalf of Entergy Arkansas, Inc (Entergy Arkansas), tendered for filing a substitute page to the First Revised Long-Term Market Rate Sales Agreement between Entergy Arkansas and City of Benton, Arkansas for the sale of power under Entergy Services' Rate Schedule SP.

Comment Date: February 21, 2002.

13. Otter Tail Power Company

[Docket No. ER02–912–000]

Take notice that on January 31, 2002 and as amended on February 4, 2002, Otter Tail Power Company submitted corrections to its proposal to implement a Control Area Services and Operations Tariff and terminate its Open Access Transmission Tariff in order to accommodate the start-up of Midwest Independent Transmission System Operator, Inc. The corrections concern the table of contents to the Control Area Services and Operations Tariff, Attachments D–1 through D–4 of the Control Area Services and Operations Tariff, the service list, and the revised tariff sheets regarding the termination of the Open Access Transmission Tariff.

Comment Date: February 25, 2002.

14. California Independent System Operator Corporation

[Docket No. ER02–922–000]

Take notice that on January 31, 2002, the California Independent System Operator Corporation (ISO) submitted for filing Amendment No. 42 to the ISO Tariff and on February 1, 2002 submitted an errata concerning Amendment No. 42. Amendment No. 42 would modify the Tariff to provide for the following: new provisions to facilitate participation in the ISO markets by eligible intermittent resources (e.g., wind); changes in the allocation for settlement Charge Type 487; Changes in the management of Intra-zonal Congestion; and Changes in the calculation of the Target Price for incremental and decremental Imbalance Energy bids. The ISO requests that each of these modifications be made effective April 1, 2002.

The ISO has served copies of this filing upon the Public Utilities Commission of the State of California, the California Energy Commission, the California Electricity Oversight Board, and on all parties with effective Scheduling Coordinator Service Agreements under the ISO Tariff. In addition, the ISO is posting this filing on the ISO's Home Page.

Comment Date: February 21, 2002.

15. Western Massachusetts Electric Company

[Docket No. ER02–959–000]

Take notice that on February 4, 2002, Northeast Utilities Service Company (NUSCO), on behalf of its affiliate, Western Massachusetts Electric Company (WMECO), filed with the Federal Energy Regulatory Commission (Commission) an executed Supplement No. 1 to Interconnection and Operation Agreement (Supplement) dated December 10, 2001, between WMECO and Consolidated Edison Energy, Inc. (CEE) that establishes the terms and conditions under which certain modifications will be made to the existing interconnection facilities between WMECO transmission and distribution system and CEEI's West Springfield Station, located in West Springfield, Massachusetts. The Supplement relates to WMECO's Rate Schedule FERC No. 432.

NUSCO states that a copy of this filing has been mailed to CEEI, and that CEEI consents to and supports its filing. NUSCO and CEEI request expedited acceptance of the Supplement, and further request that the Supplement be permitted to become effective on December 10, 2001, or as soon thereafter as the Commission permits.

Comment Date: February 25, 2002.

16. Progress Energy on Behalf of Carolina Power & Light Company

[Docket No. ER02–960–000]

Take notice that on February 4, 2002, Carolina Power & Light Company (CP&L) tendered for filing a Service Agreement for Firm Point-to-Point Transmission Service with Central Power & Lime, Inc. Service to this Eligible Customer will be in accordance with the terms and conditions of the Open Access Transmission Tariff filed on behalf of CP&L.

CP&L is requesting an effective date of February 1, 2002 for this Service Agreement. A copy of the filing was served upon the North Carolina Utilities Commission, the South Carolina Public Service Commission and the Florida Public Service Commission.

Comment Date: February 25, 2002.

17. California Independent System Operator Corporation

[Docket No. ER02–961–000]

Take notice that on February 4, 2002, the California Independent System Operator Corporation (ISO) submitted for Commission filing and acceptance

an amendment (Amendment No. 2) to the Utility Distribution Company Operating Agreement (UDC Operating Agreement) between the ISO and the City of Pasadena, California, as well as the revised UDC Operating Agreement incorporating the terms of Amendment No. 2 to the UDC Operating Agreement. The ISO requests that the filing be made effective as of January 9, 2002. The ISO requests privileged treatment, pursuant to 18 CFR 388.112, with regard to portions of the filing.

The ISO has served copies of this filing upon the City of Pasadena, California, the Public Utilities Commission of the State of California, and all parties in Docket Nos. ER99–3619 and ER01–967.

Comment Date: February 25, 2002.

18. Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.

[Docket No. ER02–962–000]

Take notice that on February 4, 2002, Montana-Dakota Utilities Co. a Division of MDU Resources Group, Inc. filed a proposal to cancel parts of its Open Access Transmission Tariff and submitted an executed service agreement with the Midwest ISO for generation related ancillary services. Such cancellation is proposed in order to accommodate the start-up of Midwest Independent Transmission System Operator, Inc. Open Access Transmission Tariff administration.

Comment Date: February 25, 2002.

19. Kansas Gas and Electric Company

[Docket No. ES02–22–000]

Take notice that on January 30, 2002, Kansas Gas and Electric Company submitted an application pursuant to section 204 of the Federal Power Act seeking authorization to (1) issue not more than $1.0 billion in short-term or medium-term securities, and (2) pledge first mortgage bonds in an aggregate principal amount not to exceed $1.0 billion to secure such short-term and medium-term indebtedness.

Comment Date: February 28, 2002.

20. Western Resources, Inc.

[Docket No. ES02–23–000]

Take notice that on January 30, 2002, Western Resources, Inc. (Western) submitted an application pursuant to section 204 of the Federal Power Act seeking authorization to (1) issue not more than $1.5 billion in short-term or medium-term securities, and (2) pledge first mortgage bonds in an aggregate principal amount not to exceed $1.5 billion to secure such short-term and medium-term indebtedness.

Western also requests a waiver of the Commission's competitive bidding and negotiated placement requirements at 18 CFR 34.2.

Comment Date: February 28, 2002.

Standard Paragraph

E. Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions 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 under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. 02–3639 Filed 2–13–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RT02–2–000, Docket No. RT01–67–000, Docket No. RT01–74–000, Docket No. RT01–75–000, Docket No. RT01–77–000, Docket No. RT01–100–000, Docket No. RT01–1–000, and Docket No. RM98–1–002, (Not Consolidated)]

State-Federal Regional RTO Panels, GridFlorida LLC, et al., GridSouth Transco L.L.C. Entergy Services, Inc., et al., Southern Company Services, Inc., Regional Transmission Organizations RTO Informational Filings, et al., Regulations Governing Off-the-Record Communications; Notice of State-Federal Southeast Regional Panel Discussion

February 8, 2002.

Take notice that on February 15, 2002, a State-Federal Southeast Regional Panel discussion will be held, pursuant to the Commission's Order issued November 9, 2001, in Docket No. RT02–2–000, et al. A transcript of the panel discussion will be placed in the above listed dockets.

Magalie R. Salas,

Secretary.

[FR Doc. 02–3648 Filed 2–13–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Regulations Governing Off-the-Record Communications; Public Notice

February 8, 2002.

This constitutes notice, in accordance with 18 CFR 385.2201(h), of the receipt of exempt and prohibited off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive an exempt or a prohibited off-the-record communication relevant to the merits of a contested on-the-record proceeding, to deliver a copy of the communication, if written, or a summary of the substance of any oral communication, to the Secretary.

Prohibited communications will be included in a public, non-decisional file associated with, but not part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such requests only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication should serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications will be included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of exempt and prohibited off-the-record communications received in the Office of the Secretary within the preceding 14 days. Copies of this filing are on file with the Commission and are available for public inspection. The documents may be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance).

Take note that this notice will now be issued by the Commission on a weekly rather than bi-weekly basis.

EXEMPT

Docket No.	Date filed	Presenter
1. CP98–150–000	01–30–02	Henry J. Kaufmann.
2. CP01–361–000	02–07–02	Alynda Foreman.
3. Project No. 372–008	02–07–02	Nan Allen.
4. Project Nos. 1975, 2061 and 2777	02–07–02	Susan Giannetino.
5. Project No. 719–007	02–07–02	Reid Baron.

Magalie R. Salas,

Secretary.

[FR Doc. 02–3645 Filed 2–13–02; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7144–9]

Meeting of the Ozone Transport Commission for the Northeast United States

AGENCY: Environmental Protection Agency.

ACTION: Notice of meeting.

SUMMARY: The United States Environmental Protection Agency is announcing the 2002 Winter Meeting of the Ozone Transport Commission (OTC).

This meeting is for the OTC to deal with appropriate matters within the Ozone Transport Region in the Northeast and Mid-Atlantic States, as provided for under the Clean Air Act Amendments of 1990. This meeting is not subject to the provisions of the Federal Advisory Committee Act, Pub. L. 92–463, as amended.

DATES: The meeting will be held on February 26, 2002 starting at 9:00 a.m. (EST).

ADDRESSES: Pier 5 Hotel, 711 Eastern Avenue, Baltimore, Maryland 21202; (410) 539–2000.

FOR FURTHER INFORMATION CONTACT: Judith M. Katz, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, PA 19103; (215) 814–2100.

For Documents and Press Inquiries Contact: Ozone Transport Commission, 444 North Capitol Street NW, Suite 638, Washington, DC 20001; (202) 508–3840; e-mail: *ozone@sso.org;* Web site: *http://www.sso.org/otc.*

SUPPLEMENTARY INFORMATION: The Clean Air Act Amendments of 1990 contain at Section 184 provisions for the ''Control of Interstate Ozone Air Pollution.'' Section 184(a) establishes an ''Ozone Transport Region'' (OTR) comprised of the States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, parts of Virginia and the District of Columbia.

The Assistant Administrator for Air and Radiation of the Environmental Protection Agency convened the first meeting of the commission in New York City on May 7, 1991. The purpose of the Ozone Transport Commission is to deal with ground level ozone formation, transport, and control within the OTR.

The purpose of this notice is to announce that this Commission will meet on February 26, 2002. The meeting will be held at the address noted earlier in this notice.

Section 176A(b)(2) of the Clean Air Act Amendments of 1990 specifies that the meetings of the Ozone Transport Commission are not subject to the provisions of the Federal Advisory Committee Act. This meeting will be open to the public as space permits.

Type of Meeting: Open.

Agenda: Copies of the final agenda will be available from the OTC office (202) 508–3840 (by e-mail: *ozone@sso.org* or via our Web site at http://www.sso.org/otc) on Tuesday, February 19, 2002. The purpose of this meeting is to review air quality needs within the Northeast and Mid-Atlantic States, including reduction of motor vehicle and stationary source air pollution. The OTC is also expected to address issues related to the transport of ozone into its region, and to discuss potential regional emission control measures.

Dated: February 6, 2002.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. 02–3658 Filed 2–13–02; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7144–8]

EPA Science Advisory Board; Notification of Public Advisory Committee Meetings

Pursuant to the Federal Advisory Committee Act, Pub. L. 92–463, notice is hereby given that two committees of the US EPA Science Advisory Board (SAB) will meet on the dates and times noted below. All times noted are Eastern Time. All meetings are open to the public, however, seating is limited and available on a first come basis. *Important Notice:* Documents that are the subject of SAB reviews are normally available from the originating EPA office and are not available from the SAB Office—information concerning availability of documents from the relevant Program Office (if any) is included below.

1. Executive Committee of the EPA Science Advisory Board—March 6–7, 2002

The Executive Committee (EC) of the US EPA Science Advisory Board (SAB) will meet on Wednesday, March 6, 2002 and Thursday, March 7, 2002 in Conference Room 6013, USEPA, Ariel Rios Building North, 1200 Pennsylvania Avenue, NW, Washington, DC 20004. The meeting will begin by 8:30 am on March 6 and adjourn no later than 5:00 pm on March 7, 2002.

Purpose of the Meeting—This meeting of the SAB Executive Committee is one in a series of periodic meetings in which the EC takes action on reports generated by SAB Committees, meets with Agency leadership, and addresses a variety of issues germane to the operation of the Board. The agenda for the March 6–7, 2002 meeting will be posted on the SAB Web site, *www.epa.gov/sab,* not later than 5 days before the meeting and is likely to include, but not be limited to the following:

a. Action on four Committee reports:

(1) *Candidate Contaminant List (CCL) Research Plan: An SAB Report* from the Drinking Water Committee (DWC). (*See* 66 FR 19770, April 17, 2001 for further details.)

(2) *A Framework for Reporting on Ecological Condition: An SAB Report* from the Ecological Processes and Effects Committee (EPEC). (*See* 65 FR 18095, April 6, 2000 for further details.)

(3) *Industrial Ecology: A Commentary* from the Environmental Engineering Committee (EEC). (*See* 66 FR 22553, May 4, 2001 for further details.)

(4) *President's FY03 Science & Technology Budget for USEPA: An SAB Report* from the Research Strategies Advisory Committee (RSAC). (*See* 67 FR 2434, January 17, 2002 for further details.)

b. Meeting with Administration officials, including:

(1) Ms. Linda Fisher, Deputy USEPA Administrator

(2) Dr. Paul Gilman, AA/ORD

c. Matters of Board business, including discussion of the following:

(1) Activities of the Policies and Procedures Subcommittee, including recommendations on SAB Panel Formation and creation of a manual to guide certain SAB activities, see *http://www.epa.gov/sab/ppsintro.htm* for background.

(2) Proposed SAB activity in the area of ecology and economics

(3) The SAB agenda for FY2002 and beyond.

Availability of Review Materials—Draft SAB reports will be posted on the SAB Web site, *www.epa.gov/sab*, approximately 10 business days before the date of the meeting or as soon as available. The underlying documents that are the subject of SAB reviews, however, are not available from the SAB Office but are normally available from the originating EPA office (please see FR references above for details or background materials for each report under review by the EC).

Charge to the Executive Committee—The focus of the review of these four Committee reports will be on the following questions:

(a) Has the SAB adequately responded to the questions posed in the Charge?

(b) Are the statements and/or responses in the draft report clear?

(c) Are there any errors of fact in the report?

In accord with the Federal Advisory Committee Act (FACA), the public and the Agency are invited to submit written comments on these three questions that are the focus of the review. Submissions should be received by March 1, 2002 by Ms. Diana Pozun, EPA Science Advisory Board, Mail Code 1400A, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington DC 20460. (Telephone (202) 564–4544, FAX (202) 501–0582; or via e-mail at *pozun.diana@epa.gov*). Submission by e-mail to Ms. Pozun will maximize the time available for review by the Executive Committee.

Although not required by FACA, the SAB will have a brief period available for applicable public comment. Therefore, anyone wishing to make oral comments on the three focus questions above, but that are not duplicative of the written comments, should contact the Designated Federal Officer for the Executive Committee, Dr. Donald G. Barnes (*see* contact information below) by noon Eastern Time on Thursday, February 28, 2002.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information concerning this meeting or wishing to submit brief oral comments (10 minutes or less) must contact Dr. Donald Barnes, Designated Federal Officer, EPA Science Advisory Board (1400A), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; telephone (202) 564–4533; FAX (202) 501–0323; or via e-mail at *barnes.don@epa.gov.* Requests for oral comments must be *in writing* (e-mail, fax or mail) and received by Dr. Barnes no later than noon Eastern Time on Thursday, February 28, 2002.

2. Environmental Engineering Committee (EEC)—March 13, 2002

The Environmental Engineering Committee (EEC) of the US EPA Science Advisory Board (SAB) will conduct a public teleconference meeting on March 13, 2002. The meeting will begin at 12:00 pm and adjourn no later than 2:00 pm. The meeting will be coordinated through a conference call connection in Room 6450C, USEPA, Ariel Rios Building North, 1200 Pennsylvania Avenue, NW, Washington, DC 20004. The public is encouraged to attend the meeting in the conference room noted above, however, the public may also attend through a telephonic link if lines are available. Additional instructions about how to participate in the conference call can be obtained by calling Ms. Mary Winston (*see* contact information below).

Subsequent teleconference meetings of the EEC are planned for May 1, 2002, July 3, 2002, September 4, 2002 and November 6, 2002. Information concerning these meetings will appear in future **Federal Register** notices.

Purpose of the Meeting—The primary purpose of this teleconference meeting is to review for approval the report of the EEC's Surface Impoundments Study Subcommittee. The Surface Impoundments Study Subcommittee reviewed *Industrial Surface Impoundments in the United States* for the Agency's Office of Solid Waste as announced in 66 FR 30917–30920 June 8, 2001 and 66 FR 9671–49672 September 28, 2001. At its February 1, 2002 teleconference meeting, the Subcommittee decided further edits were warranted to improve clarity, consistency, balance and tone of its report. The Subcommittee anticipates approving the revised draft report in time for the EEC's consideration at the March 13 conference call meeting. The EEC will use the remainder of the call for other committee business and for strategic planning.

Availability of Review Materials—The availability of *Industrial Surface Impoundments in the United States* was announced previously in the FRs cited above. The draft report of the review, once approve by the Subcommittee, will be available at the SAB's Web site, *www.epa.gov/sab.*

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information concerning this teleconference meeting or who wishes to submit brief oral comments (3 minutes or less) must contact Ms. Kathleen White, Designated Federal Officer, EPA Science Advisory Board (1400A), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; telephone (202) 564–4559; FAX (202) 501–0582; or via e-mail at *white.kathleen@epa.gov.* Requests for oral comments must be *in writing* (e-mail, fax or mail) and received by Ms. White no later than noon Eastern Time Thursday, March 7, 2002. To obtain a draft agenda or information on participation in the above teleconference meeting, please contact Ms. Mary Winston, Management Assistant, EPA Science Advisory Board (1400A), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; telephone: (202) 564–4538, FAX (202) 501–0582; or via e-mail at *winston.mary@epa.gov.*

Providing Oral or Written Comments at SAB Meetings

It is the policy of the EPA Science Advisory Board to accept written public comments of any length, and to accommodate oral public comments whenever possible. The EPA Science Advisory Board expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements.

Oral Comments: In general, each individual or group requesting an oral presentation at a face-to-face meeting will be limited to a total time of ten minutes (unless otherwise indicated). For teleconference meetings, opportunities for oral comment will usually be limited to no more than three minutes per speaker and no more than fifteen minutes total. Deadlines for getting on the public speaker list for a meeting are given above. Speakers should bring at least 35 copies of their comments and presentation slides for distribution to the reviewers and public at the meeting. *Written Comments:* Although the SAB accepts written comments until the date of the meeting (unless otherwise stated), written comments should be received in the SAB Staff Office at least one week prior to the meeting date so that the comments may be made available to the committee for their consideration. Comments should be supplied to the appropriate DFO at the address/contact information noted above in the following formats: one hard copy with original signature, and one electronic copy via e-mail (acceptable file format: Adobe Acrobat, WordPerfect, Word, or Rich Text files (in IBM-PC/Windows 95/98 format). Those providing written comments and who attend the meeting are also asked to bring 35 copies of their comments for public distribution.

General Information—Additional information concerning the EPA Science Advisory Board, its structure, function, and composition, may be found on the SAB Web site, *http://www.epa.gov/sab,* and in *The FY2001 Annual Report of the Staff Director* which is available from the SAB Publications Staff at (202) 564–4533 or via fax at (202) 501–0256. Committee rosters, draft Agendas and meeting calendars are also located on our Web site.

Meeting Access—Individuals requiring special accommodation at this meeting, including wheelchair access to the conference room, should contact the appropriate DFO at least five business days prior to the meeting so that appropriate arrangements can be made.

Dated: February 8, 2002.

Donald G. Barnes,

Staff Director, EPA Science Advisory Board.

[FR Doc. 02–3657 Filed 2–13–02; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7145–3]

Taylor Lumber & Treating Superfund Site Notice of Proposed Administrative Settlement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: In accordance with the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.,* notice is hereby given that a proposed Agreement and Covenant Not to Sue (Prospective Purchaser Agreement) associated with the Taylor Lumber & Treating National Priorities List Superfund site was executed by the United States Environment Protection Agency (EPA) on February 1, 2002. The proposed Prospective Purchaser Agreement would resolve certain potential claims of the United States under sections 106 and 107(a) of CERCLA, 42 U.S.C. 9606 and 9607(a), against Pacific Wood Preserving of Oregon (''PWPO''), a Nevada corporation.

DATES: Comments must be submitted on or before February 28, 2002.

ADDRESSES: The proposed Prospective Purchaser Agreement and additional background documents relating to the settlement are available for public inspection at the U.S. Environmental Protection Agency, 1200 Sixth Ave., Seattle, WA 98101. A copy of the propoosed settlement may be obtained from Jennifer Byrne, Assistant Regional Counsel (ORC–158), Office of Regional Counsel, U.S. EPA Region 10, Seattle, WA 98101. Comments should reference ''Pacific Wood Preserving of Oregon PPA, Taylor Lumber & Treating Superfund Site'' and ''Docket No. CERCLA–10–2002–0034'' and should be addressed to Jennifer Byrne at the above address.

FOR FURTHER INFORMATION CONTACT: Jennifer Byrne, Assistant Regional Counsel (ORC–158), Office of Regional Counsel, U.S. EPA Region 10, Seattle, WA 9810; phone: (206) 553–0050; fax: (206) 553–0163; e-mail: *byrne.jennifer@epa.gov.*

SUPPLEMENTARY INFORMATION: Pacific Wood Preserving of Oregon (PWPO) plans to acquire a 34-acre parcel, constituting a major portion of the Superfund Site, located at 22125 S.W. Rock Creek Road in Sheridan, Oregon. PWPO intends to conduct a business on the parcel involving the treatment of lumber products and poles with preservatives that have relatively low environmental impact and toxicity and are distinguishable from preservatives presently found on the Site. PWPO's acquisition of the parcel occurs under the supervision of the United States Bankruptcy Court, District of Oregon, where Taylor Lumber & Treating, the current owner of the parcel, has filed a Chapter 11 bankruptcy petition.

In exchange for the settlement, EPA will receive $500,000 in cash, which will be placed in a special account for use at the Site. In addition, PWPO has agreed to operate and maintain a groundwater extraction and disposal system, to maintain the existing asphalt cover, and to maintain the contaminated soil storage cells. Further, PWPO has agreed not to treat wood with solutions containing ammoniacal copper zinc arsenate, cooper chromated arsenate, pentachlorophenol, creosote, or any arsenical wood-preserving compounds.

Because of the schedule in the bankruptcy proceeding, EPA is allowing fourteen days for public comments. For fourteen calendar days following the date of publication of this notice, EPA will receive written comments relating to the proposed Prospective Purchaser Agreement. EPA's response to any comments received will be available for public inspection at the U.S. Environmental Protection Agency, 1200 Sixth Ave., Seattle, WA 98101.

Dated: February 1, 2002.

L. John Iani,

Regional Administrator, Region 10.

[FR Doc. 02–3656 Filed 2–13–02; 8:45 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7145–2]

Clean Water Act Section 303(d): Availability of Proposed Determinations That Total Maximum Daily Loads (TMDLs) Are Not Needed

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: This notice announces the availability for comment of EPA determinations that TMDLs are not needed for one hundred fifty waterbody/pollutant combinations in the Calcasieu and Ouachita River Basins because new data and information show that water quality standards (WQS) are currently being met. This proposed action would result in the removal of

one hundred fifty waterbody/pollutant combinations from the Louisiana 303(d) list.

DATES: Comments on the proposed determinations that TMDLs are not needed must be submitted in writing to EPA on or before March 18, 2002.

ADDRESSES: Comments on the proposed determinations should be sent to Ellen Caldwell, Environmental Protection Specialist, Water Quality Protection Division, U.S. Environmental Protection Agency Region 6, 1445 Ross Ave., Dallas, TX 75202–2733. For further information, contact Ellen Caldwell at (214) 665–7513. Documents supporting the determinations that the TMDLs are not needed are available for public inspection at this address as well. Documents supporting the determinations that TMDLs are not needed also may be viewed at *www.epa.gov/region6/water/tmdl.htm*, or obtained by calling or writing Ms. Caldwell at the above address. Please contact Ms. Caldwell to schedule an inspection.

FOR FURTHER INFORMATION CONTACT: Ellen Caldwell at (214) 665–7513.

SUPPLEMENTARY INFORMATION: In 1996, two Louisiana environmental groups, the Sierra Club and Louisiana Environmental Action Network (plaintiffs), filed a lawsuit in Federal Court against the EPA, styled *Sierra Club, et al.* v. *Clifford et al.*, No. 96–0527, (E.D. La.). Among other claims, plaintiffs alleged that EPA failed to establish Louisiana TMDLs in a timely manner. Discussion of the court's order may be found at 65 FR 54032 (September 6, 2000).

EPA Seeks Comments on Proposed Determinations That One Hundred Fifty TMDLs for Waterbody/Pollutant Combinations are not Needed based on the assessment of new data and information that show the TMDLs are currently meeting WQS:

Subsegment	Waterbody name	Pollutant
030103	Calcasieu—Rapides-Allen Parish line to confluence with Marsh Bayou (Scenic)	Cadmium.
030201	Calcasieu River—Confluence with Marsh Bayou to Salt-water Barrier	Cadmium.
030801	West Fork Calcasieu River—From confluence of Beckwith Creek and Hickory Branch to Calcasieu River.	Cadmium.
030103	Calcasieu River—Rapides-Allen Parish line to confluence with Marsh Bayou (Scenic)	Copper.
030201	Calcasieu River—Confluence with Marsh Bayou to Salt-water Barrier	Copper.
030801	West Fork Calcasieu River—From confluence of Beckwith Creek and Hickory Branch to Calcasieu River.	Copper.
030702	English Bayou—Headwaters to Calcasieu River	Lead.
030801	West Fork Calcasieu River—From confluence of Beckwith Creek and Hickory Branch to Calcasieu River.	Lead.
030702	English Bayou—Headwaters to Calcasieu River	Mercury.
030306	Bayou Verdine (Estuarine)	Oil & grease.
030901	Bayou D'Inde—Headwaters to Calcasieu River (Estuarine)	Oil & grease.
030301	Calcasieu River and Ship Channel—Salt-water Barrier to below Moss Lake (Estuarine, includes Coon Island and Clooney Island Loops).	Pathogen indicators.
030302	Lake Charles (Estuarine)	Pathogen indicators.
030401	Calcasieu River—Calcasieu Ship Channel below Moss Lake to the Gulf of Mexico (Estuarine, includes Monkey Island Loop).	Pathogen indicators.
030402	Calcasieu Lake (Estuarine)	Pathogen indicators.
030901	Bayou D'Inde—Headwaters to Calcasieu River (Estuarine)	Pathogen indicators.
030201	Calcasieu River—Confluence with Marsh Bayou to Salt-water Barrier.	
030103	Calcasieu River—Rapides-Allen Suspended Solids Parish line to confluence with Marsh Bayou (Scenic).	Suspended solids.
030201	Calcasieu River—Confluence with Marsh Bayou to Salt-water Barrier	Turbidity.
030103	Calcasieu River—Rapides-Allen Parish line to confluence with Marsh Bayou (Scenic)	Turbidity.
080301	Black River—Jonesville to Corps of Engineers Control Structure (at mile 25, Serena)	Cadmium.
081501	Castor Creek—Headwaters to Little River	Cadmium.
081401	Dugdemona River—Headwaters to junction with Big Creek	Cadmium.
081601	Little River—Confluence of Castor Creek and Dugdemona River to junction with Bear Creek (Scenic).	Cadmium.
081602	Little River—From Bear Creek to Catahoula Lake (Scenic)	Cadmium.
080101	Ouachita River—Arkansas State Line to Columbia Lock and Dam (Scenic from the Arkansas state line to intersection with Bayou Bartholomew—22 miles).	Cadmium.
080501	Bayou de L'Outre—Arkansas State Line to Ouachita River (Scenic)	Chlorides.
081611	Bayou Funny Louis	Chlorides.
080903	Big Creek—Headwaters to Boeuf River (including Big Colewa Bayou)	Chlorides.
080901	Boeuf River—Arkansas State Line to Ouachita River	Chlorides.
081603	Catahoula Lake	Chlorides.
080609	Corney Bayou—From Corney Lake to Bayou D'Arbonne Lake (Scenic)	Chlorides.
081402	Dugdemona River—From Big Creek to Little River	Chlorides.
081601	Little River—Confluence of Castor Creek and Dugdemona River to junction with Bear Creek (Scenic).	Chlorides.
081602	Little River—From Bear Creek to Catahoula Lake (Scenic)	Chlorides.
080610	Middle Fork of Bayou D'Arbonne—From origin to Bayou D'Arbonne Lake (Scenic)	Chlorides.
081201	Tensas River—Headwaters to Jonesville (including Tensas Bayou)	Chlorides.
080301	Black River—Jonesville to Corps of Engineers Control Structure (at mile 25, Serena)	Copper.
081501	Castor Creek—Headwaters to Little River	Copper.
081604	Catahoula Lake Diversion Canal—Catahoula Lake to Black River	Copper.
081402	Dugdemona River—From Big Creek to Little River	Copper.
081401	Dugdemona River—Headwaters to junction with Big Creek	Copper.
081601	Little River—Confluence of Castor Creek and Dugdemona River to junction with Beart Creek (Scenic).	Copper.
081602	Little River—From Bear Creek to Catahoula Lake (Scenic)	Copper.

Subsegment	Waterbody name	Pollutant
080101	Ouachita River—Arkansas State Line to Columbia Lock and Dam (Scenic from the Arkansas state line to intersection with Bayou Bartholomew—22 miles).	Copper.
080201	Ouachita River—Columbia Lock and Dam to Joneville	Copper.
080101	Ouachita River—Arkansas State Line to Columbia Lock and Dam (Scenic from the Arkansas state line to intersection with Bayou Bartholomew—22 miles).	Dioxins, priority organics.
080401	Bayou Bartholomew—Arkansas State Line to Dead Bayou (Lake Bartholomew Scenic)	Lead.
080605	Bayou D'Arbonne—From Bayou D'Arbonne Lake to Ouachita River (Scenic)	Lead.
080603	Bayou D'Arbonne—From Lake Claiborne to Bayou D'Arbonne Lake	Lead.
080604	Bayou D'Arbonne Lake	Lead.
080501	Bayou de L'Outre—Arkansas State Line to Ouachita River (Scenic)	Lead
081503	Beaucoup Creek—Headwaters to Castor Creek	Lead.
080301	Black River—Jonesville to Corps of Engineers Control Structure (at mile 25, Serena)	Lead.
081501	Castor Creek—Headwaters to Little River	Lead.
081604	Catahoula Lake Diversion Canal—Catahoula Lake to Black River	Lead.
080609	Corney Bayou—From Corney Lake to Bayou D'Arbonne Lake (Scenic)	Lead.
081402	Dugdemona River—From Big Creek to Little River	Lead.
081401	Dugdemona River—Headwaters to junction with Big Creek	Lead.
081601	Little River—Confluence of Castor Creek and Dugdemona River to junction with Bear Creek (Scenic).	Lead.
081602	Little River—From Bear Creek to Catahoula Lake (Scenic)	Lead.
080610	Middle Fork of Bayou D'Arbonne—From origin to Bayou D'Arbonne Lake (Scenic)	Lead.
080101	Ouachita River—Arkansas State Line to Columbia Lock and Dam (Scenic from the Arkansas state line to intersection with Bayou Bartholomew—22 miles).	Lead.
080201	Ouachita River—Columbia Lock and Dam to Jonesville	Lead.
081201	Tensas River—Headwaters to Jonesville (including Tensas Bayou)	Lead.
080605	Bayou D'Arbonne—From Bayou D'Arbonne Lake to Ouachita River (Scenic)	Mercury.
080501	Bayou de L'Outre—Arkansas State Line to Ouachita River (Scenic)	Mercury.
080904	Bayou Lafourche—Near Oakridge to Boeuf River near Columbia	Mercury.
080301	Black River—Jonesville to Corps of Engineers Control Structure (at mile 25, Serena)	Mercury.
080901	Boeuf River—Arkansas State Line to Ouachita River	Mercury.
081501	Castor Creek—Headwaters to Little River	Mercury.
081402	Dugdemona River—From Big Creek to Little River	Mercury.
081401	Dugdemona River—Headwaters to junction with Big Creek	Mercury.
081602	Little River—From Bear Creek to Catahoula Lake (Scenic)	Mercury.
080201	Ouachita River—Columbia Lock and Dam to Jonesville	Mercury.
081401	Dugdemona River—Headwaters to junction with Big Creek	Non-priority organics.
081601	Little River—Confluence of Castor Creek and Dugdemona River to junction with Bear Creek (Scenic).	Non-priority organics.
081203	Lake Bruin (Oxbow Lake)	Nutrients.
081501	Castor Creek—Headwaters to Little River	Oil & grease.
081601	Little River—Confluence of Castor Creek and Dugdemona River to junction with Bear Creek (Scenic).	Oil & grease.
081602	Little River—From Bear Creek to Catahoula Lake (Scenic)	Oil & grease.
081611	Bayou Funny Louis	Oil & grease.
081603	Catahoula Lake	Oil & grease.
081001	Bayou Macon—Arkansas State Line to Tensas River	Organic enrichment/Low DO.
081203	Lake Bruin (Oxbow Lake)	Organic enrichment/Low DO.
080401	Bayou Bartholomew—Arkansas State Line to Dead Bayou (Lake Bartholomew Scenic)	Other inorganics.
080603	Bayou D'Arbonne—From Lake Claiborne to Bayou D'Arbonne Lake	Other inorganics.
081201	Tensas River—Headwaters to Jonesville (including Tensas Bayou)	Other inorganics.
080905	Turkey Creek—Headwaters to Turkey Creek Cutoff and Turkey Creek Cutoff to Big Creek including Glade Slough.	Other inorganics.
080401	Bayou Bartholomew—Arkansas State Line to Dead Bayou (Lake Bartholomew Scenic)	Pathogen indicators.
080904	Bayou Lafourche—Near Oakridge to Boeuf River near Columbia	Pathogen indicators.
081501	Castor Creek—Headwaters to Little River	Pathogen indicators.
081609	Hemphill Creek—Headwaters to Catahoula Lake (includes Hair Creek)	Pathogen indicators.
080902	Bayou Bonne Idee—Headwaters to Boeuf River	Pesticides.
080301	Black River—Jonesville to Corps of Engineers Control Structure (at mile 25, Serena)	Pesticides.
080302	Black River—Corps of Engineer Control Structure to Red River	Pesticides.
080910	Clear Lake	Pesticides.
080909	Crew Lake	Pesticides.
081202	Lake St. Joseph (Oxbow Lake)	Pesticides.
080101	Ouachita River—Arkansas State Line to Columbia Lock and Dam (Scenic from the Arkansas state line to intersection with Bayou Bartholomew—22 miles).	Pesticides.
080201	Ouachita River—Columbia Lock and Dam to Jonesville	Pesticides.
080905	Turkey Creek—Headwaters to Turkey Creek Cutoff and Turkey Creek Cutoff to Big Creek including Glade Slough.	Pesticides.
080401	Bayou Bartholomew—Arkansas State Line to Dead Bayou (Lake Bartholomew Scenic)	Pesticides.
080904	Bayou Lafourche—Near Oakridge to Boeuf River near Columbia	Pesticides.
080202	Bayou Louis	Pesticides.
081203	Lake Bruin (Oxbow Lake)	Pesticides.
080102	Bayou Chauvin	pH.
080501	Bayou de L'Outre—Arkansas State Line to Ouachita River (Scenic)	Salinity/TDS.
080903	Big Creek—Headwaters to Boeuf River (including Big Colewa Bayou)	Salinity/TDS.

Subsegment	Waterbody name	Pollutant
081603	Catahoula Lake	Salinity/TDS.
080609	Corney Bayou—From Corney Lake to D'Arbonne Lake	Salinity/TDS.
081402	Dugdemona River—From Big Creek to Little River	Salinity/TDS.
081601	Little River—Confluence of Castor Creek and Dugdemona River to junction with Bear Creek (Scenic).	Salinity/TDS.
081602	Little River—From Bear Creek to Catahoula Lake (Scenic)	Salinity/TDS.
080610	Middle Fork of Bayou D'Arbonne—From origin to Bayou D'Arbonne Lake (Scenic)	Salinity/TDS.
081201	Tensas River—Headwaters to Jonesville (including Tensas Bayou)	Salinity/TDS.
080901	Boeuf River—Arkansas State Line to Ouachita River	Salinity/TDS.
081611	Bayou Funny Louis	Salinity/TDS.
080302	Black River—Corps of Engineers Control Structure to Red River	Siltation.
081602	Little River—From Bear Creek to Catahoula Lake (Scenic)	Siltation.
080201	Ouachita River—Columbia Lock and Dam to Jonesville	Siltation.
080501	Bayou de L'Outre—Arkansas State Line to Ouachita River (Scenic)	Sulfates.
081611	Bayou Funny Louis	Sulfates.
080903	Big Creek—Headwaters to Boeuf River (including Big Colewa Bayou)	Sulfates.
080901	Boeuf River—Arkansas State Line to Ouachita River	Sulfates.
081501	Castor Creek—Headwaters to Little River	Sulfates.
081603	Catahoula Lake	Sulfates.
080609	Corney Bayou—From Corney Lake to Bayou D'Arbonne Lake (Scenic)	Sulfates.
081402	Dugdemona River—From Big Creek to Little River	Sulfates.
081601	Little River—Confluence of Castor Creek and Dugdemona River to junction with Bear Creek (Scenic).	Sulfates.
081602	Little River—From Bear Creek to Catahoula Lake (Scenic)	Sulfates.
080610	Middle Fork of Bayou D'Arbonne—From origin to Bayou D'Arbonne Lake (Scenic)	Sulfates.
081201	Tensas River—Headwaters to Jonesville (including Tensas Bayou)	Sulfates.
080401	Bayou Bartholomew—Arkansas State Line to Dead Bayou (Lake Bartholomew Scenic)	Suspended solids.
080902	Bayou Bonne Idee—Headwaters to Boeuf River	Suspended solids.
080605	Bayou D'Arbonne—From Bayou D'Arbonne Lake to Ouachita River (Scenic)	Suspended solids.
080603	Bayou D'Arbonne—From Lake Claiborne to Bayou D'Arbonne Lake	Suspended solids.
081501	Castor Creek—Headwaters to Little River	Suspended solids.
080609	Corney Bayou—From Corney Lake to Bayou D'Arbonne Lake (Scenic)	Suspended solids.
080905	Turkey Creek—Headwaters to Turkey Creek Cutoff and Turkey Creek Cutoff to Big Creek including Glade Slough.	Suspended solids.
080101	Ouachita River—Arkansas State Line to Columbia Lock and Dam (Scenic from the Arkansas state line to intersection with Bayou Bartholomew—22 miles).	Suspended solids.
081402	Dugdemona River—From Big Creek to Little Creek	Turbidity.
081601	Little River—Confluence of Castor Creek and Dugdemona River to junction with Bear Creek (Scenic).	Turbidity.
081602	Little River—From Bear Creek to Catahoula Lake (Scenic)	Turbidity.
080905	Turkey Creek—Headwaters to Turkey Creek Cutoff and Turkey Creek Cutoff to Big Creek including Glade Slough.	Turbidity.
080401	Bayou Bartholomew—Arkansas State Line to Dead Bayou (Lake Bartholomew Scenic)	Turbidity.
081611	Bayou Funny Louis	Turbidity.
080610	Middle Fork of Bayou D'Arbonne— From origin to Bayou D'Arbonne Lake (Scenic)	Turbidity.
080101	Ouachita River—Arkansas State Line to Columbia Lock and Dam (Scenic from the Arkansas state line to intersection with Bayou Bartholomew—22 miles).	Turbidity.
080301	Black River—Jonesville to Corps of Engineers Control Structure (at mile 25, Serena)	Unknown toxicity.

EPA requests that the public provide to EPA any water quality related data and information that may be relevant to these proposed determinations that TMDLs are not needed. EPA will review all data and information submitted during the public comment period and revise the determinations where appropriate.

Dated: February 5, 2002.

Oscar Ramirez, Jr.,

Acting Director, Water Quality Protection Division, Region 6.

[FR Doc. 02–3659 Filed 2–13–02; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[Report No. AUC–02–31–A (Auction No. 31); DA 02–260]

Auction of Licenses in the 747–762 And 777–792 MHz Bands Scheduled for June 19, 2002 Comment Sought on Adding to Auction Inventory and Further Modifying Package Bidding Procedures

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document seeks comment on the potential inclusion of 24 additional licenses in Auction No. 31 and potential modifications of previously-announced procedures for Auction No. 31.

DATES: Comments are due on or before February 19, 2002 and reply comments are due on or before February 26, 2002.

ADDRESSES: Comments and reply comments must be sent by electronic mail to the following address: *auction31@fcc.gov.* The electronic mail containing the comments or reply comments must include a subject or caption referring to Auction No. 31 Comments. The Bureau requests that parties format any attachments to electronic mail as Adobe® Acrobat® (pdf) or Microsoft'' Word documents. Copies of comments and reply comments will be available for public inspection during regular business hours in the FCC Public Reference

Room, Room CY–A257, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Contact the following employees of Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, at (202) 418–0660: for legal questions: Howard Davenport; for general auction questions: Craig Bomberger or Martha Stancill; for software questions: Karen Wrege.

SUPPLEMENTARY INFORMATION: This is a summary of the *Auction No. 31 Comment Public Notice* released February 4, 2002. The complete text of the *Auction No. 31 Comment Public Notice,* including Attachment A ''Using the Smoothed Anchoring Method to Obtain Current Price Estimates,'' is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The *Auction No. 31 Comment Public Notice* may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–863–2893, facimile 202–863–2898, or via e-mail *qualexint@aol.com.*

1. By the *Auction No. 31 Comment Public Notice,* the Wireless Telecommunications Bureau (''Bureau'') seeks comment on the potential inclusion of 24 additional licenses in Auction No. 31 and potential modifications of previously-announced procedures for Auction No. 31. In the *Auction No. 31 Procedures Public Notice,* 65 FR 12251 (March 8, 2000), the Bureau established procedures for the auction of the twelve licenses in the 747–762 and 777–792 MHz bands (the ''Upper 700 MHz'' bands). The Bureau later revised its procedures to include package bidding in *Auction No. 31 Package Bidding Procedures Public Notice,* 65 FR 43361 (July 13, 2000), and subsequently modified those procedures in the *Auction No. 31 Package Bidding Procedures Modification Public Notice,* 66 FR 7907 (January 26, 2001). In light of subsequent developments and further analysis, the Bureau has determined that it may be appropriate to make further refinements. Accordingly, the *Auction No. 31 Comment Public Notice* seeks comment on whether to:

i. Include 24 licenses from the 698–746 MHz band (the ''Lower 700 MHz'' band) in Auction No. 31;

ii. Increase the number of bidder-defined packages if the Lower 700 MHz band licenses are included in Auction No. 31;

iii. Change part (iii) of the minimum acceptable bid calculation by either substituting a new method of calculating minimum acceptable bids (Option 1) or modifying the existing formula for calculating minimum acceptable bids for new packages (Option 2) and, if Option 1 is adopted, consider all bids submitted when determining provisionally winning bid sets; and

iv. Establish an aggregate reserve price or increase the previously-established minimum opening bids.

I. Whether To Include 24 Licenses From the Lower 700 MHz Band in Auction No. 31

2. The Bureau seeks comment on whether to include 24 licenses from the Lower 700 MHz band in Auction No. 31. These 24 licenses consist of licenses for four blocks of spectrum in each of the six regions known as the 700 MHz band economic area groupings (''700 MHz band EAGs''). In each 700 MHz band EAG, four Lower 700 MHz band licenses are for the use of two 12 megahertz blocks (each block consists of paired 6 megahertz segments) and two 6 megahertz blocks that are unpaired and contiguous.

3. Including these 24 Lower 700 MHz band licenses in Auction No. 31 would enable bidders to create and bid on packages containing 700 MHz band EAG licenses from both the Upper and Lower 700 MHz bands. Commenters should address any potential advantages or disadvantages of permitting package bidding on such combinations and facilitating the substitution of spectrum in the Upper and Lower 700 MHz bands. Interested parties are advised that the Bureau also seeks comment regarding this issue in a separate Public Notice addressing procedures for the auction of licenses in the Lower 700 MHz bands (Auction No. 44).

4. If these 24 additional licenses are included in Auction No. 31, operational considerations would require the Bureau also to adopt the more comprehensive revision to the minimum acceptable bid calculation described as Option 1 in Section III(B).

II. Whether to Increase the Number of Bidder-Defined Packages

5. The Bureau seeks comment on whether to increase the number of bidder-defined packages if the Bureau includes 24 licenses from the Lower 700 MHz band in Auction No. 31. Taking into account various factors, including the available licenses, the Bureau previously announced that Auction No. 31 bidders would be permitted to create and bid on up to twelve different packages of their own choosing during Auction No. 31. Commenters are asked to address whether the inclusion of additional licenses in Auction No. 31 would create any need to increase the number of bidder-defined packages, considering that bidder-defined packages may contain any number of licenses, up to all the licenses available in the auction.

III. Whether to Change the Minimum Acceptable Bid Calculation

A. Summary of Existing Procedures

6. The Bureau established the current three-part formula for calculating minimum acceptable bids in the *Auction No. 31 Package Bidding Procedures Modification Public Notice.* Pursuant to the existing procedure, the minimum acceptable bid for any particular license or package would be the greatest of: (i) The applicable minimum opening bid; (ii) the bidder's previous high bid on that license/package plus x%, where the Bureau would specify the value of x in each round; and (iii) the bidder's previous high bid on that particular license/package plus an amount based on the increase in the bidder's previous high bid needed to create a tie with the provisional winners. If the bidder has not bid on a license or an already constructed package, the bidder's previous high bid for purposes of calculating part (iii) would be the applicable minimum opening bid.

7. With respect to part (iii), the Bureau established that it would determine the amount to add to a given previous high bid in three steps. First, the Bureau would calculate a shortfall for the given bid, with the shortfall being the difference between the revenue of the provisionally winning bid set and the maximum total revenue associated with a set of bids that includes the given bid and satisfies all other constraints for determining a provisionally winning set. Second, the Bureau would determine a deficit for the given bid, or its share of the shortfall produced by the set, in two stages. Initially, the Bureau would determine the ratio of bidding units in the given bid's particular license/package to bidding units for all the non-provisionally winning bids in the set of bids that produced the shortfall. (If more than one set of bids yields the same shortfall for a given bid, the Bureau would use the set that includes the most provisionally winning bidding units.) The Bureau then would multiply the given bid's shortfall by this ratio to arrive at the deficit for the given bid. Third, and finally, the Bureau would

determine the amount to be added to the given previous high bid by multiplying the given bid's deficit by y%. At the beginning of the auction, the Bureau would set y at 100 but would retain the discretion to adjust the amount during the course of the auction.

8. However, part (iii) cannot be used to calculate the minimum acceptable bid for a package in the same round that the particular package is created because no shortfall or deficit was calculated with respect to that particular package at the end of the prior round. For such a new package, the Bureau established the following procedures. Generally, the third part of the initial minimum acceptable bid formula would be calculated for new packages by multiplying the number of bidding units in the package by the lowest $/bidding unit of any provisionally winning bid in the last five rounds. However, in the event the new package is the global package of all licenses available in the auction, the minimum acceptable bid would be the revenue generated by the provisionally winning bid set in the previous round plus w%. This assures that no bid for the global package would be accepted that does not exceed the maximum revenue in the preceding round.

9. Pursuant to current Auction No. 31 procedures, provisionally winning bids would be determined by considering: (i) For each bidder, bids from the most recent two rounds in which the bidder submitted bids or renewed bids; (ii) all provisionally winning bids from the prior round; and (iii) a set of FCC bids on each license at some small amount less than the applicable minimum opening bid. Furthermore, a bidder's bids submitted in a given round would be treated as mutually exclusive of the bidder's bids submitted in other rounds.

B. Proposed Procedures—Option 1

10. Option 1 involves two significant changes to current procedures, the first being a comprehensive revision in calculating part (iii) of the minimum acceptable bid formula and the second regarding the bids considered when determining provisionally winning bids. These changes would be made jointly or not at all. Adopting the first proposed change would enable the Bureau to include additional licenses in Auction No. 31, as discussed in Section I; could improve the pace of the auction; and would make it feasible to consider all bids submitted during the auction when determining provisionally winning bids. Considering all bids submitted during the auction when determining provisionally winning bids would make bidders responsible for all bids throughout the auction and may discourage strategic bidding. On the other hand, considering all bids submitted might make it more complex for participants and other observers to track the auction. The Bureau seeks comment on both aspects of the proposal.

i. Minimum Acceptable Bids

11. As the first part of Option 1, the Bureau proposes to replace part (iii) of the minimum acceptable bid formula with a current price estimate of the license or package plus z%. A current price estimate for each license would be calculated at the close of each round using the Smoothed Anchoring Method (see Attachment A of the *Auction No. 31 Comment Public Notice*). The current price estimate for a package would be the sum of the current price estimates of the licenses that comprise the package. Pursuant to this proposal, the Bureau would set z to be zero at the beginning of the auction but would retain the discretion to adjust the amount, including setting it at less than zero, during the course of the auction in order to provide control over the pace of the auction.

12. Implementing current price estimates for licenses and packages would preclude the need for a special version of part (iii) of the minimum acceptable bid formula for newly-created packages. However, the Bureau would retain the exception for calculating the minimum acceptable bid for a newly-created global package. After the first round of the auction, the minimum acceptable bid for the global package would always be the revenue generated by the provisionally winning bid set in the previous round plus w%. The Bureau would make this distinction in order to retain the ability to ensure that bids for the global package would continue to increase even if it were to employ a percentage z that would not guarantee that outcome. That is, the Bureau might want to set w higher than z.

ii. Bids Considered

13. As the second part of Option 1, the Bureau would consider all bids submitted during the auction when determining the provisionally winning set of bids. It is impractical to consider every bid submitted during the auction when calculating shortfalls and deficits in each round pursuant to the existing minimum acceptable bid formula. In the event that the Bureau calculates minimum acceptable bids using current price estimates, it would become feasible to consider every bid submitted when calculating minimum acceptable bids. As in the previously-established procedures, bids placed and/or renewed in different rounds would be considered as mutually exclusive—a bidder could be a provisional winner only on bids placed in the same round.

C. Proposed Procedures—Option 2

14. Option 2 involves a more modest change to current procedures, limited to revising the third part of the minimum acceptable bid formula applicable to newly-created packages. Pursuant to this alternative proposal, for newly-created packages, the third part of the minimum acceptable bid formula would be calculated by multiplying the number of bidding units in the package by the *average* dollar per bidding unit of all provisionally winning bids in the past five rounds. The average dollar per bidding unit would be calculated by dividing the sum of gross revenues from the provisionally winning bid sets over the last five rounds by five times the sum of all of bidding units in the auction. This exception would not apply to bids for the global package, however, for which the minimum acceptable bid would be the maximum revenue from the previous round plus w%.

15. This alternative proposed revision to the calculation of minimum acceptable bids could improve the pace of the auction. The Bureau seeks comment on this proposal.

IV. Whether to Establish an Aggregate Reserve Price or Increase Previously-Established Minimum Opening Bids

16. The Communications Act, *see* 47 U.S.C. 309(j)(4)(F), calls upon the Commission to prescribe methods by which a reasonable reserve price will be required, or a minimum opening bid will be established, when the Commission auctions licenses, unless the Commission determines that a reserve price or a minimum opening bid is not in the public interest. Consistent with this mandate, the Commission has directed the Bureau to seek comment on the use of a minimum opening bid and/or reserve price and on the methodology to be employed in establishing each of these mechanisms prior to the start of each auction. After seeking comment on relevant issues, the Bureau established minimum opening bids for Auction No. 31 in the *Auction No. 31 Package Bidding Procedures Public Notice.* The Bureau further established that the minimum opening bids for packages would be the sum of the minimum opening bids for the licenses comprising the package.

17. For Auction No. 31, to supplement the established minimum opening bids,

the Bureau seeks comment on establishing an aggregate reserve price that exceeds the sum of the minimum opening bids. A reserve price is an absolute minimum price below which specified goods will not be sold. Bidders, however, may place bids below reserve prices. Furthermore, reserve prices can be either public or undisclosed. The spectrum in Auction No. 31 is subject to a unique statutory clearance process, which the Commission has created incentives to accelerate. In light of these complexities, using an aggregate reserve price in addition to minimum opening bids may be appropriate to ensure ''a recovery for the public of a portion of the value of the public spectrum resource,'' 47 U.S.C. 309(j)(3)(C) commensurate with Congressional expectations.

18. With respect to the appropriate level of an aggregate reserve price, Congress has estimated that the Upper 700 MHz band licenses available for auction will generate $2.6 billion in revenue. The Commission's previous 700 MHz guard bands auctions raised nearly $541 million. Therefore, the Bureau seeks comment on the possibility of an aggregate reserve in Auction No. 31 equal to $2.6 billion in gross bids. This gross bid figure should result in net revenues approximating the Congressional revenue estimate minus net revenues from the 700 MHz guard bands auctions. Under this approach, the Commission only would accept the provisionally winning set of bids at the close of Auction No. 31 if the gross amount of the provisionally winning set of bids equals or exceeds the $2.6 billion aggregate reserve price.

19. Commenters are asked to address how the public interest would or would not be served by adopting an aggregate reserve price. In particular, given all the circumstances of this auction, the Bureau seeks comment on whether the public interest would be served by establishing an aggregate reserve price to ensure that the Commission recovers for the public a portion of the value of the public spectrum resource commensurate with Congressional expectations. Additionally, the Bureau seeks comment on whether an aggregate reserve price would introduce an added threshold problem with which bidders would have to contend. The threshold problem is defined and discussed in the *Auction No. 31 Package Bidding Procedures Public Notice.*

20. Commenters also should address whether any aggregate reserve price should be made public or remain undisclosed. Commenters supporting disclosure should address when and how any aggregate reserve price would be made public. For example, should it be disclosed when the Bureau announces the qualified bidders for the auction? Or when the auction begins? In addition, commenters should address whether the Bureau should make periodic announcements during the auction regarding whether bids meet the aggregate reserve price or postpone any announcements until after the auction closes. Commenters supporting an undisclosed aggregate reserve price should comment on whether the Bureau should announce whether bids meet any aggregate reserve at any time before the auction closes. For example, should the Bureau announce whether bids meet any aggregate reserve price if the Bureau keeps the auction open by exercising its discretion under the stopping rule?

21. Commenters addressing the level of the proposed aggregate reserve price should support their claims with valuation analyses and suggested reserve prices or formulas. In addressing these issues, commenters may also wish to address the possibility that 24 lower 700 MHz bands licenses may be added to the inventory of Auction No. 31. Any commenters suggesting license-by-license reserve prices, in place of the proposed aggregate reserve price, should explain with specificity how reserve prices for individual licenses would be established. The Bureau particularly seeks comment on such factors as, among other things, the amount of spectrum being auctioned, levels and circumstances of incumbency, the availability of technology to provide service, the size of the geographic service areas, issues of interference with other spectrum bands and any other relevant factors that reasonably could have an impact on valuation of the 747–762 and 777–792 MHz bands.

22. As an alternative, the Bureau also seeks comment on increasing the previously-established minimum opening bids in Auction No. 31. The previously-established minimum opening bids total $720 million. If commenters believe that the public interest would be served by increasing the current minimum opening bids, they should support their claims with valuation analyses and suggested minimum opening bid levels or formulas. With respect to the amounts of the minimum opening bids, the Bureau particularly seeks comment on such factors as, among other things, the amount of spectrum being auctioned, levels of incumbency, the availability of technology to provide service, the size of the geographic service areas, issues of interference with other spectrum bands and any other relevant factors that reasonably could have an impact on valuation of the 747–762 and 777–792 MHz bands.

V. Conclusion

23. Comments are due on or before February 19, 2002, and reply comments are due on or before February 26, 2002. Because of the disruption of regular mail and other deliveries in Washington, DC, the Bureau requires that all comments and reply comment be filed electronically. Comments and reply comments must be sent by electronic mail to the following address: *auction31@fcc.gov.* The electronic mail containing the comments or reply comments must include a subject or caption referring to Auction No. 31 Comments. The Bureau requests that parties format any attachments to electronic mail as Adobe® Acrobat® (pdf) or Microsoft® Word documents. Copies of comments and reply comments will be available for public inspection during regular business hours in the FCC Public Reference Room, Room CY–A257, 445 12th Street, SW., Washington, DC 20554.

24. In addition, the Bureau requests that commenters fax a courtesy copy of their comments and reply comments to the attention of Kathryn Garland at (717) 338–2850.

25. This proceeding has been designated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required. Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in § 1.1206(b) of the Commission's rules.

Federal Communications Commission.

Margaret Wiener,

Chief, Auctions and Industry Analysis Division, WTB.

[FR Doc. 02–3624 Filed 2–13–02; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meetings

AGENCY: Federal Election Commission.

DATE & TIME: Wednesday, February 20, 2002 at 10 a.m.

PLACE: 999 E Street, N.W., Washington, D.C.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. § 437g.
Audits conducted pursuant to 2 U.S.C. § 437g, § 438(b), and Title 26, U.S.C.
Matters concerning participation in civil actions or proceedings or arbitration.
Internal personnel rules and procedures or matters affecting a particular employee.

DATE & TIME: Thursday, February 21, 2002 at 10 a.m.

PLACE: 999 E Street, N.W., Washington, D.C. (Ninth Floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED:

Draft Advisory Opinion 2002–01: Harry Kresky on behalf of Lenora B. Fulani and James Mangia.
Draft Advisory Opinion 2002–02: Eric Gally.
Administrative Matters.

PERSON TO CONTACT FOR INFORMATION: Mr. Ron Harris, Press Officer, Telephone: (202) 694–1220.

Mary W. Dove,
Secretary of the Commission.
[FR Doc. 02–3739 Filed 2–12–02; 11:23 am]
BILLING CODE 6715–01–M

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than February 28, 2002.

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166–2034:

1. James Stewart and Shirley Stewart, both of Crothersville, Indiana; to retain voting shares of The Bancshares, Inc., Scottsburg, Indiana, and thereby indirectly retain voting shares of The Scott County State Bank, Scottsburg, Indiana.

B. Federal Reserve Bank of Minneapolis (Julie Stackhouse, Vice President) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. Douglas G. Hansen, Currie, Minnesota; to acquire voting shares of Currie Bancorporation, Inc., Currie, Minnesota, and thereby indirectly acquire voting shares of Currie State Bank, Currie, Minnesota.

C. Federal Reserve Bank of Kansas City (Susan Zubradt, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198–0001:

1. Blair Lauritzen Gogel, Mission Hills, Kansas, and Clarkson Davis Lauritzen, Boston, Massachusetts; to acquire voting shares of K.B.J. Enterprises, Inc., Omaha, Nebraska, and thereby indirectly acquire voting shares of Sibley State Bank, Sibley, Iowa.

Board of Governors of the Federal Reserve System, February 8, 2002.

Robert deV. Frierson,
Deputy Secretary of the Board.
[FR Doc. 02–3558 Filed 2–13–02; 8:45 am]
BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary; Solicitation of Nominations for Four Vacancies on the Health and Human Services Advisory Committee on Minority Health

AGENCY: Office of Public Health and Science, Office of Minority Health, HHS.

ACTION: Solicitation of nominations for four vacancies on the HHS Advisory Committee on Minority Health.

Authority: Section 1707(c) of the Public Health Service Act directs the Secretary to establish the Advisory Committee on Minority Health. The Committee is also governed by the Federal Advisory Committee Act (5 U.S.C. Appendix 2), which sets forth standards for the formulation and use of advisory committees.

SUMMARY: The Secretary, DHHS, signed the charter establishing the HHS Advisory Committee on Minority Health (the Committee) on September 17, 1999, and the charter was renewed on September 14, 2001. This Committee advises and makes recommendations to the Secretary on improving the health of racial and ethnic minority groups and development of goals and specific program activities. This notice requests nominations for four vacancies on the Committee beginning December 2002.

DATES: Nominations for members will be considered if we receive them at the appropriate address, as provided below, no later than 5:00 P.M. EST on May 15, 2002.

ADDRESSES: You may mail or deliver nominations for membership to the following address: Sheila Pack Merriweather, Division of Policy and Data, Office of Minority Health, 5515 Security Lane, Suite 1000, Rockville, MD 20852. Nominations will not be accepted by e-mail or by facsimile.

A request for a copy of the Secretary's charter for the Advisory Committee and list of current members can be obtained from the Office of Minority Health Resource Center, P.O. Box 37337, Washington, DC 20013–7337, telephone 1–800–444–6472, TDD 301–589–0951, e-mail: *info@omhrc.gov.* The charter and list of current members can also be downloaded from the Office of Minority Health Resource Center Web site at *http://www.omhrc.dhhs.gov.*

FOR FURTHER INFORMATION CONTACT: Sheila Pack Merriweather at (301) 443–9923; fax—301–443–8280; e-mail—*smerriweather@osophs.dhhs.gov*

SUPPLEMENTARY INFORMATION:

I. Background

The Advisory Committee advises the Secretary on improving the health of racial and ethnic minorities and developing goals and specific program activities. These activities include, but are not limited, to the following:

(1) Establish short-range and long-range goals and objectives and coordinate all other activities within the Public Health Service that relate to disease prevention, health promotion, service delivery, and research concerning such individuals.

(2) Enter into interagency agreements with other agencies of the Public Health Service.

(3) Support research, demonstrations, and evaluations to test new and innovative models.

(4) Increase knowledge and understanding of health risk factors.

(5) Develop mechanisms that support better information dissemination, education, prevention, and service delivery to individuals from disadvantaged backgrounds, including individuals who are members of racial and ethnic minority groups.

(6) Ensure that the National Center for Health Statistics collects data on the health status of each minority group.

(7) With respect to individuals who lack proficiency in speaking the English language, enter into contracts with

public and nonprofit private providers of primary health services for the purpose of increasing the access of individuals to such services by developing and carrying out programs to provide bilingual or interpretive services.

(8) Support a national minority health resource center to carry out the following:

(A) Facilitate the exchange of information regarding matters relating to health information and health promotion, preventive health services, and education in the appropriate use of health care.

(B) Facilitate access to information.

(C) Assist in the analysis of issues and problems relating to such matters.

(D) Provide technical assistance with respect to the exchange of such information (including facilitating the development of materials of such technical assistance).

(9) Carry out programs to improve access to health care services for individuals with limited proficiency in speaking the English language. Activities under the preceding sentence shall include developing and evaluating model projects.

II. Nominations

The Office of Minority Health (OMH) is requesting nominations to fill four vacancies for voting members to serve on the Advisory Committee. The Committee consists of 12 voting members appointed by the Secretary from among racial and ethnic minorities, defined as Black or African American, Hispanic/Latino, American Indian/Alaska Native, Asian American, and Native Hawaiian or Pacific Islander, who have expertise regarding issues of minority health. The racial and ethnic minority groups will be equally represented among the voting members. Employees or officers of the Federal Government may not serve as voting members, except that the Secretary may also appoint employees of the DHHS to serve as ex-officio, non-voting members.

OMH is seeking nominations of persons from a wide-array of fields including but not limited to: Public health and medicine; health administration and financing; behavioral and social sciences; immigration and rural health; health law and economics; cultural and linguistic competency; and biomedical ethics and human rights. Demonstrated expertise regarding issues of minority health, such as: Access to care; data collection and analysis; health professions development; cultural competency; and eliminating disparities in cancer, cardiovascular diseases, infant mortality, HIV infection/AIDS, child and adult immunization, diabetes, substance abuse, homicide, suicide, unintentional injuries, and other diseases and health conditions is also required.

Nominations must state that the nominee is willing to serve as a member of the Advisory Committee and appears to have no conflict of interest that would preclude membership. Potential candidates are required to provide detailed information concerning such matters as financial holdings, consultancies, and research grants or contracts to permit evaluation of possible sources of conflict of interest.

Members shall be appointed for a term of four years. Committee members will be compensated for the time they spend in Committee meetings (including travel time) as well as per diem costs.

Any interested person may nominate one or more qualified persons. Self-nominations will also be accepted.

III. Nomination Forms

Nomination forms may be obtained by contacting the Office of Minority Health Resource Center, PO Box 37337, Washington, DC 20013–7337, telephone 1–800–444–6472, TDD 301–589–0951, e-mail: *info@omhrc.gov.* Nomination forms may also be downloaded from the Office of Minority Health Resource Center Web site, *http://www.omhrc.dhhs.gov.* All nominations and curricula vitae for the Advisory Committee should be sent to Sheila Pack Merriweather at the address in this notice.

Dated: January 31, 2002.

Nathan Stinson, Jr.,

Deputy Assistant Secretary for Minority Health.

[FR Doc. 02–3571 Filed 2–13–02; 8:45 am]

BILLING CODE 4150–29–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agenda for February 13 and 14, 2002 Meeting of the President's Council on Bioethics

AGENCY: President's Council on Bioethics, HHS.

ACTION: Addendum to the Prior Notice of Public Meeting.

SUMMARY: The President's Council on Bioethics will hold its second meeting to discuss its agenda and future activities on February 13 and 14, 2002.

Tentative Agenda

Wednesday, February 13

8:30 am
Opening Remarks.
Leon R. Kass, M.D., Chairman.
8:45 am
Session 1: Human Cloning 4: Proper Use of Language.
Working Paper #5: On Terminology.
10:00 am
Break.
10:15 am
Session 2: Human Cloning 5: National Academics' Report, ''Scientific and Medical Aspects of Human Reproductive Cloning.''
Irving L. Weissman, M.D.
Noon
Lunch.
1:30 pm
Session 3: Human Cloning 6: Ethical Issues in ''Reproductive'' Cloning. Working Paper #6: The Ethics of ''Reproductive'' Cloning: Child, Family, and Society.
3:00 pm
Break.
3:15pm
Session 4: Human Cloning 7: Ethical Issues in ''Reproductive'' Cloning, Continued.
5:00 pm
Session 5: Ethical Conduct of Council Members. Q&A with Administration Attorney.
5:30 pm
Adjournment.

Thursday, February 14

8:30 am
Session 6: Human Cloning 8: Ethical Issues in ''Therapeutic/Research'' Cloning.
10:00 am
Break.
10:15 am
Session 7: Human Cloning 9: Cloning and Public Policy: Legislative Alternatives.
11:45 am
Break.
Noon
Session 8: Public Comments.
1:00 pm
Adjournment.

Public Comments: Written statements may be submitted by members of the public for the Council's records. Please submit statements to Ms. Diane Gianelli (tel. 202/296–4694). Persons wishing to comment in person may do so during the hour set aside for this purpose beginning at noon on Thursday, February 14. Comments will be limited to no more than five minutes per speaker or organization. Please give advance notice of such statements to Ms. Gianelli at the phone number given

above, and be sure to include name, affiliation, and a brief description of the topic or nature of the statement.

FOR FURTHER INFORMATION CONTACT: Diane Gianelli, 202/296–4694.

Dated: February 6, 2002.

Dean Clancy,

Executive Director, President's Council on Bioethics.

[FR Doc. 02–3626 Filed 2–13–02; 8:45 am]

BILLING CODE 4150–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the Secretary's Advisory Committee on Regulatory Reform

AGENCY: Office of the Assistant Secretary for Planning and Evaluation, Department of Health and Human Services.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given of a public hearing by the Department of Health and Human Services (HHS) Secretary's Advisory Committee on Regulatory Reform. As governed by the Federal Advisory Committee Act in accordance with Section 10(a)(2), the Secretary's Advisory Committee on Regulatory Reform is seeking guidance for the Department's efforts to streamline regulatory requirements. The Advisory Committee will advise and make recommendations for changes that would be beneficial in four broad areas: Health care delivery, health systems operations, biomedical and health research, and the development of pharmaceuticals and other products. The Committee will review changes identified through regional public hearings, written comments from the public, and consultation with HHS staff.

All meetings and hearings of the Committee are open to the general public. During each meeting, invited witnesses will address how regulations affect health-related issues. Meeting agendas will also allow some time for public comment. Additional information on each meeting's agenda and list of participating witnesses will be posted on the Committee's Web site prior to the meetings, *http://www.regreform.hhs.gov.*

DATES: The first public hearing of the Secretary's Advisory Committee on Regulatory Reform will be held on Monday, February 25, 2002, from 9:00 a.m. to 5:00 p.m. and on Tuesday, February 26, 2002, from 9:00 a.m. to 1:00 p.m.

ADDRESSES: The hearing will be held in Miami, Florida. Information about the exact location will be posted at the Web site address listed above and published in the **Federal Register** when the location has been confirmed.

FOR FURTHER INFORMATION CONTACT: Christy Schmidt, Executive Coordinator, Secretary's Advisory Committee on Regulatory Reform, Office of the Assistant Secretary for Planning and Evaluation, 200 Independence Avenue, SW., Room 344G, Washington, DC 20201, (202) 401–5182.

SUPPLEMENTARY INFORMATION: Anyone planning to attend the meeting who requires special disability-related arrangements such as sign-language interpretation should provide notice of their need by Tuesday, February 19, 2002. Please make any request to Michael Starkweather—phone: 301–628–3141; fax: 301–628–3101; e-mail: *mstarkweather@s-3.com.*

On June 8, 2001, HHS Secretary Thompson announced a Department-wide initiative to reduce regulatory burdens in health care, to improve patient care, and to respond to the concerns of health care providers and industry, State and local Governments, and individual Americans who are affected by HHS rules. Common sense approaches and careful balancing of needs can help improve patient care. As part of this initiative, the Department is establishing the Secretary's Advisory Committee on Regulatory Reform to provide findings and recommendations regarding potential regulatory changes. These changes would enable HHS programs to reduce burdens and costs associated with departmental regulations and paperwork, while at the same time maintaining or enhancing the effectiveness, efficiency, impact, and access of HHS programs.

Dated: February 7, 2002.

William Raub,

Deputy Assistant Secretary for Planning and Evaluation.

[FR Doc. 02–3625 Filed 2–13–02; 8:45 am]

BILLING CODE 4151–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Annual Update of the HHS Poverty Guidelines

AGENCY: Department of Health and Human Services.

ACTION: Notice.

SUMMARY: This notice provides an update of the HHS poverty guidelines to account for last (calendar) year's increase in prices as measured by the Consumer Price Index.

EFFECTIVE DATE: These guidelines go into effect on the day they are published (unless an office administering a program using the guidelines specifies a different effective date for that particular program).

ADDRESSES: Office of the Assistant Secretary for Planning and Evaluation, Room 404E, Humphrey Building, Department of Health and Human Services (HHS), Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: *For information about how the poverty guidelines are used or how income is defined in a particular program,* contact the Federal (or other) office which is responsible for that program.

For general questions about the poverty guidelines (but NOT for questions about a particular program—such as the Hill-Burton Uncompensated Services Program—that uses the poverty guidelines), contact Gordon Fisher, Office of the Assistant Secretary for Planning and Evaluation, Room 404E, Humphrey Building, Department of Health and Human Services, Washington, DC 20201—telephone: (202) 690–5880; persons with Internet access may visit the poverty guidelines Internet site at <*http://aspe.hhs.gov/poverty/poverty.htm*>.

For information about the Hill-Burton Uncompensated Services Program (no-fee or reduced-fee health care services at certain hospitals and other health care facilities for certain persons unable to pay for such care), contact the Office of the Director, Division of Facilities Compliance and Recovery, Health Resources and Services Administration, HHS, Room 10C–16, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857. To speak to a person, call (301) 443–5656. To receive a Hill-Burton information package, call 1–800–638–0742 (for callers outside Maryland) or 1–800–492–0359 (for callers in Maryland), and leave your name and address on the Hotline recording. Persons with Internet access may visit the Division of Facilities Compliance and Recovery Internet home page site at <*http://www.hrsa.gov/osp/dfcr*>. The Division of Facilities Compliance and Recovery notes that as set by 42 CFR 124.505(b), the effective date of this update of the poverty guidelines for facilities obligated under the Hill-Burton Uncompensated Services Program is sixty days from the date of this publication.

For information about the percentage multiple of the poverty guidelines to be used on immigration forms such as INS Form I–864, Affidavit of Support,

contact the U.S. Immigration and Naturalization Service. To obtain information on the most recent applicable poverty guidelines from the Immigration and Naturalization Service, call 1–800–375–5283. Persons with Internet access may obtain the information from the Immigration and Naturalization Service Internet site at <*http://www.ins.usdoj.gov/graphics/howdoi/affsupp.htm*>.

For information about the Department of Labor's Lower Living Standard Income Level (an alternative eligibility criterion with the poverty guidelines for certain programs under the Workforce Investment Act of 1998), contact John Beverly, Employment and Training Administration, U.S. Department of Labor—telephone: (202) 693–3502—e-mail: <*jbeverly@doleta.gov*>; persons with Internet access may visit the Employment and Training Administration's Lower Living Standard Income Level Internet site at <*http://wdsc.doleta.gov/llsil*>.

For information about the number of people in poverty since 1959 or about the Census Bureau statistical poverty thresholds, contact the HHES Division, Room G251, Federal Office Building #3, U.S. Census Bureau, Washington, D.C. 20233–8500—telephone: (301) 457–3242—or send e-mail to <*hhes-info@census.gov*>; persons with Internet access may visit the Poverty section of the Census Bureau's Internet site at <*http://www.census.gov/hhes/www/poverty.html*>.

2002 Poverty Guidelines for the 48 Contiguous States and the District of Columbia

Size of family unit	Poverty guideline
1	$8,860
2	11,940
3	15,020
4	18,100
5	21,180
6	24,260
7	27,340
8	30,420

For family units with more than 8 members, add $3,080 for each additional member. (The same increment applies to smaller family sizes also, as can be seen in the figures above.)

2002 Poverty Guidelines for Alaska

Size of family unit	Poverty guideline
1	$11,080

2002 Poverty Guidelines for Alaska—Continued

Size of family unit	Poverty guideline
2	14,930
3	18,780
4	22,630
5	26,480
6	30,330
7	34,180
8	38,030

For family units with more than 8 members, add $3,850 for each additional member. (The same increment applies to smaller family sizes also, as can be seen in the figures above.)

2002 Poverty Guidelines for Hawaii

Size of family unit	Poverty guideline
1	$10,200
2	13,740
3	17,280
4	20,820
5	24,360
6	27,900
7	31,440
8	34,980

For family units with more than 8 members, add $3,540 for each additional member. (The same increment applies to smaller family sizes also, as can be seen in the figures above.)

(Separate poverty guideline figures for Alaska and Hawaii reflect Office of Economic Opportunity administrative practice beginning in the 1966–1970 period. Note that the Census Bureau poverty thresholds—the primary version of the poverty measure—have never had separate figures for Alaska and Hawaii. The poverty guidelines are not defined for Puerto Rico, the U.S. Virgin Islands, American Samoa, Guam, the Republic of the Marshall Islands, the Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, and Palau. In cases in which a Federal program using the poverty guidelines serves any of those jurisdictions, the Federal office which administers the program is responsible for deciding whether to use the contiguous-states-and-D.C. guidelines for those jurisdictions or to follow some other procedure.)

The preceding figures are the 2002 update of the poverty guidelines required by section 673(2) of the Omnibus Budget Reconciliation Act (OBRA) of 1981 (Pub.L. 97–35—reauthorized by Pub.L. 105–285, Section 201 (1998)). As required by law, this update reflects last year's change in the Consumer Price Index (CPI–U); it was done using the same procedure used in previous years.

Section 673(2) of OBRA–1981 (42 U.S.C. 9902(2)) requires the use of these poverty guidelines as an eligibility criterion for the Community Services Block Grant program. The poverty guidelines are also used as an eligibility criterion by a number of other Federal programs (both HHS and non-HHS). Due to confusing legislative language dating back to 1972, the poverty guidelines have sometimes been mistakenly referred to as the ''OMB'' (Office of Management and Budget) poverty guidelines or poverty line. In fact, OMB has never issued the guidelines; the guidelines are issued each year by the Department of Health and Human Services (formerly by the Office of Economic Opportunity/Community Services Administration). The poverty guidelines may be formally referenced as ''the poverty guidelines updated periodically in the **Federal Register** by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2).''

The poverty guidelines are a simplified version of the Federal Government's statistical poverty thresholds used by the Census Bureau to prepare its statistical estimates of the number of persons and families in poverty. The poverty guidelines issued by the Department of Health and Human Services are used for administrative purposes—for instance, for determining whether a person or family is financially eligible for assistance or services under a particular Federal program. The poverty thresholds are used primarily for statistical purposes. Since the poverty guidelines in this notice—the 2002 guidelines—reflect price changes through calendar year 2001, they are approximately equal to the poverty thresholds for calendar year 2001 which the Census Bureau expects to issue in September or October 2002. (A preliminary version of the 2001 thresholds is now available from the Census Bureau.)

In certain cases, as noted in the relevant authorizing legislation or program regulations, a program uses the poverty guidelines as only one of several eligibility criteria, or uses a percentage multiple of the guidelines (for example, 125 percent or 185 percent of the guidelines). Non-Federal organizations which use the poverty guidelines under their own authority in non-Federally-funded activities also have the option of choosing to use a

percentage multiple of the guidelines such as 125 percent or 185 percent.

While many programs use the guidelines to classify persons or families as either eligible or ineligible, some other programs use the guidelines for the purpose of giving priority to lower-income persons or families in the provision of assistance or services.

In some cases, these poverty guidelines may not become effective for a particular program until a regulation or notice specifically applying to the program in question has been issued.

The poverty guidelines given above should be used for both farm and non-farm families. Similarly, these guidelines should be used for both aged and non-aged units. The poverty guidelines have never had an aged/non-aged distinction; only the Census Bureau (statistical) poverty thresholds have separate figures for aged and non-aged one-person and two-person units.

Definitions

There is no universal administrative definition of ''family,'' ''family unit,'' or ''household'' that is valid for all programs that use the poverty guidelines. Federal programs in some cases use administrative definitions that differ somewhat from the statistical definitions given below; the Federal office which administers a program has the responsibility for making decisions about its administrative definitions. Similarly, non-Federal organizations which use the poverty guidelines in non-Federally-funded activities may use administrative definitions that differ from the statistical definitions given below. In either case, to find out the precise definitions used by a particular program, please consult the office or organization administering the program in question.

The following statistical definitions (derived for the most part from language used in U.S. Bureau of the Census, Current Population Reports, Series P60–185 and earlier reports in the same series) are made available for illustrative purposes only; in other words, these statistical definitions are not binding for administrative purposes.

(a) Family

A family is a group of two or more persons related by birth, marriage, or adoption who live together; all such related persons are considered as members of one family. For instance, if an older married couple, their daughter and her husband and two children, and the older couple's nephew all lived in the same house or apartment, they would all be considered members of a single family.

(b) Unrelated Individual

An unrelated individual is a person 15 years old or over (other than an inmate of an institution) who is not living with any relatives. An unrelated individual may be the only person living in a house or apartment, or may be living in a house or apartment (or in group quarters such as a rooming house) in which one or more persons also live who are not related to the individual in question by birth, marriage, or adoption. Examples of unrelated individuals residing with others include a lodger, a foster child, a ward, or an employee.

(c) Household

As defined by the Census Bureau for statistical purposes, a household consists of all the persons who occupy a housing unit (house or apartment), whether they are related to each other or not. If a family and an unrelated individual, or two unrelated individuals, are living in the same housing unit, they would constitute two family units (see next item), but only one household. Some programs, such as the Food Stamp Program and the Low-Income Home Energy Assistance Program, employ administrative variations of the ''household'' concept in determining income eligibility. A number of other programs use administrative variations of the ''family'' concept in determining income eligibility. Depending on the precise program definition used, programs using a ''family'' concept would generally apply the poverty guidelines separately to each family and/or unrelated individual within a household if the household includes more than one family and/or unrelated individual.

(d) Family Unit

''Family unit'' is not an official U.S. Census Bureau term, although it has been used in the poverty guidelines **Federal Register** notice since 1978. As used here, either an unrelated individual or a family (as defined above) constitutes a family unit. In other words, a family unit of size one is an unrelated individual, while a family unit of two/three/etc. is the same as a family of two/three/etc.

Note that this notice no longer provides a definition of ''income.'' This is for two reasons. First, there is no universal administrative definition of ''income'' that is valid for all programs that use the poverty guidelines. Second, in the past there has been confusion regarding important differences between the statistical definition of income and various administrative definitions of ''income'' or ''countable income.'' The precise definition of ''income'' for a particular program is very sensitive to the specific needs and purposes of that program. To determine, for example, whether or not taxes, college scholarships, or other particular types of income should be counted as ''income'' in determining eligibility for a specific program, one must consult the office or organization administering the program in question; that office or organization has the responsibility for making decisions about the definition of ''income'' used by the program (to the extent that the definition is not already contained in legislation or regulations).

Dated: February 6, 2002.

Tommy G. Thompson,

Secretary of Health and Human Services.

[FR Doc. 02–3627 Filed 2–13–02; 8:45 am]

BILLING CODE 4154–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Nominations of Topics for EAvidence-based Practice Centers

AGENCY: Agency for Healthcare Research and Quality (AHRQ), DHHS.

ACTION: Nominations of topics for evidence reports and technology assessments.

SUMMARY: AHRQ invites nominations of topics for evidence reports and technology assessments relating to the prevention, diagnosis, treatment and management of common diseases and clinical conditions, as well as topics relating to organization and financing of health care. AHRQ's previous requests for topic nominations were published in the **Federal Register** on December 23, 1996, November 28, 1997, May 4, 1999, and November 13, 2000.

DATES: Topic nominations should be submitted by April 15, 2002, in order to be considered for the next group of evidence reports and technology assessments. In addition to timely responses to this request for nominations, AHRQ also accepts topic nominations on an ongoing basis. AHRQ will not reply to individual responses, but will consider all nominations during the selection process. Topics selected will be announced from time to time in the **Federal Register** and through AHRQ press releases.

ADDRESSES: Topics nominations should be submitted to Jacqueline Besteman, J.D., M.A., Director, Evidence-based Practice Centers (EPC) Program, Center

for Practice and Technology Assessment, AHRQ, 6010 Executive Boulevard, Suite 300, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Jacqueline Besteman, J.D., M.A., Center for Practice and Technology Assessment, AHRQ, 6010 Executive Blvd., Suite 300, Rockville, MD 20852; Phone: (301) 594–4017; Fax: (301) 594–4027; E-mail: *jbestema@ahrq.gov*

Arrangement for Public Inspection: All nominations will be available for public inspections at the Center for Practice and Technology Assessment, telephone (301) 594–4015, weekdays between 8:30 a.m. and 5 p.m. (Eastern time).

SUPPLEMENTARY INFORMATION:

1. Background

Under Title IX of the Public Health Service Act (42 U.S.C. 299a–299c) as amended by Public Law 106–129 (1999), AHRQ is charged with enhancing the quality, appropriateness, and effectiveness of health care services and access to such services. AHRQ accomplishes these goals through scientific research and through promotion of improvements in clinical practice and health systems practices including the prevention of diseases and other health conditions.

2. Purpose

The purpose of this **Federal Register** notice is to encourage participation and collaboration of professional societies, health systems, payors, and providers, with AHRQ as it carries out its mission to promote the practice of evidence-based health care. AHRQ serves as the science partner with private-sector and public organizations in their efforts to improve the quality, effectiveness, and appropriateness of health care delivery in the United States, and to expedite the translation of evidence-based research findings into improved health care services. AHRQ awards takes order contracts to its Evidence-based Practice Centers (EPCs) to undertake scientific analysis and evidence syntheses on high-priority topics. The EPCs produce science syntheses—evidence reports and technology assessments—that provide to public and private organizations the foundation for developing and implementing their own practice guidelines, performance measures, educational programs, and other strategies to improve the quality of health care and decision-making related to the effectiveness and appropriateness of specific health care technologies and services. The evidence reports and technology assessments also may be used to inform coverage and reimbursement policies.

In addition to clinical and behavioral research, as the body of scientific studies related to organization and financing of health care grows, systematic review and analysis of these studies can provide health system organizations with a scientific foundation for developing system-wide policies and practices. These reports may address and evaluate topics such as risk adjustment methodologies, market performance measures, provider payment mechanisms, and insurance purchasing tools, as well as provider integration of new scientific findings regarding health care and delivery innovations. To review topics that have been assigned to the EPCs between FY 1997 and FY 2001, visit AHRQ's Web site at *http://www.ahrq.gov/clinic/epc/#centers.*

3. Evidence-based Practice Centers (EPCs)

The EPCs prepare evidence reports and technology assessments on topics for which there is significant demand for information by health care providers, insurers, purchasers, health-related societies, and patient advocacy organizations. Such topics may include the prevention, diagnosis and/or treatment of particular clinical and behavioral conditions, use of alternative or complementary therapies, and appropriate use of commonly provided services, procedures, or technologies. Topics also may include issues related to the organization and financing of care. AHRQ widely disseminates the EPC evidence reports and technology assessments, both electronically and in print. The EPC evidence reports and technology assessments do not include clinical recommendations or recommendations or reimbursement and coverage policies.

4. Role/Responsibilities of Partners

Nominators of topics selected for development of an EPC evidence report or technology assessment assume the role of Partners of AHRQ and the EPCs. Partners have defined roles and responsibilities. AHRQ places high value on these relationships, and plans to review Partners' past performance of these responsibilities at such time as AHRQ is considering whether to accept additional topics nominated by an organization, in subsequent years. Specifically, Partners are expected to serve as resources to EPCs and they develop the evidence reports and technology assessments related to their nominated topic; serve as members of external peer reviewers of relevant draft evidence report and assessment; and commit to (a) timely translation of the EPC reports and assessments into their own quality improvement tools (*i.e.,* clinical practice guidelines, performance measures), educational programs, and reimbursement policies; and (b) dissemination of these derivative products to their membership. AHRQ also is interested in members' use of these derivative products and the products' impact on enhanced healthcare. AHRQ will look to the Partners to provide these use and impact data on products that are based on EPC evidence reports and technology assessments.

The AHRQ will review topic nominations and supporting information and determine final topics; seeking additional information as appropriate. AHRQ is very interested in receiving topic nominations from professional societies and organizations comprised of members of minority populations, as well as nomination of topics that have significant impact on the health status of women, children, ethnic and racial populations.

5. Topic Nomination and Selection Process

The processes that AHRQ employs a select topics nominated for analyses by the EPCs is described below. Section A addresses AHRQ's nomination process and selection criteria for clinical and behavioral topics. Section B addresses AHRQ's nomination process and selection criteria for organization and financing topics.

A. Section A: Clinical and Behavioral Topics

(a) Nomination Process for Clinical and Behavioral Topics

Nominations of clinical and behavioral topics for AHRQ evidence reports and technology assessments should focus on specific aspects of prevention, diagnosis, treatment and/or management of a particular condition, or on an individual procedure, treatment, or technology. Potential topics should be carefully defined and circumscribed so that the relevant published literature and other databases can be searched, evidence systematically reviewed, supplemental analyses performed, draft reports and assessments circulated for external peer review, and final evidence reports or technology assessments produced. Some reports and assessments can be completed within six months, if there is a small volume of literature to be systematically reviewed and analyzed. Other evidence reports and technology

assessments may required up to 12 months for completion due to complexity of the topic, the volume of literature to be searched, abstracted, and analyzed, and completion of the external peer review process. Topics selected will not duplicate current and widely available syntheses, unless new evidence is available that suggests the need for revisions or updates.

For each topic, the nominating organization must provide the following information: (a) Rationale and supporting evidence on the clinical relevance and importance of the topic; and (b) plans for rapid translation of the evidence reports and technology assessments into clinical guidelines, performance measures, educational programs, or other strategies for strengthening the quality of health care services, or plans to inform development of reimbursement or coverage policies; (c) plans for dissemination of these derivative products to their membership; and (d) process by which the nominating organization will measure the use of these products by their members, and impact of such use. Specifically, nomination information should include:

- Defined condition and target population.
- Three to five very focused questions to be answered.
- Incidence or prevalence, and indication of the disease burden (*e.g.,* mortality, morbidity, functional impairment) in the U.S. general population or in subpopulations (*e.g.,* Medicare and Medicaid populations). For prevalence, the number of cases in the U.S. and the number of affected persons per 1,000 persons in the general U.S. population should be provided. For incidence, the number of new cases per 100,000 a year should be provided.
- Costs associated with the clinical or behavioral condition, including average reimbursed amounts for diagnosis and therapeutic interventions (*e.g.,* average U.S. costs and number of persons who receive care for diagnosis or treatment in a year, citing ICD9–CM and CPT codes, if possible).
- Impact potential of the evidence report or technology assessment to decrease health care costs or to improve health status or clinical outcomes.
- Availability of scientific data and bibliographies of studies on the topic.
- References to significant differences in practice patterns and/or results; alternative therapies and controversies.
- Plans of the nominating organization to incorporate the report into its managerial or policy decision making (*i.e.,* rapid translation of the report or assessment into derivative products such as clinical practice guidelines or other quality improvement tools, or to inform reimbursement or coverage about a particular technology or service).
- Plans of the nominating organization for disseminating of these derivative products to its membership.
- Process by which the nominating organization will measure members' use of the derivative products, and measure the impact of such use, on clinical practice.

(b) Selection Criteria for Clinical Topics

Factors that will be considered in the selection of clinical topics for AHRQ evidence report and technology assessment topics include: (1) High incidence or prevalence in the general population and in special populations, including women, racial and ethnic minorities, pediatric and elderly populations, and those of low socieconomic status; (2) significance for the needs of the Medicare, Medicaid and other Federal health programs; (3) high costs associated with a condition, procedure, treatment, or technology, whether due to the number of people needing care, high unit cost of care, or high indirect costs; (4) controversy or uncertainty about the effectiveness or relative effectiveness of available clinical strategies or technologies; (5) impact potential for informing and improving patient or provider decision making; (6) impact potential for reducing clinically significant variations in the prevention, diagnosis, treatment, or management of a disease or condition, or in the use of a procedure or technology, or in the health outcomes achieved; (7) availability of scientific data to support the systematic review and analysis of the topic; (8) submission of nominating organization's plan to incorporate the report into its managerial or policy decision making, as defined above; and (9) submission of nominating organization's plan to disseminate derivative products to it members, and plan to measure members' use of these products, and the resultant impact of these products on clinical practice.

B. Section B: Organization and Financing Topics

(a) Nomination Process for Organization and Financing Topics

Nominations of organization and financing topics for AHRQ evidence reports should focus on specific aspects of health care organization and finance. Topics should be carefully defined and circumscribed so that relevant databases may be searched, the evidence systematically reviewed, supplemented analyses performed, draft reports circulated for external peer review, and final evidence reports produced. Reports can be completed within six months if there is a small volume of literature for systematic review and analysis. Some evidence reports may require up to 12 months for completion due to the complexity to the topic and the volume of literature to be searched, abstracted, analyzed. Topics selected will not duplicate current and widely available research syntheses, unless new evidence is available that suggests the need for revisions or updates.

For each topic, nominators should provide a rationale and supporting evidence on the importance and relevance of the topic. Nominators must also state their plans for use of the evidence report and indicate how the report could be used by public and private decision makers. Nomination information should include:

- Defined organizational/financial arrangement or structure impacting quality, outcomes, cost, access or use.
- Three to five focused questions to be answered.
- If appropriate, description of how the organizational/financial arrangement or structure is particularly relevant to delivery of care for specific vulnerable populations (*e.g.,* children, persons with chronic disease) or certain communities (*e.g.,* rural markets).
- Costs potentially affected by the organizational/financial arrangement, to the extent they can be quantified.
- Impact potential of the evidence report to decrease health care costs or to improve health status or outcomes.
- Availability of scientific and/or administrative data and bibliographies of studies on the topic.
- References to significant variation in delivery and financing patterns and/or results, and related controversies.
- Nominator's plan for use of an evidence report on the topic.
- Nominator's plan for measuring the impact of the report on practice.

(b) Selection Criteria for Organization and Financing Topics

Factors that will be considered in the selection of topics related to the organization and financing of care include the following: (1) Uncertainty about the impact of the subject organizational or financing strategy; (2) potential for the subject organizational or financing strategy or the proposed research synthesis to significantly impact aggregate health care costs; (3) policy-relevant to Medicare, Medicaid, and/or other Federal and State health programs; (4) relevant to vulnerable

populations, including racial and ethnic minorities, and particular communities, such as rural markets; (5) available scientific data to support systematic review and analysis of the topic; (6) plans of the nominating organization to incorporate the report into its managerial or policy decision-making; and (7) plans by the nominating organization to measure the impact of the report on practice.

Dated: February 8, 2002.

John M. Eisenberg,

Director.

[FR Doc. 02–3566 Filed 2–13–02; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality Notice of Meeting

In accordance with section 10(d) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2), announcement is made of a Health Care Policy and Research Special Emphasis Panel (SEP) meeting.

The Health Care Policy and Research Special Emphasis Panel is a list of experts in fields related to health care research who are invited by the Agency for Healthcare Research and Quality (AHRQ) and agree to be available, to conduct, on an as needed basis, scientific reviews of applications for AHRQ support. Individual members of the Panel do not meet regularly and do not serve for fixed or long terms. Rather, they are asked to serve for particular review meetings which require their type of expertise.

Substantial segments of the upcoming SEP meeting listed below will be closed to the public in accordance with the Federal Advisory Committee Act, section 10(d) of 5 U.S.C., Appendix 2 and 5 U.S.C. 552b(c)(6). Grant applications for Cooperative Agreement Awards are to be reviewed and discussed at this meeting. These discussions are likely to include personnel information concerning individuals associated with these applications. This information is exempt from mandatory disclosure under the above-cited statutes.

1. *SEP Meeting on:* Consumer Assessments of Health Plans Study, Phase II (CAHPS).

Date: March 11, 2002 (Open on March 11, from 8:00 a.m. to 8:15 a.m. and closed for remainder of the meeting).

Place: Hyatt Regency, Susquehanna Room, One Bethesda Metro Center, Bethesda, MD 20814.

Contact Person: Anyone wishing to obtain a roster of members or minutes of this meeting should contact Mrs. Bonnie Campbell, Committee Management Officer, Office of Research Review, Education and Policy, AHRQ, 2101 East Jefferson Street, Suite 400, Rockville, Maryland 20852, Telephone (301) 594–1846.

Agenda items for this meeting are subject to change as priorities dictate.

Dated: February 11, 2002.

John M. Eisenberg,

Director.

[FR Doc. 02–3678 Filed 2–13–02; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 02025]

Cooperative Agreement for Epidemiologic Studies of Birth Defects and Developmental Disabilities, and the Promotion of Optimal Birth Outcomes in China; Notice of Availability of Funds

A. Purpose

The Centers for Disease Control and Prevention (CDC) announces the availability of fiscal year (FY) 2002 funds for a cooperative agreement program for epidemiologic studies of birth defects and other reproductive and developmental outcomes in China.

B. Eligible Applicant

Assistance will be provided only to the National Center for Maternal and Infant Health, Peking University Health Science Center, Beijing, People's Republic of China. No other applications are solicited.

The People's Republic of China (PRC) is the most appropriate country, and the Peking University Health Science Center (PUHSC) (formerly Beijing Medical University [BMU]) is the most appropriate institution to conduct the work under this cooperative agreement.

The National Center for Maternal and Infant Health (NCMIH) at PUHSC.

Scientists at PUHSC have successfully collaborated with CDC on a large community intervention program of folic acid supplementation to prevent neural tube defects, including almost 250,000 women; and currently maintain surveillance of four large cohorts. These scientists have experience in all areas of birth defects research including clinical pediatrics and dysmorphology, epidemiology, public health, statistics, and laboratory science. Extensive data sets on perinatal health, birth outcome, and birth defects surveillance are maintained at PUHSC.

NCMIH functions as the national research center on health care, clinical epidemiology, and public health; and the national laboratory for reproductive health research. In addition, it is a national training center for professional technical personnel in medical epidemiological research and public health; an information management center for birth outcomes and reproductive health, and a consulting and advising center for the promotion of international academic exchange and cooperation.

Population Characteristics and Childbearing Practices in China.

China has a large, stable, and relatively homogeneous population, registration for marriage is required, and virtually all pregnancies are planned. Women who may be eligible to participate in clinical trials or other birth defects prevention programs can therefore be identified early, at the time of registration for marriage.

Approximately 80 percent of women in China become pregnant within one year of marriage. In accordance with family planning practices, most women, particularly in urban areas, have only one child. Thus, the PRC is well-suited for evaluating interventions directed toward the prevention of birth defects and adverse pregnancy outcomes, or for studying varying doses and schedules of nutritional supplements without interfering with national recommendations for women who are newly married or planning a pregnancy.

China Public Health Priorities.

Ensuring an optimal birth outcome is a national health priority in the PRC. In June 2001, the implementation procedure for the Maternal and Child Health Law (enacted July 1, 1995) was signed by Premier Zhu Rongji. Under the provisions of this law, all women are entitled to receive reproductive health services to ensure a healthy pregnancy and a healthy baby. As a result of the capabilities of the PUHSC, the Ministry of Health is expected to identify the NCMIH as the main technical unit for implementation of the law.

One of the major components of the implementation plan is the prevention of birth defects and reduction of infant mortality.

In addition, the Ministry of Science and Technology has taken responsibility for a number of projects to prevent birth defects and disabilities. Among these are (1) determining risk factors for congenital cardiac defects in China, (2)

surveillance for congenital cardiac defects through prenatal and postnatal ultrasound examinations, and (3) identification of risk factors for birth defects in the high risk areas of Shanxi Province, and developmental of intervention strategies.

C. Availability of Funds

Approximately $1,000,000 is available in FY 2002 to fund this award. It is expected that the award will begin on or about June 3, 2002, and will be made for a 12-month budget period within a project period of up to five years. Funding estimates may change.

Continuation awards within an approved project period will be made on the basis of satisfactory progress as evidenced by required reports and the availability of funds.

All requests for funds contained in the budget shall be stated in U.S. dollars. Once an award is made, CDC will not compensate foreign grantees for currency exchange fluctuations through the issuance of supplemental awards.

a. Funds may be spent for reasonable program purposes, including personnel, travel, supplies, and services. Equipment may be purchased if deemed necessary to accomplish program objectives, however, prior approval by CDC officials must be requested in writing.

b. The applicant may contract with other organizations under this program. However, the applicant must perform a substantial portion of the activities including program management and operations.

D. Where to Obtain Additional Information

This and other CDC Announcements can be found on the CDC home page Internet address—http://www.cdc.gov click on ''Funding'' then ''Grants and Cooperative Agreements.''

If you have questions after reviewing the contents of all the documents, business management technical assistance may be obtained from: Angelia Hill, Grants Management Specialist, International Grants and Contracts Branch, Procurement and Grants Office, Centers for Disease Control and Prevention (CDC), 2920 Brandywine Road, Room 3000, Atlanta, GA 30341–4146, Telephone: (770) 488–2785, email: aph8@cdc.gov.

Program Technical assistance, contact: R.J. Berry, MD, MPHTM—Medical Epidemiologist, National Center on Birth Defects, and Developmental Disabilities, Centers for Disease Control and Prevention, 4770 Buford Highway, N.E., MS F–45, Atlanta, GA 30341–3724, Telephone: (770) 488–3502, email: rjb1@cdc.gov.

Dated: February 8, 2002.

Rebecca O'Kelley,

Chief, International Grants and Contracts Branch, Centers for Disease Control and Prevention (CDC).

[FR Doc. 02–3605 Filed 2–13–02; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 02022]

CDC Support to Expand HIV/AIDS/STD Surveillance, Care and Prevention in Uganda; Notice of Award of Equipment Grant

A. Purpose

The Centers for Disease Control and Prevention (CDC) announces the award of fiscal year (FY) 2002 funds for an equipment grant program for the AIDS Control Programme (ACP) and Nakasero Blood Bank, Ministry of Health of the Republic of Uganda.

This equipment grant supports an earlier Cooperative Agreement (01140) with the Uganda Ministry of Health, AIDS Control Programme, to improve and expand HIV/AIDS/STD surveillance, care and prevention capacity activities in Uganda.

B. Where to Obtain Additional Information

To obtain business management technical assistance, contact: Dorimar Rosado, Lead Grants Management Specialist, International Grants and Contracts Branch, Procurement and Grants Office, Centers for Disease Control and Prevention, 2920 Brandywine Road, Room 3000, Atlanta, GA 30341–4146, Telephone number: (770) 488–2782, FAX: (770) 488–2847, Email address: dpr7@cdc.gov.

For program technical assistance, contact: Bruce Ross, c/o/ U.S. Embassy Kampala, PO Box 7070, Kampala, Uganda, or by mail: 2190 Kampala Pl, Washington, DC 20521–2190, Telephone number: 256 41 320 776, FAX: 256 41 321 457, Email address: bxr2@cdc.gov.

Dated: February 8, 2002.

Rebecca B. O'Kelley,

Chief, International Grants and Contracts Branch, Centers for Disease Control and Prevention (CDC).

[FR Doc. 02–3606 Filed 2–13–02; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 01D–0583]

Food Security Guidance; Availability; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a notice that appeared in the **Federal Register** of January 9, 2002 (67 FR 1224). The notice announced the availability of two guidance documents related to food security entitled ''Food, Producers, Processors, Transporters, and Retailers: Food Security Preventive Measures Guidance'' and ''Importers and Filers: Food Security Preventive Measures Guidance.'' The notice published with inadvertent errors. This document corrects those errors.

FOR FURTHER INFORMATION CONTACT: John Kvenberg, Office of Field Programs (HFS–600), Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 202–205–4187, e-mail: jkvenberg@cfsan.fda.gov or Donald W. Kraemer, Office of Seafood (HFS–400), Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–2300, e-mail: dwkraemer@cfsan.fda.gov.

SUPPLEMENTARY INFORMATION: In FR Doc 02–542, appearing on page 1224 in the **Federal Register** of Wednesday, January 9, 2002, the following corrections are made:

1. On page 1224, in the second column, under the **FOR FURTHER INFORMATION CONTACT** section, after the last sentence, add a second contact person to read: ''Donald W. Kraemer, Office of Seafood (HFS–400), Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–2300, e-mail: dkraemer@cfsan.fda.gov.''

2. On page 1225, in the first column, under the heading ''III. Electronic Access,'' starting in the third line the Internet address is corrected to read: '' http://www.cfsan.fda.gov/~dms/guidance.html.''

Dated: February 7, 2002.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 02–3615 Filed 2–13–02; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Pub. L. 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to OMB under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, call the HRSA Reports Clearance Officer on (301) 443–1129.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: The Sentinel Centers Network (SCN) Core Data Set—NEW

HRSA's Bureau of Primary Health Care (BPHC) established the Sentinel Centers Network (SCN) to assist in addressing critical policy issues. Twenty-five BPHC supported health centers and NHSC sites have been awarded funds through sub-contracts in this first year of operation. These health centers were identified as having adequate infrastructure and commitment through the competitive contract process to serve as ''laboratories'' that will generate data for timely policy analyses and conducting projects on topics that have immediate policy impact.

A protocol for core data collection and retrieval, timelines, expectations, and evaluation of the Network sites is currently underway. It is expected that sites will submit these core data, or have these data extracted from their existing information systems periodically. These core data may include provider level, encounter level, and user level information regarding, for example, data on service delivery, utilization, payer sources, demographics, clinical diagnoses and outcomes, staffing, and costs. Since all data obtained from the participant sites will be extracted/compiled from existing information systems, and not through primary data collection, burden will therefore be minimized. In addition, each participant site will receive technical assistance both on site and via telephone to reduce burden as much as possible.

Estimated burden hours:

Type of respondent	Number of respondents	Responses per respondent	Total responses	Hours per responses	Total burden hours
Sites	25	4	100	8	800

Send comments to Susan G. Queen, Ph.D., HRSA Reports Clearance Officer, Room 11–05, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: February 8, 2002.

Jane M. Harrison,

Director, Division of Policy Review and Coordination.

[FR Doc. 02–3617 Filed 2–13–02; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Advisory Council on Migrant Health Notice of Meeting

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Notice of meeting.

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92–463), announcement is made of the following National Advisory body scheduled to meet during the month of March 2002:

Name: National Advisory Council on Migrant Health.

Date & Time: March 15, 2002; 9:00 a.m. to 5:00 p.m.; March 16, 2002; 9:00 a.m. to 5:00 p.m.

Place: Hilton Washington and Towers Hotel, 1919 Connecticut Avenue, NW., Washington, DC 20009, Phone: (202)483–3000; Fax (202)232–0428.

The meeting is open to the public.

Agenda: This will be a meeting of the Council. The agenda includes an overview of general Council business activities and priorities. Topics of discussion will include development of the Year 2002 recommendations and background statements. In addition, the Council will explore the area of mental health and migrant and seasonal farmworkers. Finally, the Council will be reviewing nominations for Council membership for terms beginning November 2002. The Council meeting is being held in conjunction with the National Association of Community Health Centers, 27th Annual Policy and Issues Forum.

Anyone requiring information regarding the subject Council should contact Margaret Davis, Migrant Health Program, staff support to the National Advisory Council on Migrant Health, Bureau of Primary Health Care, Health Resources and Services Administration, 4350 East-West Highway, Bethesda, Maryland 20814, Telephone 301/594–0291.

Agenda items are subject to change as priorities indicate.

Dated: February 8, 2002.

Jane M. Harrison,

Director, Division of Policy Review and Coordination.

[FR Doc. 02–3616 Filed 2–13–02; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by agencies of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of

federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301/496–7057; fax: 301/402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

Filtration of Red Blood Cells

David F. Stroncek (CC), Susan F. Leitman (CC), Herb M. Cullis (EM), DHHS Reference No. E–339–01/0 filed 06 Nov 2001,

Licensing Contact: Dale Berkley; 301/496–7735 ext. 223; e-mail: *berkleyd@od.nih.gov.*

The invention is a method for collecting whole blood using an oxygen permeable collection bag to prevent the polymerization of Hemoglobin S, so as to prevent clogging of leukocyte reduction filters. Red blood cell components collected for transfusion are prepared from whole blood collected by phlebotomy or apheresis from healthy volunteers. Before the manufacturing of RBC components is complete, the blood is passed through leukocyte reduction filters to remove contaminating white blood cells. Unfortunately, RBC components from healthy donors with sickle cell trait clog these filters. When this occurs, the RBC components cannot be processed further and must be thrown out. The invention takes advantage of the discovery that the obstruction of leukocyte reduction filters is due to the polymerization of Hemoglobin S in RBCs from people with sickle cell trait when the oxygen concentration is low. The invention demonstrates that collecting the blood in oxygen permeable containers prevents this polymerization, allowing for efficient high-speed filtration of collected blood.

Discovery of Novel Inhibitors of HIV–1 Integrase That Can Be Used for the Treatment of Retroviral Infection Including AIDS

Terrence R. Burke, Jr., Xuechen Zhang, Godwin C. G. Pais, Christophe Marchand, Evguenia Svarovskaia, Vinay K. Pathak, and Yves Pommier (NCI), DHHS Reference No. E–317–01/0 filed 07 Dec 2001, Licensing Contact: Sally Hu; 301/496–7056 ext. 265; e-mail: *hus@od.nih.gov.*

This invention provides azido group-containing diketo acids that can inhibit HIV–1 integrase in vitro efficiently while being highly selective for the strand transfer step of the integration reaction. Human Immunodeficiency Virus (HIV) and other retroviruses require three viral enzymes for replication: reverse transcriptase, protease and integrase. The prognosis of AIDS has been improved recently by the discovery and application of reverse transcriptase and protease inhibitors. However, a significant fraction of patients fail to respond to such treatments and viral resistance remains a major problem. Furthermore, anti-AIDS combinations are often not well tolerated. Thus, HIV integrase is a rational target for AIDS therapy because genetic studies demonstrated that the enzyme is essential for viral replication while being without a cellular equivalent. Therefore, specific integrase inhibitors should be effective and devoid of toxicity. Since this invention involves the discovery of novel HIV–1 integrase inhibitors that are derived from diketo acids with a different anti-HIV mechanism from that of reverse transcriptase and protease inhibitors, these azide group-containing compounds may represent potential new therapeutics for treatment of retroviral infections, including AIDS.

Strategies To Destabilize the Active HIV–1 Protease Dimer Resulting in Stable Monomer Formation

John L. Medabalimi (NIDDK), Rieko Ishima (NIDCR), and Angela Gronenborn (NIDDK), DHHS Reference No. E–242–01/0 filed 23 Aug 2001, Licensing Contact: Sally Hu; 301/496–7056 ext. 265; e-mail: *hus@od.nih.gov.*

Upon maturation from its precursor, the HIV–1 protease forms and exists mostly as a functional dimer. The present invention relates to compositions and methods for inhibiting activity of functional dimeric retroviral proteases. More specifically, the invention relates to defining specific interface regions critical for dimer formation and production of stable folded monomers. These monomers are inactive and some of these monomers can block functional protease dimerization. The invention also describes a method of designing folded protease monomers that are stable in solution at concentrations several-fold higher than encountered in nature (stable up to 0.6 mM for several weeks at 20° C). Modifying the native protease monomer chain through substituting amino acids at the terminal regions brings about this stabilization. Knowledge of unique regions critical for the dimerization of the protease and the stable monomers may be used in the development of novel inhibitors targeting the protease, in the generation of clinically relevant antibodies and anti-idiotypic antibodies for the inhibition of functional protease activity, in the generation of a screening assay or kit that can be used to identify other similarly acting protease antagonists, in the preparation of vaccine formulations, and in the treatment of virally infected cells.

Novel Broadly Reactive HIV-Neutralizing Human Monoclonal Antibody Against Receptor-Induced Epitope on gp120

Dimiter Dimitrov (NCI), Maxime Moulard (EM), Dennis Burton (EM), Yuuei Shu (NCI), Sanjay Phogat (NCI), and Xiadong Xiao (NCI), DHHS Reference No. E–130–01/0 filed 16 Oct 2001, Licensing Contact: Sally Hu; 301/496–7056 ext. 265; e-mail: *hus@od.nih.gov.*

This invention provides a novel anti-HIV human monoclonal antibody named X5. The X5 antibody demonstrates promise over other conventional anti-HIV antibodies because this antibody presents a unique binding activity different than its counterparts. It has been established that the very initial stage of HIV–1 entry into cells is mediated by a complex between the virus envelope glycoprotein (Env) such as gp120-gp41, a receptor CD4 and a co-receptor CCR5. The X5 antibody binds to an epitope on gp120 that is induced by interaction between gp120 and the receptor CD4 and enhanced by the co-receptor CCR5. The X5 antibody also shows strong activity at very low levels (in the range from 0.0001–0.1 Mg/ml concentration in dependence on the isolate). Because it is a human antibody, it can be administered directly into patients so that it is an ideal candidate for clinical trials. It also can be easily produced because it was obtained by screening of phage display libraries and its sequence is known. Finally, since it has neutralized all virus envelope glycoproteins, including from primary isolates from different clades, that were tested against, the epitope is very conserved and resistance is unlikely to develop. Therefore, this antibody and/or its derivatives including fusion proteins with CD4 are good candidates for clinical development.

Additional information on the current research in Dr. Dimitrov's laboratory may be found at *http://www-*

lecb.ncifcrf.gov/~dimitrov/dimitrov.html.

Dated: February 7, 2002.

Jack Spiegel,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 02–3568 Filed 2–13–02; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant Of Exclusive License: Prophylactic and/or Therapeutic Vaccine Against Pseudomonas aeruginosa, Chlamydia trachomatis and Mycoplasma pneumonia, Influenza virus, Nisseria gonorrhea and Vibrio cholerae

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: This is notice, in accordance with 15 U.S.C. 209(c)(1) and 37 CFR 404.7(a)(1)(i), that the National Institutes of Health (NIH), Department of Health and Human Services, is contemplating the grant of a limited field of use exclusive worldwide license to practice the inventions embodied in: U.S. Provisional Patent Application Serial Number 60/257,877, filed December 21, 2000, entitled ''A Chimeric Protein Comprising Non-Toxic Pseudomonas Exotoxin A and Type IV Pilin Sequences''; U.S. Patent Number 5,869,608 issued February 9, 1999, entitled ''Nucleotide and Amino Acid Sequences of the Four Variable Domains of the Major Outer Membrane Proteins of Chlamydia Trachomatis''; U.S. Patent Application Serial Number 09/247,137 filed February 9, 1999, entitled ''Nucleotide and Amino Acid Sequences of the Four Variable Domains of the Major Outer Membrane Proteins of Chlamydia trachomatis''; U.S. Patent Number 4,892,827 issued January 9, 1990, entitled ''Recombinant Pseudomonas Exotoxins: Construction of an Active Immunotoxin with Low Side Effects''; U.S. Provisional Patent Application 60/160,923 filed October 22, 1999, entitled ''Delivery of Proteins Across Polar Epithelial Cell Layers''; and U.S. Patent Number 5,328,984 issued July 12, 1994, entitled ''Recombinant Chimeric Proteins Deliverable Across Cellular Membranes into Cytosol of Target Cells'' to Trinity BioSystems, L.L.C. of Los Altos Hills, California, U.S.A. The United States as represented by the Department of Health and Human Services is an assignee of these patent rights.

DATES: Only written comments and/or applications for a license, which are received by the NIH Office of Technology Transfer on or before April 15, 2002, will be considered.

ADDRESSES: Requests for a copy of these patent applications, inquiries, comments, and other materials relating to the contemplated license should be directed to: Carol A. Salata, Technology Licensing Specialist, Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, MD 20852–3804; Telephone: (301) 496–7735 ext 232; Facsimile: (301) 402–0220; E-mail: *salatac@OD.NIH.GOV.*

SUPPLEMENTARY INFORMATION: The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. It is anticipated that this license may be limited to the field of use as a prophylactic and/or therapeutic vaccine against Pseudomonas aeruginosa, Chlamydia trachomatis, Mycoplasma pneumoniae, Influenza virus, Nisseria gonorrhea and Vibrio cholerae. Trinity BioSystems will use Pseudomonas exotoxin A to target and deliver pathogen Type IV pilin peptide epitopes wherein said pathogen peptide epitopes are inserted into or replace a domain of Pseudomonas exotoxin A. This prospective exclusive license may be granted unless within 60 days from the date of this published notice, NIH receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

The patent Application Serial Number 60/257,877 describes a chimeric protein wherein key sequences from a Type IV pilin protein are inserted into a non-toxic version of Pseudomonas aeruginosa exotoxin A. This invention provides candidate chimeric vaccines that generate antibodies that interfere with adherence of Pseudomonas aeruginosa exotoxin A to epithelial cells and neutralize the cytotoxicity of exotoxin A. U.S. Patent Number 5,869,608 and U.S. Patent Application Serial Number 09/247,137 relate to Chlamydia epitopes needed for the Chlamydia vaccine. U.S. Provisional Patent Application Number 60/160,923 provides methods for parenteral administration of a protein by transmucosal delivery and without injection. U.S. Patent Number 4,892,827 describes Pseudomonas exotoxins with a deletion in the Ia domain that makes them less toxic. U.S. Patent Number 5,328,984 contains claims relating to the chimeric Pseudomonas exotoxin protein compositions.

Applications for a license filed in response to this notice will be treated as objections to the grant of the contemplated license. Comments and objections submitted in response to this notice will not be made available for public inspection, and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

Dated: February 7, 2002.

Jack Spiegel,

Director, Division of Technology Development and Transfer, Office of Technology Transfer.

[FR Doc. 02–3567 Filed 2–13–02; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Center for Substance Abuse Prevention; Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the Center for Substance Abuse Prevention (CSAP) Drug Testing Advisory Board to be held in March 2002.

A portion of the meeting will be open and will include a Department of Health and Human Services drug testing program update, a Department of Transportation drug testing program update, and an update on the draft guidelines for alternative specimen testing and on-site testing. If anyone needs special accommodations for persons with disabilities, please notify the Contact listed below.

The meeting will include developing the final requirements for specimen validity testing that had been published in the **Federal Register** on August 21, 2001 (66 FR 43876), and evaluation of sensitive National Laboratory Certification Program (NLCP) internal operating procedures and program development issues. Therefore, a portion of the meeting will be closed to the public as determined by the SAMHSA Administrator in accordance with Title 5 U.S.C. 552b(c)(9)(B) and 5 U.S.C. App.2, 10(d).

A roster of the board members may be obtained from: Mrs. Giselle Hersh, Division of Workplace Programs, 5600 Fishers Lane, Rockwall II, Suite 815, Rockville, MD 20857, Telephone: (301) 443–6014. The transcript for the open session will be available on the following Web site: *http://*

workplace.samhsa.gov. Additional information for this meeting may be *obtained by contacting the individual listed below.*

Committee Name: Center for Substance Abuse Prevention, Drug Testing Advisory Board.

Meeting Date: March 13, 2002; 8:30 a.m.–4:30 p.m., March 14, 2002; 8:30 a.m.–Noon.

Place: Residence Inn by Marriott, 7335 Wisconsin Avenue, Bethesda, Maryland 20814.

Type: Open: March 13, 2002; 8:30 a.m.–10:00 a.m.; Closed: March 13, 2002; 10:00 a.m.–4:30 p.m.; Closed: March 14, 2002; 8:30 a.m.–Noon.

Contact: Donna M. Bush, Ph.D., Executive Secretary, Telephone: (301) 443–6014, and FAX: (301) 443–3031.

Dated: February 5, 2002.

Toian Vaughn,

Committee Management Officer, Substance Abuse and Mental Health, Services Administration.

[FR Doc. 02–3565 Filed 2–13–02; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary; Proposed Agency Information Collection Activities; Comment Request

AGENCY: Office of American Indian Trust, Interior.

ACTION: Notice.

SUMMARY: This notice announces that the Department of the Interior is seeking to renew the information collection request for *Evaluation of the performance of trust functions performed by tribes under Self-Governance compacts,* OMB Control Number 1076–0146. Under the Paperwork Reduction Act, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, and to allow 60 days for public comment in response to the notice.

DATES: Submit comments on or before April 15, 2002.

ADDRESSES: Send comments to: James I. Pace, Acting Director, Office of American Indian Trust, United States Department of the Interior, 1849 C Street, NW, Room 2472, Washington, DC 20240; Fax No. (202) 208–7503.

FOR FURTHER INFORMATION CONTACT: James I. Pace, (202) 208–3338.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (PRA), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. It is also a requirement of the PRA that agencies provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the Department of the Interior, Office of American Indian Trust, is publishing notice of the proposed collection of information listed below.

The Department of the Interior invites comments by the public 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 a practical use; the accuracy of the Department's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; ways to enhance the quality, usefulness, and clarity of the information to be collected; and minimizing the burden of collection on those who are to respond.

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.

This collection of information will be made to ensure compliance with 25 U.S.C. 458cc(d) which requires that the Secretary of the Interior monitor the performance of trust functions which have been assumed under Self-Governance funding agreements negotiated between the Secretary and an Indian tribe/consortia (hereinafter the respondent).

This information collection addresses those statutory and regulatory performance requirements imposed upon the respondent through the assumption of a particular trust function, through a formal Self-Governance agreement pursuant to the Self-Governance Act (Pub. L. 103–413) which, if not performed properly, may create imminent jeopardy to a trust asset. The information will be used by the Department of the Interior to determine if there is imminent jeopardy to any asset held in trust by the United States for an Indian tribe or individual Indian that are being managed by a tribe/consortium on behalf of the United States pursuant to a Self-Governance agreement.

Currently there are 70 respondents. There is no preliminary work required of the respondents nor any follow-up work required. There are no forms for the respondent to fill out. The annual hour burden is calculated by the amount of time that the reviewer spends at each program site interviewing the respondents and collecting file information. The time required for each information collection is determined by the complexity and size of the program and ranges from 4 person/hours to 80 person/hours. Weighing the size and complexity of the 70 current programs, it has been determined that the average hours spent for each annual evaluation will be approximately 24 person/hours. This number, multiplied by the current number of evaluations, yields a total number of 1,680 person/hours per year for the collection of information for the purposes described herein.

The trust evaluation information collection process has four basic components:

1. Interview Process

Entrance Interview: Each trust evaluation commences with an entrance interview with tribal leadership and senior management. The purpose of this interview is to review generally the programs and functions subject to be evaluated and to clarify the specific nature of the tribe's responsibilities under its annual funding agreement. If specific issues or concerns were raised in the previous evaluation, they may be addressed during this interview as well.

Management Interviews: These interviews are conducted with tribal/consortia program directors and staff on a program-by-program basis. During this process, reviewers collect information pertaining to the respondent's compliance with all relevant statutory, regulatory, and other legal requirements for the management of the particular trust resource or function under review as well as compliance with any special terms and conditions contained in the annual funding agreement. Depending on information provided, reviewers may make additional inquiry with regard to specific programs or functions. Where tribal governments have enacted different or additional regulations or guidelines for the management of trust functions, compliance with these measures will be verified as well. Respondents are also provided the opportunity to address issues of concern during this phase of the process. Interviewers will also elicit relevant data during this phase of the process depending on the nature of the function under review.

Exit Interviews: The exit interview is designed to provide both the respondents and the interviewers the opportunity to clarify any outstanding issues or address particular concerns raised during the review process.

All interviews will be conducted according to a field guide which will provide direction to the reviewers in their performance of this collection.

2. File Review of Trust Transactions

This is a mandatory on-site function to verify information obtained through the review process and check performance on specific trust functions. Files are randomly selected and reviewed to ensure that all necessary and proper documents have been completed and filed and to ensure that all necessary approvals and/or permits have been secured.

3. On-Site Inspection

On-site inspections of trust resources are conducted as appropriate to the resource in question and may include a visit to facilities rather than a visual inspection of particular resources. Typically, on-site inspections are conducted when specific information is needed to complete the review; where there is reason to believe that a problem exists; or it is the type of resource or function that warrants physical inspection.

4. Evaluation Report

A report documenting the process used and information obtained during the evaluation process is produced by the reviewing staff. A first draft is sent to each respondent for comment prior to finalization. Where a respondent disagrees with a finding or information contained in the report, such comment will be attached to the final report. The reports are then signed by the Director of the Office of American Indian Trust and the Assistant Secretary—Indian Affairs and transmitted to the Chairman of the tribe and its Self-Governance Coordinator.

It is a requirement of the Paperwork Reduction Act that each respondent to any information collection be notified that an agency 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 pursuant to 35 U.S.C. 3506(c)(1)(B)(V); 44 CFR 1320 8(b)(3)(vii). The valid OMB control number for this information collection is 1076–0146.

Dated: January 25, 2002.

Neal A. McCaleb,

Assistant Secretary—Indian Affairs.

[FR Doc. 02–3673 Filed 2–13–02; 8:45 am]

BILLING CODE 4310–E8–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Request for Comments on Preparation of a Revised Departmental Strategic Plan

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of request for comments on preparation of a revised Departmental Strategic Plan for FY 2002–2007.

SUMMARY: The Department of the Interior has begun the process of revising its strategic plan that covers the period of FY 2000–2005. The process for developing the new plan will place a major emphasis on end-results to be achieved by the Department and how these desired outcomes can be effectively measured to assess our performance. For the narrow purpose of this specific action, information is accessible on the Departmental website *www.doi.gov.*

DATES: Comments should be provided no later than March 1, 2002.

ADDRESSES: Written comments can be provided by:

E-mail: *doistratplan@usgs.gov.*
Fax: (202) 208–2619.
Mail: U.S. Department of the Interior, Office of the Secretary, Office of Planning and Performance Management, 1849 C Street, NW B MS 5258, Washington, DC 20240.

Note: The Department is experiencing delay in mail delivery. We recommend fax or use of an express delivery service.

FOR FURTHER INFORMATION CONTACT: LeRon Bielak (202) 208–1818.

SUPPLEMENTARY INFORMATION: The current plan, nine separate bureau and office plans and a Departmental Overview, will be replaced with a single, integrated plan.

Contrary to past practices of first publishing a draft plan for comment, the DOI is soliciting stakeholder views through a series of meetings and written comments on appropriate outcomes and strategies that the Department should achieve in six primary mission areas. These areas are:

1. Preservation of Natural and Cultural Resources.
2. Restoration of Natural and Cultural Resources.
3. Recreation Uses on Public Lands.
4. Use of Natural Resources (e.g., energy and non-energy minerals, timber, water, grazing land, etc.).
5. Meeting our Trust Responsibilities to Native Americans, Alaskan Natives, and Island Communities.
6. Role of Science in Meeting the Missions of the Department.

Information obtained from internal and external stakeholders will be used to develop a revised strategic plan that is consistent with the missions of the Department and the Government Performance and Results Act (GPRA) requirements.

Dated: January 31, 2002.

Norma Campbell,

Director, Office of Planning and Performance Management.

[FR Doc. 02–3577 Filed 2–13–02; 8:45 am]

BILLING CODE 4310–RK–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Meeting of the Klamath Fisheries Council

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 Fishery Management Council, established under the authority of the Klamath River Basin Fishery Resources Restoration Act (16 U.S.C. 460ss *et seq.*). The Klamath Fishery Management Council makes recommendations to agencies that regulate harvest of anadromous fish in the Klamath River Basin. The objectives of this meeting are to hear technical reports, to discuss and develop Klamath fall chinook salmon harvest management options for the 2002 season, and to make recommendations to the Pacific Fishery Management Council and other agencies. The meeting is open to the public.

DATES: The Klamath Fishery Management Council will meet from 3:00 p.m. to 5:00 p.m. on Sunday, April 7, 2002.

ADDRESSES: The meeting will be held at the Columbia River Doubletree Hotel, 1401 N. Hayden Island Drive, Portland, Oregon.

FOR FURTHER INFORMATION CONTACT: Phil Detrich, Project Leader, 1829 South Oregon Street, Yreka, California 96097, telephone (530) 842–5763.

SUPPLEMENTARY INFORMATION: At the April 7, 2002, meeting, the Klamath Fishery Management Council may schedule short follow-up meetings to be held between April 8, 2002, and April 12, 2002, at the Columbia River Doubletree Hotel, 1401 N. Hayden Island Drive, Portland, Oregon, where the Pacific Fishery Management Council will be meeting.

For background information on the Klamath Council, please refer to the notice of their initial meeting that appeared in the **Federal Register** on July 8, 1987 (52 FR 25639).

Dated: February 1, 2002.

John Engbring,

Acting Manager, California/Nevada Operations Office, Sacramento, California.

[FR Doc. 02–3607 Filed 2–13–02; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Klamath Fishery Management Council 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 Fishery Management Council, established under the authority of the Klamath River Basin Fishery Resources Restoration Act (16 U.S.C. 460ss *et seq.*). The Klamath Fishery Management Council makes recommendations to agencies that regulate harvest of anadromous fish in the Klamath River Basin. The objectives of this meeting are to hear technical reports (including the ocean stock projection for Klamath River fall chinook in 2002), review the 2001 fishery season, and discuss and plan management of the 2002 season. The meeting is open to the public.

DATES: The Klamath Fishery Management Council will meet from 8:30 a.m. to 5:00 p.m. on Thursday, February 28, 2002, and from 8:00 a.m. to 12:00 p.m. on Friday, March 1, 2002.

ADDRESSES: The meeting will be held at the Red Lion Hotel, 1929 Fourth Street, Eureka, CA.

FOR FURTHER INFORMATION CONTACT: Phil Detrich, Project Leader, U.S. Fish and Wildlife Service, 1829 South Oregon Street, Yreka, California 96097, telephone (530) 842–5763.

SUPPLEMENTARY INFORMATION: For background information on the Klamath Council, please refer to the notice of their initial meeting that appeared in the **Federal Register** on July 8, 1987 (52 FR 25639)

Dated: February 1, 2002.

John Engbring,

Acting Manager, California/Nevada Operations Office, Sacramento, California.

[FR Doc. 02–3608 Filed 2–13–02; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–029–1310–DS CBMP]

Notice of Availability of the Draft Environmental Impact Statement and Amendment of the Powder River and Billings Resource Management Plans (RMPs); Montana

AGENCY: Bureau of Land Management, Miles City and Billings Field Offices, Interior.

ACTION: Notice of availability of the Draft Environmental Impact Statement and amendment of the Powder River and Billings Resource Management Plans (RMPs); Montana.

SUMMARY: In accordance with the Federal Land Policy and Management Act and the National Environmental Policy Act, the Bureau of Land Management (BLM) has prepared a Draft Environmental Impact Statement (EIS) and Resource Management Plan (RMP) Amendment jointly with the State of Montana (State). The BLM's planning area is the oil and gas estate administered by BLM in the Powder River and Billings RMP areas. The Powder River RMP area encompasses the southeastern portion of Montana consisting of Treasure and Powder River counties, and portions of Rosebud, Big Horn, Carter, and Custer counties. There are approximately 2,522,950 BLM-administered oil and gas acres in the Powder River RMP area. The Billings RMP area encompasses the south-central portion of Montana consisting of Wheatland, Golden Valley, Musselshell, Sweet Grass, Stillwater, Yellowstone, and Carbon counties, and the remaining portion of Big Horn County. There are approximately 662,066 BLM-administered oil and gas acres in the Billings RMP area. BLM-administered oil and gas acreage in Blaine, Park, and Gallatin counties is not part of the BLM planning effort. The State's planning area is statewide.

DATES: The 90-day comment period on the Draft EIS and Amendment will begin the date the EPA files a notice in the **Federal Register** (anticipated February 15, 2002).

ADDRESSES: You may submit your comments by any one of several methods. You may mail or hand-deliver comments to: Bureau of Land Management, Mary Bloom, Project Manager, Miles City Field Office, 111 Garryowen Road, Miles City, MT 59301. You may also comment electronically to: *coalbed_methane@state.mt.us.* Your name and return mailing address must be included in your electronic message. BLM's practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. If you wish to withhold your name or street 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. All submissions from organizations and businesses and from individuals identifying themselves as representatives or officials of organizations or businesses will be available for public inspection in their entirety.

FOR FURTHER INFORMATION CONTACT: Mary Bloom, Coal Bed Methane Project Manager, Bureau of Land Management, 111 Garryowen Road, Miles City, MT 59301, (406) 233–3649.

SUPPLEMENTARY INFORMATION: The Draft EIS and Amendment project is a joint effort between the BLM and the State. It is being prepared to analyze impacts to lands and resources as a result of proposed oil and gas development, primarily coal bed methane. The current Powder River and Billings RMPs, as amended by BLM's 1994 ''Oil and Gas Amendment of the Billings, Powder River, and South Dakota RMPs'', support limited conventional oil and gas development and limited coal bed methane exploration and production. About 9,500 conventional oil and gas wells (all ownership categories) are located in the planning area. An October 18, 2000 meeting of the Coal Bed Methane Coordination Group indicated that industry projects an interest in drilling approximately 10,000 coal bed methane wells in the Montana portion of the Powder River Basin over the next 10 years, in addition to an unspecified number of conventional oil and gas wells.

The Draft EIS and Amendment is being prepared to analyze this increased interest in oil and gas activity. Five alternative management scenarios developed by BLM and the State present a range of feasible management actions to address the issues: Alternative A—existing management (No Action); Alternative B—emphasize soil, water, air, vegetation, wildlife, and cultural resources protection; Alternative C—emphasize coal bed methane development; Alternative D—encourage coal bed methane exploration and development while maintaining existing land uses; and Alternative E—the BLM and State Preferred Alternative, which combines features of Alternatives A

through D and manages development of CBM in an environmentally sound manner. The Draft EIS discloses the environmental consequences of each alternative.

A copy of the Draft EIS and Amendment has been sent to all individuals, agencies, and groups who have expressed interest or as required by regulation or policy. Copies are also available upon request from the BLM at the address listed above.

Public Participation

There has been continual public participation throughout the EIS process. A Notice of Intent to prepare the EIS was published in the **Federal Register** on December 19, 2000, initiating a 30-day public scoping period. The scoping period closed January 31, 2001, after a two-week extension. Public scoping meetings were held at Broadus, Miles City, Ashland, Billings, and Helena, Montana from January 4 through January 11, 2001. A brochure was mailed May, 2001 updating the public on the status of the Draft EIS and Amendment.

Four designated cooperating agencies are also helping BLM and the State prepare the EIS: The Bureau of Indian Affairs, the United States Department of Energy, the Crow Tribe, and the United States Environmental Protection Agency. The Northern Cheyenne Tribe declined to become a cooperating agency, but has been invited by BLM to participate in all cooperating agency activities. Consultation with both the Crow and Northern Cheyenne tribes has taken place throughout the process to gather their input and concerns. Consultation with FWS has been initiated, and the BLM has also met with individuals from the general public, special interest groups, industry, and local governments upon their request. The Coal Bed Methane Coordination Group, whose purpose is to share information on coal bed methane, consists of representatives from local governments, special interest groups, the tribes, other federal agencies, industry, ranchers, and the State. The group has shared its concerns with BLM and remains updated on the EIS. In addition, the State has held monthly coordination calls with the BLM and with the public invited to listen in.

The BLM and the State will conduct public hearings across Montana (anticipated in April 2002) on the Draft EIS and Amendment. The time and locations of the hearings will be announced in local news releases.

To help BLM identify and consider issues and concerns on the alternatives, comments on the Draft EIS and Amendment should be as specific as possible; for example, comments should refer to specific pages or chapters in the document. After the comment period ends, all comments will be analyzed and considered by the BLM in preparing the Final EIS.

Dated: January 11, 2002.

Fred Wambolt,

Acting Field Manager.

[FR Doc. 02–3692 Filed 2–13–02; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Conversion of Potential Wilderness as Designated Wilderness, Haleakala National Park

Public Law No. 94–567, Approved October 20, 1976 designated 19,270 acres of Haleakala National Park as wilderness and an additional 5,500 acres as potential wilderness additions. These wilderness designations apply to portions of Haleakala National Park depicted on a map entitled ''Wilderness Plan, Haleakala National Park'', numbered 162–20,006–A and dated July 1972, known as the Haleakala Wilderness.

Section 3 of Pub. L. 94–567 directed the Secretary of the Interior to designate that potential wilderness additions be converted to ''designated'' wilderness through the publication of a notice in the **Federal Register** stating that these lands have been acquired by the federal government and that any previous uses thereon that are prohibited by the Wilderness Act (Pub. L. 88–577) have ceased.

All lands, with the exception of 51 acres owned by East Maui Irrigation Inc., designated as potential wilderness on map #162–20, 006 have been acquired and are now owned by the U.S. government as administered by Haleakala National Park. There are no current or proposed uses of the 5,449 acres proposed for conversion which are incompatible with the Wilderness Act. Since the 51 acres included within the Maui Irrigation parcel is not owned by the federal government, it will continue to be identified as ''potential wilderness'' in keeping with the instructions of Pub. L. 94–567.

These 5,449 acres of federally owned land now fully comply with the instructions contained in Pub. L. 95–625. Accordingly, this notice hereby converts the 5,449 acres of ''potential wilderness: within Haleakala National Park to designated wilderness.'' The 5,449 acres are accordingly added to the 19,270 acres already preserved within the National Wilderness Preservation System and bring the total area of designated wilderness at Haleakala National Park to 24,719 acres of wilderness and 51 acres of ''potential wilderness''. It is noted that construction of fences to exclude feral animals and access into the wilderness via helicopter for fence maintenance to control destructive invasive alien plants and non-native animals may be necessary to preserve wilderness resources and ecosystem processes.

Dated: February 1, 2002.

Fran P. Mainella,

Director, National Park Service.

[FR Doc. 02–3563 Filed 2–13–02; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF JUSTICE

Office of Community Oriented Policing Services; Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-Day Notice of Information Collection Under Review: New Collection; Mental Health and Community Safety Initiative Equipment and Training Progress Report.

The Department of Justice (DOJ), Office of Community Oriented Policing Services (COPS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies.

Comments are encouraged and will be accepted for ''sixty days'' until April 15, 2002. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Gretchen DePasquale, Office of Community Oriented Policing Services, 1100 Vermont Avenue, NW., Washington, DC 20530. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary

for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* New collection.

(2) *Title of Form/Collection:* Mental Health and Community Safety Initiative Equipment and Training Progress Report.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* None. U.S. Department of Justice, Office of Community Oriented Policing Services (COPS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Federally Recognized Tribal governments. *Other:* None. *Abstract:* The information collected will be used by the COPS Office to determine grantee's progress toward grant implementation and for compliance monitoring efforts.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There will be an estimated 10 responses. The estimated amount of time required for the average respondent to respond is: 2.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 35 hours.

If additional information is required contact: Brenda Dyer, Deputy Clearance Officer, Information Management and Security Staff, Justice Management Division, United States Department of Justice, 601 D Street NW., Patrick Henry Building, Suite 1600, NW., Washington, DC 20530.

Dated: February 8, 2002.

Brenda Dyer,

Deputy Clearance Officer, United States Department of Justice.

[FR Doc. 02–3583 Filed 2–13–02; 8:45 am]

BILLING CODE 4410–AT–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Partial Consent Decree Under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601 et seq.

Notice is hereby given that on February 7, 2002, a proposed partial consent decree (''consent decree'') in *United States* v. *Chrysler Corp., et al.,* Civil Action No. 5:97CV00894, was lodged with the United States District Court for the Northern District of Ohio.

In this action the United States sought recovery, under Sections 107(a) and 113 of the Comprehensive Environmental Response, Compensation and Liability Act (''CERCLA''), 42 U.S.C. 9607(a) and 9613, of response costs incurred in connection with the Krejci Dump Site in Summit County, Ohio (''Site''). The consent decree resolves claims under Sections 106 and 107 of CERCLA against Minnesota Mining and Manufacturing Company (''3M''), which is alleged to be liable as a result of having arranged for the disposal of hazardous substances at the Site. The consent decree recovers $14,700,000 in response costs, and $800,000 for natural resource damages, relating to the Site.

The Department of Justice will receive comments relating to the proposed consent decree for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, P.O. Box 7611, Washington, DC 20044–7611, and should refer to *United States* v. *Chrysler Corp., et al.,* D.J. Ref. No. 90–11–3–768.

The proposed consent decree may be examined at the Office of the United States Attorney, 1800 Bank One Center, 600 Superior Avenue, Cleveland, Ohio. A copy of the proposed consent decree may be obtained by mail from the Department of Justice Consent Decree Library, P.O. Box 7611, Washington, DC 20044–7611 or by faxing a request to Tonia Fleetwood, fax no. (202) 514–0097. In requesting a copy, please enclose a check payable to the ''U.S. Treasury'', in the amount of $5.75 (25 cents per page reproduction cost). The check should refer to *United States* v. *Chrysler Corp., et al.,* D.J. Ref. No. 90–11–3–768.

W. Benjamin Fisherow,

Deputy Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 02–3562 Filed 2–13–02; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of a Consent Decree Pursuant to The Clean Water Act

Notice is hereby given that a proposed Consent Decree in *United States of America and the State of Alabama* v. *The Board of Water and Sewer Commissioners of the City of Mobile, Alabama,* Civ. No. 02–0058–CB–S, and *Mobile Bay Watch, Inc.* v. *The Board of Water and Sewer Commissioners of the City of Mobile, Alabama,* Civ. No. CV–99–00595–CB–S, was lodged on January 24, 2002, with the United States District Court for the Southern District of Alabama.

The proposed Consent Decree would resolve certain claims under Sections 301 and 402 of the Clean Water Act, 33 U.S.C. 1251, *et seq.,* against the Board of Water and Sewer Commissioners of the City of Mobile, Alabama (''Board''), through the performance of injunctive measures, the payment of a civil penalty, and the performance of Supplemental Environmental Projects (''SEPs''). The United States, the State of Alabama and Mobile Bay Watch, Inc., allege that the Board is liable as a person who has discharged a pollutant from a point source to navigable waters of the United States without a permit and, in some cases, in excess of permit limitations.

The proposed Consent Decree would resolve the liability of the Board for the violations alleged in the complaints filed in these matters. The proposed Consent Decree would release claims against the Board for performance of injunctive measures to remedy the alleged violations, and for penalties for the violations alleged in the complaints. To resolve these claims, the Board would perform the injunctive measures described in the proposed Consent Decree, including the implementation of a capacity assurance program, a grease control program, and a water quality monitoring program; would pay a civil penalty of $114,000 ($99,000 to the United States Treasury and $15,000 to the State of Alabama); and would perform four SEPs valued at $2.5 million collectively, including the installation of new private sewer laterals in low-income households within the

Board's service area, the acquisition of environmentally beneficial parcels of land, and the creation of a water quality monitoring database.

The Department of Justice will receive comments relating to the proposed Consent Decree for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044 and should refer to *United States* v. The Board of Water and Sewer Commissioners of the City of Mobile, Alabama, DJ No. 90–5–1–1–06985.

The proposed Consent Decree may be examined at the office of the United States Attorney for the Southern District of Alabama, 63 South Royal Street, Mobile, AL 36602, and at the Region 4 Office of the Environmental Protection Agency, Atlanta Federal center, 61 Forsyth Street, SW., Atlanta, GA 30303. A copy of the proposed Consent Decree may also be obtained by faxing a request to Tonia Fleetwood, Department of Justice Consent Decree Library, fax no. (202) 616–6584; phone confirmation no. (202) 514–1547. There is a charge for the copy (25 cents per page reproduction cost). Upon requesting a copy, please mail a check payable to the ''U.S. Treasury'', in the amount of $25.75, to: Consent Decree Library, U.S. Department of Justice, P.O. Box 7611, Washington, DC 20044–7611. The check should refer to *United States* v. The Board of Water and Sewer Commissioners of the City of Mobile, Alabama, DJ No. 90–5–1–1–06985.

Walker Smith

Principal Deputy Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 02–3561 Filed 2–13–02; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF LABOR

Office of the Secretary

Presidential Task Force on Employment of Adults With Disabilities (PTFEAD) Youth Advisory Committee; Notice of Open Meeting and Agenda

AGENCY: Office of the Secretary of Labor.

ACTION: Notice of meeting.

SUMMARY: The Office of the Secretary, United States Department of Labor, is notifying the public that the Youth Advisory Committee to the Presidential Task Force on Employment of Adults with Disabilities will conduct an open meeting on Monday, March 4 and Tuesday, March 5, 2002 in Washington, DC.

Times and Location: The Youth Advisory Committee will meet from 9:00 a.m. until approximately 4:00 p.m., on Monday, March 4 and Tuesday, March 5, 2002, at the Grand Hyatt Washington, 1000 H Street, NW., Washington, DC 20001–1501.

FOR FURTHER INFORMATION CONTACT: Dr. Richard Horne, Senior Policy Advisor, Presidential Task Force on Employment of Adults with Disabilities (phone: (202) 693–4923; TTY (202) 693–4920; FAX (202) 693–4929; e-mail *Horne-Richard@dol.gov).*

SUPPLEMENTARY INFORMATION: The meeting will be open to the public. Anyone wishing to do so may submit a written statement. Written statements should be kept as brief as possible. Written submissions received prior to the meeting will be provided to the members of the committee and will be included in the record of the meeting. To ensure that a written statement is received in time to be taken to the meeting, the statement should be mailed to the contact person at least 7 business days prior to the meeting. People with disabilities who need special accommodations should contact Dr. Richard Horne (phone: (202) 693–4923; TTY (202) 693–4920; FAX (202) 693–4929; e-mail *Horne-Richard@dol.gov*) no later than one week before the meeting.

Attendees may request to make an oral presentation by notifying Dr. Richard Horne in writing at least 10 business days before the meeting. Oral presentations will be limited to 5 minutes. The request should state the capacity in which the person will appear and provide a brief outline of the presentation. Requests to make oral presentation to the Committee will be granted to the extent that time permits.

The agenda for this meeting includes:

- Introduction of Committee chair and election of other leadership positions
- An Overview of the President's New Freedom Initiative
- An Overview of the Role of the Office of Disability Employment Policy
- Solicitation of suggestions regarding youth issues in the next phase of the President's New Freedom Initiative
- Establishment of a time line for preparing and submitting the Advisory Committee's recommendations and report
- Scheduling of other Youth Advisory meetings
- Public Comment Session

An official record of the meeting will be available for public inspection in Room S 2220 of the Department of Labor Building (Francis Perkins Building) located at 200 Constitution Avenue, NW., Washington, DC 20210. For additional information contact Dr. Richard Horne (phone: (202) 693–4923; FAX (202) 693–4929; or e-mail *Horne-Richard@dol.gov*)

Signed at Washington, DC, this 8th day of February, 2002.

Gary Reed,

Acting Executive Director, Presidential Task Force on Employment of Adults with Disabilities.

[FR Doc. 02–3649 Filed 2–13–02; 8:45 am]

BILLING CODE 4510–23–P

DEPARTMENT OF LABOR

Employment and Training Administration

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Skilled Workforce for the 21st Century

AGENCIES: DOL, Employment and Training Administration (ETA) and DOT, Federal Highway Administration (FHWA).

ACTION: Notice of public meetings.

SUMMARY: Pursuant to the interagency agreement between the DOL, ETA and the DOT, FHWA announces four public open space forums and an Executive Summit to identify issues, concerns and recommendations for improving the administration of the FHWA On-the-Job Training Program. In addition, the forums and summit will address enhancing the effectiveness of the training and increasing the retention rates of trainees trained on federal-aid highway construction projects. The FHWA On-the-Job Training Program is administered to assist highway construction contractors meet their affirmative action requirements under Executive Order 11246, as amended, and the Federal-aid Highway Act of 1968.

To ensure all issues and concerns are addressed, the participants will establish the agenda for the public open space forums. At the end of each forum, a report of proceedings will be distributed to each participant. Upon the completion of the last forum, a report of findings and recommendations will be presented to highway construction industry leaders at the Executive Summit to obtain their vision of how the ETA and the FHWA can assist the industry in preparing a skilled workforce for the 21st century. Provisions will be made for individuals

with disabilities. Although the forums and the Executive Summit are open to the public, space will be limited; therefore, the ETA requests that persons interested in participating in the forums and summit pre-register with: Coffey Communications, LLC, 6917 Arlington Road, Suite 224, Bethesda, MD 20814, 301–907–0900 (Office), 301–907–2925 (Fax), *lcoffey@coffeycom.com.*

Time: Public open space forums will be held at each of the following locations within the span of two and a half days. The first two days the forums will convene at 8:30 a.m. and adjourn at 5:00 p.m. On the last day, the forum will end at 12:00 noon. The Executive Summit will be within the span of a half-day from 8:30 a.m. to 12 noon.

Dates and Locations:

March 6–8, 2002, Beau Rivage, 875 Beach Boulevard, Biloxi, MS 39530

March 20–22, 2002, Mirage Resort and Casino, 3400 S. Las Vegas Boulevard, Las Vegas, NV 89109

April 3–5, 2002, The Hilton Chicago O'Hare Airport Hotel, 8535 West Higgins Road, Chicago, IL 60666

April 17–19, 2002, Hilton Garden Inn, 1100 Arch Street, Philadelphia, PA 19107

April 30, 2002, Washington Court Hotel, 525 New Jersey Avenue, N.W., Washington, DC 20001

FOR FURTHER INFORMATION CONTACT: Dana Daugherty, Deputy Administrator, Office of Apprenticeship Training, Employer and Labor Services, ETA, U.S. Department of Labor, Room N–4671, 200 Constitution Ave., N.W., Washington, DC 20210, Telephone: 202–693–2796, or Linda J. Brown, Acting Director, Civil Rights Service Business Unit, U.S. Department of Transportation, FHWA, 400 Seventh St., SW., Room 4132, Washington, DC 20590, Telephone: (202) 366–0471; (202) 366–1599. Office hours are from 7:45am to 4:15pm, est., Monday through Friday except Federal holidays. The phone numbers are not toll free numbers.

Signed at Washington, DC, this 11th day of February, 2002.

Emily Stover Derocco,

Assistant Secretary for Employment and Training Administration.

Linda J. Brown,

Acting Director, Civil Rights, Federal Highway Administration.

[FR Doc. 02–3650 Filed 2–13–02; 8:45 am]

BILLING CODE 4510–30–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–289]

Amergen Energy Company, LLC Three Mile Island Nuclear Station, Unit 1; Exemption

1.0 Background

The AmerGen Energy Company, LLC (AmerGen, the licensee) is the holder of Facility Operating License No. DPR–50, which authorizes operation of the Three Mile Island Nuclear Station, Unit 1 (TMI–1). The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect.

The facility consists of a pressurized water reactor (PWR) located in Dauphin County in Pennsylvania.

2.0 Request/Action

Title 10 of the Code of Federal Regulations (10 CFR), part 50, § 50.44, ''Standards for combustible gas control system in light-water-cooled power reactors,'' and 10 CFR part 50, Appendix A, General Design Criterion (GDC) 41, ''Containment atmosphere cleanup,'' establish requirements for controlling the amount of hydrogen inside the reactor containment following a postulated loss-of-coolant accident (LOCA). These requirements provide specific assumptions and methods to define the amount of hydrogen generated, the rate at which hydrogen is generated, and the requirements of a combustible gas control system to control the concentration of hydrogen in the containment following a design-basis LOCA to below flammability limits. Appendix E to 10 CFR part 50, Section VI, ''Emergency Response Data System [ERDS],'' contains requirements to provide information on the concentration of hydrogen inside the containment following accidents as part of the ERDS. Section 50.44(a) to 10 CFR part 50 requires a means for control of hydrogen that may be generated following a postulated LOCA by (1) a metal-water reaction involving the fuel cladding and the reactor coolant, (2) radiolytic decomposition of the reactor coolant, and (3) corrosion of metals. Section 50.44(b) of 10 CFR and 10 CFR part 50, Appendix E, Section VI.2.a.(i).4 require that the hydrogen control measures must be capable of measuring the hydrogen concentration in the containment, ensuring a mixed atmosphere in the containment and controlling combustible gas concentrations in the containment following a LOCA. Section 50.44(c)(1) of 10 CFR part 50 requires that it must be shown that following a LOCA, but prior to effective operation of the combustible gas control system, either an uncontrolled hydrogen-oxygen recombination would not take place in containment, or the plant could withstand the consequences of uncontrolled hydrogen-oxygen recombination without loss of safety function. Section 50.44(h)(2) requires a combustible gas control system to maintain the concentration of combustible gases following a LOCA to below flammability limits. These systems can be of two types: Those allowing controlled release from containment such as a purge system, or those that do not result in a significant release from the containment such as recombiners. GDC 41 of Appendix A to 10 CFR part 50 requires that the hydrogen control system described above must control hydrogen as necessary following a LOCA to assure that containment integrity is maintained, and must meet redundancy and single failure requirements. Additional NRC staff guidance is provided in Regulatory Guide (RG) 1.7. NRC staff review and acceptance criteria are specified in Section 6.2.5 of the Standard Review Plan (NUREG–0800, July 1981). By letter dated September 20, 2000, as supplemented by letters dated August 2 and September 28, 2001, the licensee requested an exemption to the above requirements in order to remove requirements for a hydrogen control system from the TMI–1 design basis. The proposed request for exemption included a related license amendment application which would remove the hydrogen control system from the plant's operating license Technical Specifications and the Updated Final Safety Analysis Report.

3.0 Discussion

Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 50 when (1) the exemptions are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security; and (2) when special circumstances are present. These circumstances include the special circumstances as stated in 10 CFR 50.12(a)(2)(ii), ''Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule.'' The underlying

purpose of 10 CFR 50.44 is to show that following a LOCA, an uncontrolled hydrogen-oxygen recombination would not take place, or that the plant could withstand the consequences of an uncontrolled hydrogen-oxygen recombination without loss of safety function.

In its request, AmerGen asserts that the TMI–1 containment has sufficient safety margin against hydrogen burn following design-basis and severe accidents without use of the hydrogen monitoring or concentration control systems. The TMI–1 Probabilistic Risk Assessment (PRA) indicates that none of the accident sequences addressed that could realistically threaten containment due to hydrogen combustion are impacted by the hydrogen monitoring or concentration control systems. The TMI–1 Individual Plant Examination (IPE) concluded containment survival is almost certain following hydrogen combustion when the reactor building cooling units and the reactor building spray system are operating. The licensee's plant-specific containment integrity analysis for TMI–1 indicates that the ultimate pressure capacity of the containment is between 137 and 147 psig (TMI–1 PRA, Level 2, Appendix 1). This estimate is reasonable when compared to Table 6.1 of NUREG/CR–6475, ''Resolution of the Direct Containment Heating Issue for Combustion Engineering Plants and Babcock & Wilcox Plants.'' A safety margin exists for containment integrity even for conservative hydrogen concentration levels. The NRC staff has found that the relative importance of hydrogen combustion for large, dry containments with respect to containment failure is quite low. This finding supports the argument that the hydrogen recombiners are not risk significant from a containment integrity perspective and that the risk associated with hydrogen combustion is not from design-basis accidents but from severe accidents. NRC sponsored studies, such as NUREG–1150, ''Severe Accident Risks: An Assessment For Five U.S. Nuclear Power Plants,'' December 1990, and NUREG/CR–5662, ''Hydrogen Combustion, Control And Value Impact Analysis For PWR [pressurized water reactor] Dry Containments,'' June 1991, have found hydrogen combustion to be a small contributor to containment failure for large, dry containment designs due to the robustness of these containment types and the likelihood of a spurious ignition source. Additionally, studies have shown that the majority of risk to the public is from accident sequences that lead to containment failure or bypass, and that the contribution to risk from accident sequences involving hydrogen combustion is actually quite small for large, dry containments such as TMI–1's. This is true despite the fact that the hydrogen quantities produced in these events is substantially larger than the hydrogen production postulated by 10 CFR 50.44(d) and RG 1.7, Revision 2, ''Control of Combustible Gas Concentrations in Containment Following a Loss-of-Coolant Accident (LOCA),'' November 1978. Hydrogen combustion sequences that could lead to early containment failure typically involve up to 75 percent core metal-water reaction. Hydrogen combustion sequences that could lead to late containment failure involve additional sources of hydrogen due to the interaction of corium and the concrete basemat after vessel breach. Although the recombiners are effective in maintaining the RG 1.7 hydrogen concentration below the lower flammability limit of 4 volume percent, they are overwhelmed by the larger quantities of hydrogen associated with severe accidents that would typically be released over a much shorter time period (e.g., 2 hours). However, NUREG/CR–4551, Revision 1, Volume 7, Part 1, ''Evaluation of Severe Accident Risks: Zion Unit 1,'' March 1993, states that hydrogen combustion in the period before containment failure is considered to present no threat to large, dry containments. Table A.4–5 of NUREG/CR–4551 shows that the contribution of hydrogen combustion to late containment failure is also very small. Therefore, the relative importance of hydrogen combustion for large, dry containments with respect to containment failure has been shown to be quite low.

The recombiners can, however, prevent a subsequent hydrogen burn if needed due to radiolytic decomposition of water and corrosion in the long term. Analysis performed in accordance with the methodology of RG 1.7 shows that the hydrogen concentration will not reach 4 volume percent for 15 days after initiation of a design-basis LOCA. Additionally, hydrogen concentrations on the order of 6 percent or less are bounded by hydrogen generated during a severe accident and would not be a threat to containment integrity, since there is ample time between burns to reduce elevated containment temperatures using the installed containment heat removal systems. The TMI–1 IPE concluded that containment survival is almost certain following hydrogen combustion when the reactor building cooling units and the reactor building spray system are operating.

Although hydrogen igniter systems would provide some added margin that containment integrity can be maintained during hydrogen burns, Generic Issue (GI)-121, ''Hydrogen Control for PWR Dry Containments,'' found that hydrogen combustion was not a significant threat to dry containments, and concluded that there was no basis for new generic hydrogen control measures (i.e., igniters). Equipment survivability in concentrations greater than 6 percent was addressed as part of GI–121, which references NUREG/CR–5662, which assessed the benefits of hydrogen igniters. NUREG/CR–5662 concluded that simulated equipment can withstand a LOCA and single burn resulting from a 75-percent metal-water reaction in a large, dry containment. However, the multiple containment burns due to the operation of ignition systems could pose a serious threat to safety-related equipment located in the source compartment. The multiple burn environment was found potentially to be a threat because the source compartment temperature remains elevated from the previous burn. However, for TMI–1, this is not a concern for the above radiolysis and corrosion case because there is ample time between burns to reduce elevated containment temperatures via containment heat removal systems. Therefore, an additional burn in the long term due to radiolysis and corrosion would not have a similar impact on equipment survivability at TMI–1.

In a postulated LOCA, the TMI–1 emergency operating instructions (EOIs) direct the control room operators to monitor and control the hydrogen concentration inside the containment after they have carried out the steps to maintain and control the higher priority critical safety functions. Key operator actions associated with the control of hydrogen include placing the hydrogen recombiners or hydrogen purge system in operation at very low hydrogen concentration levels. These hydrogen control activities could distract operators from more important tasks in the early phases of accident mitigation and could have a negative impact on the higher priority critical operator actions. An exemption from hydrogen recombiner and purge-repressurization system requirements will eliminate the need for these systems in the EOIs and hence simplify the EOIs. The NRC staff still expects the licensee's severe accident management guidelines to address combustible gas control. The NRC staff has determined that the

simplification of the EOIs would be a safety benefit.

As stated previously, the underlying purpose of 10 CFR 50.44 is to show that, following a LOCA, an uncontrolled hydrogen-oxygen recombination would not take place, or that the plant could withstand the consequences of uncontrolled hydrogen-oxygen recombination without loss of safety function. Based on the licensee's analysis, the NRC staff's evaluation of the risk from hydrogen combustion, resolution of GI–121, and the TMI–1 IPE, the NRC staff has determined that the plant could withstand the consequences of uncontrolled hydrogen-oxygen recombination without loss of safety function without credit for the hydrogen recombiners for not only the design-basis case, but also for the more limiting severe accident with up to 100 percent metal-water reaction. Therefore, the requirements for hydrogen recombiners as part of the TMI–1 design basis are unnecessary, and their removal from the design basis is acceptable. Additionally, elimination of the hydrogen recombiners from the EOIs would simplify operator actions in the event of an accident and, therefore, would be a safety benefit. Consequently, pursuant to 10 CFR 50.12(a)(2)(ii), application of the regulation is not necessary to achieve the underlying purpose of the rule.

In the submittal, the licensee also requested an exemption from the functional requirement for hydrogen monitoring as promulgated in Part 50, Appendix E, Section VI, ''Emergency Response Data System (ERDS),'' and the elimination of any commitments made in regard to NUREG–0737, Item II.F.1, Attachment 6, ''Containment Hydrogen Monitor.'' However, in the Statement of Considerations for Appendix E to Part 50, the Commission stated that the ERDS data (which include data from the continuous hydrogen monitors) provide the data required by the NRC to perform its role during an emergency. This conclusion is still valid for not only the NRC staff, but also for licensees. The major vendors' core damage assessment methodologies continue to include continuous hydrogen monitoring. Core damage assessment methodologies were reviewed by the NRC staff in response to NUREG–0737, Item II.B.3(2)(a). Continuous hydrogen monitoring is needed to support a plant's emergency plan as described in 50.47(b)(9). Implementing documents such as RG 1.101, Revision 2, which endorsed NUREG–0654, and RG 1.101, Revision 3, which endorsed NEI–NESP–007, Revision 2, define the highest Emergency Action Level, a General Emergency, as a loss of any two barriers and potential loss of the third barrier. Potential loss of a third barrier depends on whether or not an explosive mixture exists inside containment. The continuous hydrogen monitors are used for determining whether an explosive mixture exists inside containment. Therefore, the licensee's request for exemption from the functional requirements for hydrogen monitoring is not approved.

The NRC staff has determined that for the requested exemptions related to the hydrogen recombiners and backup hydrogen purge system, pursuant to 10 CFR 50.12(a)(2)(ii), special circumstances are present, in that application of the regulations in the particular circumstances is not necessary to achieve the underlying purpose of the rule.

4.0 Conclusion

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(a), the exemption from the hydrogen recombiner and hydrogen purge system requirements is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. Also, special circumstances are present. Therefore, the Commission hereby grants AmerGen Energy Company, LLC, an exemption from the requirements for hydrogen recombiners and the hydrogen purge system of 10 CFR 50.44, and 10 CFR part 50, Appendix A, General Design Criterion 41, for the TMI–1.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment (67 FR 1788).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 8th day of February 2002.

For the Nuclear Regulatory Commission.

John A. Zwolinski,

Director, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 02–3618 Filed 2–13–02; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Existing Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Rule 10f–3, OMB Control No. 3235–0226, SEC File No. 270–237.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information discussed below. The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

Section 10(f) of the Investment Company Act of 1940 (15 U.S.C. 80a–10(f)) (the ''Act'' or ''Investment Company Act'') prohibits a registered investment company (''fund'') from purchasing any security during an underwriting or selling syndicate if the fund has certain relationships with a principal underwriter [1] for the security (''affiliated underwriter'').[2] Congress enacted this provision in 1940 to protect funds and their investors by preventing underwriters from ''dumping'' unmarketable securities on affiliated funds.[3]

In 1958, under rulemaking authority in section 10(f), the Commission adopted rule 10f–3, which is entitled ''Exemption for the Acquisition of Securities During the Existence of an Underwriting or Selling Syndicate.'' The Commission last amended the rule in January 2001.[4] Rule 10f–3 currently permits a fund to purchase securities in a transaction that otherwise would

[1] ''Principal underwriter'' is defined to mean (in relevant part) an underwriter that, in connection with a primary distribution of securities, (A) is in privity of contract with the issuer or an affiliated person of the issuer, (B) acting alone or in concert with one or more other persons, initiates or directs the formation of an underwriting syndicate, or (C) is allowed a rate of gross commission, spread, or other profit greater than the rate allowed another underwriter participating in the distribution. 15 U.S.C. 80a–2(a)(29).

[2] Section 10(f) prohibits the purchase if a principal underwriter of the security is an officer, director, member of an advisory board, investment adviser, or employee of the fund, or if any officer, director, member of an advisory board, investment adviser, or employee of the fund is affiliated with the principal underwriter. 15 U.S.C. 80a–10(f).

[3] See Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency, 76th Cong., 3d Sess. 35 (1940) (statement of Commissioner Healy).

[4] Additional amendments to rule 10f–3 were proposed on November 29, 2000. Exemption for the Acquisition of Securities During the Existence of an Underwriting or Selling Syndicate, Investment Company Act Release No. 24775 (Nov. 29, 2000). These proposals, if adopted, would expand the exemption provided by the rule to permit a fund to purchase government securities in a syndicated offering and modify the rule's percentage limit on purchases.

violate section 10(f) if, among other things: [5]

(1) The securities either are registered under the Securities Act of 1933, are municipal securities with certain credit ratings, or are offered in certain private or foreign offerings;

(2) The securities purchases meet certain conditions with respect to timing and price;

(3) The issuer of the securities has been in continuous operation for at least three years prior to the issuance of the securities;

(4) The offering involves a ''firm commitment'' underwriting;

(5) The underwriters' commission is reasonable;

(6) The fund (together with other funds advised by the same investment adviser) purchases no more than twenty-five percent of the offering;

(7) The fund purchases the securities from a member of the syndicate other than the affiliated underwriter;

(8) Each transaction effected under the rule is reported on Form N–SAR;

(9) The fund's directors have approved procedures for purchases made in reliance on the rule, regularly review fund purchases to determine whether they comply with these procedures, and approve necessary changes to the procedures; and

(10) A written record of each transaction effected under the rule is maintained for six years, the first two of which in an easily accessible place.[6]

These limitations are designed to prevent purchases under the rule from raising the concerns that section 10(f) was enacted to address and to protect the interests of investors. These requirements provide a mechanism for fund boards to oversee compliance with the rule. The required recordkeeping facilitates the Commission staff's review of rule 10f–3 transactions during routine fund inspections and, when necessary, in connection with enforcement actions.

The staff estimates that approximately 410 funds engage in a total of approximately 2050 rule 10f–3 transactions each year. We estimate that each fund makes an average of fifteen responses per year and that the 410 funds that rely on rule 10f–3 make a total of 6150 annual responses.[7] Before making a purchase under rule 10f–3, the purchasing fund must document that the transaction complies with the conditions in the rule, a process which the staff estimates takes an average of approximately thirty minutes per transaction at a cost of $22.44 per transaction.[8] Thus, annually, in the aggregate, funds spend approximately 1025 hours [9] at a cost of $46,002 [10] on pre-transaction reporting. The staff estimates that, after the transaction is complete, an additional thirty minutes is spent completing the record of the transaction at a cost of $22.44 per transaction.[11] Thus, annually, in the aggregate, funds spend approximately 1025 hours [12] at a cost of $46,002 [13] on post-transaction reporting. The staff estimates further that preparation of a quarterly report of all rule 10f–3 transactions for the board of directors takes approximately 1.5 hours per quarter (in which there are 10f–3 transactions) at a cost of $43.78.[14] The staff estimates that, on average, each of the 410 funds engages in rule 10f–3 transactions during two quarters each year. Thus, annually in the aggregate, funds spend approximately 1230 hours [15] at a cost of $35,900 [16] on the preparation of quarterly transaction reports. The staff estimates that the board of directors spends fifteen minutes reviewing these reports each quarter (in which there are 10f–3 transactions) at a cost of $500.[17] Thus, annually, in the aggregate, funds spend approximately 205 hours [18] at a cost of $410,000 [19] for the quarterly review of rule 10f–3 transactions by boards. The staff further estimates that reviewing and revising as needed written procedures for rule 10f–3 transactions takes, on average, two hours of a compliance attorney's time at a cost of approximately $124.02 [20] per year and fifteen minutes of board time at a cost of $500 per year.[21] Thus, annually, in the aggregate, the staff estimates that funds spend a total of approximately 922.5 hours [22] at a cost of approximately $255,848 [23] on monitoring and revising rule 10f–3 procedures. The staff estimates, therefore, that rule 10f–3 imposes an information collection burden of 4407.5 hours [24] at a cost of $793,752.[25] This estimate does not include the time spent filing transaction reports on Form N–SAR, which is encompassed in the information collection burden estimate for that form. Commission staff estimates that there is no cost burden for rule 10f–3 other than the costs associated with the hour burden. These estimates are made solely for the purposes of the Paperwork Reduction Act and are not derived from a comprehensive or even a representative survey or study of Commission rules. 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.

Written comments are invited on: (a) Whether the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burdens of the collections of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burdens of the collections

[5] See Rule 10f–3(b).

[6] The written record must state (i) from whom the securities were acquired, (ii) the identity of the underwriting syndicate's members, (iii) the terms of the transactions, and (iv) the information or materials on which the fund's board of directors has determined that the purchases were made in compliance with procedures established by the board. See Rule 10f–3(b)(12).

[7] 2050 instances of pre-transaction reporting + 2050 instances of post-transaction reporting + 820 quarterly reports + 820 quarterly reviews by fund boards + 410 instances of monitoring and revision of rule 10f–3 procedures = 6150 responses.

[8] Typically, personnel from several departments, including portfolio management and compliance, share this task. The staff estimates that the average hourly rate for these personnel is $44.87.

[9] 2050 transactions per year × 30 minutes per transaction = 1025 hours.

[10] 2050 transactions × $22.44/transaction = $46,002.

[11] As with the reporting at the time of the transaction, the task of completing the record of the transaction is shared among personnel for whom the staff estimates the average hourly rate to be $44.87.

[12] 2050 transactions per year × 30 minutes per transaction = 1025 hours.

[13] 2050 transactions per year × $22.44/transaction = $46,002.

[14] The staff estimates that a compliance clerk spends one hour of time, at $12.77/hour, preparing the report and a compliance attorney spends half an hour of time, at $62.01/hour, reviewing the report.

[15] 410 funds × 2 quarters/year × 1.5 hours/quarter = 1230 hours.

[16] 410 funds × 2 quarters/year × $43.78/quarter = $35,900.

[17] The staff estimates that each hour of a fund board's meeting costs $2000.

[18] 410 funds × 2 quarters/year × 15 minutes/quarter = 205 hours

[19] 410 funds × 2 quarters/year x $500/quarter = $410,000

[20] 2 hours × $62.01/hour = $124.02

[21] These averages take into account the fact that in most years, fund attorneys and boards spend little or no time modifying procedures and in other years, they spend a significant amount of time doing so.

[22] 410 funds × (2 hours by compliance attorney + 15 minutes by board/year) = 922.5 hours.

[23] 410 funds × ($124.02 for compliance attorney time + $500 for board time) = $255,848.

[24] 1025 for pre-transaction reporting + 1025 for post-transaction reporting + 1230 hours for preparing the board report + 205 hours for board review of rule 10f–3 transactions + 922.5 hours for monitoring and revising rule 10f–3 procedures = 4407.5 hours.

[25] $46,002 for pre-transaction reporting + $46,002 for post-transaction reporting + $35,900 for preparing the board report + $410,000 for board review of rule 10f–3 transactions + $255,848 for monitoring and revising rule 10f–3 procedures = $793,752.

of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Michael E. Bartell, Associate Executive Director, Office of Information Technology, Securities and Exchange Commission, Mail Stop 0–4, 450 5th Street, NW, Washington, DC 20549.

Dated: February 7, 2002.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–3628 Filed 2–13–02; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Extension of Existing Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Rule 17a–13, SEC File No. 270–27, OMB Control No. 3235–0035.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval. The Code of Federal Regulations citation to this collection of information is the following rule: 17 CFR 240.17a–13 Quarterly Security Counts to be Made by Certain Exchange Members, Brokers, and Dealers.

Rule 17a–13(b) generally requires that at least once each calendar quarter, all registered brokers and dealers physically examine and count all securities held and account for all other securities not in their possession, but subject to the broker-dealer's control or direction. Any discrepancies between the broker-dealer's securities count and the firm's records must be noted and, within seven days, the unaccounted for difference must be recorded in the firm's records. Rule 17a–13(c) provides that under specified conditions, the securities counts, examination and verification of the broker-dealer's entire list of securities may be conducted on a cyclical basis rather than on a certain date. Although Rule 17a–13 does not require filing a report with the Commission, security count discrepancies must be reported on Form X–17a–5 as required by Rule 17a–5. Rule 17a–13 exempts broker-dealers that limit their business to the sale and redemption of securities of registered investment companies and interests or participation in an insurance company separate account and those who solicit accounts for federally insured savings and loan associations, provided that such persons promptly transmit all funds and securities and hold no customer funds and securities.

The information obtained from Rule 17a–13 is used as an inventory control device to monitor a broker-dealer's ability to account for all securities held, in transfer, in transit, pledged, loaned, borrowed, deposited or otherwise subject to the firm's control or direction. Discrepancies between the securities counts and the broker-dealer's records alert the Commission and the Self Regulatory Organizations (''SROs'') to those firms having problems in their back offices.

Because of the many variations in the amount of securities that broker-dealers are accountable for, it is difficult to develop a meaningful figure for the cost of compliance with Rule 17a–13. Approximately 91% of all registered broker-dealers are subject to Rule 17a–13. Accordingly, approximately 6,579 broker-dealers have obligations under the Rule, and the average time it would take each broker-dealer to comply with the Rule is 100 hours per year, for a total estimated annualized burden of 657,900 hours. It should be noted that a significant number of firms subject to Rule 17a–13 have minimal obligations under the Rule because they do not hold securities. It should further be noted that most broker-dealers would engage in the activities required by Rule 17a–13 even if they were not required to do so.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information 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. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Michael E. Bartell, Associate Executive Director, Office of Information Technology, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549.

Dated: February 7, 2002.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–3629 Filed 2–13–02; 8:45 am]

BILLING CODE 8010–01–U

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–25413; 812–12474]

Maxim Series Fund, Inc., et al.; Notice of Application

February 8, 2002.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from section 15(a) of the Act and rule 18f–2 under the Act.

SUMMARY OF APPLICATION: GW Capital Management, LLC (the ''Manager''), Maxim Series Fund, Inc. (''Maxim'') and Orchard Series Fund (''Orchard'') (Maxim and Orchard each, a ''Fund'' and together, the ''Funds'') request an order that would permit them to enter into and materially amend subadvisory agreements without shareholder approval.

Applicants: Manager, Maxim and Orchard.

Filing Dates: The application was filed on March 9, 2001 and amended on October 5, 2001 and January 14, 2002.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on March 5, 2002, and should be accompanied by proof of service on the applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Commission, 450 Fifth Street, NW., Washington, DC

20549–0609; Applicants, c/o Beverly A. Byrne, Maxim Series Fund, Inc., 8525 East Orchard Road, Greenwood Village, CO 80111.

FOR FURTHER INFORMATION CONTACT: Stacy L. Fuller, Senior Counsel, at (202) 942–0553, or Nadya B. Roytblat, Assistant Director, at (202) 942–0564, Division of Investment Management, Office of Investment Company Regulation.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549–0102, telephone (202) 942–8090.

Applicants' Representations

1. Maxim is a Maryland corporation registered under the Act as an open-end management investment company. Maxim is organized as a series company and currently has 36 separate series. Orchard is a Delaware business trust registered under the Act as an open-end management investment company. Orchard is organized as a series company and currently has six separate series. Each series (''Portfolio'') of Maxim and Orchard has its own distinct investment objectives, policies and restrictions. Shares of Maxim's Portfolios are offered for sale to qualified pension plans and through registered separate accounts as funding vehicles for variable annuity and variable life insurance contracts issued by insurance companies. Shares of Orchard's Portfolios are sold directly to the public, to pension plans and through unregistered separate accounts.[1]

2. The Manager, a Colorado limited liability company and wholly owned subsidiary of Great West Life Insurance and Annuity Company, is registered under the Investment Advisers Act of 1940, as amended (the ''Advisers Act''). The Funds, on behalf of each Portfolio, have each entered into an investment advisory agreement with the Manager (each a ''Management Agreement''), pursuant to which the Manager serves as the investment adviser to the Portfolios. Each Management Agreement has been approved by, in the case of Maxim, a majority of the Fund's board of directors, and in the case of Orchard, a majority of the Fund's board of trustees (each a ''Board'' and together the ''Boards''), including a majority of the directors or trustees (the ''Directors'') who are not ''interested persons,'' as defined in section 2(a)(19) of the Act (''Independent Directors''), of the Fund or the Manager, as well as by each Fund's initial shareholder(s). Under the terms of the Management Agreements, the Manager, subject to oversight by the Boards, has supervisory responsibility for the investment program of each Fund.

3. The Funds and the Manager have entered or will enter into investment advisory agreements (each, an ''Advisory Agreement'') with subadvisers (each, an ''Adviser'') for each of the Portfolios. Under the Advisory Agreements, each Adviser, subject to general supervision by the Manager and the Board, has discretionary authority to invest the portion of a Portfolio's assets allocated to it by the Manager. Currently, Maxim has Advisers for 12 of its 36 Portfolios and Orchard has an Adviser for one of its six Portfolios. Unless exempt from registration, each Adviser is, and any future Adviser will be, registered under the Advisers Act. The Funds pay the Manager a fee based on the value of the average daily net assets of each Portfolio in the Fund.

4. The Manager monitors the Portfolios and the Advisers and makes recommendations to the Boards regarding allocation, and reallocation, of assets between Advisers and is responsible for recommending the hiring, termination and replacement of Advisers. The Manager recommends Advisers based on a number of factors used to evaluate their skills in managing assets pursuant to particular investment objectives. Each Adviser will be paid by the Manager out of the fees received by the Manager from the Funds.

5. Applicants request an order to permit the Manager to enter into and materially amend Advisory Agreements without obtaining shareholder approval. The requested relief will not extend to an Adviser that is an affiliated person, as defined in section 2(a)(3) of the Act, of the Funds or the Manager, other than by reason of serving as an Adviser to one or more of the Portfolios (''Affiliated Adviser''). None of the current Advisers is an Affiliated Adviser.

Applicants' Legal Analysis

1. Section 15(a) of the Act provides, in relevant part, that it is unlawful for any person to act as an investment adviser to a registered investment company except under a written contract that has been approved by the vote of the company's outstanding voting securities. Rule 18f–2 under the Act provides, in relevant part, that each series or class of stock in a series company affected by a matter must approve such matter if the Act requires shareholder approval.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction or any class or classes of persons, securities, or transactions from any provision of the Act, or from any rule thereunder, if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants request an exemption under section 6(c) of the Act from section 15(a) of the Act and rule 18f–2 under the Act to permit them to enter into and materially amend Advisory Agreements without shareholder approval.

3. Applicants assert that the shareholders are relying on the Manager's experience to select one or more Advisers best suited to achieve a Portfolio's desired investment objectives. Applicants assert that, from the perspective of the investor, the role of the Advisers is comparable to that of individual portfolio managers employed by other investment advisory firms. Applicants contend that requiring shareholder approval of each Advisory Agreement would impose costs and unnecessary delays on the Portfolios, and may preclude the Manager from acting promptly in a manner considered advisable by the Board. Applicants note that the Management Agreements will remain fully subject to section 15(a) of the Act and rule 18f–2 under the Act, including the requirements for shareholder approval.

Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. Before a Portfolio may rely on the requested order, the operation of the Portfolio in the manner described in the application will be approved by a majority of the Portfolio's outstanding voting securities (or, if the Portfolio serves as a funding medium for any sub-account of a registered separate account, pursuant to voting instructions provided by the owners of variable annuity

[1] The applicants request that any relief granted pursuant to the application also apply to future Portfolios of the Funds and any other registered open-end management investment companies and their series that (a) are advaised by the Manager or any entity controlling, controlled by, or under common control with the Manager; (b) are managed in a manner consistent with this application; and (c) comply with the terms and conditions in the application (together, the ''Future Investment Companies''). The Funds are the only existing investment companies that currently intend to rely on the requested order. Applicants state that if the name of any Portfolio or Future Investment Company contains the name of an Adviser, the name of the Adviser will be preceded by the name of the Manager.

contracts and variable life insurance policies (''Owners'') who have allocated assets to that sub-account) or, in the case of a Portfolio whose public shareholders (or Owners through a sub-account of a registered separate account) purchase shares on the basis of a prospectus containing the disclosure contemplated by condition 2 below, by the sole initial shareholder(s) before offering shares of that Portfolio to the public (or to Owners through a sub-account of a registered separate account).

2. Each Portfolio relying on the requested order will hold itself out to the public as employing the management structure described in the application. In addition, each Portfolio will disclose in its prospectus the existence, substance, and effect of any order granted pursuant to the application. Such prospectus will prominently disclose that the Manager has the ultimate responsibility (subject to oversight by the Board) to oversee the Advisers and recommend their hiring, termination, and replacement.

3. Within 90 days of the hiring of any new Adviser, the Manager will furnish shareholders (or, if the Portfolio serves as a funding medium for a sub-account of a registered separate account, Owners who have allocated assets to that sub-account) all information about the new Adviser that would be included in a proxy statement, including any change in such disclosure caused by the addition of the new Adviser. The Manager will satisfy this condition by providing shareholders (or Owners) with an information statement meeting the requirements of Regulation 14C, Schedule 14C, and Item 22 of Schedule 14A under the Securities Exchange Act of 1934.

4. The Manager will not enter into an advisory agreement with any Affiliated Adviser without that agreement, including the compensation to be paid thereunder, being approved by the shareholders of the applicable Portfolio (or, if the Portfolio serves as a funding medium for any sub-account of a registered separate account, then by the Owners who have allocated assets to that sub-account).

5. At all times, a majority of each Board will be Independent Directors, and the nomination of new or additional Independent Directors will be at the discretion of the then-existing Independent Directors.

6. When an Adviser change is proposed for a Portfolio with an Affiliated Adviser, the Board, including a majority of the Independent Directors, will make a separate finding, reflected in the Board minutes, that the change is in the best interests of the Portfolio and its shareholders (or, if the Portfolio serves as a funding medium for any sub-account of a registered separate account, in the best interests of the Portfolio and the Owners who have allocated assets to that sub-account), and does not involve a conflict of interest from which the Manager or the Affiliated Adviser derives an inappropriate advantage.

7. The Manager will provide general management services to each Fund and Portfolio, including overall supervisory responsibility for the general management and investment of each Portfolio's assets, and, subject to review and approval by the Board, will: (a) Set each Portfolio's overall investment strategies, (b) evaluate, select, and recommend Advisers to manage all or part of a Portfolio's assets; (c) allocate and, when appropriate, reallocate a Portfolio's assets among multiple Advisers, (d) monitor and evaluate the performance of the Advisers, and (e) implement procedures reasonably designed to ensure that the Advisers comply with each Portfolio's investment objectives, policies, and restrictions.

8. No Director or officer of a Fund, or director, manager or officer of the Manager will own, directly or indirectly (other than through a pooled investment vehicle that is not controlled by such person), any interest in any Adviser, except for: (a) Ownership of interests in the Manager or any entity that controls, is controlled by, or is under common control with the Manager, or (b) ownership of less than 1% of the outstanding securities of any class of equity or debt of a publicly traded company that is either an Adviser or an entity that controls, is controlled by or under common control with an Adviser.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 02–3569 Filed 2–13–02; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45413; File No. SR–Amex–2001–76]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the American Stock Exchange LLC Relating to the Obligations of Specialists and Registered Options Traders

February 7, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 12, 2001, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Amex filed amendments to the proposed rule change on December 17, 2001[3] and January 18, 2002.[4] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to amend Exchange Rules 950, 958 and 958A pertaining to the obligations of specialists and registered options traders. The text of the proposed rule change is set forth below. Additions are in italics; deletions are in brackets.

American Stock Exchange, LLC; Proposed Rule Change

Section 5. Floor Rules Applicable to Options

Rule 950 Rules of General Applicability

(a) through (m) No change.

(n) The provisions of Rule 170 and Commentaries .03 and .04 thereto, shall apply to exchange option transactions.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Amex submitted a new Form 19b–4, which replace and supersedes the original filing in its entirety (''Amendment No. 1'').

[4] Letter from Clarie P. McGrath, Vice President and Deputy General Counsel, Amex, to Elizabeth King, Associate Director, Division of Market Regulation (''Division''), Commission, dated January 16, 2002 (''Amendment No. 2''). Amendment No. 2 amends proposed Amex Rules 950 and 958 to clarify that ''lage order'' means order larger than the size communicated or disseminated pursuant to Exchange Rule 958 or larger than the Exchange's auto-ex eligible size. Amendment No. 2 also make a technical correction to proposed Amex Rule 958(h)(iii).

In addition, the following Commentary shall also apply:

Commentary

.01 No change.

.02 Specialists and registered options traders are required to compete with each other to improve the quoted markets in all series of option classes which they trade. Unless otherwise provided for in Exchange rules, it shall be a violation of just and equitable principles of trade for specialists and registered options traders to determine by agreement the spreads or prices at which they will trade any option class, or the allocation of orders in any option class. In complying with this Rule, the specialist and registered option traders must make independent decisions to determine the spreads or prices at which they will quote and trade any option class. There are, however, certain specific circumstances where to make fair and orderly markets that are competitive with other exchanges and responsive to the needs and expectations of investors, some communication among the specialist and traders may be necessary and appropriate. Therefore, notwithstanding the foregoing:

(a) Specialists are expected to participate in and support Exchange-sponsored automated systems such as automatic quote and execution systems or Exchange-approved equivalents. The variables in the formula used to generate automatically updated quotations for each option class and or series will be determined independently by the specialist. The specialist shall disclose to all registered option traders in an option class the following variables of the formula used to generate automatically updated market quotations for each option class and/or series: option pricing calculation model, volatility, interest rate, and dividends (both declared and anticipated). The specialist may receive input from the registered options traders on any one or all of these variables provided, however, it is within the specialist's sole discretion to make the final, independent decision in determining the variables to be used in the automated quote system. The registered options traders, however, are not required to give input on the variables to the specialist. The Exchange shall have the discretion to exempt specialists using an Exchange-approved proprietary automated quotation updating system from having to disclose proprietary information concerning the variables (but not the variables themselves) used by those systems;

(b) The obligation of the specialists to make competitive markets does not preclude the specialists and registered options traders from making a collective response to a request for a market, provided the member representing such order requests such response and the size of the order is larger than the size communicated or disseminated pursuant to Rule 958A or is larger than the Auto-Ex eligible size parameter.[5] With respect to orders sent through the Exchange's order routing systems that are larger than the size disseminated pursuant to Rule 958A, it is presumed that the member has requested a collective response. The allocation of contracts executed in accordance with this paragraph done in accordance with the Exchange's specialist and registered options trader participation policy; and

(c) In conjunction with their obligation as the responsible broker or dealer pursuant to Exchange Rule 958A and Rule 11Ac1–1 under the Securities Exchange Act of 1934, specialists and registered options traders may collectively agree to the best bid, best offer and aggregate quotation size required to be communicated to the Exchange pursuant to paragraph (c)(i) of Rule 958A.

* * * * *

Rule 958 Options Transactions of Registered Traders

No Registered Trader shall initiate an Exchange option transaction on the Floor for any account in which he has an interest except in accordance with following provisions:

(a) through (g) No change.

(h) Registered options traders and specialists are required to compete with each other to improve the quoted markets in all series of option classes which they trade. Unless otherwise provided for in Exchange rules, it shall be a violation of just and equitable principles of trade for registered options traders and specialists to determine by agreement the spreads or prices at which they will trade any option class, or the allocation of orders in any option class. In complying with this Rule, the registered option traders and specialist must make independent decisions to determine the spreads or prices at which they will quote and trade any option class. There are, however, certain specific circumstances where to make fair and orderly markets that are competitive with other exchanges and responsive to the needs and expectations of investors, some communication among the specialist and registered options traders may be necessary and appropriate. Therefore, notwithstanding the foregoing:

(i) Registered options traders are expected to participate in and support Exchange-sponsored automated systems such as automatic quote and execution systems or Exchange-approved equivalents. The variables in the formula used to generate automatically updated quotations for each option class and or series will be determined by the specialist. The specialist shall disclose to all registered option traders in an option class the following variables of the formula used to generate automatically updated market quotation for each option class and/or series: option pricing calculation model, volatility, interest rate, and dividends (both declared and anticipated). The specialist may receive input from the registered options traders on any one or all of these variables, provided, however, that it is within the specialist's sole discretion to make the final, independent decision in determining the variables to be used in the automated quote system. The registered options traders, however, are not required to give input on the variables to the specialist. The Exchange shall have the discretion to exempt specialists using an Exchange-approved proprietary automated quotation updating system from having to disclose proprietary information concerning the variables (but not the variables themselves) used by those systems;

(ii) *The obligation of registered options traders to make competitive markets does not preclude registered options traders and specialists from making a collective response to a request for a market provided the member representing such order requests such response and the size of the order is larger than the size communicated or disseminated pursuant to Rule 958A or is larger than the Auto-Ex eligible size parameter.[6] With respect to orders sent through the Exchange's order routing systems that are larger than the size disseminated pursuant to Rule 958A, it is presumed that the member has requested a collective response. The allocation of contracts executed in accordance with this paragraph will be done in accordance with the Exchange's*

[5] This requirement would apply to the greater of the size communicated or disseminated pursuant to Rule 958 or the Auto-Ex eligible size parameter. The Exchange plans to file an amendment clarifying this point. Telephone call between Claire P. McGrath, Vice President and Deputy General Counsel, Amex, and Sonia Patton, Special Counsel, Division, Commission (February 5, 2002).

[6] Id.

specialist and registered options trader participation policy; and

(iii) *In conjunction with their obligation as the responsible broker or dealer pursuant to Exchange Rule 958A and Rule 11Ac1–1 under the Securities Exchange Act of 1934, specialists and registered options traders may collectively agree to the best bid, best offer and aggregate quotation size required to be communicated to the Exchange pursuant to paragraph (c)(i) of Rule 958A.*

* * * * *

Rule 958A. Application of the Firm Quote Rule

(a) Definitions—(i) For purposes of this rule the terms ''aggregate quotation size'', ''best bid and best offer'', ''bid and offer'', ''quotation size'', ''quotation vendor'', ''reported security'', ''listed option'', ''option class'', ''option series'' and ''trading rotation'' shall have the meanings set forth in SEC Rule 11Ac1–1.

(ii) For purposes of this rule and SEC Rule 11Ac1–1 as applied to the Exchange and its members, the term ''responsible broker or dealer'' shall mean, with respect to any bid or offer for any listed option made available by the Exchange to quotation vendors, the specialist and any registered options traders constituting the trading crowd in such option series. The specialist and any registered options traders shall collectively be the responsible broker or dealer to the extent of the aggregate quotation size specified. *In conjunction with their obligation as the responsible broker or dealer, specialists and registered options traders may collectively agree to the best bid, best offer and aggregate quotation size required to be communicated to the Exchange pursuant to paragraph (c)(i) of this rule. The allocation of contracts executed in accordance with this rule will be done pursuant to the Exchange's specialist and registered options traders participation policy.*

(b) Through (d) No change.

* * * * *

Commentary

.01 No specialist *or registered options trader* shall be deemed to be a responsible broker or dealer with respect to a published bid or offer that is erroneous as a result of an error or omission made by the Exchange or any quotation vendor. If a published bid or published offer is accurate but the published quotation size (or published aggregate quotation size, as the case may be) associated with it is erroneous as a result of an error or omission made by the Exchange or any quotation vendor, then the specialist *and registered options traders* [who is] responsible for the published bid or published offer shall be obligated [to the extent] *as* set forth in paragraph (c) of Rule 11Ac1–1 but only to the extent of ten contracts.

.02 Absent unusual market conditions, the responsible broker or dealer shall honor any bid or offer then being displayed by quotation vendors which is erroneous, up to the quotation size then being so displayed, which has been displayed for six minutes or more. Provided, however, that the [specialist] *the responsible broker or dealer* shall not be required to honor such a bid or offer which is erroneous as to either price or size or both if:

(i)–(iv)—No change.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Amex has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Exchange Rules 950, 958 and 958A to codify its interpretation that unless otherwise provided for in Exchange rules it is a violation of just and equitable principles of trade for specialists and registered options traders (''traders'') to determine by agreement the spreads or prices at which they will trade any option class, or the allocation of orders in any option class.[7] Thus, specialists and traders are required to compete with each other to improve the quoted markets in all series of option classes which they trade. In meeting this obligation, the specialist and each trader must make independent decisions concerning what markets to quote at any given time and cannot determine by agreement what the quoted market, bid/ask differential or option prices should be. The Exchange believes that there are, however, certain specific circumstances where, in order to make fair and orderly markets that are competitive with other exchanges and responsive to the needs and expectations of investors, some communication among the specialist and traders may be necessary and appropriate. According to the Exchange, these circumstances arise: (1) In connection with the specialist's establishment of parameters used by the Exchange's automated quotation updating system (known as X–TOPS) to automatically generate options quotations in response to changes in the market for the underlying security or index; (2) in responding to customer requests for markets in size, such that the collective efforts of the specialist and traders are necessary in order to be able to fill any resulting order to buy or sell options; and (3) whenever the specialist and traders, in order to fulfill their obligations pursuant to Rule 11Ac1–1 under the Act and Amex Rule 958A, and to be competitive with other exchanges, collectively agree as to the best bid, best offer and aggregate quotation size. The following is a description of the nature and extent of the joint action among the specialist and traders that is permitted under each of these circumstances.

X–TOPS Parameters

Automated quotation updating systems, which are relied upon by the specialist and traders to provide a single immediately updated quotation for each option series, utilize option valuation formulas to generate options quotations based on a number of variables. These variables include the price of the underlying stock, time remaining to expiration, interest rates (or ''cost to carry'', the amount of interest on the money used to pay for the options position during the period prior to expiration of the option series), dividends (both declared and anticipated) and volatility. It is the specialist's obligation to determine for each option class the variables used in the X–TOPS formula. However, the quotations generated and displayed by X–TOPS result in firm quote obligations of the specialist and traders to buy or sell options at quoted prices and sizes. For this reason, the Exchange believes

[7] The Amex is submitting the proposed rule change pursuant to subparagraph IV.B.j of the Commission's September 11, 2000 Order, which requires that certain options exchanges, including the Amex, adopt new, or amend existing, rules to make express any practice or procedure ''whereby market makers trading any particular option class determine by agreement the spreads or option prices at which they will trade nay option class * * *.'' *See* Order Institution Public Administrative Proceedings Pursuant to section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions. Securities Exchange Act Release No. 43268 (September 11, 2000).

that input from the registered options traders to the specialist regarding the variables used in the X–TOPS formula is necessary and appropriate. Proposed Commentary .02 to Exchange Rule 950(n) and proposed paragraph (h) to Exchange Rule 958 reflect this by stating that the specialist (i) shall disclose to all registered option traders in an option class the variables of the formula used to generate automatically updated market quotations for each option class and/or series, and (ii) may receive input from the registered options traders on any one or all of these variables provided, however, that it is within the specialist's sole discretion to make the final independent decision in determining the variables to be used in the X–TOPS formula. Those specialists using an Exchange-approved proprietary system to calculate and generate quotes may be exempt by the Exchange from having to disclose proprietary information concerning the variables (but not the variables themselves) used by their systems.

Joint Responses to Requests for Markets

When a request for a market to buy or sell option contracts in sizes larger than the greater of the Auto-Ex eligible size or the size communicated or disseminated pursuant to Exchange Rule 958A is submitted to the specialists and traders,[8] the Exchange believes that it is typically the case that the customer on whose behalf the request is made would want to know promptly at what single price all of the options represented by the request can be bought or sold. Often in order to compete effectively with other marketplaces also trading the option and with the over-the-counter market in similar products, the Exchange believes that the specialist and traders must collectively provide a response to this kind of request. Proposed Commentary .02 to Exchange Rule 950(n) and proposed new paragraph (h) to Exchange Rule 958 would expressly permit a collective response to the member provided the member requests such a collective response. With respect to orders sent through the Exchange's order routing systems that are larger than the size disseminated pursuant to Exchange Rule 958, it would be presumed that the member has requested a collective response.

In addition, the specialist will sometimes agree to transact the full size of the options order at a specific price and subsequently allocate portions of the order to participating registered options traders. If or when a trade is executed, the contracts will be allocated in accordance with the Exchange's specialist and registered options traders participation policy.[9]

Firm Quote Guarantees

Currently, Amex Rule 958A obligates specialists and traders to be firm for (i) customer orders up to the quotation size being disseminated, and (ii) broker-dealer orders, up to the size established and periodically published by the Exchange. Rule 11Ac1–1 under the Act anticipates that exchanges will disseminate one automatically generated quote for a trading crowd, which necessitates collective action on behalf of the specialist and traders to communicate size to the Exchange. If or when a trade is executed, the contracts will be allocated in accordance with the Exchange's specialist and registered options traders participation policy.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act[10] in general and furthers the objectives of Section 6(b)[11] in particular in that it is designed to promote just and equitable principles of trade, remove impediments to a free and open market and a national market system, and protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Amex consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filings will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to the File No. SR–Amex–2001–76 and should be submitted by March 7, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–3495 Filed 2–13–02; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45417; File No. SR–Amex–00–47]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the American Stock Exchange LLC Relating to Amendment of Exchange Rule 933

February 7, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4[2] thereunder, notice is hereby given that on August 17, 2000, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange

[8] *See supra* note 5.

[9] *See* Securities Exchange Act Release No. 42964 (June 20, 2000) 65 FR 39972 (June 28, 2000) which proposes to codify current practices regarding the participation in option trades executed on the Exchange by registered options traders and specialists.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to amend Exchange Rule 933 to new Commentary .01. Below is the text of the proposed rule change. Proposed new language is *italicized.*

.01 If a member or member organization grants a non-member electronic access to the Exchange's order routing or executions systems through the member's or member organization's order routing systems, and if the non-member uses that access to violate Exchange rules or other applicable regulations, including, but not limited to, the Exchange's ''unbundling'' prohibition, the member or member organization is in violation of Exchange rules if it has either knowingly facilitated the violation or has failed to establish procedures reasonably designed to prevent access to the member or member organization's order routing systems from being used to effect such violation.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Amex has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange represents that it established the Auto-Ex system to provide small customer orders with an immediate single price execution. In 1996, the Exchange adopted Rule 933 to prohibit the ''unbundling'' (*i.e.,* the splitting or dividing-up) of customer option orders to make them fit within the size parameters of the Exchange's Auto-Ex system.[3]

The new Commentary would make explicit the existing implicit obligations of members and member organizations under Rule 933. Thus, members and member organizations that provide their customers with electronic access to the Exchange's order routing and execution systems would be explicitly required to take reasonable steps to ensure that their customers do not unbundle their orders to satisfy Auto-Ex eligibility criteria and to otherwise comply with the Exchange's rules and other applicable regulations. The new Commentary would further provide that members and member organizations may not knowingly facilitate a violation of the Exchange rules (including the unbundling rule) and other applicable regulations by non-members that have electronic access to the Trading Floor through the member organization's order routing systems. The Exchange represents that the Chicago Board Options Exchange (''CBOE'') has already adopted a similar rule,[4] and the Exchange believes that the proposed clarification of Rule 933 will assist members and member organizations in understanding their compliance responsibilities.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act[5] in general, and furthers the objectives of Section 6(b)(5)[6] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the Exchange, it has become effective pursuant to section 19(b)(3)(A)(i) of the Act[7] and subparagraph (f)(1) of Rule 19b–4 thereunder.[8] Although at any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act,[9] the Commission notes that the abrogation period for this proposed rule change has expired. The Commission also notes that concurrently with this notice, it is publishing an order granting accelerated approval to a proposed rule change by the Amex that, among other things, deletes the Commentary that is proposed herein.[10]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be

[3] *See* Securities Exchange Act Release No. 37429 (July 12, 1996), 61 FR 37782 (July 19, 1996) (SR–Amex–96–26).

[4] *See* Securities Exchange Act Release No. 38974 (August 26, 1997), 62 FR 46528 (September 3, 1997) (SR–CBOE–97–32). *See also* CBOE Regulatory Bulletin 00–27, ''Access to Retail Automatic Execution Systems ('RAES'),'' (January 27, 2000).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A)(i).

[8] 17 CFR 240.19b–4(f)(1).

[9] 15 U.S.C. 78s(b)(3)(C).

[10] *See* Securities Exchange Act Release No. 45418 (February 7, 2002) (SR–Amex–2001–96).

available for inspection and copying at the principal office of the Exchange.

All submissions should refer to the File No. SR–Amex–00–47 and should be submitted by March 7, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–3570 Filed 2–13–02; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45427; File No. SR–CBOE–2001–71]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Chicago Board Options Exchange, Inc. to Incorporate Certain Principal Considerations in Determining Sanctions and to Incorporate in the Exchange's Minor Rule Violation Plan Violations of the Exchange's Order Handling Rules

February 8, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 26, 2001, the Chicago Board of Options Exchange, Inc. (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Exchange Rule 17.11 (Judgment and Sanction) to adopt sanctioning guidelines that the Exchange believes will promote consistency and uniformity in determining appropriate remedial sanctions through the resolution of disciplinary matters through offers of settlement or after formal disciplinary hearings. In addition, the Exchange proposes to amend Exchange Rule 17.50 (Imposition of Fines for Minor Rule Violations) to incorporate in its Minor Rule Violation Plan violations of the Exchange's order handling rules. The text of the proposed rule change is available at the CBOE's Office of the Secretary and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

The purpose of the proposed rule change is to amend CBOE Rule 17.11 (Judgment and Sanction) to incorporate certain Principal Considerations in Determining Sanctions (''Principal Considerations'') to promote consistency and uniformity in determining appropriate remedial sanctions through the resolution of disciplinary matters through offers of settlement or after formal disciplinary hearings. In addition, the proposed rule change would amend CBOE Rule 17.50 (Imposition of Fines for Minor Rule Violations) to incorporate in its Minor Rule Violation Plan violations of the Exchange's order handling rules, including violations of firm quote requirements pursuant to Exchange Rule 8.51; failure to promptly book and display limit orders that would improve the disseminated quote pursuant to Exchange Rules 7.7 and 8.85(b); failure to honor the priority of marketable customer orders maintained in the Customer Limit Order Book pursuant to Exchange Rule 6.45; and failure to use due diligence in order execution pursuant to Rules 6.73 and 8.85(b).

The Exchange filed this proposed rule change in accordance with Section IV.B.i of the Commission's September 11, 2000 Order Instituting Administrative Proceedings Pursuant to Section 19(h)(1) of the Securities Exchange Act of 1934 (''Order''),[3] which required the Exchange to adopt rules establishing, or modifying existing, sanctioning guidelines such that they are reasonably designed to effectively enforce compliance with options order handling rules. The Exchange believes that the Principal Considerations, as set forth in proposed Exchange Rule 17.11, codify the historical considerations the Exchange's Business Conduct Committee (''BCC'') has applied in determining appropriate sanctions.

With respect to violations of the Exchange's order handling rules, the Exchange proposes that these violations covered under the plan should be included in a rolling twenty-four month ''look-back'' period. With respect to the failure to submit trade information on time and failure to submit trade information to the price reporter pursuant to Exchange Rule 6.51, the Exchange does not propose to amend the current ''look-back'' period or fine schedule as set forth in Exchange Rule 17.50(g)(4) at this time.[4] With respect to fines imposed upon Market-Makers or Floor Brokers for the conduct resulting in violations of the order handling rules as set forth in Exchange Rule 17.50(g)(5), the following fine schedule would be applied:

Number of offenses in any rolling twenty-four-month period	Fine amount
1st Offense	$500 to $1,500.
2nd Offense ...	$1,000 to $3,000.
3rd Offense	$2,000 to $5,000.
Subsequent Offenses.	$3,500 to $5,000 or Referral to Business Conduct Committee[5].

The Exchange intends to use an automated surveillance program in the detection of order handling violations and a rolling twenty-four month look-back period in the determination of recidivist conduct.[6] As a result, the

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[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 43268 (September 11, 2000), Administrative Proceeding File No. 3–10282.

[4] For violations of any of the Exchange's order handling rules, the BCC would consider the party's entire disciplinary history for purposes of determining whether violations should consitute a first, second or subsequent disciplinary action as set forth in CBOE's Internal BCC Sanction Guidelines. *See* letter from Pat Sexton, Assistant General Counsel, CBOE, to Deborah Lassman Flynn, Assistant Director, Division of Market Regulation (''Division''), Commission, dated February 8, 2002.

[5] The Exchange has agreed to submit an amendment to clarify that after a maximum of 6 offenses, subsequent offenses would be referred to the BCC. *See* telephone conversation between Mary L. Bender, Senior Vice President and Chief Regulatory Officer, CBOE, and Deborah Flynn, Assistant Director, Division, Commission, on February 6, 2002.

[6] The Exchange has agreed to submit an amendment to proposed Rule 17.50(a) to clarify this point. *See* telephone conversation between Mary L. Bender, Senior Vice President and Chief Regulatory Officer, CBOE, and Deborah Flynn, Assistant

Exchange believes it is appropriate, at times, to aggregate individual violations of particular rules and treat such violations as a single offense.[7] The Exchange believes that aggregation would enable its staff to analyze large amounts of regulatory data and craft appropriate remedies, including minor fines, without being held to rigid schedules or being required to bring formal disciplinary action based on a minimal number of surveillance breaks. Similarly, the Exchange would, if no exceptional circumstances are present, impose a fine based upon a determination that there exists a pattern or practice of violative conduct. The Exchange would also be permitted to aggregate similar violations if the conduct was unintentional, incurred no injury to public investors, or the violations resulted from a single systemic problem or cause that has been corrected.

According to the Exchange, the proposed change to Exchange Rule 17.50 would allow any member who is issued a summary fine notice for conduct covered in paragraph (g)(5) of its rule, and also meets one of the levels described below, to have the opportunity to submit one written offer of settlement to the BCC in accordance with the provisions of Exchange Rule 17.8(a) (Submission of Offer), provided, however, that the Interpretations and Polices to Rule 17.8 would not apply to an offer made under Exchange Rule 17.50 and the member would be required to submit the offer within 30 days of the date of service of the written notice informing the member of the fine(s) imposed. The member would also be permitted to appear once before the BCC to make an oral statement in support of the offer. According to the Exchange, this is consistent with the current application of the rule as set forth in Exchange Rule 17.50 and Interpretation and Policy .01(b) under the Exchange's Minor Rule Violation Plan. Under the proposal, a member would be permitted to make one offer of settlement:

(1) When the summary fine amount is greater than $2,500 but not more than $5,000 for a single offense, regardless of whether the single offense is the result of one violation or multiple violations aggregated together; or

(2) When the total fine for multiple offenses is greater than $10,000 in the aggregate and not more than $5,000 for any single offense, again regardless of whether any single offense is the result of one violation or multiple violations aggregated together.

The Exchange notes that to the extent that other Exchange rules or effective Regulatory Circulars include different schedules for summary fines related to the same types of conduct addressed herein, this rule change is intended to supersede all other existing provisions. Should the Commission approve this filing, the Exchange will file proposed rule changes effective upon filing to correct any discrepancies in the provisions of other Exchange rules or Regulatory Circulars.

(2) Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,[8] in general, and furthers the objectives of sections 6(b)(5)[9] and 6(b)(7),[10] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and processing information with respect to transactions in securities, to protect investors and the public interest, and enhances the effectiveness and fairness of the Exchange's disciplinary procedures. Lastly, the Exchange believes that the proposed rule change will refine and enhance the Exchange's Minor Rule Violation Plan to make it more efficient and effective.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

A. By order approve such proposed rule change; or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR–CBOE–2001–71 and should be submitted by March 7, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Secretary.

[FR Doc. 02–3631 Filed 2–13–02; 8:45 am]

BILLING CODE 8010–01–U

Director, Division, Commission, on February 6, 2002.

[7] The Exchange submitted to the Commission a letter, for which it requested confidential treatment, proposing how its regulatory staff would aggregate violations of the order handling rules, where the violations are identified through the Exchange's automated surveillance system. *See* letter from Mary L. Bender, Senior Vice President and Chief Regulatory Officer, CBOE, to John McCarthy, Associate Director, Office of Compliance, Inspections and Examinations, Commission, dated December 21, 2001.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78f(b)(7).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45338; File No. SR–MSRB–2001–07]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of Proposed Rule Change Relating to Minimum Denominations

January 25, 2002.

On October 16, 2001, the Municipal Securities Rulemaking Board (''MSRB'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') and Rule 19b–4 thereunder,[1] a proposed rule change (File No. SR–MSRB–2001–07) concerning minimum denominations consisting of an amendment to its rule G–15 on confirmation, clearance and settlement of transactions with customers, an amendment to its rule G–8 on books and records to be made by brokers, dealers and municipal securities dealers, and an interpretation of its rule G–17 on conduct of municipal securities activities.

The proposed rule change was published for comment in the **Federal Register** on December 28, 2001.[2] The Commission received fifteen comment letters on the MSRB's proposed rule change. This order approves the proposal.

I. Description of the Proposed Rule Change

The MSRB proposed this rule change as a measure to ensure that dealers observe the minimum denominations stated in the official documents of municipal securities issues. Official documents for municipal securities issues may state a ''minimum denomination'' larger than the normal $5,000 par value. For example, an issuer may state a high minimum denomination (typically $100,000) to qualify for one of several exemptions from Rule 15c2–12's [3] requirement to file certain disclosure documents. Additionally, an issuer may set high minimum denominations because of a concern that the securities may not be appropriate for those retail investors who would be likely to purchase securities in relatively small amounts.

Several issuers have expressed concern to the MSRB upon discovering that their issues with high minimum denominations were trading in the secondary market in transaction amounts much lower than the stated minimum denomination. Based on information obtained from the MSRB Transaction Reporting Program, it appears that there are significant numbers of these types of transactions. In the past, brokers, dealers and municipal securities dealers (collectively ''dealers'') effecting such transactions likely would have noticed the problem when attempting to make delivery of a certificate to the customer. Generally, the transfer agent would not have been able to honor a request for a certificate with a par value below the minimum denomination. However, the increased use of book-entry deliveries and safekeeping arrangements for retail customers largely preclude the need for individual certificates for customers and there is no other systemic screening to identify transactions that are in below-minimum denomination amounts. Today, municipal securities predominantly stay in a book-entry environment, with ownership recorded on the books and records of depositories and other nominees, a restriction on the par value of certificates does not effectively restrict the size of transactions.

The MSRB believes that it is appropriate for the rule to be prospective in this manner so that issuers, dealers and other market participants will be aware of the secondary market implications of high minimum denominations at the time the decision is made to incorporate them into an issue's terms. Accordingly, the proposed rule change includes an amendment to MSRB rule G–15 that would prohibit transactions in below-minimum denomination amounts for securities issued after June 1, 2002, with two limited exceptions.

The general prohibition of the rule G–15 amendment is designed to prevent dealers from effecting transactions that break up securities positions into amounts below the issue's denomination. The two exceptions in the amendment to rule G–15 are designed to help preserve liquidity of customers' below-minimum denomination positions that may occur through actions other than a dealer effecting transactions in below-minimum denomination amounts.[4] First, a dealer may purchase a below-minimum denomination position from a customer provided that the customer liquidates his/her entire position. Second, a dealer may sell such a liquidated position to another customer but would be required to provide written disclosure, either on the confirmation or separately, to the effect that the security position is below the minimum denomination and that liquidity may be adversely affected by this fact.

Under MSRB rule G–8, on books and records, customer confirmations must be kept for three years in a dealer's books and records. To ensure consistency in the recordkeeping requirements for separate written disclosures given to a customer under the rule G–15 amendment and the recordkeeping requirements for customer confirmations, the proposed rule change includes an amendment to rule G–8 that would require dealers to keep a record of these separate written disclosures for a minimum of three years.

Although certain written disclosures would be required, after the trade, for those transactions done under the second exemption to the rule G–15 amendment, the MSRB also seeks to address a more general need for time-of-trade disclosure in the proposed rule change. Rule G–17 states: ''In the conduct of its municipal securities activities, each broker, dealer, and municipal securities dealer shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice.'' The MSRB has interpreted this rule to mean, among other things, that dealers are required to disclose, at or before the sale of municipal securities to a customer, all material facts concerning the transaction, including a complete description of the security. The proposed rule change includes an interpretation of rule G–17 stating that any time a dealer is selling to a customer a quantity of municipal securities below the minimum denomination for the issue, the dealer should consider this to be a material fact about the transaction. The MSRB believes that a dealer's failure to disclose such a material fact to the customer, and to explain how this could affect the liquidity of the customer's position, generally would constitute a violation of the dealer's duty under rule G–17 to disclose all material facts about the transaction to the customer.

[1] 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b–4 thereunder.

[2] See Release No. 34–45174 (December 19, 2001), 66 FR 67342.

[3] 17 CFR 240.15c2–12.

[4] A below-minimum denomination position may be created, for example, by call provisions that allow calls in amounts less than the minimum denomination, investment advisors who may split positions they purchase among several clients or the division of an estate as a result of a death or divorce. Such below-minimum denomination positions also may be created as a result of a gift.

While the rule G–15 amendment applies only to municipal securities issued after June 1, 2002, the interpretation of rule G–17 applies to all transactions in municipal securities regardless of the date of issuance of the security traded. This helps ensure that all future investors are made aware at or prior to the time of trade that the securities position they are about to purchase is below the minimum denomination and that the liquidity of that position may be adversely affected by this fact.

II. Summary of Comments

The Commission received fifteen comments letters on the proposal.[5] All of the letters received favored the proposal. Collectively, the comment letters asserted that the proposal balanced the enforcement of bondholder protections without impairing liquidity of bonds currently held in unauthorized denominations by unsuspecting investors.[6] All but three of the commenters preferred a retroactive application; nevertheless, they supported the proposal's prospective enforcement of bondholders' protections.[7]

III. Discussion

The Commission must approve a proposed MSRB rule change if the Commission finds that the MSRB's proposal is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that govern the MSRB.[8] The language of section 15(b)(2)(C) of the Exchange Act requires that the MSRB's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principals of trade, to foster cooperation and coordination with persons engaged in regulating, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national system, and, in general, to protect investors and the public interest.[9]

After careful review, the Commission finds that the MSRB's proposed rule change concerning minimum denominations meets this standard. The minimum denominations proposal consists of an amendment to MSRB Rule G–15 on confirmation, clearance and settlement of transactions with customers, an amendment to MSRB Rule G–8 on books and records to be made by brokers, dealers and municipal securities dealers, and an interpretation of MSRB Rule G–17 on conduct of municipal securities activities. The Commission believes that this proposed rule change is consistent with the requirements of the Exchange Act, and the rules and regulations thereunder, in particular, section 15B(b)(2)(C).

IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Exchange Act that the proposed rule change (SR–MSRB–2001–07) be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–2588 Filed 2–13–02; 8:45 am]

BILLING CODE 8010–01–P

[5] See letter from Rebecca Floyd, Executive Vice President and General Counsel, Kansas Development Finance Authority to Office of the Secretary, Commission, dated January 14, 2002; letter from Neil P. Moss, Executive Director, Idaho Health Facilities Authority to Office of the Secretary, Commission, dated January 14, 2002; letter from Corinne M. Johnson, Executive Director, Colorado Health Facilities Authority to Office of the Secretary, Commission, dated January 14, 2002; letter from Edith F. Behr, President, National Council of Health Facilities Finance Authorities to Office of the Secretary, Commission, dated January 14, 2002; letter from Edith F. Behr, Executive Director, New Jersey Health Care Facilities Financing Authority to Office of the Secretary, Commission, dated January 14, 2002; letter from Larry Nines, Executive Director, Wisconsin Health and Educational Facilities Authority to Office of the Secretary, Commission, dated January 15, 2002; letter form Christopher B. Taylor, Auditor and Advisor, Department of Health and Human Services, The North Carolina Medical Care Commission to Office of the Secretary, Commission, dated January 15, 2002; letter from Don A. Templeton, Executive Director, South Dakota Health and Educational Facilities Authority to Office of the Secretary, Commission, dated January 15, 2002; letter from Robert E. Donovan, Executive Director, Rhode Island Health and Educational Building Corporation to Office of the Secretary, Commission, dated January 15, 2002; letter from David C. Bliss, Executive Director, New Hampshire Health and Education Facilities Authority to Office of the Secretary, Commission, dated January 15, 2002; letter from Malcolm S. Rode, Executive Director, Vermont Educational and Health Buildings Financing Agency, dated January 15, 2002; letter from Jill H. Tanner, Executive Director, Indiana Health Facilities Financing Authority to Office of the Secretary, Commission, dated January 16, 2002; letter from Kim Herman, Executive Director, Washington Higher Education Facilities Authority to Office of the Secretary, Commission, dated January 16, 2002; letter from Mary R. Jeka, Acting Executive Director, Massachusetts Health and Educational Facilities Authority to Office of the Secretary, Commission, dated January 16, 2002; and letter from Michael J. Stanard, Executive Director, Missouri Health and Educational Facilities Authority to Office of the Secretary, Commission, dated January 16, 2002.

[6] *See* note 4, *supra*.

[7] *See* note 4, *supra* (not including the letter from Missouri Health and Educational Facilities Authority; the letter from National Council of Health Facilities Finance Authority, and the letter from Washington Higher Education Facilities Authority).

[8] Additionally, in approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[9] 15 U.S.C. 78o–4(b)(2)(c).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45421; File No. SR–Phlx–2001–114]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Aggregation of Individual Violations of Exchange Order Handling Rules and Option Floor Procedure Advices

February 7, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 18, 2001, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Exchange Rule 960.2(f), Determination to Initiate Charges, and Exchange Rule 970 concerning the Exchange's minor rule violation enforcement and reporting plan (''Minor Rule Plan''),[3] by clarifying that the Exchange may aggregate, or ''batch,'' individual violations of Exchange order handling rules and Option Floor Procedure

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Exchange Rule 970 sets forth the criteria for the imposition of a fine (not to exceed $2,500) on any member, member organization, or any partner, officer, director or person employed by or associated with any member or member organization, for any violation of a Floor Procedure Advice, which violation the Exchange shall have determined is minor in nature. Such a fine is imposed in lieu of commencing a ''disciplinary proceeding'' as that term is used in Exchange Rules 960.1–960.12. Minor Rule Plan fines are subject to Rule 19d–1 under the Act.

Advices (''OFPAs'')[4] and consider such ''batched'' violations as a single offense.

The proposed rules would also expressly provide that, as an alternative to ''batching'' of order handling violations, in certain circumstances in which the Exchange determines that there exists a pattern or practice of violative conduct without exceptional circumstances, or when any single instance of violative conduct without exceptional circumstances is deemed to be egregious, the Exchange may refer the matter to the Business Conduct Committee (''BCC'') for possible disciplinary action.

The text of the proposed rule change is available at the Phlx's Office of the Secretary and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

The purpose of the proposed rule change is to clarify that the Exchange may consider an aggregate number of violations of order handling rules and OFPAs[5] as one single offense for purposes of initiating disciplinary action under Exchange rules, or imposing fines pursuant to fine schedules set forth in the relevant OFPAs under the Exchange's Minor Rule Plan.[6] The Exchange believes that such aggregation of order handling violations would enable the Exchange's Market Surveillance Department to identify, through exception reporting and through on-floor surveillance,[7] members and member organizations that fail to meet acceptable compliance thresholds for such rules and OFPAs, and to determine whether to impose fines pursuant to the Exchange's Minor Rule Plan or refer the matter to the BCC for consideration of formal disciplinary action.[8]

The proposed rule change contemplates that aggregation of order handling violations in every instance may not be appropriate. The proposed rule change provides two alternatives to aggregation. First, the Exchange may refer the matter to the BCC for possible disciplinary action when the Exchange determines that there exists a pattern or practice of violative conduct without exceptional circumstances. The Exchange believes that the provision relating to a pattern or practice of order handling violations would enable it to identify and discipline repeat offenders, and should ultimately deter such conduct and encourage member organizations to remain compliant with the requirement.

As a second alternative to aggregation, the proposed rules would provide that, when any single instance of violative conduct without exceptional circumstances is deemed to be egregious, the Exchange may refer the matter to the BCC for possible disciplinary action. The Exchange could determine that a single instance of violative conduct is so flagrant that such an instance would not be appropriate for aggregation under the proposed rule change.[9] The Exchange believes that this provision would allow it to discipline egregious offenders appropriately and expeditiously when the offense rises above the aggregation threshold.

The Exchange believes that the aggregation proposal, in conjunction with the alternatives to aggregation relating to a pattern or practice of order handling violations or an egregious order handling violation, provide it with the means to enforce Exchange order handling rules in a manner that should ultimately deter such conduct and result in fewer violations.

(2) Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,[10] in general, and furthers the objectives of section 6(b)(5) of the Act,[11] in particular, in that it is designed to perfect the mechanisms of a free and open market and the national market system, protect investors and the public interest and promote just and equitable principles of trade by codifying the way in which order handling violations will be enforced.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and

[4] The Exchange has agreed to amend the proposed rule change to clarify that ''batching'' of violations can only occur where the Exchange uses automated surveillance to detect violations. *See* telephone conversation between Edith Hallahan, First Vice President and Deputy General Counsel, Phlx, and Deborah Lassman Flynn, Assistant Director, Division of Market Regulation (''Division''), Commission, on February 7, 2002.

[5] Specifically, the Exchange proposes to ''batch'' violations of Exchange Rules 1051 (concerning the requirement that a member or member organization initiating an options transaction must report or ensure that the transaction is reported within 90 seconds of execution to the tape) and Exchange Rule 1082 (concerning the requirement that quotes be firm for both price and size, and the requirement that marketable orders received in a size greater than the disseminated size be executed in their entirety or up to the disseminated size within 30 seconds); OFPA A–1 (concerning the requirement that a specialist shall use due diligence to ensure that the best available bid and offer is displayed for those option series in which he is assigned); OFPA F–2 (the aforementioned 90-second trade reporting requirement under the Exchange's Minor Rule Plan); and other OFPAs, pursuant to its Numerical Criteria for Bringing Cases for Violation of Phlx Order Handling Rules.

[6] The Exchange filed this proposed rule change in accordance with the provisions of Section IV.B.i of the Commission's September 11, 2000 Order Instituting Administrative Proceedings Pursuant to Section 19(h)(1) of the Act, which required the Exchange to adopt rules establishing, or modifying existing, sanctioning guidelines such that they are reasonably designed to effectively enforce compliance with options order handling rules. *See* Securities Exchange Act Release No. 43268 (September 11, 2000), Administrative Proceeding File No. 3–10282 (the ''Order'').

[7] *See supra* note 4.

[8] The Exchange submitted to the Commission a letter, for which it requested confidential treatment, proposing how its regulatory staff would aggregate violations of the order handling rules, where the violations are identified through the Exchange's automated surveillance system. *See* letter from Anne Exline Starr, First Vice President Regulatory Group, Phlx, to John McCarthy, Associate Director, Office of Compliance, Inspections and Examinations, Commission, and Deborah Lassman Flynn, Assistant Director, Division, Commission, dated January 30, 2002.

[9] For example, the Exchange states that in the event that it discovers through investigation that a single violation or a pattern or practice of violations of Exchange order handling rules is the result of intentional conduct on the part of a member organization, nothing would preclude the Exchange from referring such a matter directly to the Business Conduct Committee for possible disciplinary action.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

A. By order approve such proposed rule change; or

B.Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR–Phlx-2001–114 and should be submitted by March 7, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Secretary.

[FR Doc. 02–3630 Filed 2–13–02; 8:45 am]

BILLING CODE 8010–01–U

[12] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Sunrise Airlines, Inc. d/b/a Flair Airlines of its Intent To Resume Operations

AGENCY: Office of the Secretary, Department of Transportation.

ACTION: Notice of Order to Show Cause (Order 2002–2–5) Docket OST–2001–8695.

SUMMARY: The Department of Transportation is directing all interested persons to show cause why it should not issue an order finding Sunrise Airlines, Inc., fit, willing, and able to resume scheduled passenger operations as a commuter air carrier, subject to conditions.

DATES: Persons wishing to file objections should do so no later than February 22, 2002.

ADDRESSES: Objections and answers to objections should be filed in Docket OST–2001–8695 and addressed to the Department of Transportation Dockets (SVC–124, Room PL–401), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, and should be served upon the parties listed in Attachment A to the order.

FOR FURTHER INFORMATION CONTACT: Ms. Delores King, Air Carrier Fitness Division (X–56, Room 6401), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366–2343.

Dated: February 8, 2002.

Read C. Van De Water,

Assistant Secretary for Aviation, and International Affairs.

[FR Doc. 02–3620 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2002–11]

Petitions for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption part 11 of Title 14, Code of Federal Regulations (14 CFR), this notice contains a summary of certain petitions seeking relief from specified requirements of 14 CFR, dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received on or before March 6, 2002.

ADDRESSES: Send comments on any petition 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–2001–11097 at the beginning 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 the petition, any comments received, and any final disposition 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 (telephone 1–800–647–5527) 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: Sandy Buchanan-Sumter (202) 267–7271, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR §§ 11.85 and 11.91.

Issued in Washington, DC, on February 11, 2002.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

Petitions for Exemption

Docket No.: FAA–2001–11097.
Petitioner: Business Jet Services.
Section of 14 CFR Affected: 14 CFR § 135.145.
Description of Relief Sought: To permit Business Jet Services to place turbo-jet airplanes in service without conducting proving flights.

[FR Doc. 02–3637 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[RSPA–2002–11270, Notice No. 02–4]

Advisory Notice; Enhancing the Security of Hazardous Materials in Transportation

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Advisory notice.

SUMMARY: This notice advises shippers and carriers of voluntary measures to enhance the security of hazardous materials shipments during

transportation. The notice addresses personnel, facility, and en route security issues and includes contact points for obtaining additional, more detailed information.

FOR FURTHER INFORMATION CONTACT: Susan Gorsky, Office of Hazardous Materials Standards, Research and Special Programs Administration, telephone (202) 366–8553.

SUPPLEMENTARY INFORMATION: As a result of the terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001, and subsequent threats related to biological materials, the Research and Special Programs Administration (RSPA, we) is engaged in a broad review of government and industry hazardous materials transportation safety and security programs. As part of this review, we established the Hazardous Materials Direct Action Group (Hazmat DAG). The Hazmat DAG met with representatives of the hazardous materials industry, emergency response community, and state governments to discuss transportation security issues in the wake of the September 11 attacks and continuing terrorist threats.

In the wrong hands, hazardous materials pose a significant security threat, particularly those that may be used as weapons of mass destruction. Persons who offer, transport, or store hazardous materials in transit should review their security measures and make any necessary adjustments to ensure the security of hazardous materials shipments.

Based in part on discussions in the Hazmat DAG and on the results of our initial internal review of ongoing security programs and practices, we identified a number of actions for persons involved in the transportation of hazardous materials to implement to enhance security. You should consider actions commensurate with the level of threat posed by the specific hazardous materials you handle. These possible actions are not government regulations or mandates. However, we strongly suggest that you consider implementation of the following measures as appropriate to your industry and operations.

I. Security Plan

The most important action a shipper or carrier should consider is the development and implementation of a security plan. You can use a risk management model to assess security risks and develop appropriate measures to reduce or eliminate risk. Most risk management models utilize the following steps:

(1) Identify areas of concern and partners that may be affected or with whom coordination may be appropriate;

(2) Assemble detailed information on system operations;

(3) Identify control points where interventions can reduce or eliminate risk;

(4) Select and prioritize options to meet identified security goals;

(5) Take action to implement the strategy;

(6) Verify implementation of the strategy; and

(7) Evaluate the effectiveness of the strategy to determine whether additional actions are necessary.

You may first want to list materials you handle, and identify those materials with the potential to be used as weapons of mass destruction or targets of opportunity. Then, consider a review of your current activities and operations from a transportation security perspective. Ask yourself, ''What are we doing now? What could go wrong? What can we do differently?'' The next step is to consider how to reduce the risks you have identified. For hazardous materials transportation, a security plan likely will focus on personnel, facility, and en route security issues. To assist you in performing appropriate risk assessments, we posted a Risk Management Self-Evaluation Framework on our website (*http://hazmat.dot.gov*).

II. Personnel Security

Your employees can be one of your most critical assets as you endeavor to improve the security of your shipping or transportation operations. You should consider taking one or more of the following actions:

- Assure your employees are familiar with your security plan and properly trained in its implementation. Training should include company security objectives, specific security procedures, employee responsibilities, and organizational security structure.
- Encourage your employees to report suspicious incidents or events.
- Implement routine security inspections.
- Convene regular employee/management meetings on security measures and awareness.
- Have an internal communication system to inform your staff of events, facts, trends, updates, and the like. Because Internet communications may be accessed by others, consider alternative methods for communicating sensitive information.

At the same time, you should be aware of the possibility that someone you hire may pose a potential security risk. You should consider establishing a process to verify the information provided by applicants on application forms or resumes, including checking with former and current employers and personal references provided by job applicants.

III. Facility Security

You should consider taking one or more of the following steps to prevent unauthorized access to your facility:

- Establish partnerships with local law enforcement officials, emergency responders and other public safety agencies with jurisdiction over your facility. Through such relationships, you can learn about threats, trends, and successful and unsuccessful security programs.
- Request a review of your facility and security program by local law enforcement officials.
- Restrict the availability of information related to your facility and the materials you handle. Encourage authorities in possession of information about your facility to limit disclosure of that information on a need-to-know basis.
- Add security guards and increase off-hours patrols by security or law enforcement personnel.
- Improve fencing around your facility. Check the adequacy of locks and other protective equipment. Consider equipping access gates with timed closure devices. Conduct frequent inspections.
- Install additional lights, alarm systems, or surveillance cameras.
- Restrict access to a single entry or gate.
- Place limits on visitor access; require visitors to register and show photo identification and have someone accompany visitors at all times.
- Require employees to display identification cards or badges.
- Conduct security spot checks of personnel and vehicles.
- Upgrade security procedures for handling pick-ups and deliveries at your facilities. Verify all paperwork and require pick-ups and deliveries to be handled only by appointment with known vendors. Require vendors to call before a delivery and to provide the driver's name and vehicle number. Accept packages and deliveries only at the facility front gate.
- Secure hazardous materials in locked buildings or fenced areas. Have a sign-out system for keys.
- Secure valves, manways, and other fixtures on transportation equipment when not in use. Lock all vehicle and delivery trailer doors when not in use. Secure all rail, truck, and barge

containers when stored at your location. Use tamper-resistant or tamper-evident seals and locks on cargo compartment openings.

• Periodically inventory the quantity of hazardous materials you have on site in order to recognize if a theft has occurred.

• Keep records of security incidents. Review records to identify trends and potential vulnerabilities.

• Report any suspicious incidents or individuals to your local Federal Bureau of Investigation (FBI) office and to local law enforcement officials.

IV. En Route Security

Shippers and carriers can work together to assure the security of hazardous materials shipments en route from origin to destination:

• Shippers should assess the transportation modes or combinations of modes available for transporting specific materials and select the most appropriate method of transportation to assure efficient and secure movement of product from origin to destination.

• Know your carriers. Have a system for qualifying the carriers used to transport hazardous materials. Use carrier safety ratings, assessments, safety surveys, or audits and ask the carrier to provide information on security measures it has implemented. Verify the carrier has an appropriate employee hiring and review process, including background checks, and an on-going security training program.

• Verify the identity of carrier and/or driver prior to loading a hazardous material. Ask the driver for photo identification and commercial drivers license and compare with information provided by the carrier. Ask the driver to tell you the name of the consignee and the destination for the material and confirm with your records before releasing shipments.

• Identify preferred and alternative routing, including acceptable deviations. Strive to minimize product exposures to communities or populated areas, including downtown areas; avoid tunnels and bridges where possible; and expedite transportation of the shipment to its final destination.

• Minimize stops en route; if you must stop, select locations with adequate lighting on well-traveled roads and check your vehicle after each stop to make sure nothing has been tampered with. Consider using two drivers or driver relays to minimize stops during the trip. Avoid layovers, particularly for high hazard materials.

• Shippers and rail carriers should cooperate to assure the security of rail cars stored temporarily on leased track.

• If materials must be stored during transportation, make sure they are stored in secure facilities.

• Train drivers in how to avoid highjacking or stolen cargo—keep vehicles locked when parked and avoid casual conversations with strangers about cargoes and routes.

• Consider if a guard or escort for a specific shipment or hazardous material is appropriate.

• Consider utilizing advanced technology to track or protect shipments en route to their destinations. For example, you may wish to install tractor and trailer anti-theft devices or utilize satellite tracking or surveillance systems. As an alternative, consider frequent checks with drivers by cell phone to ensure everything is in order.

• Install tamper-proof seals on all valves and package or container openings.

• Establish a communication system with transport vehicles and operators, including a crisis communication system with primary and back-up means of communication among the shipper, carrier, and law enforcement and emergency response officials.

• Implement a system for a customer to alert the shipper if a hazardous materials shipment is not received when expected. When products are delivered, check the carrier's identity with shipping documents provided by the shipper.

• Get to know your customers and their hazardous materials programs. If you suspect you shipped or delivered a hazardous material to someone who may intend to use it for a criminal purpose, notify your local FBI office or local law enforcement officials.

• Report any suspicious incidents or individuals to your local FBI office and to local law enforcement officials.

V. Additional Information

Up-to-date information is a key element of any security plan. You should consider methods to: (1) Gather as much data as you can about your own operations and those of other businesses with similar product lines and transportation patterns; (2) develop a communications network to share best practices and lessons learned; (3) share information on security incidents to determine if there is a pattern of activities that, when considered in isolation are not significant, but when taken as a whole generate concern; and (4) revise your security plans as necessary to take account of changed circumstances and new information.

The following resources may be helpful:

Federal Agencies

Research and Special Programs Administration, U.S. Department of Transportation, 400 7th Street, SW., Washington, DC 20590, Telephone: 800–467–4922 (Hazardous Materials Information Center), *hazmat.dot.gov* (Hazmat Safety Homepage)

Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, Telephone: 202–366–4000, *www.faa.gov*

Federal Motor Carrier Safety Administration, U.S. Department of Transportation, 400 7th Street, SW., Washington, DC 20590, Telephone, *www.fmcsa.dot.gov*

Federal Railroad Administration, U.S. Department of Transportation, 1120 Vermont Ave., NW., Washington, DC 20590, Telephone, *www.fra.dot.gov*

United States Coast Guard, 2100 Second Street, SW., Washington, DC 20593, Telephone: 202–267–2229, *www.uscg.mil*

Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, Telephone: 202–260–2090, *www.epa.gov*

Occupational Safety and Health Administration, 200 Constitution Avenue, NW., Washington, DC 20210, Telephone, *www.osha.gov*

Industry Associations and Organizations

American Chemistry Council, 1300 Wilson Boulevard, Arlington, Virginia 22209, Telephone: 703–741–5000, *www.americanchemistry.com*

American Petroleum Institute, 1220 L Street, NW., Washington, DC 20005, Telephone: 202–682–8000, *www.api.org*

American Society for Industrial Security, 1625 Prince Street, Alexandria, Virginia 22314, Telephone: 703–519–6200, *www.asisonline.org*

American Trucking Associations, 2200 Mill Road, Alexandria, Virginia 22314, Telephone: 703–838–1700, *www.truckline.com*

Association of American Railroads, 50 F Street, NW., Washington, DC 20001–1564, Telephone: 202–639–2100, *www.aar.org*

Center for Chemical Process Safety, American Institute of Chemical Engineers, 3 Park Ave, New York, N.Y. 10016–5991, Telephone: 212–591–7319, *www.aiche.org/ccps*

Chlorine Institute, Suite 506, 2001 L Street, NW., Washington, DC 20036, Telephone: 202–775–2790, *www.cl2.com*

Compressed Gas Association, Suite 1004, 1725 Jefferson David Highway, Arlington, Virginia 22202, Telephone: 703–412–0900, *www.cganet.com*

Fertilizer Institute, Union Center Plaza, Suite 430, 820 First Street, NE, Washington, DC 20002, Telephone: 202–962–0490, *www.tfi.org*

Institute of Makers of Explosives, Suite 310, 1120 19th Street, NW., Washington, DC 20036, Telephone: 202–429–9280, *www.ime.org*

National Association of Chemical Distributors, Suite 1250, 1560 Wilson Boulevard, Arlington, Virginia 22209, Telephone: 703–527–6223, *www.nacd.com*

National Propane Gas Association, Suite 100, 600 Eisenhower Lane, Lisle, Illinois 60532, Telephone: 630–515–0600, *www.npga.org*

National Tank Truck Carriers, 2200 Mill Road, Alexandria, Virginia 22314, Telephone: 703–838–1960, *www.tanktransport.com*

Security Industry Association, 635 Slaters Lane, Alexandria, Virginia 22314, *www.siaonline.org*

Synthetic Organic Chemical Manufacturers Association, Suite 700, 1850 M Street, NW., Washington, DC 20036, Telephone: 202–721–4100, *www.socma.com*

The above listing is by no means exhaustive; other government and private organizations have developed or are developing hazardous materials transportation security guidelines.

Issued in Washington, DC, on February 10, 2002.

Robert A. McGuire,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 02–3636 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–60–P

Notices

Federal Register

Vol. 67, No. 31

Thursday, February 14, 2002

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

Forest Service

White Pass Ski Area Expansion, Okanogan-Wenatchee and Gifford Pinchot National Forests, Yakima and Lewis Counties, Washington

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Forest Service, USDA, will prepare an environmental impact statement (EIS) to analyze and disclose the environmental impacts of a site-specific proposal to modify the present special use permit of the White Pass Company, current operator of the White Pass Ski Area. This modification would authorize expansion into approximately 300 acres in Pigtail Basin, located between the current permit area and Hogback Basin, for the purpose of providing additional skiing opportunities. This action is proposed in response to an application by the White Pass Company to expand the permit area on the Cowlitz Valley Ranger District of the Gifford Pinchot National Forest. The Naches Ranger District of the Okanogan-Wenatchee National Forests administers the current White Pass Company permit. The proposed action is at White Pass, Washington, approximately 50 miles west of the city of Yakima. The purpose of the EIS will be to develop and evaluate a range of alternatives, including a No Action alternative and possible additional alternatives, to respond to issues identified during the scoping process. The proposed project will be in compliance with the direction in the Wenatchee and Gifford Pinchot National Forest Land and Resource Management Plans (1990), as amended by the Northwest Forest Pan (1994), which provide the overall guidance for management of the area. The Agency invites written comments on the scope of this project. In addition, the agency gives notice of this analysis so that interested and affected people are aware of how they may participate and contribute to the final decision.

ADDRESSES: Submit written comments and suggestions to Sonny J. O'Neal, Forest Supervisor, Okanogan-Wenatchee National Forests, 215 Melody Lane, Wenatchee, Washington 98801, Attn: White Pass Ski Area Expansion.

FOR FURTHER INFORMATION CONTACT: Questions and comments about this EIS should be directed to Randall Shepard, District Ranger, Naches Ranger District, 10061 Highway 12, Naches, WA 98937; Phone 509–653–2205.

SUPPLEMENTARY INFORMATION: The Okanogan-Wenatchee National Forests are initiating this action in response to an ongoing request by the White Pass Company to expand their current ski area permit boundary.

This is White Pass Company's third request to expand the skiing opportunities at White Pass. The first proposal was submitted after passage of the Washington Wilderness Act of 1984, which withdrew the area in question from Wilderness for the express purpose of study for its ski development potential. Subsequent litigation regarding the Forest's decision to authorize the expansion, in combination with concerns regarding new wildlife information, led to withdrawal of that decision by the Wenatchee National Forest Supervisor in 1992.

In 1998, the analysis for a second, smaller scale proposal for expansion was documented in an Environmental Impact Statement and a Record of Decision authorizing the expansion was issued. In a subsequent lawsuit, the U.S. District Court, Western District of Washington, rules against the Forest Service on two grounds and the ROD was again withdrawn.

This current proposal has been developed following (1) a review and understanding of the issues raised during the previous EIS attempt; (2) the review of current and updated environmental standards such as the amended Northwest Forest Plan direction, Aquatic Conservation Strategy, and the Interim Direction for Roadless Area Protection; (3) recent discussions with interested groups regarding the proposed action and alternatives; and (4) the continued search for an expansion location that best fits into the social, cultural, environmental and skier needs.

A range of alternatives will be considered, including a No Action Alternative. Other alternatives will be developed in response to issues received during scoping. Preliminary issues that have been identified include the potential effects on the following: Inventoried roadless area, riparian areas, Pacific Crest Trail, backcountry winter recreation opportunities, scenery, heritage resources, wildlife habitat, air quality, socioeconomics, and the cumulative effects of the proposed action on existing uses within the current permit area.

Continued public participation will be especially important at several points during the analysis. The Forest Service will be seeking information, comments, and assistance from Federal, State, and local agencies, Tribes, and other organizations and individuals who may be interested in or affected by the proposed actions. This information will be used in preparation of the draft EIS. The scoping process includes:

1. Identifying potential issues.
2. Identifying issues to be analyzed in depth.
3. Eliminating insignificant issues or issues which have been covered by a relevant previous environmental process.
4. Exploring additional alternatives.
5. Identifying potential environmental effects of the proposed action and alternatives (i.e., direct, indirect and cumulative effects and connected actions).
6. Determining potential cooperating agencies and task assignments.

Comments received in response to this notice, including names and addresses of those who comment, will be considered part of the public record on this Proposed Action and will be available for public inspection. Comments submitted anonymously will be accepted and considered; however, those who submit anonymous comments will not have standing to appeal the subsequent decision under 36 CFR part 215. Additionally, pursuant to 7 CFR 1.27(d), any person may request the agency to withhold a submission from the public record by showing how the Freedom of Information Act (FOIA) permits such confidentiality. Persons requesting such confidentiality should be aware that

under the FOIA, confidentiality may be granted in only very limited circumstances, such as to protect trade secrets. The Forest Service will inform the requester of the agency's decision regarding the request for confidentiality, and where the request is denied, the agency will return the submission and notify the requester that the comments may be resubmitted with or without name and address within a specified number of days.

The draft EIS is expected to be filed with the Environmental Protection Agency (EPA) and to be available for review in June 2002. The EPA will publish a notice of availability of the draft EIS in the **Federal Register**. The comment period on the draft EIS will be 45 days from the date the EPA notice appears in the **Federal Register**. At that time, copies of the draft EIS will be distributed to interested and affected agencies, organizations, Tribes, and members of the public for their review and comment. It is very important that those interested in the management of the Okanogan-Wenatchee and Gifford Pinchot National Forests participate at that time.

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 of a draft EIS 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 connections. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft EIS stage, but that are not raised until after completion of the final EIS may be waived or dismissed by the courts. *City of Angoon* v. *Hodel,* 803 F.2d 1016, 1022 (9th Cir. 1986) and *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 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 in the final EIS.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft EIS should be as specified as possible. It is also helpful if comments refer to specific pages or chapters of the draft EIS. Comments may also address the adequacy of the draft EIS or the merits of the alternatives formulated and discussed in the statement. 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.

The final EIS is scheduled to be completed no later than September 2002. In the final EIS, the Forest Service is required to respond to comments and responses received during the comment period that pertain to the environmental consequences discussed in the draft EIS and applicable laws, regulations and policies considered in making the decision regarding this proposal.

Sonny J. O'Neal, Forest Supervisor, Okanogan-Wenatchee National Forests, and Claire Lavendel, Forest Supervisor, Gilfford Pinchot National Forest, are the responsible officials. As the responsible officials, they will document the decision and reasons for the decision in the record of decision. That decision will be subject to Forest Service appeal regulation (36 CFR part 215).

Dated: January 25, 2002.

Sonny J. O'Neal,

Forest Supervisor, Okanogan-Wenatchee National Forests.

[FR Doc. 02–3604 Filed 2–13–02; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Colville Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Colville Resource Advisory Council will meet on Thursday, February 28, 2002 at the Spokane Community College, Colville Campus Dominion Room at 985 S. Elm Street, Colville, Washington. The meeting will begin at 9 a.m. and conclude at 4 p.m.

Agenda items include: review, modify and approve minutes from January meeting; review, modify and approve RAC bylaws; review and evaluate sample project selection processes and choose a process for future use; review and discuss submitted projects and determine needs for further information or presentations; agenda for next meeting scheduled for March 21, 2002; RAC budget & expenses immediate needs for public communication; and Public Forum.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding this meeting to designated federal official, Nora Rasure or Cynthia Reichelt, Public Affairs Officer, Colville National Forest, 765 S. Main, Colville, Washington 99114: (509) 684–7000.

Dated: February 7, 2002.

Nora B. Rasure,

Forest Supervisor.

[FR Doc. 02–3593 Filed 2–13–02; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Olympic Peninsula Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Olympic Peninsula Resource Advisory Committee (RAC) will hold its next meeting on March 6, 2002. The meeting will be held at the Jamestown S'Klallam Tribal Center's conference room, 1033 Old Blyn Highway, Blyn, Washington. The meeting will begin at 9:30 am and end at approximately 3:30 pm. Agenda topics are: Introductions; Approval of minutes of previous meeting; Bylaw update; Update on Title III Projects; Review and select process for applications; Presentation of project proposals; Selection of recommended projects and priorities; Public comments; and Identify next meeting date and location.

All Olympic Peninsula Resource Advisory Committee Meetings are open to the public. Interested citizens are encouraged to attend.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding this meeting to Ken Eldredge, RAC Liaison, USDA, Olympic National Forest Headquarters, 1835 Black Lake Blvd., Olympia, WA 98512–5623, (360) 956–2323 or Dale Hom, Forest Supervisor and Designated Federal Official, at (360) 956–2301.

Dated: February 6, 2002.

Dale Hom,

Forest Supervisor, Olympic National Forest.

[FR Doc. 02–3590 Filed 2–13–02; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Tehama County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Tehama County Resource Advisory Committee (RAC) will hold its second meeting.

DATES: The meeting will be held on March 14, 2002, and will begin at 9:00 a.m. and end at approximately 12:00 p.m.

ADDRESSES: The meeting will be held at the Lincoln Street School, PDC Room, 1135 Lincoln Street, Red Bluff, CA.

FOR FURTHER INFORMATION CONTACT: Bobbin Gaddini, Committee Coordinator, USDA, Mendocino National Forest, Grindstone Ranger District, P.O. Box 164, Elk Creek, CA 95939. (530) 968–5329; e-mail *ggaddini@fs.fed.us.*

SUPPLEMENTARY INFORMATION: Agenda items to be covered include: (1) Introductions of all committee members, alternate members and Forest Service personnel. (2) Consideration of a Vice-Chair. (3) Project Proposals Mendocino, Shasta-Trinity, Lassen. (4) Member Presentations (5) Individual Presentations (6) Project Applications (7) General Discussion (8) Public Comment. The meeting is open to the public. Public input opportunity will be provided and individuals will have the opportunity to address the Committee at that time.

Dated: February 5, 2002.

James F. Giachino,

Designated Federal Officer.

[FR Doc. 02–3591 Filed 2–13–02; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Glenn/Colusa County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Glenn/Colusa County Resource Advisory Committee (RAC) will hold its second meeting.

DATES: The meeting will be held on March 7, 2002, and will begin at 1:30 p.m. until approximately 6 p.m.

ADDRESSES: The meeting will be held at the Mendocino National Forest Supervisor's Office, 825 N. Humboldt Ave., Willows, CA.

FOR FURTHER INFORMATION CONTACT: Bobbin Gaddini, Committee Coordinator, USDA, Mendocino National Forest, Grindstone Ranger District, P.O. Box 164, Elk Creek, CA 95939. (530) 968–5329; e-mail *ggaddini@fs.fed.us.*

SUPPLEMENTARY INFORMATION: Agenda items to be covered include: (1) Select Chairperson, (2) Operating Guidelines. (3) Recommendation and Agreement Process, (4) Forest Service Project Proposals/Opportunities w/Nepa Completed. (5) Glenn County Project Idea (6) Next Agenda and (7) Public Comment. The meeting is open to the public. Public input opportunity will be provided and individuals will have the opportunity to address the Committee at that time.

Dated: February 4, 2002.

James F. Giachino,

Designated Federal Officer.

[FR Doc. 02–3592 Filed 2–13–02; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Central Idaho Resource Advisory Committee Meeting; Salmon-Challis National Forest Butte, Custer, and Lemhi Counties, ID

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting of the Resource Advisory Committee.

SUMMARY: The Central Idaho Resource Advisory Committee will meet at 3:30 p.m., February 22, 2002 at the Challis High School cafeteria, 100 High Street, Challis, Idaho. The 15-member committee will establish procedures for evaluating proposed projects and discuss preliminary project proposals for 2002. The meeting is open to the public and time will be scheduled for public comments.

The Central Idaho Resource Advisory Committee was established by the Secretary of Agriculture under Title II of the Secure Rural Schools and Community Self-Determination Act of 2000 to work collaboratively with the Salmon-Challis National Forest to provide advice and recommendations consistent with the purposes of the Act.

Dated: February 5, 2002.

George Matejko,

Forest Supervisor, Salmon-Challis National Forest, Designated Federal Officer, Central Idaho Resource Advisory Committee.

[FR Doc. 02–3599 Filed 2–13–02; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Winema and Fremont National Forests Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Winema and Fremont Resource Advisory Committee will hold its second meeting on Monday, February 25, 2002. The meeting will be held in the Gearhart Room of the Lakeview Interagency Office, 1301 South G Street, in Lakeview, Oregon. The meeting will begin at 9:30 am and end at approximately 3:30 pm. The agenda will include a final review and approval of bylaws and operating guidelines, consideration of Title II project proposals submitted by the public and other agencies, and final recommendations for funding of fiscal year 2002 projects.

All Winema and Fremont Resource Advisory Committee Meetings are open to the public. There will be a time for public input and comment. Interested citizens are encouraged to attend.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding this meeting to Bill Aney, Designated Federal Official, USDA, Paisley Ranger District, Fremont National Forest, P.O. Box 67, Paisley, OR 97636 (541) 943–4401 or Chuck Graham, Forest Supervisor at (541) 947–2151 or 883–6714.

Dated: February 7, 2002.

Charles Graham,

Forest Supervisor, Winema and Fremont National Forests.

[FR Doc. 02–3603 Filed 2–13–02; 8:45 am]

BILLING CODE 3410–11–M

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Nevada 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 Nevada Advisory Committee to the Commission will convene at 10:00 a.m. and adjourn at 12:00 p.m. on Friday, March 1, 2002, at the Crowne Plaza Hotel, 4255 South Paradise Road, Las Vegas, Nevada 89109. The purpose of the meeting is the orientation of new members and briefing by employment complainants.

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, February 8, 2002.

Ivy L. Davis,

Chief, Regional Programs Coordination Unit.

[FR Doc. 02–3664 Filed 2–13–02; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the West Virginia 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 West Virginia Advisory Committee to the Commission will convene at 11:30 a.m. and adjourn at 3:30 p.m. on March 5, 2002, at the Charleston Job Corps Center, 1000 Kennawa Drive, Charleston, West Virginia 25311. The Committee will hold a planning meeting to discuss its draft report based on three community forums held between 1998 and 2000, coordinate information gathered from newly elected officials, and plan future projects.

Persons desiring additional information, or planning a presentation to the Committee, should contact Chairperson Gregory T. Hinton, 304–367–4244, or Ki-Taek Chun, Director of the Eastern Regional Office, 202–376–7533 (TDD 202–376–8116). Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least ten (10) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, February 8, 2002.

Ivy L. Davis,

Chief, Regional Programs Coordination Unit.

[FR Doc. 02–3665 Filed 2–13–02; 8:45 am]

BILLING CODE 6335–01–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Information Collection; Submission for OMB Review; Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (hereinafter the ''Corporation'') has submitted a public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paper Reduction Act of 1995, Public Law 104–13, (44 U.S.C. Chapter 35). Copies of this ICR, with applicable supporting documentation, may be obtained by calling the Corporation for National and Community Service, Bruce Kellogg, at (202) 606–5000, extension 526. Individuals who use a telecommunications device for the deaf (TTY–TDD) may call (800) 833–3722 between the hours of 9 a.m. and 5 p.m. Eastern Standard Time, Monday through Friday.

Comments should be sent to the Office of Information and Regulatory Affairs, Attn: Ms. Brenda Aguilar, OMB Desk Officer for the Corporation for National and Community Service, Office of Management and Budget, Room 10235, Washington, DC 20503, within 30 days from the date of publication in this **Federal Register**.

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Propose ways to enhance the quality, utility and clarity of the information to be collected; and
- Propose ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

An ICR document has been submitted to OMB for consideration concerning two forms, each a proposed revision to an earlier OMB-approved form. They are:

(1) The *Forbearance Request Form* (OMB #3045–0030), and

(2) the *Interest Accrual Form* (OMB #3045–0053).

These are the documents by which AmeriCorps members first request postponement, during their term of service, of their obligation to make payments on qualified student loans and then access the interest payment benefit that they have earned by successfully completing their service. Both forms are important for AmeriCorps members who have outstanding qualified student loans during their period of national service.

The document was published in the **Federal Register** on November 14, 2001, for a 60-day pre-clearance public comment period. Only one organization, a loan servicing organization, requested a copy of the document. Four of its suggestions concerning the Interest Accrual Form were incorporated into the version now being presented to OMB for consideration. Three other suggestions were not incorporated, mainly due to space considerations and the Corporation's belief that the time allotted for forwarding the form will not cause undue delay.

Each form will be individually discussed below.

A. Forebearance Request Form

Type of Review: Renewal.

Agency: Corporation for National and Community Service.

Title: Forbearance Request Form.

OMB Number: OMB #3045–0030.

Agency Number: None.

Affected Public: AmeriCorps members and the holders of their qualified student loans.

Total Respondents: 6,500 annually.

Frequency: Average of once per year of national service per loan.

Average Time Per Response: Ten minutes for the AmeriCorps member to complete the form.

Estimated Total Burden Hours: 1083 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Description

AmeriCorps members may request a suspension of their obligation to repay most qualified student loans not in default during their service period. The purpose of the forbearance is to accommodate the minimal living allowance they receive while they complete their term of service, although interest continues to accrue during this period.

Currently, AmeriCorps members use an OMB approved form entitled *Forbearance Request for National Service* to obtain certification that they are in an approved national service position. The form also serves as the borrower's official request to the loan companies for forbearance. Since forbearance is granted by the loan holder and not the Corporation, the form requests of the loan holder that a forbearance be approved for the national service. The Corporation's role is to verify that the borrower is an AmeriCorps member and is eligible for

this mandatory forbearance on qualified student loans. An AmeriCorps member completes one part of the form and sends it to the office of the National Service Trust. The Trust provides written verification that the borrower is in an approved national service position, then forwards the form to the loan holder at the address provided by the AmeriCorps member. The loan holder will act upon the request.

This form has been adopted by many of the larger loan holders (*e.g.,* Sallie Mae) and is given to their borrowers with the loan holders' own logos at the top of the form. Indeed, the form was originally developed with the assistance of Sallie Mae and representatives of several student loan associations. Having a separate form for forbearance based on AmeriCorps service clearly distinguishes it from forbearance requests based on one of the other conditions for which a borrower may be eligible (*e.g.,* military service, employment in certain low income areas, student status).

Several other loan holders have chosen to modify their own existing forbearance request forms by including an additional option— ''AmeriCorps service'' or ''national service'' —to the choices already available. The Corporation verifies national service participation using all types of forms presented to it, on a loan holder's unique form as well as the OMB approved form.

The form needs some minor revisions to clarify certain sections and to facilitate processing of the information; for example, to add loans made by a state agency to the list of qualified loans, add a statement of purpose to the member's section, identify the service dates as mandatory, limit the form to a single loan holder each, and add the National Service Trust's toll-free number.

The Corporation seeks to continue using this particular form, albeit in a slightly revised version. This is a voluntary form. It is one way to provide verification to a loan holder that one of its borrowers is eligible for the mandatory forbearance, while at the same time allowing the borrower to request the forbearance from the loan company. The Corporation will continue its policy of verifying AmeriCorps participation on any form the loan holder wishes to use. The current form is due to expire March 31, 2002.

Analysis of Comments Received During the Public Comment Period

One comment was received from a loan servicing organization. It concerned the proposed change to require a separate forbearance request form for each lender. It commented favorably that although the change appeared to increase the burden on the borrower it was likely to have the opposite effect. The loan servicer noted that when all loan holders were listed on one form, as before, some loan holders may not have received the form timely or at all; and some of the borrower's loans may have become delinquent as a consequence.

B. Interest Accrual Form

Type of Review: Renewal.

Agency: Corporation for National and Community Service.

Title: Interest Accrual Form.

OMB Number: OMB #3045–0053.

Agency Number: None.

Affected Public: AmeriCorps members and the holders of their qualified student loans.

Total Respondents: 6,500 annually.

Frequency: Average of once per year of national service per loan

Average Time Per Response: 10 minutes, total (three minutes for the AmeriCorps member to complete the form and seven minutes for the loan holder).

Estimated Total Burden Hours: 1083 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Description

The Corporation pays all or a portion of the interest that accrues during a period of national service for those who successfully complete their service and have had their loans in forbearance during the service. Using the current form, AmeriCorps members complete the top section and indicate their dates of service. Then they mail the form to the loan holder who indicates the total amount of interest that accrued during the service period, or indicates a daily accrual rate. The loan holder also adds the address where the payment should be sent and returns the form to the National Service Trust. When the Corporation receives this information, it is reviewed for accuracy and is either paid or returned to the loan holder or lender for additional information.

The revisions address the most common causes for delays in processing interest payments. The changes modify the title for consistency, reduce the number of days prior to completion of service for submitting the form, more clearly identify the member's address information, identify the service dates as essential, add loans made by a state agency to the list of qualified loans, request loan type information and if more than one loan is cited request loan numbers, clarify the language regarding grace period information, add to the lender's certification a statement that the loans cited are in forbearance, and add a space for the lender's fax number. The current form is due to expire March 31, 2002.

Analysis of Comments Received During the Public Comment Period

One response was received from a loan servicing organization. It suggested a different wording for the lender's certification and for the identification of a grace period, which wording the Corporation agreed was clearer and incorporated into the form. It objected to changing the daily interest rate from a dollar amount to a percentage as a complication. We agreed, and we also accepted a recommendation to restore the list of examples of qualified student loans.

The loan servicer argued that decreasing the number of days prior to the member's completion date for sending in the form from 90 to 30 could delay payment until some time after the completion of service. In fact, payment cannot be made until the member's education award is in place. The purpose of this change is simply to decrease the number of forms that cannot be processed because the education award has not yet been granted. However, because most awards are now processed electronically much faster than before, we do not expect this change to cause any appreciable delay in making interest payments.

Another comment questioned giving the loan type and payoff amount in the space available, if the borrower has multiple eligible loan types. It was also thought a statement of purpose for this information would be useful. We concur but are constrained by space limitations. With the addition of loans made to members by state agencies, verification of qualified loan types becomes more subject to scrutiny, and a statement of the loan type will facilitate processing of the payment request. Similarly, providing the payoff amount, as is routinely done on the Voucher and Payment Request Form, should help avoid the delays caused by awaiting confirmation of that figure.

Dated: February 7, 2002.

Charlene Dunn,

Director, National Service Trust.

[FR Doc. 02–3600 Filed 2–13–02; 8:45 am]

BILLING CODE 6050–$$–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0031]

Federal Acquisition Regulation; Information Collection; Contractor Use of Government Supply Sources

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.

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 contractor use of Government supply sources. The clearance currently expires on April 30, 2002.

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: Submit comments on or before April 15, 2002.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the General Services Administration, FAR Secretariat (MVP), 1800 F Street, NW., Room 4035, Washington, DC 20405. Please cite OMB Control No. 9000–0031, Contractor Use of Government Supply Sources, in all correspondence.

FOR FURTHER INFORMATION CONTACT: Linda Nelson, Acquisition Policy Division, GSA (202) 501–1900.

SUPPLEMENTARY INFORMATION:

A. Purpose

When it is in the best interest of the Government and when supplies and services are required by a Government contract, contracting officers may authorize contractors to use Government supply sources in performing certain contracts.

The information informs the schedule contractor that the ordering contractor is authorized to use this Government supply source and fills the ordering contractor's order under the terms of the Government contract.

B. Annual Reporting Burden

Respondents: 300.
Responses Per Respondent: 7.
Annual Responses: 2,100.
Hours Per Response: .25.
Total Burden Hours: 525.

Obtaining Copies of Proposals:

Requesters may obtain a copy of the information collection document from the General Services Administration, FAR Secretariat (MVP), Room 4035, 1800 F Street, NW., Washington, DC 20405, telephone (202) 501–4775. Please cite OMB Control No. 9000–0031, Contractor Use of Government Supply Sources, in all correspondence.

Dated: February 5, 2002.

Al Matera,

Director, Acquisition Policy Division.

[FR Doc. 02–3594 Filed 2–13–02; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0032]

Federal Acquisition Regulation; Information Collection; Contractor Use of Interagency Motor Pool Vehicles

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 clearance.

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 contractor use of interagency motor pool vehicles. The clearance currently expires on April 30, 2002.

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: Submit comments on or before April 15, 2002.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the General Services Administration, FAR Secretariat (MVP), 1800 F Street, NW, Room 4035, Washington, DC 20405. Please cite OMB Control No. 9000–0032, Contractor Use of Interagency Motor Pool Vehicles, in all correspondence.

FOR FURTHER INFORMATION CONTACT: Linda Klein, Acquisition Policy Division, GSA (202) 501–3775.

SUPPLEMENTARY INFORMATION:

A. Purpose

If it is in the best interest of the Government, the contracting officer may authorize cost-reimbursement contractors to obtain, for official purposes only, interagency motor pool vehicles and related services. Contractors' requests for vehicles must obtain two copies of the agency authorization, the number of vehicles and related services required and period of use, a list of employees who are authorized to request the vehicles, a listing of equipment authorized to be serviced, and billing instructions and address.

A written statement that the contractor will assume, without the right of reimbursement from the Government, the cost or expense of any use of the motor pool vehicles and services not related to the performance of the contract is necessary before the contracting officer may authorize cost-reimbursement contractors to obtain interagency motor pool vehicles and related services.

The information is used by the Government to determine that it is in

the Government's best interest to authorize a cost-reimbursement contractor to obtain, for official purposes only, interagency motor pool vehicles and related services, and to provide those vehicles.

B. Annual Reporting Burden

Respondents: 70.
Responses Per Respondent: 2.
Annual Responses: 140.
Hours Per Response: .5.
Total Burden Hours: 70.

Obtaining Copies of Proposals

Requesters may obtain a copy of the information collection document from the General Services Administration, FAR Secretariat (MVP), Room 4035, 1800 F Street, NW, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0032, Contractor Use of Interagency Motor Pool Vehicles, in all correspondence.

Dated: February 5, 2002.

Al Matera,

Director, Acquisition Policy Division.

[FR Doc. 02–3595 Filed 2–13–02; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE
GENERAL SERVICES ADMINISTRATION
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0035]

Federal Acquisition Regulation; Submission for OMB Review; Claims and Appeals

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.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation

(FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning claims and appeals. A request for public comments was published at 66 FR 59782, November 30, 2001. No comments were received.

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: Submit comments on or before March 18, 2002.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (MVP), 1800 F Street,NW., Room 4035, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Rhonda Cundiff, Acquisition Policy Division, GSA (202) 501–0044.

SUPPLEMENTARY INFORMATION:

A. Purpose

It is the Government's policy to try to resolve all contractual issues by mutual agreement at the contracting officer's level without litigation. Contractor's claims must be submitted in writing to the contracting officer for a decision.

Claims exceeding $100,000 must be accompanied by a certification that (1) the claim is made in good faith; (2) supporting data are accurate and complete; and (3) the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable. Contractors may appeal the contracting officer's decision by submitting written appeals to the appropriate officials.

B. Annual Reporting Burden

Respondents: 4,500.
Responses Per Respondent: 3.
Annual Responses: 13,500.
Hours Per Response: 1.
Total Burden Hours: 13,500.

Obtaining Copies of Proposals: Requesters may obtain a copy of the proposal from the General Services Administration, FAR Secretariat (MVP), Room 4035, 1800 F Street, NW., Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0035, Claims and Appeals, in all correspondence.

Dated: February 5, 2002.

Al Matera,

Director, Acquisition Policy Division.

[FR Doc. 02–3596 Filed 2–13–02; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0065]

Federal Acquisition Regulation; Submission for OMB Review; Overtime

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 (9000–0065).

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning overtime. A request for public comments was published at 66 FR 58455, November 21, 2001. No comments were received.

DATES: Submit comments on or before March 18, 2002.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (MVP), 1800 F Streets, NW., Room 4035, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Linda Nelson, Acquisition Policy Division, GSA (202) 501–1900.

SUPPLEMENTARY INFORMATION:

A. Purpose

Federal solicitations normally do not specify delivery schedules that will require overtime at the Government's expense. However, when overtime is required under a contract and it exceeds the dollar ceiling established during negotiations, the contractor must request approval from the contracting officer for overtime. With the request, the contractor must provide information regarding the need for overtime.

B. Annual Reporting Burden

Respondents: 1,270.
Responses Per Respondent: 1.
Total Responses: 1,270.
Hours Per Response: .25.

Total Burden Hours: 318.

Obtaining Copies of Proposals: Requester may obtain a copy of the proposal from the General Services Administration, FAR Secretariat (MVP), Room 4035, 1800 F Street, NW., Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0065, Overtime, in all correspondence.

Dated: February 5, 2002.

Al Matera,

Director, Acquisition Policy Division.

[FR Doc. 02–3597 Filed 2–13–02; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0004]

Federal Acquisition Regulation; Submission for OMB Review; Architect-Engineer and Related Services Questionnaire (SF 254)

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 (9000–0004).

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning Architect-Engineer and Related Services Questionnaire (SF 254). A request for public comments was published at 66 FR 58454, November 21, 2001. No comments were received.

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: Submit comments on or before March 18, 2002.

ADDRESSES: Submit comments including suggestions for reducing this burden to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (MVP), 1800 F Street, NW, Room 4035, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Cecelia Davis, Acquisition Policy Division, GSA (202) 219–0202.

SUPPLEMENTARY INFORMATION:

A. Purpose

Standard Form 254 is used by all Executive agencies to obtain uniform information about a firm's experience in architect-engineering (A–E) projects. The form is submitted annually as required by 40 U.S.C. 541–544 by firms wishing to be considered for Government A–E contracts. The information obtained on this form is used to determine if a firm should be solicited for A–E projects.

B. Annual Reporting Burden

Respondents: 5,000.
Responses Per Respondent: 7.
Total Responses: 35,000.
Hours Per Response: 1.
Total Burden Hours: 35,000.

Obtaining Copies of Proposals

Requester may obtain a copy of the proposal from the General Services Administration, FAR Secretariat (MVP), Room 4035, 1800 F Street, NW, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0004, Architect-Engineer and Related Services Questionnaire (SF 254), in all correspondence.

Dated: February 5, 2002.

Al Matera,

Director, Acquisition Policy Division.

[FR Doc. 02–3598 Filed 2–13–02; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Correction notice.

SUMMARY: On February 7, 2002, an emergency notice inviting comment from the public was published for ''Application for New Grants—State Program Improvement Grants for Children with Disabilities'' in the **Federal Register** (Volume 67, Number 26) dated February 7, 2002. In the Preamble, under **DATES**, the second sentence should read, ''Approval by the Office of Management and Budget (OMB) has been requested by February 11, 2002''. The Leader, Regulatory Information Management, Office of the Chief Information Officer, hereby issues a correction notice as required by the Paperwork Reduction Act of 1995.

Dated: February 8, 2002.

John D. Tressler,

Leader, Regulatory Information Management Group, Office of the Chief Information Officer.

[FR Doc. 02–3589 Filed 2–13–02; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER02–565–000]

Duke Energy Enterprise, L.L.C.; Notice of Issuance of Order

February 8, 2002.

Duke Energy Enterprise, L.L.C. (Duke Enterprise) submitted for filing a tariff under which Duke Enterprise will engage in the sale of energy, capacity, and/or ancillary service at market-based rates. Duke Enterprise also requested waiver of various Commission regulations. In particular, Duke Enterprise requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by Duke Enterprise.

On January 30, 2002, pursuant to delegated authority, the Director, Office of Markets, Tariffs and Rates-East, granted requests for blanket approval under part 34, subject to the following:

Acceptance of Duke Enterprise's market-based rate tariff is subject to any tariff condition adopted by the Commission in Docket No. EL01–118–000.

Any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Duke Enterprise 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 to be heard in opposition within this period, Duke Enterprise is authorized to issue securities and assume 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 Duke Enterprise, 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 Enterprise'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 March 1, 2002.

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). Comments, protests, and interventions 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.

Magalie R. Salas,

Secretary.

[FR Doc. 02–3644 Filed 2–13–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP01–384–000 and CP01–387–000]

Islander East Pipeline Company, L.L.C., Algonquin Gas Transmission Company; Notice of Site Visit

February 8, 2002.

On February 20, 2002, the staff of the Office of Energy Projects (OEP) will conduct a pre-certification site visit of Islander East Pipeline Company's Islander East Pipeline Project in New Haven County, Connecticut. Selected alternatives in Connecticut will be inspected by automobile and on foot, as appropriate. The site visit will start at 1:30 P.M. at the lobby of the Islander East Pipeline Company's Office at 454 East Main Street, Route 1, Branford, Connecticut. Representatives of Islander East will accompany the OEP staff.

All interested parties may attend. Those planning to attend must provide their own transportation. For additional information, contact the Commission's Office of External Affairs at (202) 208–1088.

Magalie R. Salas,

Secretary.

[FR Doc. 02–3640 Filed 2–13–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP98–53–024]

Kinder Morgan Interstate Gas Transmission L.L.C., et al.; Notice of Offer of Settlement

February 8, 2002.

Take notice that on January 24, 2002, Kinder Morgan Interstate Gas Transmission L.L.C. (KMIGT), on behalf of itself and Signatory Parties,[1] filed an Offer of Settlement (Settlement) under Rule 602 of the Commission's Rules of Practice and Procedure in the captioned docket. The Settlement is designed to: (1) Extinguish the liability of all working interest owners whose aggregate total liability (principle and interest) as of September 30, 2001 is $80,000 or less; (2) establish the liabilities of the remaining 30 working interest owners, and then reduce such liabilities by the greater of $80,000 or 25%; and (3) extinguish the liability of royalty owners to working interest owners participating in the settlement for refunds of *ad valorem* taxes, due to the Commission's implementation of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Public Service Company of Colorado*.[2] A copy of the Settlement is on file with the Commission and is available for public inspection in the Public Reference Room. The Settlement may be viewed on the web at *http://www.ferc.fed.us/online/rims.htm* (call 202–208–2222 for assistance).

The Settlement is structured as an agreement among all working interest owners, regardless of their status as a Signatory Party. The Settlement provides the opportunity for every working interest owner to affirmatively opt-out of the settlement, with KMIGT and other parties, including the Commission, retaining the right to pursue any claims against those working interest owners which elect not to accept the terms of the settlement, or to defend against any claims by such working interest owners with respect to Kansas ad valorem taxes.

In accordance with section 385.602(f), initial comments are due by February 13, 2002, and any reply comments are due by February 25, 2002.

Magalie R. Salas,

Secretary.

[FR Doc. 02–3646 Filed 2–13–02; 8:45 am]

BILLING CODE 6717–01–P

[1] Other than KMIGT, Signatory Parties include Amoco Production Company, Anadarko Petroleum Corporation, George A. Angle d/b/a Frontier Oil Company, Atlantic Richfield Company, Benson Mineral Group, Inc., Beren Corporation and associated working interests, Chevron U.S.A. Inc., Dominion Oklahoma Texas Exploration and Production, Inc., Eastman Dillon Oil & Gas Associates, Ensign Operating Company, Finney-Kearney County Gas Venture, Russell Freeman, Graham-Michaelis Corporation, Griggs Oil Inc., Hallador Petroleum Company, Helmerich & Payne Inc., Hummon Corporation, IBEX Partnership, Ltd., IMC Global, Inc., Kaiser-Francis Oil Company, The Kansas Corporation Commission, Kansas Natural Gas, Inc., Kansas Petroleum, Inc., Kinder Morgan, Inc., D. R. Lauck Oil Company, John P. Lockridge, John P. Lockridge Operator, Inc. and related working interests, Midwest Energy, Inc., Mobil Oil Corporation, Mountain Petroleum Corporation, Northwestern Public Service, a Division of NorthWestern Corporation, OXY USA Inc., Pickrell Drilling Company, Inc., Pioneer Natural Resources USA, Inc., Public Service Company of Colorado, Reliant Energy Minnegasco, a Division of Reliant Energy Resources Corporation, RME Petroleum Corporation, Wanda Smith, Texas Exploration and Production Inc., UtiliCorp United, Inc., Westgate Greenland, L.P., and Williams Production RMT Company.

[2] *Public Service Co. of Colorado, et al.*, 80 FERC¶ 61,264 (1997), *reh'g denied*, 82 FERC ¶ 61,058 (1998). Appeal pending. *Anadarko Petroleum Corporation* v. *FERC*, Case No. 98–1227 et al.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP02–66–000]

Louisville Gas and Electric Company; Notice of Application

February 8, 2002.

Take notice that on January 14, 2002, Louisville Gas and Electric Company (Louisville) filed an application pursuant to section 7 of the Natural Gas Act (NGA) and 18 CFR 284.224 for a limited-jurisdiction blanket certificate of public convenience and necessity authorizing Louisville to offer open access firm and interruptible storage services in interstate commerce at market-based rates. Louisville includes with its application a Market Power Analysis which, it maintains, demonstrates that Louisville does not have market power in the relevant market for its proposed services. Louisville also submits with its filing an operational statement. Louisville states that it will offer the storage service by displacement through the two interstate pipelines serving Louisville—Texas Gas

Transmission Corporation and Tennessee Gas Pipeline Company.

Louisville states that questions concerning this filing may be directed to James F. Bowe, Jr., Dewey Ballantine LLP, at (202) 429–1444 (fax (202) 429–1579, email jbowe@deweyballantine.com).

Any person desiring to be heard or to protest this 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 sections 385.211 and 384.214 of the Commission's rules of practices and procedures. All such motions or protests must be filed not later than March 8, 2002. 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 this filing are on file with the Commission and are available for public inspection in the Public Reference Room. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions 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 under the ''e-Filing'' link.

Take further notice that, pursuant to the authority contained in a subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the NGA and the Commission's rules of practice and procedures, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein ir if the Commission on its own review of the matter finds that a grant of the subject authorization is required by the public convenience and necessity. If a motion for leave to intervene is timely filed or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Louisville to appear or to be represented at the hearing.

Magalie R. Salas,

Secretary.

[FR Doc. 02–3641 Filed 2–13–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER02–537–000]

Shady Hills Power Company L.L.C.; Notice of Issuance of Order

February 8, 2002.

Shady Hills Power Company L.L.C (Shady Hills) submitted for filing a tariff under which Shady Hills will engage in the sale of energy, capacity, and /or ancillary service at market-based rates. Shady Hills also requested waiver of various Commission regulations. In particular, Shady Hills requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by Shady Hills.

On January 30, 2002, pursuant to delegated authority, the Director, Office of Markets, Tariffs and Rates-East, granted requests for blanket approval under Part 34, subject to the following:

Acceptance of Shady Hill's market-based rate tariff is subject to any tariff condition adopted by the Commission in Docket No. EL01–118–000.

Any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Shady Hills 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 to be heard in opposition within this period, Shady Hills is authorized to issue securities and assume 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 Shady Hills, 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 Shady Hills' 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 March 1, 2002.

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). Comments, protests, and interventions 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.

Magalie R. Salas,

Secretary.

[FR Doc. 02–3643 Filed 2–13–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97–71–030]

Transcontinental Gas Pipe Line Corporation; Notice of ICTS Revenue Sharing Refund Report

February 7, 2002.

Take notice that on January 31, 2002, Transcontinental Gas Pipe Line Corporation (Transco) tendered for filing a refund report showing that on January 18, 2002, Transco submitted ICTS revenue sharing refunds (total principal and interest amount of $6,890.98) to all affected shippers in Docket Nos. RP97–71 and RP97–312.

Transco states that Section 7 of Transco's Rate Schedule ICTS provides that, during the effectiveness of the Docket No. RP97–71 rate period, which began on May 1, 1997, Transco shall refund annually 75% of the fixed cost component of all revenues collected associated with Rate Schedule ICTS interconnect transfer service charges to maximum rate firm transportation and maximum rate interruptible transportation Buyers (collectively, Eligible Shippers). Transco states that it has calculated that the refund amount for the annual period from May 1, 1999 through April 30, 2000 equals $6,890.98.

Pursuant to Section 7 of Rate Schedule ICTS, Transco states that it has refunded that amount to Eligible Shippers based on each Eligible Shipper's actual fixed cost contribution as a percentage of the total fixed cost contribution of all such Eligible Shippers (exclusive of the fixed cost contribution pertaining to service purchased by Seller from third parties).

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and

Regulations. All such protests must be filed on or before February 14, 2002. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions 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 under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. 02–3638 Filed 2–13–02; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP02–157–000]

Transwestern Pipeline Company; Notice of Proposed Changes in FERC Gas Tariff

February 8, 2002.

Take notice that on February 1, 2002, Transwestern Pipeline Company (Transwestern), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets, proposed to be effective March 4, 2002:

7th Revised Sheet No. 14
4th Revised Sheet No. 15
4th Revised Sheet No. 16
8th Revised Sheet No. 24
10th Revised Sheet No. 25
7th Revised Sheet No. 25A
11th Revised Sheet No. 33
6th Revised Sheet No. 34
6th Revised Sheet No. 35
1st Revised Sheet No. 37C
19th Revised Sheet No. 48
7th Revised Sheet No. 51B
8th Revised Sheet No. 72
3rd Revised Sheet No. 72A
4th Revised Sheet No. 72B
4th Revised Sheet No. 95B.01
6th Revised Sheet No. 95D

Transwestern states that the above tariff sheets are being filed to provide for electronic contracting for service under Transwestern's Rate Schedules FTS–1, FTS–2, LFT, EFBH, FTS–3, ITS–1, and PNR, and Operator Balancing Agreements to be implemented on the Transwestern system during March, 2002. Transwestern states that it currently has electronic contracting for capacity release available on its system. Concurrent with these tariff changes Transwestern is implementing a new contracting system that will, among other things, enable Transwestern and its shippers to comply with GISB timelines and the Commission's policies on contracting. Transwestern anticipates that this electronic contracting capability will replace current facsimile and mail methods for exchange of contractual documents.

Transwestern states that it has begun working with its shippers to transition to the new system and will continue to accept written requests, contracts and amendments during the transition period. The proposed tariff modifications permit shippers to request service and execute service agreements electronically on Transwestern's Web site located at www.tw.enron.com. The instant filing also includes minor corrections, as well as changes to update or clarify certain tariff provisions in conformance with the electronic processes provided for herein.

Transwestern further states that copies of the filing have been mailed to each of its customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions 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 under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. 02–3647 Filed 2–13–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER02–476–000]

Troup Electric Membership Corporation; Notice of Issuance of Order

February 8, 2002.

Troup Electric Membership Corporation (Troup EMC) submitted for filing a tariff under which Troup EMC will engage in the sale of energy and capacity at market-based rates. Troup EMC also requested waiver of various Commission regulations. In particular, Troup EMC requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by Troup EMC.

On January 30, 2002, pursuant to delegated authority, the Director, Office of Markets, Tariffs and Rates-East, granted requests for blanket approval under Part 34, subject to the following:

Acceptance of Troup EMC's market-based rate tariff is subject to any tariff condition adopted by the Commission in Docket No. EL01–118–000.

Any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Troup EMC 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 to be heard in opposition within this period, Troup EMC is authorized to issue securities and assume 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 Troup EMC, 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 Troup EMC'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 March 1, 2002.

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). Comments, protests, and interventions 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.

Magalie R. Salas,

Secretary.

[FR Doc. 02–3642 Filed 2–13–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER99–705–001, et al.]

Golden Spread Electric Cooperative, Inc., et al.; Electric Rate and Corporate Regulation Filings

February 7, 2002.

Take notice that the following filings have been made with the Commission. Any comments should be submitted in accordance with Standard Paragraph E at the end of this notice.

1. Golden Spread Electric Cooperative, Inc.

[Docket No. ER99–705–001]

Take notice that on January 31, 2002 Golden Spread Electric Cooperative, Inc. (Golden Spread) tendered for filing with the Federal Energy Regulatory Commission (Commission) its triennial updated market analysis (Triennial Analysis) in accordance with the Commission's January 14, 1999 Order in Docket No. ER99–705–000, which authorized Golden Spread to sell power at market-based rates. Golden Spread also has filed a motion for leave to file its Triennial Analysis out-of-time.

Comment Date: February 21, 2002.

2. Puget Sound Energy, Inc.

[Docket No. ER99–845–003]

Take notice that on January 29, 2002, Puget Sound Energy, Inc. (Puget) filed with the Federal Energy Regulatory Commission its three-year updated market analysis. Puget is an investor-owned public utility established and organized under the laws of the State of Washington, with its principal offices located in Bellevue, Washington. Puget engages in, among other things, generating, transmitting, and marketing electric power.

Comment Date: February 19, 2002.

3. American Electric Power Service Corporation

[Docket No. ER01–2215–001]

Take notice that on February 1, 2002, the American Electric Power Service Corporation (AEPSC) tendered for filing an executed amended Interconnection and Operation Agreement between Indiana Michigan Power Company and Duke Energy Vigo, LLC. The agreement is pursuant to the AEP Companies' Open Access Transmission Service Tariff (OATT) that has been designated as the Operating Companies of the American Electric Power System FERC Electric Tariff Second Revised Volume No. 6, effective June 15, 2000.

AEP requests an effective date of August 2, 2001. A copy of the filing was served upon the Indiana Utility Regulatory Commission and the Michigan Public Service Commission.

Comment Date: February 22, 2002.

4. GWF, LLC

[Docket Nos. ER02–42–002]

Take notice that on January 29, 2002, GWF Energy LLC filed a refund report in compliance with the Commission's Order published at 97 FERC ¶ 61,297 (December 19, 2001) related to revenues collected prior to the Effective Date of the long-term power sales agreement between GWF Energy LLC and the California Department of Water Resources.

Comment Date: February 19, 2002.

5. Split Rock Energy LLC

[Docket No. ER02–349–001]

Take notice that on January 31, 2002, Split Rock Energy LLC submitted revised Pricing Methodology—Energy Transfer Pricing and Capacity Cost-Sharing Principles for Split Rock Energy LLC.

Comment Date: February 21, 2002.

6. Southwestern Electric Power Company

[Docket No. ER02–381–001]

Take notice that on January 31, 2002 Southwestern Electric Power Company (SWEPCO) submitted for filing in compliance with the requirements of the Commission's January 16, 2002 ''Order Accepting, as Modified, Restated Agreement'' in Docket No. ER02–381–000 revisions to the Restated and Amended Power Supply Agreement between SWEPCO and Northeast Texas Electric Cooperatives, Inc.

SWEPCO states that a copy of this filing has been served on each person designated on the official service list in Docket No. ER02–381–000 and the Public Utility Commission of Texas.

Comment Date: February 21, 2002.

7. Midwest Independent Transmission System Operator, Inc.

[Docket No. ER02–484–001]

Take notice that on January 31, 2002, the Midwest Independent Transmission System Operator, Inc., (Midwest ISO) and the Midwest ISO Transmission Owners jointly submitted for filing a substitute page of the Midwest ISO Agreement regarding the implementation of the revenue distribution for revenues from the Regional Through and Out Rate surcharge. The substitute page states the percentages for revenue distribution without rounding to the next full percentage point.

The Midwest ISO seeks waiver of the Commission's regulations, 18 CFR 385.2010 (2001), with respect to service on all parties on the official service list in this proceeding. The Midwest ISO has electronically served a copy of this filing, with attachments, upon all Midwest ISO Members, Member representatives of Transmission Owners and Non-Transmission Owners, the Midwest ISO Advisory Committee participants, Policy Subcommittee participants, as well as all state commissions within the region. In addition, the filings has been electronically posted on the Midwest ISO's website at *www.midwestiso.org* under the heading ''Filings to FERC'' for other interested parties in this matter. The Midwest ISO will provide hard copies to any interested parties upon request.

Comment Date: February 21, 2002.

8. The Dayton Power and Light Company

[Docket No. ER02–504–001]

Take notice that on February 4, 2002, The Dayton Power and Light Company (Dayton) submitted to the Federal Energy Regulatory Commission (Commission) service agreements establishing The Dayton Power & Light Company (Energy Services) as customers under the terms of Dayton's Open Access Transmission Tariff.

Dayton requests an effective date of one day subsequent to this filing for the service agreements. Accordingly, Dayton requests waiver of the Commission's notice requirements. Copies of this filing were served upon Energy Services and the Public Utilities Commission of Ohio.

Comment Date: February 25, 2002.

9. California Independent System Operator Corporation

[Docket No. ER02–599–001]

Take notice that on January 30, 2002, the California Independent System

Operator Corporation (ISO), submitted a revised informational filing as to its transmission Access Charge rates. The ISO states that the revised filing was necessary because Pacific Gas and Electric Company and San Diego Gas and Electric Company submitted revised data to the Commission which affects the Access Charge formula rates. The ISO has requested that the revised rates be effective as of January 1, 2002.

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 with effective Scheduling Coordinator Agreements under the ISO Tariff, as well as the parties listed on the Commission's service list.

Comment Date: February 20, 2002.

10. Consolidated Edison Company of New York, Inc.

[Docket No. ER02–729–001]

Take notice that on January 29, 2002, Consolidated Edison Company of New York, Inc. (Con Edison) tendered for filing an amendment to its filing of a Supplement to its Rate Schedule FERC 117, an agreement to provide interconnection and transmission service to the Long Island Power Authority (LIPA).

Con Edison states that a copy of this filing has been served by mail upon LIPA.

Comment Date: February 19, 2002.

11. Wolverine Power Supply Cooperative, Inc.

[Docket No. ER02–791–001]

Take notice that on January 29, 2002, Wolverine Power Supply Cooperative, Inc., amended its January 17, 2002 filing of four Amended and Consolidated Wholesale Power Contracts (Contract) between Wolverine Power Supply Cooperative, Inc. (Wolverine) and Cherryland Electric Cooperative (Cherryland), HomeWorks Tri-County Electric Cooperative (HomeWorks), Great Lakes Energy Cooperative (Great Lakes), Presque Isle Electric and Gas Co-op, Inc. (Presque Isle) by submitting attachments that were inadvertently excluded from the initial Contract filing. Wolverine requests an effective date of March 15, 2002 for these Contracts.

Wolverine states that a copy of this filing has been served upon its member cooperatives: Cherryland Electric Cooperative, Great Lakes Energy, Presque Isle Electric & Gas Cooperative, HomeWorks Tri-County Electric Cooperative, Wolverine Power Marketing Cooperative, and the Michigan Public Service Commission.

Comment Date: February 19, 2002.

12. Entergy Services, Inc.

[Docket No. ER02–819–001]

Take notice that on January 31, 2002, Entergy Services, Inc. (Entergy Services), on behalf of Entergy Arkansas, Inc (Entergy Arkansas), tendered for filing a substitute page to the First Revised Long-Term Market Rate Sales Agreement between Entergy Arkansas and City of Benton, Arkansas for the sale of power under Entergy Services' Rate Schedule SP.

Comment Date: February 21, 2002.

13. Otter Tail Power Company

[Docket No. ER02–912–000]

Take notice that on January 31, 2002 and as amended on February 4, 2002, Otter Tail Power Company submitted corrections to its proposal to implement a Control Area Services and Operations Tariff and terminate its Open Access Transmission Tariff in order to accommodate the start-up of Midwest Independent Transmission System Operator, Inc. The corrections concern the table of contents to the Control Area Services and Operations Tariff, Attachments D–1 through D–4 of the Control Area Services and Operations Tariff, the service list, and the revised tariff sheets regarding the termination of the Open Access Transmission Tariff.

Comment Date: February 25, 2002.

14. California Independent System Operator Corporation

[Docket No. ER02–922–000]

Take notice that on January 31, 2002, the California Independent System Operator Corporation (ISO) submitted for filing Amendment No. 42 to the ISO Tariff and on February 1, 2002 submitted an errata concerning Amendment No. 42. Amendment No. 42 would modify the Tariff to provide for the following: new provisions to facilitate participation in the ISO markets by eligible intermittent resources (e.g., wind); changes in the allocation for settlement Charge Type 487; Changes in the management of Intra-zonal Congestion; and Changes in the calculation of the Target Price for incremental and decremental Imbalance Energy bids. The ISO requests that each of these modifications be made effective April 1, 2002.

The ISO has served copies of this filing upon the Public Utilities Commission of the State of California, the California Energy Commission, the California Electricity Oversight Board, and on all parties with effective Scheduling Coordinator Service Agreements under the ISO Tariff. In addition, the ISO is posting this filing on the ISO's Home Page.

Comment Date: February 21, 2002.

15. Western Massachusetts Electric Company

[Docket No. ER02–959–000]

Take notice that on February 4, 2002, Northeast Utilities Service Company (NUSCO), on behalf of its affiliate, Western Massachusetts Electric Company (WMECO), filed with the Federal Energy Regulatory Commission (Commission) an executed Supplement No. 1 to Interconnection and Operation Agreement (Supplement) dated December 10, 2001, between WMECO and Consolidated Edison Energy, Inc. (CEE) that establishes the terms and conditions under which certain modifications will be made to the existing interconnection facilities between WMECO transmission and distribution system and CEEI's West Springfield Station, located in West Springfield, Massachusetts. The Supplement relates to WMECO's Rate Schedule FERC No. 432.

NUSCO states that a copy of this filing has been mailed to CEEI, and that CEEI consents to and supports its filing. NUSCO and CEEI request expedited acceptance of the Supplement, and further request that the Supplement be permitted to become effective on December 10, 2001, or as soon thereafter as the Commission permits.

Comment Date: February 25, 2002.

16. Progress Energy on Behalf of Carolina Power & Light Company

[Docket No. ER02–960–000]

Take notice that on February 4, 2002, Carolina Power & Light Company (CP&L) tendered for filing a Service Agreement for Firm Point-to-Point Transmission Service with Central Power & Lime, Inc. Service to this Eligible Customer will be in accordance with the terms and conditions of the Open Access Transmission Tariff filed on behalf of CP&L.

CP&L is requesting an effective date of February 1, 2002 for this Service Agreement. A copy of the filing was served upon the North Carolina Utilities Commission, the South Carolina Public Service Commission and the Florida Public Service Commission.

Comment Date: February 25, 2002.

17. California Independent System Operator Corporation

[Docket No. ER02–961–000]

Take notice that on February 4, 2002, the California Independent System Operator Corporation (ISO) submitted for Commission filing and acceptance

an amendment (Amendment No. 2) to the Utility Distribution Company Operating Agreement (UDC Operating Agreement) between the ISO and the City of Pasadena, California, as well as the revised UDC Operating Agreement incorporating the terms of Amendment No. 2 to the UDC Operating Agreement. The ISO requests that the filing be made effective as of January 9, 2002. The ISO requests privileged treatment, pursuant to 18 CFR 388.112, with regard to portions of the filing.

The ISO has served copies of this filing upon the City of Pasadena, California, the Public Utilities Commission of the State of California, and all parties in Docket Nos. ER99–3619 and ER01–967.

Comment Date: February 25, 2002.

18. Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.

[Docket No. ER02–962–000]

Take notice that on February 4, 2002, Montana-Dakota Utilities Co. a Division of MDU Resources Group, Inc. filed a proposal to cancel parts of its Open Access Transmission Tariff and submitted an executed service agreement with the Midwest ISO for generation related ancillary services. Such cancellation is proposed in order to accommodate the start-up of Midwest Independent Transmission System Operator, Inc. Open Access Transmission Tariff administration.

Comment Date: February 25, 2002.

19. Kansas Gas and Electric Company

[Docket No. ES02–22–000]

Take notice that on January 30, 2002, Kansas Gas and Electric Company submitted an application pursuant to section 204 of the Federal Power Act seeking authorization to (1) issue not more than $1.0 billion in short-term or medium-term securities, and (2) pledge first mortgage bonds in an aggregate principal amount not to exceed $1.0 billion to secure such short-term and medium-term indebtedness.

Comment Date: February 28, 2002.

20. Western Resources, Inc.

[Docket No. ES02–23–000]

Take notice that on January 30, 2002, Western Resources, Inc. (Western) submitted an application pursuant to section 204 of the Federal Power Act seeking authorization to (1) issue not more than $1.5 billion in short-term or medium-term securities, and (2) pledge first mortgage bonds in an aggregate principal amount not to exceed $1.5 billion to secure such short-term and medium-term indebtedness.

Western also requests a waiver of the Commission's competitive bidding and negotiated placement requirements at 18 CFR 34.2.

Comment Date: February 28, 2002.

Standard Paragraph

E. Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions 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 under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. 02–3639 Filed 2–13–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RT02–2–000, Docket No. RT01–67–000, Docket No. RT01–74–000, Docket No. RT01–75–000, Docket No. RT01–77–000, Docket No. RT01–100–000, Docket No. RT01–1–000, and Docket No. RM98–1–002, (Not Consolidated)]

State-Federal Regional RTO Panels, GridFlorida LLC, et al., GridSouth Transco L.L.C. Entergy Services, Inc., et al., Southern Company Services, Inc., Regional Transmission Organizations RTO Informational Filings, et al., Regulations Governing Off-the-Record Communications; Notice of State-Federal Southeast Regional Panel Discussion

February 8, 2002.

Take notice that on February 15, 2002, a State-Federal Southeast Regional Panel discussion will be held, pursuant to the Commission's Order issued November 9, 2001, in Docket No. RT02–2–000, et al. A transcript of the panel discussion will be placed in the above listed dockets.

Magalie R. Salas,

Secretary.

[FR Doc. 02–3648 Filed 2–13–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Regulations Governing Off-the-Record Communications; Public Notice

February 8, 2002.

This constitutes notice, in accordance with 18 CFR 385.2201(h), of the receipt of exempt and prohibited off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive an exempt or a prohibited off-the-record communication relevant to the merits of a contested on-the-record proceeding, to deliver a copy of the communication, if written, or a summary of the substance of any oral communication, to the Secretary.

Prohibited communications will be included in a public, non-decisional file associated with, but not part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such requests only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication should serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications will be included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of exempt and prohibited off-the-record communications received in the Office of the Secretary within the preceding 14 days. Copies of this filing are on file with the Commission and are available for public inspection. The documents may be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance).

Take note that this notice will now be issued by the Commission on a weekly rather than bi-weekly basis.

EXEMPT

Docket No.	Date filed	Presenter
1. CP98–150–000	01–30–02	Henry J. Kaufmann.
2. CP01–361–000	02–07–02	Alynda Foreman.
3. Project No. 372–008	02–07–02	Nan Allen.
4. Project Nos. 1975, 2061 and 2777	02–07–02	Susan Giannetino.
5. Project No. 719–007	02–07–02	Reid Baron.

Magalie R. Salas,

Secretary.

[FR Doc. 02–3645 Filed 2–13–02; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7144–9]

Meeting of the Ozone Transport Commission for the Northeast United States

AGENCY: Environmental Protection Agency.

ACTION: Notice of meeting.

SUMMARY: The United States Environmental Protection Agency is announcing the 2002 Winter Meeting of the Ozone Transport Commission (OTC).

This meeting is for the OTC to deal with appropriate matters within the Ozone Transport Region in the Northeast and Mid-Atlantic States, as provided for under the Clean Air Act Amendments of 1990. This meeting is not subject to the provisions of the Federal Advisory Committee Act, Pub. L. 92–463, as amended.

DATES: The meeting will be held on February 26, 2002 starting at 9:00 a.m. (EST).

ADDRESSES: Pier 5 Hotel, 711 Eastern Avenue, Baltimore, Maryland 21202; (410) 539–2000.

FOR FURTHER INFORMATION CONTACT: Judith M. Katz, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, PA 19103; (215) 814–2100.

For Documents and Press Inquiries Contact: Ozone Transport Commission, 444 North Capitol Street NW, Suite 638, Washington, DC 20001; (202) 508–3840; e-mail: *ozone@sso.org;* Web site: *http://www.sso.org/otc.*

SUPPLEMENTARY INFORMATION: The Clean Air Act Amendments of 1990 contain at Section 184 provisions for the ''Control of Interstate Ozone Air Pollution.'' Section 184(a) establishes an ''Ozone Transport Region'' (OTR) comprised of the States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, parts of Virginia and the District of Columbia.

The Assistant Administrator for Air and Radiation of the Environmental Protection Agency convened the first meeting of the commission in New York City on May 7, 1991. The purpose of the Ozone Transport Commission is to deal with ground level ozone formation, transport, and control within the OTR.

The purpose of this notice is to announce that this Commission will meet on February 26, 2002. The meeting will be held at the address noted earlier in this notice.

Section 176A(b)(2) of the Clean Air Act Amendments of 1990 specifies that the meetings of the Ozone Transport Commission are not subject to the provisions of the Federal Advisory Committee Act. This meeting will be open to the public as space permits.

Type of Meeting: Open.

Agenda: Copies of the final agenda will be available from the OTC office (202) 508–3840 (by e-mail: *ozone@sso.org* or via our Web site at http://www.sso.org/otc) on Tuesday, February 19, 2002. The purpose of this meeting is to review air quality needs within the Northeast and Mid-Atlantic States, including reduction of motor vehicle and stationary source air pollution. The OTC is also expected to address issues related to the transport of ozone into its region, and to discuss potential regional emission control measures.

Dated: February 6, 2002.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. 02–3658 Filed 2–13–02; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7144–8]

EPA Science Advisory Board; Notification of Public Advisory Committee Meetings

Pursuant to the Federal Advisory Committee Act, Pub. L. 92–463, notice is hereby given that two committees of the US EPA Science Advisory Board (SAB) will meet on the dates and times noted below. All times noted are Eastern Time. All meetings are open to the public, however, seating is limited and available on a first come basis. *Important Notice:* Documents that are the subject of SAB reviews are normally available from the originating EPA office and are not available from the SAB Office—information concerning availability of documents from the relevant Program Office (if any) is included below.

1. Executive Committee of the EPA Science Advisory Board—March 6–7, 2002

The Executive Committee (EC) of the US EPA Science Advisory Board (SAB) will meet on Wednesday, March 6, 2002 and Thursday, March 7, 2002 in Conference Room 6013, USEPA, Ariel Rios Building North, 1200 Pennsylvania Avenue, NW, Washington, DC 20004. The meeting will begin by 8:30 am on March 6 and adjourn no later than 5:00 pm on March 7, 2002.

Purpose of the Meeting—This meeting of the SAB Executive Committee is one in a series of periodic meetings in which the EC takes action on reports generated by SAB Committees, meets with Agency leadership, and addresses a variety of issues germane to the operation of the Board. The agenda for the March 6–7, 2002 meeting will be posted on the SAB Web site, *www.epa.gov/sab,* not later than 5 days before the meeting and is likely to include, but not be limited to the following:

a. Action on four Committee reports:

(1) *Candidate Contaminant List (CCL) Research Plan: An SAB Report* from the Drinking Water Committee (DWC). (*See* 66 FR 19770, April 17, 2001 for further details.)

(2) *A Framework for Reporting on Ecological Condition: An SAB Report* from the Ecological Processes and Effects Committee (EPEC). (*See* 65 FR 18095, April 6, 2000 for further details.)

(3) *Industrial Ecology: A Commentary* from the Environmental Engineering Committee (EEC). (*See* 66 FR 22553, May 4, 2001 for further details.)

(4) *President's FY03 Science & Technology Budget for USEPA: An SAB Report* from the Research Strategies Advisory Committee (RSAC). (*See* 67 FR 2434, January 17, 2002 for further details.)

b. Meeting with Administration officials, including:

(1) Ms. Linda Fisher, Deputy USEPA Administrator

(2) Dr. Paul Gilman, AA/ORD

c. Matters of Board business, including discussion of the following:

(1) Activities of the Policies and Procedures Subcommittee, including recommendations on SAB Panel Formation and creation of a manual to guide certain SAB activities, see *http://www.epa.gov/sab/ppsintro.htm* for background.

(2) Proposed SAB activity in the area of ecology and economics

(3) The SAB agenda for FY2002 and beyond.

Availability of Review Materials—Draft SAB reports will be posted on the SAB Web site, *www.epa.gov/sab*, approximately 10 business days before the date of the meeting or as soon as available. The underlying documents that are the subject of SAB reviews, however, are not available from the SAB Office but are normally available from the originating EPA office (please see FR references above for details or background materials for each report under review by the EC).

Charge to the Executive Committee—The focus of the review of these four Committee reports will be on the following questions:

(a) Has the SAB adequately responded to the questions posed in the Charge?

(b) Are the statements and/or responses in the draft report clear?

(c) Are there any errors of fact in the report?

In accord with the Federal Advisory Committee Act (FACA), the public and the Agency are invited to submit written comments on these three questions that are the focus of the review. Submissions should be received by March 1, 2002 by Ms. Diana Pozun, EPA Science Advisory Board, Mail Code 1400A, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington DC 20460. (Telephone (202) 564–4544, FAX (202) 501–0582; or via e-mail at *pozun.diana@epa.gov*). Submission by e-mail to Ms. Pozun will maximize the time available for review by the Executive Committee.

Although not required by FACA, the SAB will have a brief period available for applicable public comment. Therefore, anyone wishing to make oral comments on the three focus questions above, but that are not duplicative of the written comments, should contact the Designated Federal Officer for the Executive Committee, Dr. Donald G. Barnes (*see* contact information below) by noon Eastern Time on Thursday, February 28, 2002.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information concerning this meeting or wishing to submit brief oral comments (10 minutes or less) must contact Dr. Donald Barnes, Designated Federal Officer, EPA Science Advisory Board (1400A), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; telephone (202) 564–4533; FAX (202) 501–0323; or via e-mail at *barnes.don@epa.gov.* Requests for oral comments must be *in writing* (e-mail, fax or mail) and received by Dr. Barnes no later than noon Eastern Time on Thursday, February 28, 2002.

2. Environmental Engineering Committee (EEC)—March 13, 2002

The Environmental Engineering Committee (EEC) of the US EPA Science Advisory Board (SAB) will conduct a public teleconference meeting on March 13, 2002. The meeting will begin at 12:00 pm and adjourn no later than 2:00 pm. The meeting will be coordinated through a conference call connection in Room 6450C, USEPA, Ariel Rios Building North, 1200 Pennsylvania Avenue, NW, Washington, DC 20004. The public is encouraged to attend the meeting in the conference room noted above, however, the public may also attend through a telephonic link if lines are available. Additional instructions about how to participate in the conference call can be obtained by calling Ms. Mary Winston (*see* contact information below).

Subsequent teleconference meetings of the EEC are planned for May 1, 2002, July 3, 2002, September 4, 2002 and November 6, 2002. Information concerning these meetings will appear in future **Federal Register** notices.

Purpose of the Meeting—The primary purpose of this teleconference meeting is to review for approval the report of the EEC's Surface Impoundments Study Subcommittee. The Surface Impoundments Study Subcommittee reviewed *Industrial Surface Impoundments in the United States* for the Agency's Office of Solid Waste as announced in 66 FR 30917–30920 June 8, 2001 and 66 FR 9671–49672 September 28, 2001. At its February 1, 2002 teleconference meeting, the Subcommittee decided further edits were warranted to improve clarity, consistency, balance and tone of its report. The Subcommittee anticipates approving the revised draft report in time for the EEC's consideration at the March 13 conference call meeting. The EEC will use the remainder of the call for other committee business and for strategic planning.

Availability of Review Materials—The availability of *Industrial Surface Impoundments in the United States* was announced previously in the FRs cited above. The draft report of the review, once approve by the Subcommittee, will be available at the SAB's Web site, *www.epa.gov/sab.*

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information concerning this teleconference meeting or who wishes to submit brief oral comments (3 minutes or less) must contact Ms. Kathleen White, Designated Federal Officer, EPA Science Advisory Board (1400A), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; telephone (202) 564–4559; FAX (202) 501–0582; or via e-mail at *white.kathleen@epa.gov.* Requests for oral comments must be *in writing* (e-mail, fax or mail) and received by Ms. White no later than noon Eastern Time Thursday, March 7, 2002. To obtain a draft agenda or information on participation in the above teleconference meeting, please contact Ms. Mary Winston, Management Assistant, EPA Science Advisory Board (1400A), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; telephone: (202) 564–4538, FAX (202) 501–0582; or via e-mail at *winston.mary@epa.gov.*

Providing Oral or Written Comments at SAB Meetings

It is the policy of the EPA Science Advisory Board to accept written public comments of any length, and to accommodate oral public comments whenever possible. The EPA Science Advisory Board expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements.

Oral Comments: In general, each individual or group requesting an oral presentation at a face-to-face meeting will be limited to a total time of ten minutes (unless otherwise indicated). For teleconference meetings, opportunities for oral comment will usually be limited to no more than three minutes per speaker and no more than fifteen minutes total. Deadlines for getting on the public speaker list for a meeting are given above. Speakers should bring at least 35 copies of their comments and presentation slides for distribution to the reviewers and public at the meeting. *Written Comments:* Although the SAB accepts written comments until the date of the meeting (unless otherwise stated), written comments should be received in the SAB Staff Office at least one week prior to the meeting date so that the comments may be made available to the committee for their consideration. Comments should be supplied to the appropriate DFO at the address/contact information noted above in the following formats: one hard copy with original signature, and one electronic copy via e-mail (acceptable file format: Adobe Acrobat, WordPerfect, Word, or Rich Text files (in IBM-PC/Windows 95/98 format). Those providing written comments and who attend the meeting are also asked to bring 35 copies of their comments for public distribution.

General Information—Additional information concerning the EPA Science Advisory Board, its structure, function, and composition, may be found on the SAB Web site, *http://www.epa.gov/sab,* and in *The FY2001 Annual Report of the Staff Director* which is available from the SAB Publications Staff at (202) 564–4533 or via fax at (202) 501–0256. Committee rosters, draft Agendas and meeting calendars are also located on our Web site.

Meeting Access—Individuals requiring special accommodation at this meeting, including wheelchair access to the conference room, should contact the appropriate DFO at least five business days prior to the meeting so that appropriate arrangements can be made.

Dated: February 8, 2002.

Donald G. Barnes,

Staff Director, EPA Science Advisory Board.

[FR Doc. 02–3657 Filed 2–13–02; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7145–3]

Taylor Lumber & Treating Superfund Site Notice of Proposed Administrative Settlement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: In accordance with the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.,* notice is hereby given that a proposed Agreement and Covenant Not to Sue (Prospective Purchaser Agreement) associated with the Taylor Lumber & Treating National Priorities List Superfund site was executed by the United States Environment Protection Agency (EPA) on February 1, 2002. The proposed Prospective Purchaser Agreement would resolve certain potential claims of the United States under sections 106 and 107(a) of CERCLA, 42 U.S.C. 9606 and 9607(a), against Pacific Wood Preserving of Oregon (''PWPO''), a Nevada corporation.

DATES: Comments must be submitted on or before February 28, 2002.

ADDRESSES: The proposed Prospective Purchaser Agreement and additional background documents relating to the settlement are available for public inspection at the U.S. Environmental Protection Agency, 1200 Sixth Ave., Seattle, WA 98101. A copy of the propoosed settlement may be obtained from Jennifer Byrne, Assistant Regional Counsel (ORC–158), Office of Regional Counsel, U.S. EPA Region 10, Seattle, WA 98101. Comments should reference ''Pacific Wood Preserving of Oregon PPA, Taylor Lumber & Treating Superfund Site'' and ''Docket No. CERCLA–10–2002–0034'' and should be addressed to Jennifer Byrne at the above address.

FOR FURTHER INFORMATION CONTACT: Jennifer Byrne, Assistant Regional Counsel (ORC–158), Office of Regional Counsel, U.S. EPA Region 10, Seattle, WA 9810; phone: (206) 553–0050; fax: (206) 553–0163; e-mail: *byrne.jennifer@epa.gov.*

SUPPLEMENTARY INFORMATION: Pacific Wood Preserving of Oregon (PWPO) plans to acquire a 34-acre parcel, constituting a major portion of the Superfund Site, located at 22125 S.W. Rock Creek Road in Sheridan, Oregon. PWPO intends to conduct a business on the parcel involving the treatment of lumber products and poles with preservatives that have relatively low environmental impact and toxicity and are distinguishable from preservatives presently found on the Site. PWPO's acquisition of the parcel occurs under the supervision of the United States Bankruptcy Court, District of Oregon, where Taylor Lumber & Treating, the current owner of the parcel, has filed a Chapter 11 bankruptcy petition.

In exchange for the settlement, EPA will receive $500,000 in cash, which will be placed in a special account for use at the Site. In addition, PWPO has agreed to operate and maintain a groundwater extraction and disposal system, to maintain the existing asphalt cover, and to maintain the contaminated soil storage cells. Further, PWPO has agreed not to treat wood with solutions containing ammoniacal copper zinc arsenate, cooper chromated arsenate, pentachlorophenol, creosote, or any arsenical wood-preserving compounds.

Because of the schedule in the bankruptcy proceeding, EPA is allowing fourteen days for public comments. For fourteen calendar days following the date of publication of this notice, EPA will receive written comments relating to the proposed Prospective Purchaser Agreement. EPA's response to any comments received will be available for public inspection at the U.S. Environmental Protection Agency, 1200 Sixth Ave., Seattle, WA 98101.

Dated: February 1, 2002.

L. John Iani,

Regional Administrator, Region 10.

[FR Doc. 02–3656 Filed 2–13–02; 8:45 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7145–2]

Clean Water Act Section 303(d): Availability of Proposed Determinations That Total Maximum Daily Loads (TMDLs) Are Not Needed

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: This notice announces the availability for comment of EPA determinations that TMDLs are not needed for one hundred fifty waterbody/pollutant combinations in the Calcasieu and Ouachita River Basins because new data and information show that water quality standards (WQS) are currently being met. This proposed action would result in the removal of

one hundred fifty waterbody/pollutant combinations from the Louisiana 303(d) list.

DATES: Comments on the proposed determinations that TMDLs are not needed must be submitted in writing to EPA on or before March 18, 2002.

ADDRESSES: Comments on the proposed determinations should be sent to Ellen Caldwell, Environmental Protection Specialist, Water Quality Protection Division, U.S. Environmental Protection Agency Region 6, 1445 Ross Ave., Dallas, TX 75202–2733. For further information, contact Ellen Caldwell at (214) 665–7513. Documents supporting the determinations that the TMDLs are not needed are available for public inspection at this address as well. Documents supporting the determinations that TMDLs are not needed also may be viewed at *www.epa.gov/region6/water/tmdl.htm*, or obtained by calling or writing Ms. Caldwell at the above address. Please contact Ms. Caldwell to schedule an inspection.

FOR FURTHER INFORMATION CONTACT: Ellen Caldwell at (214) 665–7513.

SUPPLEMENTARY INFORMATION: In 1996, two Louisiana environmental groups, the Sierra Club and Louisiana Environmental Action Network (plaintiffs), filed a lawsuit in Federal Court against the EPA, styled *Sierra Club, et al.* v. *Clifford et al.*, No. 96–0527, (E.D. La.). Among other claims, plaintiffs alleged that EPA failed to establish Louisiana TMDLs in a timely manner. Discussion of the court's order may be found at 65 FR 54032 (September 6, 2000).

EPA Seeks Comments on Proposed Determinations That One Hundred Fifty TMDLs for Waterbody/Pollutant Combinations are not Needed based on the assessment of new data and information that show the TMDLs are currently meeting WQS:

Subsegment	Waterbody name	Pollutant
030103	Calcasieu—Rapides-Allen Parish line to confluence with Marsh Bayou (Scenic)	Cadmium.
030201	Calcasieu River—Confluence with Marsh Bayou to Salt-water Barrier	Cadmium.
030801	West Fork Calcasieu River—From confluence of Beckwith Creek and Hickory Branch to Calcasieu River.	Cadmium.
030103	Calcasieu River—Rapides-Allen Parish line to confluence with Marsh Bayou (Scenic)	Copper.
030201	Calcasieu River—Confluence with Marsh Bayou to Salt-water Barrier	Copper.
030801	West Fork Calcasieu River—From confluence of Beckwith Creek and Hickory Branch to Calcasieu River.	Copper.
030702	English Bayou—Headwaters to Calcasieu River	Lead.
030801	West Fork Calcasieu River—From confluence of Beckwith Creek and Hickory Branch to Calcasieu River.	Lead.
030702	English Bayou—Headwaters to Calcasieu River	Mercury.
030306	Bayou Verdine (Estuarine)	Oil & grease.
030901	Bayou D'Inde—Headwaters to Calcasieu River (Estuarine)	Oil & grease.
030301	Calcasieu River and Ship Channel—Salt-water Barrier to below Moss Lake (Estuarine, includes Coon Island and Clooney Island Loops).	Pathogen indicators.
030302	Lake Charles (Estuarine)	Pathogen indicators.
030401	Calcasieu River—Calcasieu Ship Channel below Moss Lake to the Gulf of Mexico (Estuarine, includes Monkey Island Loop).	Pathogen indicators.
030402	Calcasieu Lake (Estuarine)	Pathogen indicators.
030901	Bayou D'Inde—Headwaters to Calcasieu River (Estuarine)	Pathogen indicators.
030201	Calcasieu River—Confluence with Marsh Bayou to Salt-water Barrier.	
030103	Calcasieu River—Rapides-Allen Suspended Solids Parish line to confluence with Marsh Bayou (Scenic).	Suspended solids.
030201	Calcasieu River—Confluence with Marsh Bayou to Salt-water Barrier	Turbidity.
030103	Calcasieu River—Rapides-Allen Parish line to confluence with Marsh Bayou (Scenic)	Turbidity.
080301	Black River—Jonesville to Corps of Engineers Control Structure (at mile 25, Serena)	Cadmium.
081501	Castor Creek—Headwaters to Little River	Cadmium.
081401	Dugdemona River—Headwaters to junction with Big Creek	Cadmium.
081601	Little River—Confluence of Castor Creek and Dugdemona River to junction with Bear Creek (Scenic).	Cadmium.
081602	Little River—From Bear Creek to Catahoula Lake (Scenic)	Cadmium.
080101	Ouachita River—Arkansas State Line to Columbia Lock and Dam (Scenic from the Arkansas state line to intersection with Bayou Bartholomew—22 miles).	Cadmium.
080501	Bayou de L'Outre—Arkansas State Line to Ouachita River (Scenic)	Chlorides.
081611	Bayou Funny Louis	Chlorides.
080903	Big Creek—Headwaters to Boeuf River (including Big Colewa Bayou)	Chlorides.
080901	Boeuf River—Arkansas State Line to Ouachita River	Chlorides.
081603	Catahoula Lake	Chlorides.
080609	Corney Bayou—From Corney Lake to Bayou D'Arbonne Lake (Scenic)	Chlorides.
081402	Dugdemona River—From Big Creek to Little River	Chlorides.
081601	Little River—Confluence of Castor Creek and Dugdemona River to junction with Bear Creek (Scenic).	Chlorides.
081602	Little River—From Bear Creek to Catahoula Lake (Scenic)	Chlorides.
080610	Middle Fork of Bayou D'Arbonne—From origin to Bayou D'Arbonne Lake (Scenic)	Chlorides.
081201	Tensas River—Headwaters to Jonesville (including Tensas Bayou)	Chlorides.
080301	Black River—Jonesville to Corps of Engineers Control Structure (at mile 25, Serena)	Copper.
081501	Castor Creek—Headwaters to Little River	Copper.
081604	Catahoula Lake Diversion Canal—Catahoula Lake to Black River	Copper.
081402	Dugdemona River—From Big Creek to Little River	Copper.
081401	Dugdemona River—Headwaters to junction with Big Creek	Copper.
081601	Little River—Confluence of Castor Creek and Dugdemona River to junction with Beart Creek (Scenic).	Copper.
081602	Little River—From Bear Creek to Catahoula Lake (Scenic)	Copper.

Subsegment	Waterbody name	Pollutant
080101	Ouachita River—Arkansas State Line to Columbia Lock and Dam (Scenic from the Arkansas state line to intersection with Bayou Bartholomew—22 miles).	Copper.
080201	Ouachita River—Columbia Lock and Dam to Joneville	Copper.
080101	Ouachita River—Arkansas State Line to Columbia Lock and Dam (Scenic from the Arkansas state line to intersection with Bayou Bartholomew—22 miles).	Dioxins, priority organics.
080401	Bayou Bartholomew—Arkansas State Line to Dead Bayou (Lake Bartholomew Scenic)	Lead.
080605	Bayou D'Arbonne—From Bayou D'Arbonne Lake to Ouachita River (Scenic)	Lead.
080603	Bayou D'Arbonne—From Lake Claiborne to Bayou D'Arbonne Lake	Lead.
080604	Bayou D'Arbonne Lake	Lead.
080501	Bayou de L'Outre—Arkansas State Line to Ouachita River (Scenic)	Lead
081503	Beaucoup Creek—Headwaters to Castor Creek	Lead.
080301	Black River—Jonesville to Corps of Engineers Control Structure (at mile 25, Serena)	Lead.
081501	Castor Creek—Headwaters to Little River	Lead.
081604	Catahoula Lake Diversion Canal—Catahoula Lake to Black River	Lead.
080609	Corney Bayou—From Corney Lake to Bayou D'Arbonne Lake (Scenic)	Lead.
081402	Dugdemona River—From Big Creek to Little River	Lead.
081401	Dugdemona River—Headwaters to junction with Big Creek	Lead.
081601	Little River—Confluence of Castor Creek and Dugdemona River to junction with Bear Creek (Scenic).	Lead.
081602	Little River—From Bear Creek to Catahoula Lake (Scenic)	Lead.
080610	Middle Fork of Bayou D'Arbonne—From origin to Bayou D'Arbonne Lake (Scenic)	Lead.
080101	Ouachita River—Arkansas State Line to Columbia Lock and Dam (Scenic from the Arkansas state line to intersection with Bayou Bartholomew—22 miles).	Lead.
080201	Ouachita River—Columbia Lock and Dam to Jonesville	Lead.
081201	Tensas River—Headwaters to Jonesville (including Tensas Bayou)	Lead.
080605	Bayou D'Arbonne—From Bayou D'Arbonne Lake to Ouachita River (Scenic)	Mercury.
080501	Bayou de L'Outre—Arkansas State Line to Ouachita River (Scenic)	Mercury.
080904	Bayou Lafourche—Near Oakridge to Boeuf River near Columbia	Mercury.
080301	Black River—Jonesville to Corps of Engineers Control Structure (at mile 25, Serena)	Mercury.
080901	Boeuf River—Arkansas State Line to Ouachita River	Mercury.
081501	Castor Creek—Headwaters to Little River	Mercury.
081402	Dugdemona River—From Big Creek to Little River	Mercury.
081401	Dugdemona River—Headwaters to junction with Big Creek	Mercury.
081602	Little River—From Bear Creek to Catahoula Lake (Scenic)	Mercury.
080201	Ouachita River—Columbia Lock and Dam to Jonesville	Mercury.
081401	Dugdemona River—Headwaters to junction with Big Creek	Non-priority organics.
081601	Little River—Confluence of Castor Creek and Dugdemona River to junction with Bear Creek (Scenic).	Non-priority organics.
081203	Lake Bruin (Oxbow Lake)	Nutrients.
081501	Castor Creek—Headwaters to Little River	Oil & grease.
081601	Little River—Confluence of Castor Creek and Dugdemona River to junction with Bear Creek (Scenic).	Oil & grease.
081602	Little River—From Bear Creek to Catahoula Lake (Scenic)	Oil & grease.
081611	Bayou Funny Louis	Oil & grease.
081603	Catahoula Lake	Oil & grease.
081001	Bayou Macon—Arkansas State Line to Tensas River	Organic enrichment/Low DO.
081203	Lake Bruin (Oxbow Lake)	Organic enrichment/Low DO.
080401	Bayou Bartholomew—Arkansas State Line to Dead Bayou (Lake Bartholomew Scenic)	Other inorganics.
080603	Bayou D'Arbonne—From Lake Claiborne to Bayou D'Arbonne Lake	Other inorganics.
081201	Tensas River—Headwaters to Jonesville (including Tensas Bayou)	Other inorganics.
080905	Turkey Creek—Headwaters to Turkey Creek Cutoff and Turkey Creek Cutoff to Big Creek including Glade Slough.	Other inorganics.
080401	Bayou Bartholomew—Arkansas State Line to Dead Bayou (Lake Bartholomew Scenic)	Pathogen indicators.
080904	Bayou Lafourche—Near Oakridge to Boeuf River near Columbia	Pathogen indicators.
081501	Castor Creek—Headwaters to Little River	Pathogen indicators.
081609	Hemphill Creek—Headwaters to Catahoula Lake (includes Hair Creek)	Pathogen indicators.
080902	Bayou Bonne Idee—Headwaters to Boeuf River	Pesticides.
080301	Black River—Jonesville to Corps of Engineers Control Structure (at mile 25, Serena)	Pesticides.
080302	Black River—Corps of Engineer Control Structure to Red River	Pesticides.
080910	Clear Lake	Pesticides.
080909	Crew Lake	Pesticides.
081202	Lake St. Joseph (Oxbow Lake)	Pesticides.
080101	Ouachita River—Arkansas State Line to Columbia Lock and Dam (Scenic from the Arkansas state line to intersection with Bayou Bartholomew—22 miles).	Pesticides.
080201	Ouachita River—Columbia Lock and Dam to Jonesville	Pesticides.
080905	Turkey Creek—Headwaters to Turkey Creek Cutoff and Turkey Creek Cutoff to Big Creek including Glade Slough.	Pesticides.
080401	Bayou Bartholomew—Arkansas State Line to Dead Bayou (Lake Bartholomew Scenic)	Pesticides.
080904	Bayou Lafourche—Near Oakridge to Boeuf River near Columbia	Pesticides.
080202	Bayou Louis	Pesticides.
081203	Lake Bruin (Oxbow Lake)	Pesticides.
080102	Bayou Chauvin	pH.
080501	Bayou de L'Outre—Arkansas State Line to Ouachita River (Scenic)	Salinity/TDS.
080903	Big Creek—Headwaters to Boeuf River (including Big Colewa Bayou)	Salinity/TDS.

Subsegment	Waterbody name	Pollutant
081603	Catahoula Lake	Salinity/TDS.
080609	Corney Bayou—From Corney Lake to D'Arbonne Lake	Salinity/TDS.
081402	Dugdemona River—From Big Creek to Little River	Salinity/TDS.
081601	Little River—Confluence of Castor Creek and Dugdemona River to junction with Bear Creek (Scenic).	Salinity/TDS.
081602	Little River—From Bear Creek to Catahoula Lake (Scenic)	Salinity/TDS.
080610	Middle Fork of Bayou D'Arbonne—From origin to Bayou D'Arbonne Lake (Scenic)	Salinity/TDS.
081201	Tensas River—Headwaters to Jonesville (including Tensas Bayou)	Salinity/TDS.
080901	Boeuf River—Arkansas State Line to Ouachita River	Salinity/TDS.
081611	Bayou Funny Louis	Salinity/TDS.
080302	Black River—Corps of Engineers Control Structure to Red River	Siltation.
081602	Little River—From Bear Creek to Catahoula Lake (Scenic)	Siltation.
080201	Ouachita River—Columbia Lock and Dam to Jonesville	Siltation.
080501	Bayou de L'Outre—Arkansas State Line to Ouachita River (Scenic)	Sulfates.
081611	Bayou Funny Louis	Sulfates.
080903	Big Creek—Headwaters to Boeuf River (including Big Colewa Bayou)	Sulfates.
080901	Boeuf River—Arkansas State Line to Ouachita River	Sulfates.
081501	Castor Creek—Headwaters to Little River	Sulfates.
081603	Catahoula Lake	Sulfates.
080609	Corney Bayou—From Corney Lake to Bayou D'Arbonne Lake (Scenic)	Sulfates.
081402	Dugdemona River—From Big Creek to Little River	Sulfates.
081601	Little River—Confluence of Castor Creek and Dugdemona River to junction with Bear Creek (Scenic).	Sulfates.
081602	Little River—From Bear Creek to Catahoula Lake (Scenic)	Sulfates.
080610	Middle Fork of Bayou D'Arbonne—From origin to Bayou D'Arbonne Lake (Scenic)	Sulfates.
081201	Tensas River—Headwaters to Jonesville (including Tensas Bayou)	Sulfates.
080401	Bayou Bartholomew—Arkansas State Line to Dead Bayou (Lake Bartholomew Scenic)	Suspended solids.
080902	Bayou Bonne Idee—Headwaters to Boeuf River	Suspended solids.
080605	Bayou D'Arbonne—From Bayou D'Arbonne Lake to Ouachita River (Scenic)	Suspended solids.
080603	Bayou D'Arbonne—From Lake Claiborne to Bayou D'Arbonne Lake	Suspended solids.
081501	Castor Creek—Headwaters to Little River	Suspended solids.
080609	Corney Bayou—From Corney Lake to Bayou D'Arbonne Lake (Scenic)	Suspended solids.
080905	Turkey Creek—Headwaters to Turkey Creek Cutoff and Turkey Creek Cutoff to Big Creek including Glade Slough.	Suspended solids.
080101	Ouachita River—Arkansas State Line to Columbia Lock and Dam (Scenic from the Arkansas state line to intersection with Bayou Bartholomew—22 miles).	Suspended solids.
081402	Dugdemona River—From Big Creek to Little Creek	Turbidity.
081601	Little River—Confluence of Castor Creek and Dugdemona River to junction with Bear Creek (Scenic).	Turbidity.
081602	Little River—From Bear Creek to Catahoula Lake (Scenic)	Turbidity.
080905	Turkey Creek—Headwaters to Turkey Creek Cutoff and Turkey Creek Cutoff to Big Creek including Glade Slough.	Turbidity.
080401	Bayou Bartholomew—Arkansas State Line to Dead Bayou (Lake Bartholomew Scenic)	Turbidity.
081611	Bayou Funny Louis	Turbidity.
080610	Middle Fork of Bayou D'Arbonne— From origin to Bayou D'Arbonne Lake (Scenic)	Turbidity.
080101	Ouachita River—Arkansas State Line to Columbia Lock and Dam (Scenic from the Arkansas state line to intersection with Bayou Bartholomew—22 miles).	Turbidity.
080301	Black River—Jonesville to Corps of Engineers Control Structure (at mile 25, Serena)	Unknown toxicity.

EPA requests that the public provide to EPA any water quality related data and information that may be relevant to these proposed determinations that TMDLs are not needed. EPA will review all data and information submitted during the public comment period and revise the determinations where appropriate.

Dated: February 5, 2002.

Oscar Ramirez, Jr.,

Acting Director, Water Quality Protection Division, Region 6.

[FR Doc. 02–3659 Filed 2–13–02; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[Report No. AUC–02–31–A (Auction No. 31); DA 02–260]

Auction of Licenses in the 747–762 And 777–792 MHz Bands Scheduled for June 19, 2002 Comment Sought on Adding to Auction Inventory and Further Modifying Package Bidding Procedures

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document seeks comment on the potential inclusion of 24 additional licenses in Auction No. 31 and potential modifications of previously-announced procedures for Auction No. 31.

DATES: Comments are due on or before February 19, 2002 and reply comments are due on or before February 26, 2002.

ADDRESSES: Comments and reply comments must be sent by electronic mail to the following address: *auction31@fcc.gov.* The electronic mail containing the comments or reply comments must include a subject or caption referring to Auction No. 31 Comments. The Bureau requests that parties format any attachments to electronic mail as Adobe® Acrobat® (pdf) or Microsoft'' Word documents. Copies of comments and reply comments will be available for public inspection during regular business hours in the FCC Public Reference

Room, Room CY–A257, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Contact the following employees of Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, at (202) 418–0660: for legal questions: Howard Davenport; for general auction questions: Craig Bomberger or Martha Stancill; for software questions: Karen Wrege.

SUPPLEMENTARY INFORMATION: This is a summary of the *Auction No. 31 Comment Public Notice* released February 4, 2002. The complete text of the *Auction No. 31 Comment Public Notice,* including Attachment A ''Using the Smoothed Anchoring Method to Obtain Current Price Estimates,'' is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The *Auction No. 31 Comment Public Notice* may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–863–2893, facimile 202–863–2898, or via e-mail *qualexint@aol.com.*

1. By the *Auction No. 31 Comment Public Notice,* the Wireless Telecommunications Bureau (''Bureau'') seeks comment on the potential inclusion of 24 additional licenses in Auction No. 31 and potential modifications of previously-announced procedures for Auction No. 31. In the *Auction No. 31 Procedures Public Notice,* 65 FR 12251 (March 8, 2000), the Bureau established procedures for the auction of the twelve licenses in the 747–762 and 777–792 MHz bands (the ''Upper 700 MHz'' bands). The Bureau later revised its procedures to include package bidding in *Auction No. 31 Package Bidding Procedures Public Notice,* 65 FR 43361 (July 13, 2000), and subsequently modified those procedures in the *Auction No. 31 Package Bidding Procedures Modification Public Notice,* 66 FR 7907 (January 26, 2001). In light of subsequent developments and further analysis, the Bureau has determined that it may be appropriate to make further refinements. Accordingly, the *Auction No. 31 Comment Public Notice* seeks comment on whether to:

i. Include 24 licenses from the 698–746 MHz band (the ''Lower 700 MHz'' band) in Auction No. 31;

ii. Increase the number of bidder-defined packages if the Lower 700 MHz band licenses are included in Auction No. 31;

iii. Change part (iii) of the minimum acceptable bid calculation by either substituting a new method of calculating minimum acceptable bids (Option 1) or modifying the existing formula for calculating minimum acceptable bids for new packages (Option 2) and, if Option 1 is adopted, consider all bids submitted when determining provisionally winning bid sets; and

iv. Establish an aggregate reserve price or increase the previously-established minimum opening bids.

I. Whether To Include 24 Licenses From the Lower 700 MHz Band in Auction No. 31

2. The Bureau seeks comment on whether to include 24 licenses from the Lower 700 MHz band in Auction No. 31. These 24 licenses consist of licenses for four blocks of spectrum in each of the six regions known as the 700 MHz band economic area groupings (''700 MHz band EAGs''). In each 700 MHz band EAG, four Lower 700 MHz band licenses are for the use of two 12 megahertz blocks (each block consists of paired 6 megahertz segments) and two 6 megahertz blocks that are unpaired and contiguous.

3. Including these 24 Lower 700 MHz band licenses in Auction No. 31 would enable bidders to create and bid on packages containing 700 MHz band EAG licenses from both the Upper and Lower 700 MHz bands. Commenters should address any potential advantages or disadvantages of permitting package bidding on such combinations and facilitating the substitution of spectrum in the Upper and Lower 700 MHz bands. Interested parties are advised that the Bureau also seeks comment regarding this issue in a separate Public Notice addressing procedures for the auction of licenses in the Lower 700 MHz bands (Auction No. 44).

4. If these 24 additional licenses are included in Auction No. 31, operational considerations would require the Bureau also to adopt the more comprehensive revision to the minimum acceptable bid calculation described as Option 1 in Section III(B).

II. Whether to Increase the Number of Bidder-Defined Packages

5. The Bureau seeks comment on whether to increase the number of bidder-defined packages if the Bureau includes 24 licenses from the Lower 700 MHz band in Auction No. 31. Taking into account various factors, including the available licenses, the Bureau previously announced that Auction No. 31 bidders would be permitted to create and bid on up to twelve different packages of their own choosing during Auction No. 31. Commenters are asked to address whether the inclusion of additional licenses in Auction No. 31 would create any need to increase the number of bidder-defined packages, considering that bidder-defined packages may contain any number of licenses, up to all the licenses available in the auction.

III. Whether to Change the Minimum Acceptable Bid Calculation

A. Summary of Existing Procedures

6. The Bureau established the current three-part formula for calculating minimum acceptable bids in the *Auction No. 31 Package Bidding Procedures Modification Public Notice.* Pursuant to the existing procedure, the minimum acceptable bid for any particular license or package would be the greatest of: (i) The applicable minimum opening bid; (ii) the bidder's previous high bid on that license/package plus x%, where the Bureau would specify the value of x in each round; and (iii) the bidder's previous high bid on that particular license/package plus an amount based on the increase in the bidder's previous high bid needed to create a tie with the provisional winners. If the bidder has not bid on a license or an already constructed package, the bidder's previous high bid for purposes of calculating part (iii) would be the applicable minimum opening bid.

7. With respect to part (iii), the Bureau established that it would determine the amount to add to a given previous high bid in three steps. First, the Bureau would calculate a shortfall for the given bid, with the shortfall being the difference between the revenue of the provisionally winning bid set and the maximum total revenue associated with a set of bids that includes the given bid and satisfies all other constraints for determining a provisionally winning set. Second, the Bureau would determine a deficit for the given bid, or its share of the shortfall produced by the set, in two stages. Initially, the Bureau would determine the ratio of bidding units in the given bid's particular license/package to bidding units for all the non-provisionally winning bids in the set of bids that produced the shortfall. (If more than one set of bids yields the same shortfall for a given bid, the Bureau would use the set that includes the most provisionally winning bidding units.) The Bureau then would multiply the given bid's shortfall by this ratio to arrive at the deficit for the given bid. Third, and finally, the Bureau would

determine the amount to be added to the given previous high bid by multiplying the given bid's deficit by y%. At the beginning of the auction, the Bureau would set y at 100 but would retain the discretion to adjust the amount during the course of the auction.

8. However, part (iii) cannot be used to calculate the minimum acceptable bid for a package in the same round that the particular package is created because no shortfall or deficit was calculated with respect to that particular package at the end of the prior round. For such a new package, the Bureau established the following procedures. Generally, the third part of the initial minimum acceptable bid formula would be calculated for new packages by multiplying the number of bidding units in the package by the lowest $/bidding unit of any provisionally winning bid in the last five rounds. However, in the event the new package is the global package of all licenses available in the auction, the minimum acceptable bid would be the revenue generated by the provisionally winning bid set in the previous round plus w%. This assures that no bid for the global package would be accepted that does not exceed the maximum revenue in the preceding round.

9. Pursuant to current Auction No. 31 procedures, provisionally winning bids would be determined by considering: (i) For each bidder, bids from the most recent two rounds in which the bidder submitted bids or renewed bids; (ii) all provisionally winning bids from the prior round; and (iii) a set of FCC bids on each license at some small amount less than the applicable minimum opening bid. Furthermore, a bidder's bids submitted in a given round would be treated as mutually exclusive of the bidder's bids submitted in other rounds.

B. Proposed Procedures—Option 1

10. Option 1 involves two significant changes to current procedures, the first being a comprehensive revision in calculating part (iii) of the minimum acceptable bid formula and the second regarding the bids considered when determining provisionally winning bids. These changes would be made jointly or not at all. Adopting the first proposed change would enable the Bureau to include additional licenses in Auction No. 31, as discussed in Section I; could improve the pace of the auction; and would make it feasible to consider all bids submitted during the auction when determining provisionally winning bids. Considering all bids submitted during the auction when determining provisionally winning bids would make bidders responsible for all bids throughout the auction and may discourage strategic bidding. On the other hand, considering all bids submitted might make it more complex for participants and other observers to track the auction. The Bureau seeks comment on both aspects of the proposal.

i. Minimum Acceptable Bids

11. As the first part of Option 1, the Bureau proposes to replace part (iii) of the minimum acceptable bid formula with a current price estimate of the license or package plus z%. A current price estimate for each license would be calculated at the close of each round using the Smoothed Anchoring Method (see Attachment A of the *Auction No. 31 Comment Public Notice*). The current price estimate for a package would be the sum of the current price estimates of the licenses that comprise the package. Pursuant to this proposal, the Bureau would set z to be zero at the beginning of the auction but would retain the discretion to adjust the amount, including setting it at less than zero, during the course of the auction in order to provide control over the pace of the auction.

12. Implementing current price estimates for licenses and packages would preclude the need for a special version of part (iii) of the minimum acceptable bid formula for newly-created packages. However, the Bureau would retain the exception for calculating the minimum acceptable bid for a newly-created global package. After the first round of the auction, the minimum acceptable bid for the global package would always be the revenue generated by the provisionally winning bid set in the previous round plus w%. The Bureau would make this distinction in order to retain the ability to ensure that bids for the global package would continue to increase even if it were to employ a percentage z that would not guarantee that outcome. That is, the Bureau might want to set w higher than z.

ii. Bids Considered

13. As the second part of Option 1, the Bureau would consider all bids submitted during the auction when determining the provisionally winning set of bids. It is impractical to consider every bid submitted during the auction when calculating shortfalls and deficits in each round pursuant to the existing minimum acceptable bid formula. In the event that the Bureau calculates minimum acceptable bids using current price estimates, it would become feasible to consider every bid submitted when calculating minimum acceptable bids. As in the previously-established procedures, bids placed and/or renewed in different rounds would be considered as mutually exclusive—a bidder could be a provisional winner only on bids placed in the same round.

C. Proposed Procedures—Option 2

14. Option 2 involves a more modest change to current procedures, limited to revising the third part of the minimum acceptable bid formula applicable to newly-created packages. Pursuant to this alternative proposal, for newly-created packages, the third part of the minimum acceptable bid formula would be calculated by multiplying the number of bidding units in the package by the *average* dollar per bidding unit of all provisionally winning bids in the past five rounds. The average dollar per bidding unit would be calculated by dividing the sum of gross revenues from the provisionally winning bid sets over the last five rounds by five times the sum of all of bidding units in the auction. This exception would not apply to bids for the global package, however, for which the minimum acceptable bid would be the maximum revenue from the previous round plus w%.

15. This alternative proposed revision to the calculation of minimum acceptable bids could improve the pace of the auction. The Bureau seeks comment on this proposal.

IV. Whether to Establish an Aggregate Reserve Price or Increase Previously-Established Minimum Opening Bids

16. The Communications Act, *see* 47 U.S.C. 309(j)(4)(F), calls upon the Commission to prescribe methods by which a reasonable reserve price will be required, or a minimum opening bid will be established, when the Commission auctions licenses, unless the Commission determines that a reserve price or a minimum opening bid is not in the public interest. Consistent with this mandate, the Commission has directed the Bureau to seek comment on the use of a minimum opening bid and/or reserve price and on the methodology to be employed in establishing each of these mechanisms prior to the start of each auction. After seeking comment on relevant issues, the Bureau established minimum opening bids for Auction No. 31 in the *Auction No. 31 Package Bidding Procedures Public Notice.* The Bureau further established that the minimum opening bids for packages would be the sum of the minimum opening bids for the licenses comprising the package.

17. For Auction No. 31, to supplement the established minimum opening bids,

the Bureau seeks comment on establishing an aggregate reserve price that exceeds the sum of the minimum opening bids. A reserve price is an absolute minimum price below which specified goods will not be sold. Bidders, however, may place bids below reserve prices. Furthermore, reserve prices can be either public or undisclosed. The spectrum in Auction No. 31 is subject to a unique statutory clearance process, which the Commission has created incentives to accelerate. In light of these complexities, using an aggregate reserve price in addition to minimum opening bids may be appropriate to ensure ''a recovery for the public of a portion of the value of the public spectrum resource,'' 47 U.S.C. 309(j)(3)(C) commensurate with Congressional expectations.

18. With respect to the appropriate level of an aggregate reserve price, Congress has estimated that the Upper 700 MHz band licenses available for auction will generate $2.6 billion in revenue. The Commission's previous 700 MHz guard bands auctions raised nearly $541 million. Therefore, the Bureau seeks comment on the possibility of an aggregate reserve in Auction No. 31 equal to $2.6 billion in gross bids. This gross bid figure should result in net revenues approximating the Congressional revenue estimate minus net revenues from the 700 MHz guard bands auctions. Under this approach, the Commission only would accept the provisionally winning set of bids at the close of Auction No. 31 if the gross amount of the provisionally winning set of bids equals or exceeds the $2.6 billion aggregate reserve price.

19. Commenters are asked to address how the public interest would or would not be served by adopting an aggregate reserve price. In particular, given all the circumstances of this auction, the Bureau seeks comment on whether the public interest would be served by establishing an aggregate reserve price to ensure that the Commission recovers for the public a portion of the value of the public spectrum resource commensurate with Congressional expectations. Additionally, the Bureau seeks comment on whether an aggregate reserve price would introduce an added threshold problem with which bidders would have to contend. The threshold problem is defined and discussed in the *Auction No. 31 Package Bidding Procedures Public Notice.*

20. Commenters also should address whether any aggregate reserve price should be made public or remain undisclosed. Commenters supporting disclosure should address when and how any aggregate reserve price would be made public. For example, should it be disclosed when the Bureau announces the qualified bidders for the auction? Or when the auction begins? In addition, commenters should address whether the Bureau should make periodic announcements during the auction regarding whether bids meet the aggregate reserve price or postpone any announcements until after the auction closes. Commenters supporting an undisclosed aggregate reserve price should comment on whether the Bureau should announce whether bids meet any aggregate reserve at any time before the auction closes. For example, should the Bureau announce whether bids meet any aggregate reserve price if the Bureau keeps the auction open by exercising its discretion under the stopping rule?

21. Commenters addressing the level of the proposed aggregate reserve price should support their claims with valuation analyses and suggested reserve prices or formulas. In addressing these issues, commenters may also wish to address the possibility that 24 lower 700 MHz bands licenses may be added to the inventory of Auction No. 31. Any commenters suggesting license-by-license reserve prices, in place of the proposed aggregate reserve price, should explain with specificity how reserve prices for individual licenses would be established. The Bureau particularly seeks comment on such factors as, among other things, the amount of spectrum being auctioned, levels and circumstances of incumbency, the availability of technology to provide service, the size of the geographic service areas, issues of interference with other spectrum bands and any other relevant factors that reasonably could have an impact on valuation of the 747–762 and 777–792 MHz bands.

22. As an alternative, the Bureau also seeks comment on increasing the previously-established minimum opening bids in Auction No. 31. The previously-established minimum opening bids total $720 million. If commenters believe that the public interest would be served by increasing the current minimum opening bids, they should support their claims with valuation analyses and suggested minimum opening bid levels or formulas. With respect to the amounts of the minimum opening bids, the Bureau particularly seeks comment on such factors as, among other things, the amount of spectrum being auctioned, levels of incumbency, the availability of technology to provide service, the size of the geographic service areas, issues of interference with other spectrum bands and any other relevant factors that reasonably could have an impact on valuation of the 747–762 and 777–792 MHz bands.

V. Conclusion

23. Comments are due on or before February 19, 2002, and reply comments are due on or before February 26, 2002. Because of the disruption of regular mail and other deliveries in Washington, DC, the Bureau requires that all comments and reply comment be filed electronically. Comments and reply comments must be sent by electronic mail to the following address: *auction31@fcc.gov.* The electronic mail containing the comments or reply comments must include a subject or caption referring to Auction No. 31 Comments. The Bureau requests that parties format any attachments to electronic mail as Adobe® Acrobat® (pdf) or Microsoft® Word documents. Copies of comments and reply comments will be available for public inspection during regular business hours in the FCC Public Reference Room, Room CY–A257, 445 12th Street, SW., Washington, DC 20554.

24. In addition, the Bureau requests that commenters fax a courtesy copy of their comments and reply comments to the attention of Kathryn Garland at (717) 338–2850.

25. This proceeding has been designated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required. Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in § 1.1206(b) of the Commission's rules.

Federal Communications Commission.

Margaret Wiener,

Chief, Auctions and Industry Analysis Division, WTB.

[FR Doc. 02–3624 Filed 2–13–02; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meetings

AGENCY: Federal Election Commission.

DATE & TIME: Wednesday, February 20, 2002 at 10 a.m.

PLACE: 999 E Street, N.W., Washington, D.C.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. § 437g.
Audits conducted pursuant to 2 U.S.C. § 437g, § 438(b), and Title 26, U.S.C.
Matters concerning participation in civil actions or proceedings or arbitration.
Internal personnel rules and procedures or matters affecting a particular employee.

DATE & TIME: Thursday, February 21, 2002 at 10 a.m.

PLACE: 999 E Street, N.W., Washington, D.C. (Ninth Floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED:

Draft Advisory Opinion 2002–01: Harry Kresky on behalf of Lenora B. Fulani and James Mangia.
Draft Advisory Opinion 2002–02: Eric Gally.
Administrative Matters.

PERSON TO CONTACT FOR INFORMATION: Mr. Ron Harris, Press Officer, Telephone: (202) 694–1220.

Mary W. Dove,
Secretary of the Commission.
[FR Doc. 02–3739 Filed 2–12–02; 11:23 am]
BILLING CODE 6715–01–M

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than February 28, 2002.

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166–2034:

1. James Stewart and Shirley Stewart, both of Crothersville, Indiana; to retain voting shares of The Bancshares, Inc., Scottsburg, Indiana, and thereby indirectly retain voting shares of The Scott County State Bank, Scottsburg, Indiana.

B. Federal Reserve Bank of Minneapolis (Julie Stackhouse, Vice President) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. Douglas G. Hansen, Currie, Minnesota; to acquire voting shares of Currie Bancorporation, Inc., Currie, Minnesota, and thereby indirectly acquire voting shares of Currie State Bank, Currie, Minnesota.

C. Federal Reserve Bank of Kansas City (Susan Zubradt, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198–0001:

1. Blair Lauritzen Gogel, Mission Hills, Kansas, and Clarkson Davis Lauritzen, Boston, Massachusetts; to acquire voting shares of K.B.J. Enterprises, Inc., Omaha, Nebraska, and thereby indirectly acquire voting shares of Sibley State Bank, Sibley, Iowa.

Board of Governors of the Federal Reserve System, February 8, 2002.

Robert deV. Frierson,
Deputy Secretary of the Board.
[FR Doc. 02–3558 Filed 2–13–02; 8:45 am]
BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary; Solicitation of Nominations for Four Vacancies on the Health and Human Services Advisory Committee on Minority Health

AGENCY: Office of Public Health and Science, Office of Minority Health, HHS.

ACTION: Solicitation of nominations for four vacancies on the HHS Advisory Committee on Minority Health.

Authority: Section 1707(c) of the Public Health Service Act directs the Secretary to establish the Advisory Committee on Minority Health. The Committee is also governed by the Federal Advisory Committee Act (5 U.S.C. Appendix 2), which sets forth standards for the formulation and use of advisory committees.

SUMMARY: The Secretary, DHHS, signed the charter establishing the HHS Advisory Committee on Minority Health (the Committee) on September 17, 1999, and the charter was renewed on September 14, 2001. This Committee advises and makes recommendations to the Secretary on improving the health of racial and ethnic minority groups and development of goals and specific program activities. This notice requests nominations for four vacancies on the Committee beginning December 2002.

DATES: Nominations for members will be considered if we receive them at the appropriate address, as provided below, no later than 5:00 P.M. EST on May 15, 2002.

ADDRESSES: You may mail or deliver nominations for membership to the following address: Sheila Pack Merriweather, Division of Policy and Data, Office of Minority Health, 5515 Security Lane, Suite 1000, Rockville, MD 20852. Nominations will not be accepted by e-mail or by facsimile.

A request for a copy of the Secretary's charter for the Advisory Committee and list of current members can be obtained from the Office of Minority Health Resource Center, P.O. Box 37337, Washington, DC 20013–7337, telephone 1–800–444–6472, TDD 301–589–0951, e-mail: *info@omhrc.gov.* The charter and list of current members can also be downloaded from the Office of Minority Health Resource Center Web site at *http://www.omhrc.dhhs.gov.*

FOR FURTHER INFORMATION CONTACT: Sheila Pack Merriweather at (301) 443–9923; fax—301–443–8280; e-mail—*smerriweather@osophs.dhhs.gov*

SUPPLEMENTARY INFORMATION:

I. Background

The Advisory Committee advises the Secretary on improving the health of racial and ethnic minorities and developing goals and specific program activities. These activities include, but are not limited, to the following:

(1) Establish short-range and long-range goals and objectives and coordinate all other activities within the Public Health Service that relate to disease prevention, health promotion, service delivery, and research concerning such individuals.

(2) Enter into interagency agreements with other agencies of the Public Health Service.

(3) Support research, demonstrations, and evaluations to test new and innovative models.

(4) Increase knowledge and understanding of health risk factors.

(5) Develop mechanisms that support better information dissemination, education, prevention, and service delivery to individuals from disadvantaged backgrounds, including individuals who are members of racial and ethnic minority groups.

(6) Ensure that the National Center for Health Statistics collects data on the health status of each minority group.

(7) With respect to individuals who lack proficiency in speaking the English language, enter into contracts with

public and nonprofit private providers of primary health services for the purpose of increasing the access of individuals to such services by developing and carrying out programs to provide bilingual or interpretive services.

(8) Support a national minority health resource center to carry out the following:

(A) Facilitate the exchange of information regarding matters relating to health information and health promotion, preventive health services, and education in the appropriate use of health care.

(B) Facilitate access to information.

(C) Assist in the analysis of issues and problems relating to such matters.

(D) Provide technical assistance with respect to the exchange of such information (including facilitating the development of materials of such technical assistance).

(9) Carry out programs to improve access to health care services for individuals with limited proficiency in speaking the English language. Activities under the preceding sentence shall include developing and evaluating model projects.

II. Nominations

The Office of Minority Health (OMH) is requesting nominations to fill four vacancies for voting members to serve on the Advisory Committee. The Committee consists of 12 voting members appointed by the Secretary from among racial and ethnic minorities, defined as Black or African American, Hispanic/Latino, American Indian/Alaska Native, Asian American, and Native Hawaiian or Pacific Islander, who have expertise regarding issues of minority health. The racial and ethnic minority groups will be equally represented among the voting members. Employees or officers of the Federal Government may not serve as voting members, except that the Secretary may also appoint employees of the DHHS to serve as ex-officio, non-voting members.

OMH is seeking nominations of persons from a wide-array of fields including but not limited to: Public health and medicine; health administration and financing; behavioral and social sciences; immigration and rural health; health law and economics; cultural and linguistic competency; and biomedical ethics and human rights. Demonstrated expertise regarding issues of minority health, such as: Access to care; data collection and analysis; health professions development; cultural competency; and eliminating disparities in cancer, cardiovascular diseases, infant mortality, HIV infection/AIDS, child and adult immunization, diabetes, substance abuse, homicide, suicide, unintentional injuries, and other diseases and health conditions is also required.

Nominations must state that the nominee is willing to serve as a member of the Advisory Committee and appears to have no conflict of interest that would preclude membership. Potential candidates are required to provide detailed information concerning such matters as financial holdings, consultancies, and research grants or contracts to permit evaluation of possible sources of conflict of interest.

Members shall be appointed for a term of four years. Committee members will be compensated for the time they spend in Committee meetings (including travel time) as well as per diem costs.

Any interested person may nominate one or more qualified persons. Self-nominations will also be accepted.

III. Nomination Forms

Nomination forms may be obtained by contacting the Office of Minority Health Resource Center, PO Box 37337, Washington, DC 20013–7337, telephone 1–800–444–6472, TDD 301–589–0951, e-mail: *info@omhrc.gov.* Nomination forms may also be downloaded from the Office of Minority Health Resource Center Web site, *http://www.omhrc.dhhs.gov.* All nominations and curricula vitae for the Advisory Committee should be sent to Sheila Pack Merriweather at the address in this notice.

Dated: January 31, 2002.

Nathan Stinson, Jr.,

Deputy Assistant Secretary for Minority Health.

[FR Doc. 02–3571 Filed 2–13–02; 8:45 am]

BILLING CODE 4150–29–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agenda for February 13 and 14, 2002 Meeting of the President's Council on Bioethics

AGENCY: President's Council on Bioethics, HHS.

ACTION: Addendum to the Prior Notice of Public Meeting.

SUMMARY: The President's Council on Bioethics will hold its second meeting to discuss its agenda and future activities on February 13 and 14, 2002.

Tentative Agenda

Wednesday, February 13

8:30 am
Opening Remarks.
Leon R. Kass, M.D., Chairman.
8:45 am
Session 1: Human Cloning 4: Proper Use of Language.
Working Paper #5: On Terminology.
10:00 am
Break.
10:15 am
Session 2: Human Cloning 5: National Academics' Report, ''Scientific and Medical Aspects of Human Reproductive Cloning.''
Irving L. Weissman, M.D.
Noon
Lunch.
1:30 pm
Session 3: Human Cloning 6: Ethical Issues in ''Reproductive'' Cloning. Working Paper #6: The Ethics of ''Reproductive'' Cloning: Child, Family, and Society.
3:00 pm
Break.
3:15pm
Session 4: Human Cloning 7: Ethical Issues in ''Reproductive'' Cloning, Continued.
5:00 pm
Session 5: Ethical Conduct of Council Members. Q&A with Administration Attorney.
5:30 pm
Adjournment.

Thursday, February 14

8:30 am
Session 6: Human Cloning 8: Ethical Issues in ''Therapeutic/Research'' Cloning.
10:00 am
Break.
10:15 am
Session 7: Human Cloning 9: Cloning and Public Policy: Legislative Alternatives.
11:45 am
Break.
Noon
Session 8: Public Comments.
1:00 pm
Adjournment.

Public Comments: Written statements may be submitted by members of the public for the Council's records. Please submit statements to Ms. Diane Gianelli (tel. 202/296–4694). Persons wishing to comment in person may do so during the hour set aside for this purpose beginning at noon on Thursday, February 14. Comments will be limited to no more than five minutes per speaker or organization. Please give advance notice of such statements to Ms. Gianelli at the phone number given

above, and be sure to include name, affiliation, and a brief description of the topic or nature of the statement.

FOR FURTHER INFORMATION CONTACT: Diane Gianelli, 202/296–4694.

Dated: February 6, 2002.

Dean Clancy,

Executive Director, President's Council on Bioethics.

[FR Doc. 02–3626 Filed 2–13–02; 8:45 am]

BILLING CODE 4150–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the Secretary's Advisory Committee on Regulatory Reform

AGENCY: Office of the Assistant Secretary for Planning and Evaluation, Department of Health and Human Services.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given of a public hearing by the Department of Health and Human Services (HHS) Secretary's Advisory Committee on Regulatory Reform. As governed by the Federal Advisory Committee Act in accordance with Section 10(a)(2), the Secretary's Advisory Committee on Regulatory Reform is seeking guidance for the Department's efforts to streamline regulatory requirements. The Advisory Committee will advise and make recommendations for changes that would be beneficial in four broad areas: Health care delivery, health systems operations, biomedical and health research, and the development of pharmaceuticals and other products. The Committee will review changes identified through regional public hearings, written comments from the public, and consultation with HHS staff.

All meetings and hearings of the Committee are open to the general public. During each meeting, invited witnesses will address how regulations affect health-related issues. Meeting agendas will also allow some time for public comment. Additional information on each meeting's agenda and list of participating witnesses will be posted on the Committee's Web site prior to the meetings, *http://www.regreform.hhs.gov.*

DATES: The first public hearing of the Secretary's Advisory Committee on Regulatory Reform will be held on Monday, February 25, 2002, from 9:00 a.m. to 5:00 p.m. and on Tuesday, February 26, 2002, from 9:00 a.m. to 1:00 p.m.

ADDRESSES: The hearing will be held in Miami, Florida. Information about the exact location will be posted at the Web site address listed above and published in the **Federal Register** when the location has been confirmed.

FOR FURTHER INFORMATION CONTACT: Christy Schmidt, Executive Coordinator, Secretary's Advisory Committee on Regulatory Reform, Office of the Assistant Secretary for Planning and Evaluation, 200 Independence Avenue, SW., Room 344G, Washington, DC 20201, (202) 401–5182.

SUPPLEMENTARY INFORMATION: Anyone planning to attend the meeting who requires special disability-related arrangements such as sign-language interpretation should provide notice of their need by Tuesday, February 19, 2002. Please make any request to Michael Starkweather—phone: 301–628–3141; fax: 301–628–3101; e-mail: *mstarkweather@s-3.com.*

On June 8, 2001, HHS Secretary Thompson announced a Department-wide initiative to reduce regulatory burdens in health care, to improve patient care, and to respond to the concerns of health care providers and industry, State and local Governments, and individual Americans who are affected by HHS rules. Common sense approaches and careful balancing of needs can help improve patient care. As part of this initiative, the Department is establishing the Secretary's Advisory Committee on Regulatory Reform to provide findings and recommendations regarding potential regulatory changes. These changes would enable HHS programs to reduce burdens and costs associated with departmental regulations and paperwork, while at the same time maintaining or enhancing the effectiveness, efficiency, impact, and access of HHS programs.

Dated: February 7, 2002.

William Raub,

Deputy Assistant Secretary for Planning and Evaluation.

[FR Doc. 02–3625 Filed 2–13–02; 8:45 am]

BILLING CODE 4151–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Annual Update of the HHS Poverty Guidelines

AGENCY: Department of Health and Human Services.

ACTION: Notice.

SUMMARY: This notice provides an update of the HHS poverty guidelines to account for last (calendar) year's increase in prices as measured by the Consumer Price Index.

EFFECTIVE DATE: These guidelines go into effect on the day they are published (unless an office administering a program using the guidelines specifies a different effective date for that particular program).

ADDRESSES: Office of the Assistant Secretary for Planning and Evaluation, Room 404E, Humphrey Building, Department of Health and Human Services (HHS), Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: *For information about how the poverty guidelines are used or how income is defined in a particular program,* contact the Federal (or other) office which is responsible for that program.

For general questions about the poverty guidelines (but NOT for questions about a particular program—such as the Hill-Burton Uncompensated Services Program—that uses the poverty guidelines), contact Gordon Fisher, Office of the Assistant Secretary for Planning and Evaluation, Room 404E, Humphrey Building, Department of Health and Human Services, Washington, DC 20201—telephone: (202) 690–5880; persons with Internet access may visit the poverty guidelines Internet site at <*http://aspe.hhs.gov/poverty/poverty.htm*>.

For information about the Hill-Burton Uncompensated Services Program (no-fee or reduced-fee health care services at certain hospitals and other health care facilities for certain persons unable to pay for such care), contact the Office of the Director, Division of Facilities Compliance and Recovery, Health Resources and Services Administration, HHS, Room 10C–16, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857. To speak to a person, call (301) 443–5656. To receive a Hill-Burton information package, call 1–800–638–0742 (for callers outside Maryland) or 1–800–492–0359 (for callers in Maryland), and leave your name and address on the Hotline recording. Persons with Internet access may visit the Division of Facilities Compliance and Recovery Internet home page site at <*http://www.hrsa.gov/osp/dfcr*>. The Division of Facilities Compliance and Recovery notes that as set by 42 CFR 124.505(b), the effective date of this update of the poverty guidelines for facilities obligated under the Hill-Burton Uncompensated Services Program is sixty days from the date of this publication.

For information about the percentage multiple of the poverty guidelines to be used on immigration forms such as INS Form I–864, Affidavit of Support,

contact the U.S. Immigration and Naturalization Service. To obtain information on the most recent applicable poverty guidelines from the Immigration and Naturalization Service, call 1–800–375–5283. Persons with Internet access may obtain the information from the Immigration and Naturalization Service Internet site at <*http://www.ins.usdoj.gov/graphics/howdoi/affsupp.htm*>.

For information about the Department of Labor's Lower Living Standard Income Level (an alternative eligibility criterion with the poverty guidelines for certain programs under the Workforce Investment Act of 1998), contact John Beverly, Employment and Training Administration, U.S. Department of Labor—telephone: (202) 693–3502—e-mail: <*jbeverly@doleta.gov*>; persons with Internet access may visit the Employment and Training Administration's Lower Living Standard Income Level Internet site at <*http://wdsc.doleta.gov/llsil*>.

For information about the number of people in poverty since 1959 or about the Census Bureau statistical poverty thresholds, contact the HHES Division, Room G251, Federal Office Building #3, U.S. Census Bureau, Washington, D.C. 20233–8500—telephone: (301) 457–3242—or send e-mail to <*hhes-info@census.gov*>; persons with Internet access may visit the Poverty section of the Census Bureau's Internet site at <*http://www.census.gov/hhes/www/poverty.html*>.

2002 Poverty Guidelines for the 48 Contiguous States and the District of Columbia

Size of family unit	Poverty guideline
1	$8,860
2	11,940
3	15,020
4	18,100
5	21,180
6	24,260
7	27,340
8	30,420

For family units with more than 8 members, add $3,080 for each additional member. (The same increment applies to smaller family sizes also, as can be seen in the figures above.)

2002 Poverty Guidelines for Alaska

Size of family unit	Poverty guideline
1	$11,080

2002 Poverty Guidelines for Alaska—Continued

Size of family unit	Poverty guideline
2	14,930
3	18,780
4	22,630
5	26,480
6	30,330
7	34,180
8	38,030

For family units with more than 8 members, add $3,850 for each additional member. (The same increment applies to smaller family sizes also, as can be seen in the figures above.)

2002 Poverty Guidelines for Hawaii

Size of family unit	Poverty guideline
1	$10,200
2	13,740
3	17,280
4	20,820
5	24,360
6	27,900
7	31,440
8	34,980

For family units with more than 8 members, add $3,540 for each additional member. (The same increment applies to smaller family sizes also, as can be seen in the figures above.)

(Separate poverty guideline figures for Alaska and Hawaii reflect Office of Economic Opportunity administrative practice beginning in the 1966–1970 period. Note that the Census Bureau poverty thresholds—the primary version of the poverty measure—have never had separate figures for Alaska and Hawaii. The poverty guidelines are not defined for Puerto Rico, the U.S. Virgin Islands, American Samoa, Guam, the Republic of the Marshall Islands, the Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, and Palau. In cases in which a Federal program using the poverty guidelines serves any of those jurisdictions, the Federal office which administers the program is responsible for deciding whether to use the contiguous-states-and-D.C. guidelines for those jurisdictions or to follow some other procedure.)

The preceding figures are the 2002 update of the poverty guidelines required by section 673(2) of the Omnibus Budget Reconciliation Act (OBRA) of 1981 (Pub.L. 97–35—reauthorized by Pub.L. 105–285, Section 201 (1998)). As required by law, this update reflects last year's change in the Consumer Price Index (CPI–U); it was done using the same procedure used in previous years.

Section 673(2) of OBRA–1981 (42 U.S.C. 9902(2)) requires the use of these poverty guidelines as an eligibility criterion for the Community Services Block Grant program. The poverty guidelines are also used as an eligibility criterion by a number of other Federal programs (both HHS and non-HHS). Due to confusing legislative language dating back to 1972, the poverty guidelines have sometimes been mistakenly referred to as the ''OMB'' (Office of Management and Budget) poverty guidelines or poverty line. In fact, OMB has never issued the guidelines; the guidelines are issued each year by the Department of Health and Human Services (formerly by the Office of Economic Opportunity/Community Services Administration). The poverty guidelines may be formally referenced as ''the poverty guidelines updated periodically in the **Federal Register** by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2).''

The poverty guidelines are a simplified version of the Federal Government's statistical poverty thresholds used by the Census Bureau to prepare its statistical estimates of the number of persons and families in poverty. The poverty guidelines issued by the Department of Health and Human Services are used for administrative purposes—for instance, for determining whether a person or family is financially eligible for assistance or services under a particular Federal program. The poverty thresholds are used primarily for statistical purposes. Since the poverty guidelines in this notice—the 2002 guidelines—reflect price changes through calendar year 2001, they are approximately equal to the poverty thresholds for calendar year 2001 which the Census Bureau expects to issue in September or October 2002. (A preliminary version of the 2001 thresholds is now available from the Census Bureau.)

In certain cases, as noted in the relevant authorizing legislation or program regulations, a program uses the poverty guidelines as only one of several eligibility criteria, or uses a percentage multiple of the guidelines (for example, 125 percent or 185 percent of the guidelines). Non-Federal organizations which use the poverty guidelines under their own authority in non-Federally-funded activities also have the option of choosing to use a

percentage multiple of the guidelines such as 125 percent or 185 percent.

While many programs use the guidelines to classify persons or families as either eligible or ineligible, some other programs use the guidelines for the purpose of giving priority to lower-income persons or families in the provision of assistance or services.

In some cases, these poverty guidelines may not become effective for a particular program until a regulation or notice specifically applying to the program in question has been issued.

The poverty guidelines given above should be used for both farm and non-farm families. Similarly, these guidelines should be used for both aged and non-aged units. The poverty guidelines have never had an aged/non-aged distinction; only the Census Bureau (statistical) poverty thresholds have separate figures for aged and non-aged one-person and two-person units.

Definitions

There is no universal administrative definition of ''family,'' ''family unit,'' or ''household'' that is valid for all programs that use the poverty guidelines. Federal programs in some cases use administrative definitions that differ somewhat from the statistical definitions given below; the Federal office which administers a program has the responsibility for making decisions about its administrative definitions. Similarly, non-Federal organizations which use the poverty guidelines in non-Federally-funded activities may use administrative definitions that differ from the statistical definitions given below. In either case, to find out the precise definitions used by a particular program, please consult the office or organization administering the program in question.

The following statistical definitions (derived for the most part from language used in U.S. Bureau of the Census, Current Population Reports, Series P60–185 and earlier reports in the same series) are made available for illustrative purposes only; in other words, these statistical definitions are not binding for administrative purposes.

(a) Family

A family is a group of two or more persons related by birth, marriage, or adoption who live together; all such related persons are considered as members of one family. For instance, if an older married couple, their daughter and her husband and two children, and the older couple's nephew all lived in the same house or apartment, they would all be considered members of a single family.

(b) Unrelated Individual

An unrelated individual is a person 15 years old or over (other than an inmate of an institution) who is not living with any relatives. An unrelated individual may be the only person living in a house or apartment, or may be living in a house or apartment (or in group quarters such as a rooming house) in which one or more persons also live who are not related to the individual in question by birth, marriage, or adoption. Examples of unrelated individuals residing with others include a lodger, a foster child, a ward, or an employee.

(c) Household

As defined by the Census Bureau for statistical purposes, a household consists of all the persons who occupy a housing unit (house or apartment), whether they are related to each other or not. If a family and an unrelated individual, or two unrelated individuals, are living in the same housing unit, they would constitute two family units (see next item), but only one household. Some programs, such as the Food Stamp Program and the Low-Income Home Energy Assistance Program, employ administrative variations of the ''household'' concept in determining income eligibility. A number of other programs use administrative variations of the ''family'' concept in determining income eligibility. Depending on the precise program definition used, programs using a ''family'' concept would generally apply the poverty guidelines separately to each family and/or unrelated individual within a household if the household includes more than one family and/or unrelated individual.

(d) Family Unit

''Family unit'' is not an official U.S. Census Bureau term, although it has been used in the poverty guidelines **Federal Register** notice since 1978. As used here, either an unrelated individual or a family (as defined above) constitutes a family unit. In other words, a family unit of size one is an unrelated individual, while a family unit of two/three/etc. is the same as a family of two/three/etc.

Note that this notice no longer provides a definition of ''income.'' This is for two reasons. First, there is no universal administrative definition of ''income'' that is valid for all programs that use the poverty guidelines. Second, in the past there has been confusion regarding important differences between the statistical definition of income and various administrative definitions of ''income'' or ''countable income.'' The precise definition of ''income'' for a particular program is very sensitive to the specific needs and purposes of that program. To determine, for example, whether or not taxes, college scholarships, or other particular types of income should be counted as ''income'' in determining eligibility for a specific program, one must consult the office or organization administering the program in question; that office or organization has the responsibility for making decisions about the definition of ''income'' used by the program (to the extent that the definition is not already contained in legislation or regulations).

Dated: February 6, 2002.

Tommy G. Thompson,

Secretary of Health and Human Services.

[FR Doc. 02–3627 Filed 2–13–02; 8:45 am]

BILLING CODE 4154–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Nominations of Topics for EAvidence-based Practice Centers

AGENCY: Agency for Healthcare Research and Quality (AHRQ), DHHS.

ACTION: Nominations of topics for evidence reports and technology assessments.

SUMMARY: AHRQ invites nominations of topics for evidence reports and technology assessments relating to the prevention, diagnosis, treatment and management of common diseases and clinical conditions, as well as topics relating to organization and financing of health care. AHRQ's previous requests for topic nominations were published in the **Federal Register** on December 23, 1996, November 28, 1997, May 4, 1999, and November 13, 2000.

DATES: Topic nominations should be submitted by April 15, 2002, in order to be considered for the next group of evidence reports and technology assessments. In addition to timely responses to this request for nominations, AHRQ also accepts topic nominations on an ongoing basis. AHRQ will not reply to individual responses, but will consider all nominations during the selection process. Topics selected will be announced from time to time in the **Federal Register** and through AHRQ press releases.

ADDRESSES: Topics nominations should be submitted to Jacqueline Besteman, J.D., M.A., Director, Evidence-based Practice Centers (EPC) Program, Center

for Practice and Technology Assessment, AHRQ, 6010 Executive Boulevard, Suite 300, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Jacqueline Besteman, J.D., M.A., Center for Practice and Technology Assessment, AHRQ, 6010 Executive Blvd., Suite 300, Rockville, MD 20852; Phone: (301) 594–4017; Fax: (301) 594–4027; E-mail: *jbestema@ahrq.gov*

Arrangement for Public Inspection: All nominations will be available for public inspections at the Center for Practice and Technology Assessment, telephone (301) 594–4015, weekdays between 8:30 a.m. and 5 p.m. (Eastern time).

SUPPLEMENTARY INFORMATION:

1. Background

Under Title IX of the Public Health Service Act (42 U.S.C. 299a–299c) as amended by Public Law 106–129 (1999), AHRQ is charged with enhancing the quality, appropriateness, and effectiveness of health care services and access to such services. AHRQ accomplishes these goals through scientific research and through promotion of improvements in clinical practice and health systems practices including the prevention of diseases and other health conditions.

2. Purpose

The purpose of this **Federal Register** notice is to encourage participation and collaboration of professional societies, health systems, payors, and providers, with AHRQ as it carries out its mission to promote the practice of evidence-based health care. AHRQ serves as the science partner with private-sector and public organizations in their efforts to improve the quality, effectiveness, and appropriateness of health care delivery in the United States, and to expedite the translation of evidence-based research findings into improved health care services. AHRQ awards takes order contracts to its Evidence-based Practice Centers (EPCs) to undertake scientific analysis and evidence syntheses on high-priority topics. The EPCs produce science syntheses—evidence reports and technology assessments—that provide to public and private organizations the foundation for developing and implementing their own practice guidelines, performance measures, educational programs, and other strategies to improve the quality of health care and decision-making related to the effectiveness and appropriateness of specific health care technologies and services. The evidence reports and technology assessments also may be used to inform coverage and reimbursement policies.

In addition to clinical and behavioral research, as the body of scientific studies related to organization and financing of health care grows, systematic review and analysis of these studies can provide health system organizations with a scientific foundation for developing system-wide policies and practices. These reports may address and evaluate topics such as risk adjustment methodologies, market performance measures, provider payment mechanisms, and insurance purchasing tools, as well as provider integration of new scientific findings regarding health care and delivery innovations. To review topics that have been assigned to the EPCs between FY 1997 and FY 2001, visit AHRQ's Web site at *http://www.ahrq.gov/clinic/epc/#centers.*

3. Evidence-based Practice Centers (EPCs)

The EPCs prepare evidence reports and technology assessments on topics for which there is significant demand for information by health care providers, insurers, purchasers, health-related societies, and patient advocacy organizations. Such topics may include the prevention, diagnosis and/or treatment of particular clinical and behavioral conditions, use of alternative or complementary therapies, and appropriate use of commonly provided services, procedures, or technologies. Topics also may include issues related to the organization and financing of care. AHRQ widely disseminates the EPC evidence reports and technology assessments, both electronically and in print. The EPC evidence reports and technology assessments do not include clinical recommendations or recommendations or reimbursement and coverage policies.

4. Role/Responsibilities of Partners

Nominators of topics selected for development of an EPC evidence report or technology assessment assume the role of Partners of AHRQ and the EPCs. Partners have defined roles and responsibilities. AHRQ places high value on these relationships, and plans to review Partners' past performance of these responsibilities at such time as AHRQ is considering whether to accept additional topics nominated by an organization, in subsequent years. Specifically, Partners are expected to serve as resources to EPCs and they develop the evidence reports and technology assessments related to their nominated topic; serve as members of external peer reviewers of relevant draft evidence report and assessment; and commit to (a) timely translation of the EPC reports and assessments into their own quality improvement tools (*i.e.,* clinical practice guidelines, performance measures), educational programs, and reimbursement policies; and (b) dissemination of these derivative products to their membership. AHRQ also is interested in members' use of these derivative products and the products' impact on enhanced healthcare. AHRQ will look to the Partners to provide these use and impact data on products that are based on EPC evidence reports and technology assessments.

The AHRQ will review topic nominations and supporting information and determine final topics; seeking additional information as appropriate. AHRQ is very interested in receiving topic nominations from professional societies and organizations comprised of members of minority populations, as well as nomination of topics that have significant impact on the health status of women, children, ethnic and racial populations.

5. Topic Nomination and Selection Process

The processes that AHRQ employs a select topics nominated for analyses by the EPCs is described below. Section A addresses AHRQ's nomination process and selection criteria for clinical and behavioral topics. Section B addresses AHRQ's nomination process and selection criteria for organization and financing topics.

A. Section A: Clinical and Behavioral Topics

(a) Nomination Process for Clinical and Behavioral Topics

Nominations of clinical and behavioral topics for AHRQ evidence reports and technology assessments should focus on specific aspects of prevention, diagnosis, treatment and/or management of a particular condition, or on an individual procedure, treatment, or technology. Potential topics should be carefully defined and circumscribed so that the relevant published literature and other databases can be searched, evidence systematically reviewed, supplemental analyses performed, draft reports and assessments circulated for external peer review, and final evidence reports or technology assessments produced. Some reports and assessments can be completed within six months, if there is a small volume of literature to be systematically reviewed and analyzed. Other evidence reports and technology

assessments may required up to 12 months for completion due to complexity of the topic, the volume of literature to be searched, abstracted, and analyzed, and completion of the external peer review process. Topics selected will not duplicate current and widely available syntheses, unless new evidence is available that suggests the need for revisions or updates.

For each topic, the nominating organization must provide the following information: (a) Rationale and supporting evidence on the clinical relevance and importance of the topic; and (b) plans for rapid translation of the evidence reports and technology assessments into clinical guidelines, performance measures, educational programs, or other strategies for strengthening the quality of health care services, or plans to inform development of reimbursement or coverage policies; (c) plans for dissemination of these derivative products to their membership; and (d) process by which the nominating organization will measure the use of these products by their members, and impact of such use. Specifically, nomination information should include:

- Defined condition and target population.
- Three to five very focused questions to be answered.
- Incidence or prevalence, and indication of the disease burden (*e.g.,* mortality, morbidity, functional impairment) in the U.S. general population or in subpopulations (*e.g.,* Medicare and Medicaid populations). For prevalence, the number of cases in the U.S. and the number of affected persons per 1,000 persons in the general U.S. population should be provided. For incidence, the number of new cases per 100,000 a year should be provided.
- Costs associated with the clinical or behavioral condition, including average reimbursed amounts for diagnosis and therapeutic interventions (*e.g.,* average U.S. costs and number of persons who receive care for diagnosis or treatment in a year, citing ICD9–CM and CPT codes, if possible).
- Impact potential of the evidence report or technology assessment to decrease health care costs or to improve health status or clinical outcomes.
- Availability of scientific data and bibliographies of studies on the topic.
- References to significant differences in practice patterns and/or results; alternative therapies and controversies.
- Plans of the nominating organization to incorporate the report into its managerial or policy decision making (*i.e.,* rapid translation of the report or assessment into derivative products such as clinical practice guidelines or other quality improvement tools, or to inform reimbursement or coverage about a particular technology or service).
- Plans of the nominating organization for disseminating of these derivative products to its membership.
- Process by which the nominating organization will measure members' use of the derivative products, and measure the impact of such use, on clinical practice.

(b) Selection Criteria for Clinical Topics

Factors that will be considered in the selection of clinical topics for AHRQ evidence report and technology assessment topics include: (1) High incidence or prevalence in the general population and in special populations, including women, racial and ethnic minorities, pediatric and elderly populations, and those of low socieconomic status; (2) significance for the needs of the Medicare, Medicaid and other Federal health programs; (3) high costs associated with a condition, procedure, treatment, or technology, whether due to the number of people needing care, high unit cost of care, or high indirect costs; (4) controversy or uncertainty about the effectiveness or relative effectiveness of available clinical strategies or technologies; (5) impact potential for informing and improving patient or provider decision making; (6) impact potential for reducing clinically significant variations in the prevention, diagnosis, treatment, or management of a disease or condition, or in the use of a procedure or technology, or in the health outcomes achieved; (7) availability of scientific data to support the systematic review and analysis of the topic; (8) submission of nominating organization's plan to incorporate the report into its managerial or policy decision making, as defined above; and (9) submission of nominating organization's plan to disseminate derivative products to it members, and plan to measure members' use of these products, and the resultant impact of these products on clinical practice.

B. Section B: Organization and Financing Topics

(a) Nomination Process for Organization and Financing Topics

Nominations of organization and financing topics for AHRQ evidence reports should focus on specific aspects of health care organization and finance. Topics should be carefully defined and circumscribed so that relevant databases may be searched, the evidence systematically reviewed, supplemented analyses performed, draft reports circulated for external peer review, and final evidence reports produced. Reports can be completed within six months if there is a small volume of literature for systematic review and analysis. Some evidence reports may require up to 12 months for completion due to the complexity to the topic and the volume of literature to be searched, abstracted, analyzed. Topics selected will not duplicate current and widely available research syntheses, unless new evidence is available that suggests the need for revisions or updates.

For each topic, nominators should provide a rationale and supporting evidence on the importance and relevance of the topic. Nominators must also state their plans for use of the evidence report and indicate how the report could be used by public and private decision makers. Nomination information should include:

- Defined organizational/financial arrangement or structure impacting quality, outcomes, cost, access or use.
- Three to five focused questions to be answered.
- If appropriate, description of how the organizational/financial arrangement or structure is particularly relevant to delivery of care for specific vulnerable populations (*e.g.,* children, persons with chronic disease) or certain communities (*e.g.,* rural markets).
- Costs potentially affected by the organizational/financial arrangement, to the extent they can be quantified.
- Impact potential of the evidence report to decrease health care costs or to improve health status or outcomes.
- Availability of scientific and/or administrative data and bibliographies of studies on the topic.
- References to significant variation in delivery and financing patterns and/or results, and related controversies.
- Nominator's plan for use of an evidence report on the topic.
- Nominator's plan for measuring the impact of the report on practice.

(b) Selection Criteria for Organization and Financing Topics

Factors that will be considered in the selection of topics related to the organization and financing of care include the following: (1) Uncertainty about the impact of the subject organizational or financing strategy; (2) potential for the subject organizational or financing strategy or the proposed research synthesis to significantly impact aggregate health care costs; (3) policy-relevant to Medicare, Medicaid, and/or other Federal and State health programs; (4) relevant to vulnerable

populations, including racial and ethnic minorities, and particular communities, such as rural markets; (5) available scientific data to support systematic review and analysis of the topic; (6) plans of the nominating organization to incorporate the report into its managerial or policy decision-making; and (7) plans by the nominating organization to measure the impact of the report on practice.

Dated: February 8, 2002.

John M. Eisenberg,

Director.

[FR Doc. 02–3566 Filed 2–13–02; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality Notice of Meeting

In accordance with section 10(d) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2), announcement is made of a Health Care Policy and Research Special Emphasis Panel (SEP) meeting.

The Health Care Policy and Research Special Emphasis Panel is a list of experts in fields related to health care research who are invited by the Agency for Healthcare Research and Quality (AHRQ) and agree to be available, to conduct, on an as needed basis, scientific reviews of applications for AHRQ support. Individual members of the Panel do not meet regularly and do not serve for fixed or long terms. Rather, they are asked to serve for particular review meetings which require their type of expertise.

Substantial segments of the upcoming SEP meeting listed below will be closed to the public in accordance with the Federal Advisory Committee Act, section 10(d) of 5 U.S.C., Appendix 2 and 5 U.S.C. 552b(c)(6). Grant applications for Cooperative Agreement Awards are to be reviewed and discussed at this meeting. These discussions are likely to include personnel information concerning individuals associated with these applications. This information is exempt from mandatory disclosure under the above-cited statutes.

1. *SEP Meeting on:* Consumer Assessments of Health Plans Study, Phase II (CAHPS).

Date: March 11, 2002 (Open on March 11, from 8:00 a.m. to 8:15 a.m. and closed for remainder of the meeting).

Place: Hyatt Regency, Susquehanna Room, One Bethesda Metro Center, Bethesda, MD 20814.

Contact Person: Anyone wishing to obtain a roster of members or minutes of this meeting should contact Mrs. Bonnie Campbell, Committee Management Officer, Office of Research Review, Education and Policy, AHRQ, 2101 East Jefferson Street, Suite 400, Rockville, Maryland 20852, Telephone (301) 594–1846.

Agenda items for this meeting are subject to change as priorities dictate.

Dated: February 11, 2002.

John M. Eisenberg,

Director.

[FR Doc. 02–3678 Filed 2–13–02; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 02025]

Cooperative Agreement for Epidemiologic Studies of Birth Defects and Developmental Disabilities, and the Promotion of Optimal Birth Outcomes in China; Notice of Availability of Funds

A. Purpose

The Centers for Disease Control and Prevention (CDC) announces the availability of fiscal year (FY) 2002 funds for a cooperative agreement program for epidemiologic studies of birth defects and other reproductive and developmental outcomes in China.

B. Eligible Applicant

Assistance will be provided only to the National Center for Maternal and Infant Health, Peking University Health Science Center, Beijing, People's Republic of China. No other applications are solicited.

The People's Republic of China (PRC) is the most appropriate country, and the Peking University Health Science Center (PUHSC) (formerly Beijing Medical University [BMU]) is the most appropriate institution to conduct the work under this cooperative agreement.

The National Center for Maternal and Infant Health (NCMIH) at PUHSC.

Scientists at PUHSC have successfully collaborated with CDC on a large community intervention program of folic acid supplementation to prevent neural tube defects, including almost 250,000 women; and currently maintain surveillance of four large cohorts. These scientists have experience in all areas of birth defects research including clinical pediatrics and dysmorphology, epidemiology, public health, statistics, and laboratory science. Extensive data sets on perinatal health, birth outcome, and birth defects surveillance are maintained at PUHSC.

NCMIH functions as the national research center on health care, clinical epidemiology, and public health; and the national laboratory for reproductive health research. In addition, it is a national training center for professional technical personnel in medical epidemiological research and public health; an information management center for birth outcomes and reproductive health, and a consulting and advising center for the promotion of international academic exchange and cooperation.

Population Characteristics and Childbearing Practices in China.

China has a large, stable, and relatively homogeneous population, registration for marriage is required, and virtually all pregnancies are planned. Women who may be eligible to participate in clinical trials or other birth defects prevention programs can therefore be identified early, at the time of registration for marriage.

Approximately 80 percent of women in China become pregnant within one year of marriage. In accordance with family planning practices, most women, particularly in urban areas, have only one child. Thus, the PRC is well-suited for evaluating interventions directed toward the prevention of birth defects and adverse pregnancy outcomes, or for studying varying doses and schedules of nutritional supplements without interfering with national recommendations for women who are newly married or planning a pregnancy.

China Public Health Priorities.

Ensuring an optimal birth outcome is a national health priority in the PRC. In June 2001, the implementation procedure for the Maternal and Child Health Law (enacted July 1, 1995) was signed by Premier Zhu Rongji. Under the provisions of this law, all women are entitled to receive reproductive health services to ensure a healthy pregnancy and a healthy baby. As a result of the capabilities of the PUHSC, the Ministry of Health is expected to identify the NCMIH as the main technical unit for implementation of the law.

One of the major components of the implementation plan is the prevention of birth defects and reduction of infant mortality.

In addition, the Ministry of Science and Technology has taken responsibility for a number of projects to prevent birth defects and disabilities. Among these are (1) determining risk factors for congenital cardiac defects in China, (2)

surveillance for congenital cardiac defects through prenatal and postnatal ultrasound examinations, and (3) identification of risk factors for birth defects in the high risk areas of Shanxi Province, and developmental of intervention strategies.

C. Availability of Funds

Approximately $1,000,000 is available in FY 2002 to fund this award. It is expected that the award will begin on or about June 3, 2002, and will be made for a 12-month budget period within a project period of up to five years. Funding estimates may change.

Continuation awards within an approved project period will be made on the basis of satisfactory progress as evidenced by required reports and the availability of funds.

All requests for funds contained in the budget shall be stated in U.S. dollars. Once an award is made, CDC will not compensate foreign grantees for currency exchange fluctuations through the issuance of supplemental awards.

a. Funds may be spent for reasonable program purposes, including personnel, travel, supplies, and services. Equipment may be purchased if deemed necessary to accomplish program objectives, however, prior approval by CDC officials must be requested in writing.

b. The applicant may contract with other organizations under this program. However, the applicant must perform a substantial portion of the activities including program management and operations.

D. Where to Obtain Additional Information

This and other CDC Announcements can be found on the CDC home page Internet address—http://www.cdc.gov click on ''Funding'' then ''Grants and Cooperative Agreements.''

If you have questions after reviewing the contents of all the documents, business management technical assistance may be obtained from: Angelia Hill, Grants Management Specialist, International Grants and Contracts Branch, Procurement and Grants Office, Centers for Disease Control and Prevention (CDC), 2920 Brandywine Road, Room 3000, Atlanta, GA 30341–4146, Telephone: (770) 488–2785, email: aph8@cdc.gov.

Program Technical assistance, contact: R.J. Berry, MD, MPHTM—Medical Epidemiologist, National Center on Birth Defects, and Developmental Disabilities, Centers for Disease Control and Prevention, 4770 Buford Highway, N.E., MS F–45, Atlanta, GA 30341–3724, Telephone: (770) 488–3502, email: rjb1@cdc.gov.

Dated: February 8, 2002.

Rebecca O'Kelley,

Chief, International Grants and Contracts Branch, Centers for Disease Control and Prevention (CDC).

[FR Doc. 02–3605 Filed 2–13–02; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 02022]

CDC Support to Expand HIV/AIDS/STD Surveillance, Care and Prevention in Uganda; Notice of Award of Equipment Grant

A. Purpose

The Centers for Disease Control and Prevention (CDC) announces the award of fiscal year (FY) 2002 funds for an equipment grant program for the AIDS Control Programme (ACP) and Nakasero Blood Bank, Ministry of Health of the Republic of Uganda.

This equipment grant supports an earlier Cooperative Agreement (01140) with the Uganda Ministry of Health, AIDS Control Programme, to improve and expand HIV/AIDS/STD surveillance, care and prevention capacity activities in Uganda.

B. Where to Obtain Additional Information

To obtain business management technical assistance, contact: Dorimar Rosado, Lead Grants Management Specialist, International Grants and Contracts Branch, Procurement and Grants Office, Centers for Disease Control and Prevention, 2920 Brandywine Road, Room 3000, Atlanta, GA 30341–4146, Telephone number: (770) 488–2782, FAX: (770) 488–2847, Email address: dpr7@cdc.gov.

For program technical assistance, contact: Bruce Ross, c/o/ U.S. Embassy Kampala, PO Box 7070, Kampala, Uganda, or by mail: 2190 Kampala Pl, Washington, DC 20521–2190, Telephone number: 256 41 320 776, FAX: 256 41 321 457, Email address: bxr2@cdc.gov.

Dated: February 8, 2002.

Rebecca B. O'Kelley,

Chief, International Grants and Contracts Branch, Centers for Disease Control and Prevention (CDC).

[FR Doc. 02–3606 Filed 2–13–02; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 01D–0583]

Food Security Guidance; Availability; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a notice that appeared in the **Federal Register** of January 9, 2002 (67 FR 1224). The notice announced the availability of two guidance documents related to food security entitled ''Food, Producers, Processors, Transporters, and Retailers: Food Security Preventive Measures Guidance'' and ''Importers and Filers: Food Security Preventive Measures Guidance.'' The notice published with inadvertent errors. This document corrects those errors.

FOR FURTHER INFORMATION CONTACT: John Kvenberg, Office of Field Programs (HFS–600), Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 202–205–4187, e-mail: jkvenberg@cfsan.fda.gov or Donald W. Kraemer, Office of Seafood (HFS–400), Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–2300, e-mail: dwkraemer@cfsan.fda.gov.

SUPPLEMENTARY INFORMATION: In FR Doc 02–542, appearing on page 1224 in the **Federal Register** of Wednesday, January 9, 2002, the following corrections are made:

1. On page 1224, in the second column, under the **FOR FURTHER INFORMATION CONTACT** section, after the last sentence, add a second contact person to read: ''Donald W. Kraemer, Office of Seafood (HFS–400), Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–2300, e-mail: dkraemer@cfsan.fda.gov.''

2. On page 1225, in the first column, under the heading ''III. Electronic Access,'' starting in the third line the Internet address is corrected to read: '' http://www.cfsan.fda.gov/~dms/guidance.html.''

Dated: February 7, 2002.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 02–3615 Filed 2–13–02; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Pub. L. 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to OMB under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, call the HRSA Reports Clearance Officer on (301) 443–1129.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: The Sentinel Centers Network (SCN) Core Data Set—NEW

HRSA's Bureau of Primary Health Care (BPHC) established the Sentinel Centers Network (SCN) to assist in addressing critical policy issues. Twenty-five BPHC supported health centers and NHSC sites have been awarded funds through sub-contracts in this first year of operation. These health centers were identified as having adequate infrastructure and commitment through the competitive contract process to serve as ''laboratories'' that will generate data for timely policy analyses and conducting projects on topics that have immediate policy impact.

A protocol for core data collection and retrieval, timelines, expectations, and evaluation of the Network sites is currently underway. It is expected that sites will submit these core data, or have these data extracted from their existing information systems periodically. These core data may include provider level, encounter level, and user level information regarding, for example, data on service delivery, utilization, payer sources, demographics, clinical diagnoses and outcomes, staffing, and costs. Since all data obtained from the participant sites will be extracted/compiled from existing information systems, and not through primary data collection, burden will therefore be minimized. In addition, each participant site will receive technical assistance both on site and via telephone to reduce burden as much as possible.

Estimated burden hours:

Type of respondent	Number of respondents	Responses per respondent	Total responses	Hours per responses	Total burden hours
Sites	25	4	100	8	800

Send comments to Susan G. Queen, Ph.D., HRSA Reports Clearance Officer, Room 11–05, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: February 8, 2002.

Jane M. Harrison,

Director, Division of Policy Review and Coordination.

[FR Doc. 02–3617 Filed 2–13–02; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Advisory Council on Migrant Health Notice of Meeting

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Notice of meeting.

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92–463), announcement is made of the following National Advisory body scheduled to meet during the month of March 2002:

Name: National Advisory Council on Migrant Health.

Date & Time: March 15, 2002; 9:00 a.m. to 5:00 p.m.; March 16, 2002; 9:00 a.m. to 5:00 p.m.

Place: Hilton Washington and Towers Hotel, 1919 Connecticut Avenue, NW., Washington, DC 20009, Phone: (202)483–3000; Fax (202)232–0428.

The meeting is open to the public.

Agenda: This will be a meeting of the Council. The agenda includes an overview of general Council business activities and priorities. Topics of discussion will include development of the Year 2002 recommendations and background statements. In addition, the Council will explore the area of mental health and migrant and seasonal farmworkers. Finally, the Council will be reviewing nominations for Council membership for terms beginning November 2002. The Council meeting is being held in conjunction with the National Association of Community Health Centers, 27th Annual Policy and Issues Forum.

Anyone requiring information regarding the subject Council should contact Margaret Davis, Migrant Health Program, staff support to the National Advisory Council on Migrant Health, Bureau of Primary Health Care, Health Resources and Services Administration, 4350 East-West Highway, Bethesda, Maryland 20814, Telephone 301/594–0291.

Agenda items are subject to change as priorities indicate.

Dated: February 8, 2002.

Jane M. Harrison,

Director, Division of Policy Review and Coordination.

[FR Doc. 02–3616 Filed 2–13–02; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by agencies of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of

federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301/496–7057; fax: 301/402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

Filtration of Red Blood Cells

David F. Stroncek (CC), Susan F. Leitman (CC), Herb M. Cullis (EM), DHHS Reference No. E–339–01/0 filed 06 Nov 2001,

Licensing Contact: Dale Berkley; 301/496–7735 ext. 223; e-mail: *berkleyd@od.nih.gov.*

The invention is a method for collecting whole blood using an oxygen permeable collection bag to prevent the polymerization of Hemoglobin S, so as to prevent clogging of leukocyte reduction filters. Red blood cell components collected for transfusion are prepared from whole blood collected by phlebotomy or apheresis from healthy volunteers. Before the manufacturing of RBC components is complete, the blood is passed through leukocyte reduction filters to remove contaminating white blood cells. Unfortunately, RBC components from healthy donors with sickle cell trait clog these filters. When this occurs, the RBC components cannot be processed further and must be thrown out. The invention takes advantage of the discovery that the obstruction of leukocyte reduction filters is due to the polymerization of Hemoglobin S in RBCs from people with sickle cell trait when the oxygen concentration is low. The invention demonstrates that collecting the blood in oxygen permeable containers prevents this polymerization, allowing for efficient high-speed filtration of collected blood.

Discovery of Novel Inhibitors of HIV–1 Integrase That Can Be Used for the Treatment of Retroviral Infection Including AIDS

Terrence R. Burke, Jr., Xuechen Zhang, Godwin C. G. Pais, Christophe Marchand, Evguenia Svarovskaia, Vinay K. Pathak, and Yves Pommier (NCI), DHHS Reference No. E–317–01/0 filed 07 Dec 2001, Licensing Contact: Sally Hu; 301/496–7056 ext. 265; e-mail: *hus@od.nih.gov.*

This invention provides azido group-containing diketo acids that can inhibit HIV–1 integrase in vitro efficiently while being highly selective for the strand transfer step of the integration reaction. Human Immunodeficiency Virus (HIV) and other retroviruses require three viral enzymes for replication: reverse transcriptase, protease and integrase. The prognosis of AIDS has been improved recently by the discovery and application of reverse transcriptase and protease inhibitors. However, a significant fraction of patients fail to respond to such treatments and viral resistance remains a major problem. Furthermore, anti-AIDS combinations are often not well tolerated. Thus, HIV integrase is a rational target for AIDS therapy because genetic studies demonstrated that the enzyme is essential for viral replication while being without a cellular equivalent. Therefore, specific integrase inhibitors should be effective and devoid of toxicity. Since this invention involves the discovery of novel HIV–1 integrase inhibitors that are derived from diketo acids with a different anti-HIV mechanism from that of reverse transcriptase and protease inhibitors, these azide group-containing compounds may represent potential new therapeutics for treatment of retroviral infections, including AIDS.

Strategies To Destabilize the Active HIV–1 Protease Dimer Resulting in Stable Monomer Formation

John L. Medabalimi (NIDDK), Rieko Ishima (NIDCR), and Angela Gronenborn (NIDDK), DHHS Reference No. E–242–01/0 filed 23 Aug 2001, Licensing Contact: Sally Hu; 301/496–7056 ext. 265; e-mail: *hus@od.nih.gov.*

Upon maturation from its precursor, the HIV–1 protease forms and exists mostly as a functional dimer. The present invention relates to compositions and methods for inhibiting activity of functional dimeric retroviral proteases. More specifically, the invention relates to defining specific interface regions critical for dimer formation and production of stable folded monomers. These monomers are inactive and some of these monomers can block functional protease dimerization. The invention also describes a method of designing folded protease monomers that are stable in solution at concentrations several-fold higher than encountered in nature (stable up to 0.6 mM for several weeks at 20° C). Modifying the native protease monomer chain through substituting amino acids at the terminal regions brings about this stabilization. Knowledge of unique regions critical for the dimerization of the protease and the stable monomers may be used in the development of novel inhibitors targeting the protease, in the generation of clinically relevant antibodies and anti-idiotypic antibodies for the inhibition of functional protease activity, in the generation of a screening assay or kit that can be used to identify other similarly acting protease antagonists, in the preparation of vaccine formulations, and in the treatment of virally infected cells.

Novel Broadly Reactive HIV-Neutralizing Human Monoclonal Antibody Against Receptor-Induced Epitope on gp120

Dimiter Dimitrov (NCI), Maxime Moulard (EM), Dennis Burton (EM), Yuuei Shu (NCI), Sanjay Phogat (NCI), and Xiadong Xiao (NCI), DHHS Reference No. E–130–01/0 filed 16 Oct 2001, Licensing Contact: Sally Hu; 301/496–7056 ext. 265; e-mail: *hus@od.nih.gov.*

This invention provides a novel anti-HIV human monoclonal antibody named X5. The X5 antibody demonstrates promise over other conventional anti-HIV antibodies because this antibody presents a unique binding activity different than its counterparts. It has been established that the very initial stage of HIV–1 entry into cells is mediated by a complex between the virus envelope glycoprotein (Env) such as gp120-gp41, a receptor CD4 and a co-receptor CCR5. The X5 antibody binds to an epitope on gp120 that is induced by interaction between gp120 and the receptor CD4 and enhanced by the co-receptor CCR5. The X5 antibody also shows strong activity at very low levels (in the range from 0.0001–0.1 Mg/ml concentration in dependence on the isolate). Because it is a human antibody, it can be administered directly into patients so that it is an ideal candidate for clinical trials. It also can be easily produced because it was obtained by screening of phage display libraries and its sequence is known. Finally, since it has neutralized all virus envelope glycoproteins, including from primary isolates from different clades, that were tested against, the epitope is very conserved and resistance is unlikely to develop. Therefore, this antibody and/or its derivatives including fusion proteins with CD4 are good candidates for clinical development.

Additional information on the current research in Dr. Dimitrov's laboratory may be found at *http://www-*

lecb.ncifcrf.gov/~dimitrov/dimitrov.html.

Dated: February 7, 2002.

Jack Spiegel,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 02–3568 Filed 2–13–02; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant Of Exclusive License: Prophylactic and/or Therapeutic Vaccine Against Pseudomonas aeruginosa, Chlamydia trachomatis and Mycoplasma pneumonia, Influenza virus, Nisseria gonorrhea and Vibrio cholerae

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: This is notice, in accordance with 15 U.S.C. 209(c)(1) and 37 CFR 404.7(a)(1)(i), that the National Institutes of Health (NIH), Department of Health and Human Services, is contemplating the grant of a limited field of use exclusive worldwide license to practice the inventions embodied in: U.S. Provisional Patent Application Serial Number 60/257,877, filed December 21, 2000, entitled ''A Chimeric Protein Comprising Non-Toxic Pseudomonas Exotoxin A and Type IV Pilin Sequences''; U.S. Patent Number 5,869,608 issued February 9, 1999, entitled ''Nucleotide and Amino Acid Sequences of the Four Variable Domains of the Major Outer Membrane Proteins of Chlamydia Trachomatis''; U.S. Patent Application Serial Number 09/247,137 filed February 9, 1999, entitled ''Nucleotide and Amino Acid Sequences of the Four Variable Domains of the Major Outer Membrane Proteins of Chlamydia trachomatis''; U.S. Patent Number 4,892,827 issued January 9, 1990, entitled ''Recombinant Pseudomonas Exotoxins: Construction of an Active Immunotoxin with Low Side Effects''; U.S. Provisional Patent Application 60/160,923 filed October 22, 1999, entitled ''Delivery of Proteins Across Polar Epithelial Cell Layers''; and U.S. Patent Number 5,328,984 issued July 12, 1994, entitled ''Recombinant Chimeric Proteins Deliverable Across Cellular Membranes into Cytosol of Target Cells'' to Trinity BioSystems, L.L.C. of Los Altos Hills, California, U.S.A. The United States as represented by the Department of Health and Human Services is an assignee of these patent rights.

DATES: Only written comments and/or applications for a license, which are received by the NIH Office of Technology Transfer on or before April 15, 2002, will be considered.

ADDRESSES: Requests for a copy of these patent applications, inquiries, comments, and other materials relating to the contemplated license should be directed to: Carol A. Salata, Technology Licensing Specialist, Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, MD 20852–3804; Telephone: (301) 496–7735 ext 232; Facsimile: (301) 402–0220; E-mail: *salatac@OD.NIH.GOV.*

SUPPLEMENTARY INFORMATION: The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. It is anticipated that this license may be limited to the field of use as a prophylactic and/or therapeutic vaccine against Pseudomonas aeruginosa, Chlamydia trachomatis, Mycoplasma pneumoniae, Influenza virus, Nisseria gonorrhea and Vibrio cholerae. Trinity BioSystems will use Pseudomonas exotoxin A to target and deliver pathogen Type IV pilin peptide epitopes wherein said pathogen peptide epitopes are inserted into or replace a domain of Pseudomonas exotoxin A. This prospective exclusive license may be granted unless within 60 days from the date of this published notice, NIH receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

The patent Application Serial Number 60/257,877 describes a chimeric protein wherein key sequences from a Type IV pilin protein are inserted into a non-toxic version of Pseudomonas aeruginosa exotoxin A. This invention provides candidate chimeric vaccines that generate antibodies that interfere with adherence of Pseudomonas aeruginosa exotoxin A to epithelial cells and neutralize the cytotoxicity of exotoxin A. U.S. Patent Number 5,869,608 and U.S. Patent Application Serial Number 09/247,137 relate to Chlamydia epitopes needed for the Chlamydia vaccine. U.S. Provisional Patent Application Number 60/160,923 provides methods for parenteral administration of a protein by transmucosal delivery and without injection. U.S. Patent Number 4,892,827 describes Pseudomonas exotoxins with a deletion in the Ia domain that makes them less toxic. U.S. Patent Number 5,328,984 contains claims relating to the chimeric Pseudomonas exotoxin protein compositions.

Applications for a license filed in response to this notice will be treated as objections to the grant of the contemplated license. Comments and objections submitted in response to this notice will not be made available for public inspection, and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

Dated: February 7, 2002.

Jack Spiegel,

Director, Division of Technology Development and Transfer, Office of Technology Transfer.

[FR Doc. 02–3567 Filed 2–13–02; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Center for Substance Abuse Prevention; Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the Center for Substance Abuse Prevention (CSAP) Drug Testing Advisory Board to be held in March 2002.

A portion of the meeting will be open and will include a Department of Health and Human Services drug testing program update, a Department of Transportation drug testing program update, and an update on the draft guidelines for alternative specimen testing and on-site testing. If anyone needs special accommodations for persons with disabilities, please notify the Contact listed below.

The meeting will include developing the final requirements for specimen validity testing that had been published in the **Federal Register** on August 21, 2001 (66 FR 43876), and evaluation of sensitive National Laboratory Certification Program (NLCP) internal operating procedures and program development issues. Therefore, a portion of the meeting will be closed to the public as determined by the SAMHSA Administrator in accordance with Title 5 U.S.C. 552b(c)(9)(B) and 5 U.S.C. App.2, 10(d).

A roster of the board members may be obtained from: Mrs. Giselle Hersh, Division of Workplace Programs, 5600 Fishers Lane, Rockwall II, Suite 815, Rockville, MD 20857, Telephone: (301) 443–6014. The transcript for the open session will be available on the following Web site: *http://*

workplace.samhsa.gov. Additional information for this meeting may be *obtained by contacting the individual listed below.*

Committee Name: Center for Substance Abuse Prevention, Drug Testing Advisory Board.

Meeting Date: March 13, 2002; 8:30 a.m.–4:30 p.m., March 14, 2002; 8:30 a.m.–Noon.

Place: Residence Inn by Marriott, 7335 Wisconsin Avenue, Bethesda, Maryland 20814.

Type: Open: March 13, 2002; 8:30 a.m.–10:00 a.m.; Closed: March 13, 2002; 10:00 a.m.–4:30 p.m.; Closed: March 14, 2002; 8:30 a.m.–Noon.

Contact: Donna M. Bush, Ph.D., Executive Secretary, Telephone: (301) 443–6014, and FAX: (301) 443–3031.

Dated: February 5, 2002.

Toian Vaughn,

Committee Management Officer, Substance Abuse and Mental Health, Services Administration.

[FR Doc. 02–3565 Filed 2–13–02; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary; Proposed Agency Information Collection Activities; Comment Request

AGENCY: Office of American Indian Trust, Interior.

ACTION: Notice.

SUMMARY: This notice announces that the Department of the Interior is seeking to renew the information collection request for *Evaluation of the performance of trust functions performed by tribes under Self-Governance compacts,* OMB Control Number 1076–0146. Under the Paperwork Reduction Act, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, and to allow 60 days for public comment in response to the notice.

DATES: Submit comments on or before April 15, 2002.

ADDRESSES: Send comments to: James I. Pace, Acting Director, Office of American Indian Trust, United States Department of the Interior, 1849 C Street, NW, Room 2472, Washington, DC 20240; Fax No. (202) 208–7503.

FOR FURTHER INFORMATION CONTACT: James I. Pace, (202) 208–3338.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (PRA), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. It is also a requirement of the PRA that agencies provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the Department of the Interior, Office of American Indian Trust, is publishing notice of the proposed collection of information listed below.

The Department of the Interior invites comments by the public 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 a practical use; the accuracy of the Department's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; ways to enhance the quality, usefulness, and clarity of the information to be collected; and minimizing the burden of collection on those who are to respond.

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.

This collection of information will be made to ensure compliance with 25 U.S.C. 458cc(d) which requires that the Secretary of the Interior monitor the performance of trust functions which have been assumed under Self-Governance funding agreements negotiated between the Secretary and an Indian tribe/consortia (hereinafter the respondent).

This information collection addresses those statutory and regulatory performance requirements imposed upon the respondent through the assumption of a particular trust function, through a formal Self-Governance agreement pursuant to the Self-Governance Act (Pub. L. 103–413) which, if not performed properly, may create imminent jeopardy to a trust asset. The information will be used by the Department of the Interior to determine if there is imminent jeopardy to any asset held in trust by the United States for an Indian tribe or individual Indian that are being managed by a tribe/consortium on behalf of the United States pursuant to a Self-Governance agreement.

Currently there are 70 respondents. There is no preliminary work required of the respondents nor any follow-up work required. There are no forms for the respondent to fill out. The annual hour burden is calculated by the amount of time that the reviewer spends at each program site interviewing the respondents and collecting file information. The time required for each information collection is determined by the complexity and size of the program and ranges from 4 person/hours to 80 person/hours. Weighing the size and complexity of the 70 current programs, it has been determined that the average hours spent for each annual evaluation will be approximately 24 person/hours. This number, multiplied by the current number of evaluations, yields a total number of 1,680 person/hours per year for the collection of information for the purposes described herein.

The trust evaluation information collection process has four basic components:

1. Interview Process

Entrance Interview: Each trust evaluation commences with an entrance interview with tribal leadership and senior management. The purpose of this interview is to review generally the programs and functions subject to be evaluated and to clarify the specific nature of the tribe's responsibilities under its annual funding agreement. If specific issues or concerns were raised in the previous evaluation, they may be addressed during this interview as well.

Management Interviews: These interviews are conducted with tribal/consortia program directors and staff on a program-by-program basis. During this process, reviewers collect information pertaining to the respondent's compliance with all relevant statutory, regulatory, and other legal requirements for the management of the particular trust resource or function under review as well as compliance with any special terms and conditions contained in the annual funding agreement. Depending on information provided, reviewers may make additional inquiry with regard to specific programs or functions. Where tribal governments have enacted different or additional regulations or guidelines for the management of trust functions, compliance with these measures will be verified as well. Respondents are also provided the opportunity to address issues of concern during this phase of the process. Interviewers will also elicit relevant data during this phase of the process depending on the nature of the function under review.

Exit Interviews: The exit interview is designed to provide both the respondents and the interviewers the opportunity to clarify any outstanding issues or address particular concerns raised during the review process.

All interviews will be conducted according to a field guide which will provide direction to the reviewers in their performance of this collection.

2. File Review of Trust Transactions

This is a mandatory on-site function to verify information obtained through the review process and check performance on specific trust functions. Files are randomly selected and reviewed to ensure that all necessary and proper documents have been completed and filed and to ensure that all necessary approvals and/or permits have been secured.

3. On-Site Inspection

On-site inspections of trust resources are conducted as appropriate to the resource in question and may include a visit to facilities rather than a visual inspection of particular resources. Typically, on-site inspections are conducted when specific information is needed to complete the review; where there is reason to believe that a problem exists; or it is the type of resource or function that warrants physical inspection.

4. Evaluation Report

A report documenting the process used and information obtained during the evaluation process is produced by the reviewing staff. A first draft is sent to each respondent for comment prior to finalization. Where a respondent disagrees with a finding or information contained in the report, such comment will be attached to the final report. The reports are then signed by the Director of the Office of American Indian Trust and the Assistant Secretary—Indian Affairs and transmitted to the Chairman of the tribe and its Self-Governance Coordinator.

It is a requirement of the Paperwork Reduction Act that each respondent to any information collection be notified that an agency 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 pursuant to 35 U.S.C. 3506(c)(1)(B)(V); 44 CFR 1320 8(b)(3)(vii). The valid OMB control number for this information collection is 1076–0146.

Dated: January 25, 2002.

Neal A. McCaleb,

Assistant Secretary—Indian Affairs.

[FR Doc. 02–3673 Filed 2–13–02; 8:45 am]

BILLING CODE 4310–E8–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Request for Comments on Preparation of a Revised Departmental Strategic Plan

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of request for comments on preparation of a revised Departmental Strategic Plan for FY 2002–2007.

SUMMARY: The Department of the Interior has begun the process of revising its strategic plan that covers the period of FY 2000–2005. The process for developing the new plan will place a major emphasis on end-results to be achieved by the Department and how these desired outcomes can be effectively measured to assess our performance. For the narrow purpose of this specific action, information is accessible on the Departmental website *www.doi.gov.*

DATES: Comments should be provided no later than March 1, 2002.

ADDRESSES: Written comments can be provided by:

E-mail: *doistratplan@usgs.gov.*
Fax: (202) 208–2619.
Mail: U.S. Department of the Interior, Office of the Secretary, Office of Planning and Performance Management, 1849 C Street, NW B MS 5258, Washington, DC 20240.

Note: The Department is experiencing delay in mail delivery. We recommend fax or use of an express delivery service.

FOR FURTHER INFORMATION CONTACT: LeRon Bielak (202) 208–1818.

SUPPLEMENTARY INFORMATION: The current plan, nine separate bureau and office plans and a Departmental Overview, will be replaced with a single, integrated plan.

Contrary to past practices of first publishing a draft plan for comment, the DOI is soliciting stakeholder views through a series of meetings and written comments on appropriate outcomes and strategies that the Department should achieve in six primary mission areas. These areas are:

1. Preservation of Natural and Cultural Resources.
2. Restoration of Natural and Cultural Resources.
3. Recreation Uses on Public Lands.
4. Use of Natural Resources (e.g., energy and non-energy minerals, timber, water, grazing land, etc.).
5. Meeting our Trust Responsibilities to Native Americans, Alaskan Natives, and Island Communities.
6. Role of Science in Meeting the Missions of the Department.

Information obtained from internal and external stakeholders will be used to develop a revised strategic plan that is consistent with the missions of the Department and the Government Performance and Results Act (GPRA) requirements.

Dated: January 31, 2002.

Norma Campbell,

Director, Office of Planning and Performance Management.

[FR Doc. 02–3577 Filed 2–13–02; 8:45 am]

BILLING CODE 4310–RK–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Meeting of the Klamath Fisheries Council

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 Fishery Management Council, established under the authority of the Klamath River Basin Fishery Resources Restoration Act (16 U.S.C. 460ss *et seq.*). The Klamath Fishery Management Council makes recommendations to agencies that regulate harvest of anadromous fish in the Klamath River Basin. The objectives of this meeting are to hear technical reports, to discuss and develop Klamath fall chinook salmon harvest management options for the 2002 season, and to make recommendations to the Pacific Fishery Management Council and other agencies. The meeting is open to the public.

DATES: The Klamath Fishery Management Council will meet from 3:00 p.m. to 5:00 p.m. on Sunday, April 7, 2002.

ADDRESSES: The meeting will be held at the Columbia River Doubletree Hotel, 1401 N. Hayden Island Drive, Portland, Oregon.

FOR FURTHER INFORMATION CONTACT: Phil Detrich, Project Leader, 1829 South Oregon Street, Yreka, California 96097, telephone (530) 842–5763.

SUPPLEMENTARY INFORMATION: At the April 7, 2002, meeting, the Klamath Fishery Management Council may schedule short follow-up meetings to be held between April 8, 2002, and April 12, 2002, at the Columbia River Doubletree Hotel, 1401 N. Hayden Island Drive, Portland, Oregon, where the Pacific Fishery Management Council will be meeting.

For background information on the Klamath Council, please refer to the notice of their initial meeting that appeared in the **Federal Register** on July 8, 1987 (52 FR 25639).

Dated: February 1, 2002.

John Engbring,

Acting Manager, California/Nevada Operations Office, Sacramento, California.

[FR Doc. 02–3607 Filed 2–13–02; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Klamath Fishery Management Council 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 Fishery Management Council, established under the authority of the Klamath River Basin Fishery Resources Restoration Act (16 U.S.C. 460ss *et seq.*). The Klamath Fishery Management Council makes recommendations to agencies that regulate harvest of anadromous fish in the Klamath River Basin. The objectives of this meeting are to hear technical reports (including the ocean stock projection for Klamath River fall chinook in 2002), review the 2001 fishery season, and discuss and plan management of the 2002 season. The meeting is open to the public.

DATES: The Klamath Fishery Management Council will meet from 8:30 a.m. to 5:00 p.m. on Thursday, February 28, 2002, and from 8:00 a.m. to 12:00 p.m. on Friday, March 1, 2002.

ADDRESSES: The meeting will be held at the Red Lion Hotel, 1929 Fourth Street, Eureka, CA.

FOR FURTHER INFORMATION CONTACT: Phil Detrich, Project Leader, U.S. Fish and Wildlife Service, 1829 South Oregon Street, Yreka, California 96097, telephone (530) 842–5763.

SUPPLEMENTARY INFORMATION: For background information on the Klamath Council, please refer to the notice of their initial meeting that appeared in the **Federal Register** on July 8, 1987 (52 FR 25639)

Dated: February 1, 2002.

John Engbring,

Acting Manager, California/Nevada Operations Office, Sacramento, California.

[FR Doc. 02–3608 Filed 2–13–02; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–029–1310–DS CBMP]

Notice of Availability of the Draft Environmental Impact Statement and Amendment of the Powder River and Billings Resource Management Plans (RMPs); Montana

AGENCY: Bureau of Land Management, Miles City and Billings Field Offices, Interior.

ACTION: Notice of availability of the Draft Environmental Impact Statement and amendment of the Powder River and Billings Resource Management Plans (RMPs); Montana.

SUMMARY: In accordance with the Federal Land Policy and Management Act and the National Environmental Policy Act, the Bureau of Land Management (BLM) has prepared a Draft Environmental Impact Statement (EIS) and Resource Management Plan (RMP) Amendment jointly with the State of Montana (State). The BLM's planning area is the oil and gas estate administered by BLM in the Powder River and Billings RMP areas. The Powder River RMP area encompasses the southeastern portion of Montana consisting of Treasure and Powder River counties, and portions of Rosebud, Big Horn, Carter, and Custer counties. There are approximately 2,522,950 BLM-administered oil and gas acres in the Powder River RMP area. The Billings RMP area encompasses the south-central portion of Montana consisting of Wheatland, Golden Valley, Musselshell, Sweet Grass, Stillwater, Yellowstone, and Carbon counties, and the remaining portion of Big Horn County. There are approximately 662,066 BLM-administered oil and gas acres in the Billings RMP area. BLM-administered oil and gas acreage in Blaine, Park, and Gallatin counties is not part of the BLM planning effort. The State's planning area is statewide.

DATES: The 90-day comment period on the Draft EIS and Amendment will begin the date the EPA files a notice in the **Federal Register** (anticipated February 15, 2002).

ADDRESSES: You may submit your comments by any one of several methods. You may mail or hand-deliver comments to: Bureau of Land Management, Mary Bloom, Project Manager, Miles City Field Office, 111 Garryowen Road, Miles City, MT 59301. You may also comment electronically to: *coalbed_methane@state.mt.us.* Your name and return mailing address must be included in your electronic message. BLM's practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. If you wish to withhold your name or street 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. All submissions from organizations and businesses and from individuals identifying themselves as representatives or officials of organizations or businesses will be available for public inspection in their entirety.

FOR FURTHER INFORMATION CONTACT: Mary Bloom, Coal Bed Methane Project Manager, Bureau of Land Management, 111 Garryowen Road, Miles City, MT 59301, (406) 233–3649.

SUPPLEMENTARY INFORMATION: The Draft EIS and Amendment project is a joint effort between the BLM and the State. It is being prepared to analyze impacts to lands and resources as a result of proposed oil and gas development, primarily coal bed methane. The current Powder River and Billings RMPs, as amended by BLM's 1994 ''Oil and Gas Amendment of the Billings, Powder River, and South Dakota RMPs'', support limited conventional oil and gas development and limited coal bed methane exploration and production. About 9,500 conventional oil and gas wells (all ownership categories) are located in the planning area. An October 18, 2000 meeting of the Coal Bed Methane Coordination Group indicated that industry projects an interest in drilling approximately 10,000 coal bed methane wells in the Montana portion of the Powder River Basin over the next 10 years, in addition to an unspecified number of conventional oil and gas wells.

The Draft EIS and Amendment is being prepared to analyze this increased interest in oil and gas activity. Five alternative management scenarios developed by BLM and the State present a range of feasible management actions to address the issues: Alternative A—existing management (No Action); Alternative B—emphasize soil, water, air, vegetation, wildlife, and cultural resources protection; Alternative C—emphasize coal bed methane development; Alternative D—encourage coal bed methane exploration and development while maintaining existing land uses; and Alternative E—the BLM and State Preferred Alternative, which combines features of Alternatives A

through D and manages development of CBM in an environmentally sound manner. The Draft EIS discloses the environmental consequences of each alternative.

A copy of the Draft EIS and Amendment has been sent to all individuals, agencies, and groups who have expressed interest or as required by regulation or policy. Copies are also available upon request from the BLM at the address listed above.

Public Participation

There has been continual public participation throughout the EIS process. A Notice of Intent to prepare the EIS was published in the **Federal Register** on December 19, 2000, initiating a 30-day public scoping period. The scoping period closed January 31, 2001, after a two-week extension. Public scoping meetings were held at Broadus, Miles City, Ashland, Billings, and Helena, Montana from January 4 through January 11, 2001. A brochure was mailed May, 2001 updating the public on the status of the Draft EIS and Amendment.

Four designated cooperating agencies are also helping BLM and the State prepare the EIS: The Bureau of Indian Affairs, the United States Department of Energy, the Crow Tribe, and the United States Environmental Protection Agency. The Northern Cheyenne Tribe declined to become a cooperating agency, but has been invited by BLM to participate in all cooperating agency activities. Consultation with both the Crow and Northern Cheyenne tribes has taken place throughout the process to gather their input and concerns. Consultation with FWS has been initiated, and the BLM has also met with individuals from the general public, special interest groups, industry, and local governments upon their request. The Coal Bed Methane Coordination Group, whose purpose is to share information on coal bed methane, consists of representatives from local governments, special interest groups, the tribes, other federal agencies, industry, ranchers, and the State. The group has shared its concerns with BLM and remains updated on the EIS. In addition, the State has held monthly coordination calls with the BLM and with the public invited to listen in.

The BLM and the State will conduct public hearings across Montana (anticipated in April 2002) on the Draft EIS and Amendment. The time and locations of the hearings will be announced in local news releases.

To help BLM identify and consider issues and concerns on the alternatives, comments on the Draft EIS and Amendment should be as specific as possible; for example, comments should refer to specific pages or chapters in the document. After the comment period ends, all comments will be analyzed and considered by the BLM in preparing the Final EIS.

Dated: January 11, 2002.

Fred Wambolt,

Acting Field Manager.

[FR Doc. 02–3692 Filed 2–13–02; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Conversion of Potential Wilderness as Designated Wilderness, Haleakala National Park

Public Law No. 94–567, Approved October 20, 1976 designated 19,270 acres of Haleakala National Park as wilderness and an additional 5,500 acres as potential wilderness additions. These wilderness designations apply to portions of Haleakala National Park depicted on a map entitled ''Wilderness Plan, Haleakala National Park'', numbered 162–20,006–A and dated July 1972, known as the Haleakala Wilderness.

Section 3 of Pub. L. 94–567 directed the Secretary of the Interior to designate that potential wilderness additions be converted to ''designated'' wilderness through the publication of a notice in the **Federal Register** stating that these lands have been acquired by the federal government and that any previous uses thereon that are prohibited by the Wilderness Act (Pub. L. 88–577) have ceased.

All lands, with the exception of 51 acres owned by East Maui Irrigation Inc., designated as potential wilderness on map #162–20, 006 have been acquired and are now owned by the U.S. government as administered by Haleakala National Park. There are no current or proposed uses of the 5,449 acres proposed for conversion which are incompatible with the Wilderness Act. Since the 51 acres included within the Maui Irrigation parcel is not owned by the federal government, it will continue to be identified as ''potential wilderness'' in keeping with the instructions of Pub. L. 94–567.

These 5,449 acres of federally owned land now fully comply with the instructions contained in Pub. L. 95–625. Accordingly, this notice hereby converts the 5,449 acres of ''potential wilderness: within Haleakala National Park to designated wilderness.'' The 5,449 acres are accordingly added to the 19,270 acres already preserved within the National Wilderness Preservation System and bring the total area of designated wilderness at Haleakala National Park to 24,719 acres of wilderness and 51 acres of ''potential wilderness''. It is noted that construction of fences to exclude feral animals and access into the wilderness via helicopter for fence maintenance to control destructive invasive alien plants and non-native animals may be necessary to preserve wilderness resources and ecosystem processes.

Dated: February 1, 2002.

Fran P. Mainella,

Director, National Park Service.

[FR Doc. 02–3563 Filed 2–13–02; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF JUSTICE

Office of Community Oriented Policing Services; Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-Day Notice of Information Collection Under Review: New Collection; Mental Health and Community Safety Initiative Equipment and Training Progress Report.

The Department of Justice (DOJ), Office of Community Oriented Policing Services (COPS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies.

Comments are encouraged and will be accepted for ''sixty days'' until April 15, 2002. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Gretchen DePasquale, Office of Community Oriented Policing Services, 1100 Vermont Avenue, NW., Washington, DC 20530. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary

for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* New collection.

(2) *Title of Form/Collection:* Mental Health and Community Safety Initiative Equipment and Training Progress Report.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* None. U.S. Department of Justice, Office of Community Oriented Policing Services (COPS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Federally Recognized Tribal governments. *Other:* None. *Abstract:* The information collected will be used by the COPS Office to determine grantee's progress toward grant implementation and for compliance monitoring efforts.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There will be an estimated 10 responses. The estimated amount of time required for the average respondent to respond is: 2.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 35 hours.

If additional information is required contact: Brenda Dyer, Deputy Clearance Officer, Information Management and Security Staff, Justice Management Division, United States Department of Justice, 601 D Street NW., Patrick Henry Building, Suite 1600, NW., Washington, DC 20530.

Dated: February 8, 2002.

Brenda Dyer,

Deputy Clearance Officer, United States Department of Justice.

[FR Doc. 02–3583 Filed 2–13–02; 8:45 am]

BILLING CODE 4410–AT–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Partial Consent Decree Under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601 et seq.

Notice is hereby given that on February 7, 2002, a proposed partial consent decree (''consent decree'') in *United States* v. *Chrysler Corp., et al.,* Civil Action No. 5:97CV00894, was lodged with the United States District Court for the Northern District of Ohio.

In this action the United States sought recovery, under Sections 107(a) and 113 of the Comprehensive Environmental Response, Compensation and Liability Act (''CERCLA''), 42 U.S.C. 9607(a) and 9613, of response costs incurred in connection with the Krejci Dump Site in Summit County, Ohio (''Site''). The consent decree resolves claims under Sections 106 and 107 of CERCLA against Minnesota Mining and Manufacturing Company (''3M''), which is alleged to be liable as a result of having arranged for the disposal of hazardous substances at the Site. The consent decree recovers $14,700,000 in response costs, and $800,000 for natural resource damages, relating to the Site.

The Department of Justice will receive comments relating to the proposed consent decree for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, P.O. Box 7611, Washington, DC 20044–7611, and should refer to *United States* v. *Chrysler Corp., et al.,* D.J. Ref. No. 90–11–3–768.

The proposed consent decree may be examined at the Office of the United States Attorney, 1800 Bank One Center, 600 Superior Avenue, Cleveland, Ohio. A copy of the proposed consent decree may be obtained by mail from the Department of Justice Consent Decree Library, P.O. Box 7611, Washington, DC 20044–7611 or by faxing a request to Tonia Fleetwood, fax no. (202) 514–0097. In requesting a copy, please enclose a check payable to the ''U.S. Treasury'', in the amount of $5.75 (25 cents per page reproduction cost). The check should refer to *United States* v. *Chrysler Corp., et al.,* D.J. Ref. No. 90–11–3–768.

W. Benjamin Fisherow,

Deputy Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 02–3562 Filed 2–13–02; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of a Consent Decree Pursuant to The Clean Water Act

Notice is hereby given that a proposed Consent Decree in *United States of America and the State of Alabama* v. *The Board of Water and Sewer Commissioners of the City of Mobile, Alabama,* Civ. No. 02–0058–CB–S, and *Mobile Bay Watch, Inc.* v. *The Board of Water and Sewer Commissioners of the City of Mobile, Alabama,* Civ. No. CV–99–00595–CB–S, was lodged on January 24, 2002, with the United States District Court for the Southern District of Alabama.

The proposed Consent Decree would resolve certain claims under Sections 301 and 402 of the Clean Water Act, 33 U.S.C. 1251, *et seq.,* against the Board of Water and Sewer Commissioners of the City of Mobile, Alabama (''Board''), through the performance of injunctive measures, the payment of a civil penalty, and the performance of Supplemental Environmental Projects (''SEPs''). The United States, the State of Alabama and Mobile Bay Watch, Inc., allege that the Board is liable as a person who has discharged a pollutant from a point source to navigable waters of the United States without a permit and, in some cases, in excess of permit limitations.

The proposed Consent Decree would resolve the liability of the Board for the violations alleged in the complaints filed in these matters. The proposed Consent Decree would release claims against the Board for performance of injunctive measures to remedy the alleged violations, and for penalties for the violations alleged in the complaints. To resolve these claims, the Board would perform the injunctive measures described in the proposed Consent Decree, including the implementation of a capacity assurance program, a grease control program, and a water quality monitoring program; would pay a civil penalty of $114,000 ($99,000 to the United States Treasury and $15,000 to the State of Alabama); and would perform four SEPs valued at $2.5 million collectively, including the installation of new private sewer laterals in low-income households within the

Board's service area, the acquisition of environmentally beneficial parcels of land, and the creation of a water quality monitoring database.

The Department of Justice will receive comments relating to the proposed Consent Decree for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044 and should refer to *United States* v. The Board of Water and Sewer Commissioners of the City of Mobile, Alabama, DJ No. 90–5–1–1–06985.

The proposed Consent Decree may be examined at the office of the United States Attorney for the Southern District of Alabama, 63 South Royal Street, Mobile, AL 36602, and at the Region 4 Office of the Environmental Protection Agency, Atlanta Federal center, 61 Forsyth Street, SW., Atlanta, GA 30303. A copy of the proposed Consent Decree may also be obtained by faxing a request to Tonia Fleetwood, Department of Justice Consent Decree Library, fax no. (202) 616–6584; phone confirmation no. (202) 514–1547. There is a charge for the copy (25 cents per page reproduction cost). Upon requesting a copy, please mail a check payable to the ''U.S. Treasury'', in the amount of $25.75, to: Consent Decree Library, U.S. Department of Justice, P.O. Box 7611, Washington, DC 20044–7611. The check should refer to *United States* v. The Board of Water and Sewer Commissioners of the City of Mobile, Alabama, DJ No. 90–5–1–1–06985.

Walker Smith

Principal Deputy Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 02–3561 Filed 2–13–02; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF LABOR

Office of the Secretary

Presidential Task Force on Employment of Adults With Disabilities (PTFEAD) Youth Advisory Committee; Notice of Open Meeting and Agenda

AGENCY: Office of the Secretary of Labor.

ACTION: Notice of meeting.

SUMMARY: The Office of the Secretary, United States Department of Labor, is notifying the public that the Youth Advisory Committee to the Presidential Task Force on Employment of Adults with Disabilities will conduct an open meeting on Monday, March 4 and Tuesday, March 5, 2002 in Washington, DC.

Times and Location: The Youth Advisory Committee will meet from 9:00 a.m. until approximately 4:00 p.m., on Monday, March 4 and Tuesday, March 5, 2002, at the Grand Hyatt Washington, 1000 H Street, NW., Washington, DC 20001–1501.

FOR FURTHER INFORMATION CONTACT: Dr. Richard Horne, Senior Policy Advisor, Presidential Task Force on Employment of Adults with Disabilities (phone: (202) 693–4923; TTY (202) 693–4920; FAX (202) 693–4929; e-mail *Horne-Richard@dol.gov).*

SUPPLEMENTARY INFORMATION: The meeting will be open to the public. Anyone wishing to do so may submit a written statement. Written statements should be kept as brief as possible. Written submissions received prior to the meeting will be provided to the members of the committee and will be included in the record of the meeting. To ensure that a written statement is received in time to be taken to the meeting, the statement should be mailed to the contact person at least 7 business days prior to the meeting. People with disabilities who need special accommodations should contact Dr. Richard Horne (phone: (202) 693–4923; TTY (202) 693–4920; FAX (202) 693–4929; e-mail *Horne-Richard@dol.gov*) no later than one week before the meeting.

Attendees may request to make an oral presentation by notifying Dr. Richard Horne in writing at least 10 business days before the meeting. Oral presentations will be limited to 5 minutes. The request should state the capacity in which the person will appear and provide a brief outline of the presentation. Requests to make oral presentation to the Committee will be granted to the extent that time permits.

The agenda for this meeting includes:

- Introduction of Committee chair and election of other leadership positions
- An Overview of the President's New Freedom Initiative
- An Overview of the Role of the Office of Disability Employment Policy
- Solicitation of suggestions regarding youth issues in the next phase of the President's New Freedom Initiative
- Establishment of a time line for preparing and submitting the Advisory Committee's recommendations and report
- Scheduling of other Youth Advisory meetings
- Public Comment Session

An official record of the meeting will be available for public inspection in Room S 2220 of the Department of Labor Building (Francis Perkins Building) located at 200 Constitution Avenue, NW., Washington, DC 20210. For additional information contact Dr. Richard Horne (phone: (202) 693–4923; FAX (202) 693–4929; or e-mail *Horne-Richard@dol.gov*)

Signed at Washington, DC, this 8th day of February, 2002.

Gary Reed,

Acting Executive Director, Presidential Task Force on Employment of Adults with Disabilities.

[FR Doc. 02–3649 Filed 2–13–02; 8:45 am]

BILLING CODE 4510–23–P

DEPARTMENT OF LABOR

Employment and Training Administration

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Skilled Workforce for the 21st Century

AGENCIES: DOL, Employment and Training Administration (ETA) and DOT, Federal Highway Administration (FHWA).

ACTION: Notice of public meetings.

SUMMARY: Pursuant to the interagency agreement between the DOL, ETA and the DOT, FHWA announces four public open space forums and an Executive Summit to identify issues, concerns and recommendations for improving the administration of the FHWA On-the-Job Training Program. In addition, the forums and summit will address enhancing the effectiveness of the training and increasing the retention rates of trainees trained on federal-aid highway construction projects. The FHWA On-the-Job Training Program is administered to assist highway construction contractors meet their affirmative action requirements under Executive Order 11246, as amended, and the Federal-aid Highway Act of 1968.

To ensure all issues and concerns are addressed, the participants will establish the agenda for the public open space forums. At the end of each forum, a report of proceedings will be distributed to each participant. Upon the completion of the last forum, a report of findings and recommendations will be presented to highway construction industry leaders at the Executive Summit to obtain their vision of how the ETA and the FHWA can assist the industry in preparing a skilled workforce for the 21st century. Provisions will be made for individuals

with disabilities. Although the forums and the Executive Summit are open to the public, space will be limited; therefore, the ETA requests that persons interested in participating in the forums and summit pre-register with: Coffey Communications, LLC, 6917 Arlington Road, Suite 224, Bethesda, MD 20814, 301–907–0900 (Office), 301–907–2925 (Fax), *lcoffey@coffeycom.com.*

Time: Public open space forums will be held at each of the following locations within the span of two and a half days. The first two days the forums will convene at 8:30 a.m. and adjourn at 5:00 p.m. On the last day, the forum will end at 12:00 noon. The Executive Summit will be within the span of a half-day from 8:30 a.m. to 12 noon.

Dates and Locations:

March 6–8, 2002, Beau Rivage, 875 Beach Boulevard, Biloxi, MS 39530

March 20–22, 2002, Mirage Resort and Casino, 3400 S. Las Vegas Boulevard, Las Vegas, NV 89109

April 3–5, 2002, The Hilton Chicago O'Hare Airport Hotel, 8535 West Higgins Road, Chicago, IL 60666

April 17–19, 2002, Hilton Garden Inn, 1100 Arch Street, Philadelphia, PA 19107

April 30, 2002, Washington Court Hotel, 525 New Jersey Avenue, N.W., Washington, DC 20001

FOR FURTHER INFORMATION CONTACT: Dana Daugherty, Deputy Administrator, Office of Apprenticeship Training, Employer and Labor Services, ETA, U.S. Department of Labor, Room N–4671, 200 Constitution Ave., N.W., Washington, DC 20210, Telephone: 202–693–2796, or Linda J. Brown, Acting Director, Civil Rights Service Business Unit, U.S. Department of Transportation, FHWA, 400 Seventh St., SW., Room 4132, Washington, DC 20590, Telephone: (202) 366–0471; (202) 366–1599. Office hours are from 7:45am to 4:15pm, est., Monday through Friday except Federal holidays. The phone numbers are not toll free numbers.

Signed at Washington, DC, this 11th day of February, 2002.

Emily Stover Derocco,

Assistant Secretary for Employment and Training Administration.

Linda J. Brown,

Acting Director, Civil Rights, Federal Highway Administration.

[FR Doc. 02–3650 Filed 2–13–02; 8:45 am]

BILLING CODE 4510–30–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–289]

Amergen Energy Company, LLC Three Mile Island Nuclear Station, Unit 1; Exemption

1.0 Background

The AmerGen Energy Company, LLC (AmerGen, the licensee) is the holder of Facility Operating License No. DPR–50, which authorizes operation of the Three Mile Island Nuclear Station, Unit 1 (TMI–1). The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect.

The facility consists of a pressurized water reactor (PWR) located in Dauphin County in Pennsylvania.

2.0 Request/Action

Title 10 of the Code of Federal Regulations (10 CFR), part 50, § 50.44, ''Standards for combustible gas control system in light-water-cooled power reactors,'' and 10 CFR part 50, Appendix A, General Design Criterion (GDC) 41, ''Containment atmosphere cleanup,'' establish requirements for controlling the amount of hydrogen inside the reactor containment following a postulated loss-of-coolant accident (LOCA). These requirements provide specific assumptions and methods to define the amount of hydrogen generated, the rate at which hydrogen is generated, and the requirements of a combustible gas control system to control the concentration of hydrogen in the containment following a design-basis LOCA to below flammability limits. Appendix E to 10 CFR part 50, Section VI, ''Emergency Response Data System [ERDS],'' contains requirements to provide information on the concentration of hydrogen inside the containment following accidents as part of the ERDS. Section 50.44(a) to 10 CFR part 50 requires a means for control of hydrogen that may be generated following a postulated LOCA by (1) a metal-water reaction involving the fuel cladding and the reactor coolant, (2) radiolytic decomposition of the reactor coolant, and (3) corrosion of metals. Section 50.44(b) of 10 CFR and 10 CFR part 50, Appendix E, Section VI.2.a.(i).4 require that the hydrogen control measures must be capable of measuring the hydrogen concentration in the containment, ensuring a mixed atmosphere in the containment and controlling combustible gas concentrations in the containment following a LOCA. Section 50.44(c)(1) of 10 CFR part 50 requires that it must be shown that following a LOCA, but prior to effective operation of the combustible gas control system, either an uncontrolled hydrogen-oxygen recombination would not take place in containment, or the plant could withstand the consequences of uncontrolled hydrogen-oxygen recombination without loss of safety function. Section 50.44(h)(2) requires a combustible gas control system to maintain the concentration of combustible gases following a LOCA to below flammability limits. These systems can be of two types: Those allowing controlled release from containment such as a purge system, or those that do not result in a significant release from the containment such as recombiners. GDC 41 of Appendix A to 10 CFR part 50 requires that the hydrogen control system described above must control hydrogen as necessary following a LOCA to assure that containment integrity is maintained, and must meet redundancy and single failure requirements. Additional NRC staff guidance is provided in Regulatory Guide (RG) 1.7. NRC staff review and acceptance criteria are specified in Section 6.2.5 of the Standard Review Plan (NUREG–0800, July 1981). By letter dated September 20, 2000, as supplemented by letters dated August 2 and September 28, 2001, the licensee requested an exemption to the above requirements in order to remove requirements for a hydrogen control system from the TMI–1 design basis. The proposed request for exemption included a related license amendment application which would remove the hydrogen control system from the plant's operating license Technical Specifications and the Updated Final Safety Analysis Report.

3.0 Discussion

Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 50 when (1) the exemptions are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security; and (2) when special circumstances are present. These circumstances include the special circumstances as stated in 10 CFR 50.12(a)(2)(ii), ''Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule.'' The underlying

purpose of 10 CFR 50.44 is to show that following a LOCA, an uncontrolled hydrogen-oxygen recombination would not take place, or that the plant could withstand the consequences of an uncontrolled hydrogen-oxygen recombination without loss of safety function.

In its request, AmerGen asserts that the TMI–1 containment has sufficient safety margin against hydrogen burn following design-basis and severe accidents without use of the hydrogen monitoring or concentration control systems. The TMI–1 Probabilistic Risk Assessment (PRA) indicates that none of the accident sequences addressed that could realistically threaten containment due to hydrogen combustion are impacted by the hydrogen monitoring or concentration control systems. The TMI–1 Individual Plant Examination (IPE) concluded containment survival is almost certain following hydrogen combustion when the reactor building cooling units and the reactor building spray system are operating. The licensee's plant-specific containment integrity analysis for TMI–1 indicates that the ultimate pressure capacity of the containment is between 137 and 147 psig (TMI–1 PRA, Level 2, Appendix 1). This estimate is reasonable when compared to Table 6.1 of NUREG/CR–6475, ''Resolution of the Direct Containment Heating Issue for Combustion Engineering Plants and Babcock & Wilcox Plants.'' A safety margin exists for containment integrity even for conservative hydrogen concentration levels. The NRC staff has found that the relative importance of hydrogen combustion for large, dry containments with respect to containment failure is quite low. This finding supports the argument that the hydrogen recombiners are not risk significant from a containment integrity perspective and that the risk associated with hydrogen combustion is not from design-basis accidents but from severe accidents. NRC sponsored studies, such as NUREG–1150, ''Severe Accident Risks: An Assessment For Five U.S. Nuclear Power Plants,'' December 1990, and NUREG/CR–5662, ''Hydrogen Combustion, Control And Value Impact Analysis For PWR [pressurized water reactor] Dry Containments,'' June 1991, have found hydrogen combustion to be a small contributor to containment failure for large, dry containment designs due to the robustness of these containment types and the likelihood of a spurious ignition source. Additionally, studies have shown that the majority of risk to the public is from accident sequences that lead to containment failure or bypass, and that the contribution to risk from accident sequences involving hydrogen combustion is actually quite small for large, dry containments such as TMI–1's. This is true despite the fact that the hydrogen quantities produced in these events is substantially larger than the hydrogen production postulated by 10 CFR 50.44(d) and RG 1.7, Revision 2, ''Control of Combustible Gas Concentrations in Containment Following a Loss-of-Coolant Accident (LOCA),'' November 1978. Hydrogen combustion sequences that could lead to early containment failure typically involve up to 75 percent core metal-water reaction. Hydrogen combustion sequences that could lead to late containment failure involve additional sources of hydrogen due to the interaction of corium and the concrete basemat after vessel breach. Although the recombiners are effective in maintaining the RG 1.7 hydrogen concentration below the lower flammability limit of 4 volume percent, they are overwhelmed by the larger quantities of hydrogen associated with severe accidents that would typically be released over a much shorter time period (e.g., 2 hours). However, NUREG/CR–4551, Revision 1, Volume 7, Part 1, ''Evaluation of Severe Accident Risks: Zion Unit 1,'' March 1993, states that hydrogen combustion in the period before containment failure is considered to present no threat to large, dry containments. Table A.4–5 of NUREG/CR–4551 shows that the contribution of hydrogen combustion to late containment failure is also very small. Therefore, the relative importance of hydrogen combustion for large, dry containments with respect to containment failure has been shown to be quite low.

The recombiners can, however, prevent a subsequent hydrogen burn if needed due to radiolytic decomposition of water and corrosion in the long term. Analysis performed in accordance with the methodology of RG 1.7 shows that the hydrogen concentration will not reach 4 volume percent for 15 days after initiation of a design-basis LOCA. Additionally, hydrogen concentrations on the order of 6 percent or less are bounded by hydrogen generated during a severe accident and would not be a threat to containment integrity, since there is ample time between burns to reduce elevated containment temperatures using the installed containment heat removal systems. The TMI–1 IPE concluded that containment survival is almost certain following hydrogen combustion when the reactor building cooling units and the reactor building spray system are operating.

Although hydrogen igniter systems would provide some added margin that containment integrity can be maintained during hydrogen burns, Generic Issue (GI)-121, ''Hydrogen Control for PWR Dry Containments,'' found that hydrogen combustion was not a significant threat to dry containments, and concluded that there was no basis for new generic hydrogen control measures (i.e., igniters). Equipment survivability in concentrations greater than 6 percent was addressed as part of GI–121, which references NUREG/CR–5662, which assessed the benefits of hydrogen igniters. NUREG/CR–5662 concluded that simulated equipment can withstand a LOCA and single burn resulting from a 75-percent metal-water reaction in a large, dry containment. However, the multiple containment burns due to the operation of ignition systems could pose a serious threat to safety-related equipment located in the source compartment. The multiple burn environment was found potentially to be a threat because the source compartment temperature remains elevated from the previous burn. However, for TMI–1, this is not a concern for the above radiolysis and corrosion case because there is ample time between burns to reduce elevated containment temperatures via containment heat removal systems. Therefore, an additional burn in the long term due to radiolysis and corrosion would not have a similar impact on equipment survivability at TMI–1.

In a postulated LOCA, the TMI–1 emergency operating instructions (EOIs) direct the control room operators to monitor and control the hydrogen concentration inside the containment after they have carried out the steps to maintain and control the higher priority critical safety functions. Key operator actions associated with the control of hydrogen include placing the hydrogen recombiners or hydrogen purge system in operation at very low hydrogen concentration levels. These hydrogen control activities could distract operators from more important tasks in the early phases of accident mitigation and could have a negative impact on the higher priority critical operator actions. An exemption from hydrogen recombiner and purge-repressurization system requirements will eliminate the need for these systems in the EOIs and hence simplify the EOIs. The NRC staff still expects the licensee's severe accident management guidelines to address combustible gas control. The NRC staff has determined that the

simplification of the EOIs would be a safety benefit.

As stated previously, the underlying purpose of 10 CFR 50.44 is to show that, following a LOCA, an uncontrolled hydrogen-oxygen recombination would not take place, or that the plant could withstand the consequences of uncontrolled hydrogen-oxygen recombination without loss of safety function. Based on the licensee's analysis, the NRC staff's evaluation of the risk from hydrogen combustion, resolution of GI–121, and the TMI–1 IPE, the NRC staff has determined that the plant could withstand the consequences of uncontrolled hydrogen-oxygen recombination without loss of safety function without credit for the hydrogen recombiners for not only the design-basis case, but also for the more limiting severe accident with up to 100 percent metal-water reaction. Therefore, the requirements for hydrogen recombiners as part of the TMI–1 design basis are unnecessary, and their removal from the design basis is acceptable. Additionally, elimination of the hydrogen recombiners from the EOIs would simplify operator actions in the event of an accident and, therefore, would be a safety benefit. Consequently, pursuant to 10 CFR 50.12(a)(2)(ii), application of the regulation is not necessary to achieve the underlying purpose of the rule.

In the submittal, the licensee also requested an exemption from the functional requirement for hydrogen monitoring as promulgated in Part 50, Appendix E, Section VI, ''Emergency Response Data System (ERDS),'' and the elimination of any commitments made in regard to NUREG–0737, Item II.F.1, Attachment 6, ''Containment Hydrogen Monitor.'' However, in the Statement of Considerations for Appendix E to Part 50, the Commission stated that the ERDS data (which include data from the continuous hydrogen monitors) provide the data required by the NRC to perform its role during an emergency. This conclusion is still valid for not only the NRC staff, but also for licensees. The major vendors' core damage assessment methodologies continue to include continuous hydrogen monitoring. Core damage assessment methodologies were reviewed by the NRC staff in response to NUREG–0737, Item II.B.3(2)(a). Continuous hydrogen monitoring is needed to support a plant's emergency plan as described in 50.47(b)(9). Implementing documents such as RG 1.101, Revision 2, which endorsed NUREG–0654, and RG 1.101, Revision 3, which endorsed NEI–NESP–007, Revision 2, define the highest Emergency Action Level, a General Emergency, as a loss of any two barriers and potential loss of the third barrier. Potential loss of a third barrier depends on whether or not an explosive mixture exists inside containment. The continuous hydrogen monitors are used for determining whether an explosive mixture exists inside containment. Therefore, the licensee's request for exemption from the functional requirements for hydrogen monitoring is not approved.

The NRC staff has determined that for the requested exemptions related to the hydrogen recombiners and backup hydrogen purge system, pursuant to 10 CFR 50.12(a)(2)(ii), special circumstances are present, in that application of the regulations in the particular circumstances is not necessary to achieve the underlying purpose of the rule.

4.0 Conclusion

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(a), the exemption from the hydrogen recombiner and hydrogen purge system requirements is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. Also, special circumstances are present. Therefore, the Commission hereby grants AmerGen Energy Company, LLC, an exemption from the requirements for hydrogen recombiners and the hydrogen purge system of 10 CFR 50.44, and 10 CFR part 50, Appendix A, General Design Criterion 41, for the TMI–1.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment (67 FR 1788).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 8th day of February 2002.

For the Nuclear Regulatory Commission.

John A. Zwolinski,

Director, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 02–3618 Filed 2–13–02; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Existing Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Rule 10f–3, OMB Control No. 3235–0226, SEC File No. 270–237.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information discussed below. The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

Section 10(f) of the Investment Company Act of 1940 (15 U.S.C. 80a–10(f)) (the ''Act'' or ''Investment Company Act'') prohibits a registered investment company (''fund'') from purchasing any security during an underwriting or selling syndicate if the fund has certain relationships with a principal underwriter [1] for the security (''affiliated underwriter'').[2] Congress enacted this provision in 1940 to protect funds and their investors by preventing underwriters from ''dumping'' unmarketable securities on affiliated funds.[3]

In 1958, under rulemaking authority in section 10(f), the Commission adopted rule 10f–3, which is entitled ''Exemption for the Acquisition of Securities During the Existence of an Underwriting or Selling Syndicate.'' The Commission last amended the rule in January 2001.[4] Rule 10f–3 currently permits a fund to purchase securities in a transaction that otherwise would

[1] ''Principal underwriter'' is defined to mean (in relevant part) an underwriter that, in connection with a primary distribution of securities, (A) is in privity of contract with the issuer or an affiliated person of the issuer, (B) acting alone or in concert with one or more other persons, initiates or directs the formation of an underwriting syndicate, or (C) is allowed a rate of gross commission, spread, or other profit greater than the rate allowed another underwriter participating in the distribution. 15 U.S.C. 80a–2(a)(29).

[2] Section 10(f) prohibits the purchase if a principal underwriter of the security is an officer, director, member of an advisory board, investment adviser, or employee of the fund, or if any officer, director, member of an advisory board, investment adviser, or employee of the fund is affiliated with the principal underwriter. 15 U.S.C. 80a–10(f).

[3] See Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency, 76th Cong., 3d Sess. 35 (1940) (statement of Commissioner Healy).

[4] Additional amendments to rule 10f–3 were proposed on November 29, 2000. Exemption for the Acquisition of Securities During the Existence of an Underwriting or Selling Syndicate, Investment Company Act Release No. 24775 (Nov. 29, 2000). These proposals, if adopted, would expand the exemption provided by the rule to permit a fund to purchase government securities in a syndicated offering and modify the rule's percentage limit on purchases.

violate section 10(f) if, among other things: [5]

(1) The securities either are registered under the Securities Act of 1933, are municipal securities with certain credit ratings, or are offered in certain private or foreign offerings;

(2) The securities purchases meet certain conditions with respect to timing and price;

(3) The issuer of the securities has been in continuous operation for at least three years prior to the issuance of the securities;

(4) The offering involves a ''firm commitment'' underwriting;

(5) The underwriters' commission is reasonable;

(6) The fund (together with other funds advised by the same investment adviser) purchases no more than twenty-five percent of the offering;

(7) The fund purchases the securities from a member of the syndicate other than the affiliated underwriter;

(8) Each transaction effected under the rule is reported on Form N–SAR;

(9) The fund's directors have approved procedures for purchases made in reliance on the rule, regularly review fund purchases to determine whether they comply with these procedures, and approve necessary changes to the procedures; and

(10) A written record of each transaction effected under the rule is maintained for six years, the first two of which in an easily accessible place.[6]

These limitations are designed to prevent purchases under the rule from raising the concerns that section 10(f) was enacted to address and to protect the interests of investors. These requirements provide a mechanism for fund boards to oversee compliance with the rule. The required recordkeeping facilitates the Commission staff's review of rule 10f–3 transactions during routine fund inspections and, when necessary, in connection with enforcement actions.

The staff estimates that approximately 410 funds engage in a total of approximately 2050 rule 10f–3 transactions each year. We estimate that each fund makes an average of fifteen responses per year and that the 410 funds that rely on rule 10f–3 make a total of 6150 annual responses.[7] Before making a purchase under rule 10f–3, the purchasing fund must document that the transaction complies with the conditions in the rule, a process which the staff estimates takes an average of approximately thirty minutes per transaction at a cost of $22.44 per transaction.[8] Thus, annually, in the aggregate, funds spend approximately 1025 hours [9] at a cost of $46,002 [10] on pre-transaction reporting. The staff estimates that, after the transaction is complete, an additional thirty minutes is spent completing the record of the transaction at a cost of $22.44 per transaction.[11] Thus, annually, in the aggregate, funds spend approximately 1025 hours [12] at a cost of $46,002 [13] on post-transaction reporting. The staff estimates further that preparation of a quarterly report of all rule 10f–3 transactions for the board of directors takes approximately 1.5 hours per quarter (in which there are 10f–3 transactions) at a cost of $43.78.[14] The staff estimates that, on average, each of the 410 funds engages in rule 10f–3 transactions during two quarters each year. Thus, annually in the aggregate, funds spend approximately 1230 hours [15] at a cost of $35,900 [16] on the preparation of quarterly transaction reports. The staff estimates that the board of directors spends fifteen minutes reviewing these reports each quarter (in which there are 10f–3 transactions) at a cost of $500.[17] Thus, annually, in the aggregate, funds spend approximately 205 hours [18] at a cost of $410,000 [19] for the quarterly review of rule 10f–3 transactions by boards. The staff further estimates that reviewing and revising as needed written procedures for rule 10f–3 transactions takes, on average, two hours of a compliance attorney's time at a cost of approximately $124.02 [20] per year and fifteen minutes of board time at a cost of $500 per year.[21] Thus, annually, in the aggregate, the staff estimates that funds spend a total of approximately 922.5 hours [22] at a cost of approximately $255,848 [23] on monitoring and revising rule 10f–3 procedures. The staff estimates, therefore, that rule 10f–3 imposes an information collection burden of 4407.5 hours [24] at a cost of $793,752.[25] This estimate does not include the time spent filing transaction reports on Form N–SAR, which is encompassed in the information collection burden estimate for that form. Commission staff estimates that there is no cost burden for rule 10f–3 other than the costs associated with the hour burden. These estimates are made solely for the purposes of the Paperwork Reduction Act and are not derived from a comprehensive or even a representative survey or study of Commission rules. 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.

Written comments are invited on: (a) Whether the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burdens of the collections of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burdens of the collections

[5] See Rule 10f–3(b).

[6] The written record must state (i) from whom the securities were acquired, (ii) the identity of the underwriting syndicate's members, (iii) the terms of the transactions, and (iv) the information or materials on which the fund's board of directors has determined that the purchases were made in compliance with procedures established by the board. See Rule 10f–3(b)(12).

[7] 2050 instances of pre-transaction reporting + 2050 instances of post-transaction reporting + 820 quarterly reports + 820 quarterly reviews by fund boards + 410 instances of monitoring and revision of rule 10f–3 procedures = 6150 responses.

[8] Typically, personnel from several departments, including portfolio management and compliance, share this task. The staff estimates that the average hourly rate for these personnel is $44.87.

[9] 2050 transactions per year × 30 minutes per transaction = 1025 hours.

[10] 2050 transactions × $22.44/transaction = $46,002.

[11] As with the reporting at the time of the transaction, the task of completing the record of the transaction is shared among personnel for whom the staff estimates the average hourly rate to be $44.87.

[12] 2050 transactions per year × 30 minutes per transaction = 1025 hours.

[13] 2050 transactions per year × $22.44/transaction = $46,002.

[14] The staff estimates that a compliance clerk spends one hour of time, at $12.77/hour, preparing the report and a compliance attorney spends half an hour of time, at $62.01/hour, reviewing the report.

[15] 410 funds × 2 quarters/year × 1.5 hours/quarter = 1230 hours.

[16] 410 funds × 2 quarters/year × $43.78/quarter = $35,900.

[17] The staff estimates that each hour of a fund board's meeting costs $2000.

[18] 410 funds × 2 quarters/year × 15 minutes/quarter = 205 hours

[19] 410 funds × 2 quarters/year x $500/quarter = $410,000

[20] 2 hours × $62.01/hour = $124.02

[21] These averages take into account the fact that in most years, fund attorneys and boards spend little or no time modifying procedures and in other years, they spend a significant amount of time doing so.

[22] 410 funds × (2 hours by compliance attorney + 15 minutes by board/year) = 922.5 hours.

[23] 410 funds × ($124.02 for compliance attorney time + $500 for board time) = $255,848.

[24] 1025 for pre-transaction reporting + 1025 for post-transaction reporting + 1230 hours for preparing the board report + 205 hours for board review of rule 10f–3 transactions + 922.5 hours for monitoring and revising rule 10f–3 procedures = 4407.5 hours.

[25] $46,002 for pre-transaction reporting + $46,002 for post-transaction reporting + $35,900 for preparing the board report + $410,000 for board review of rule 10f–3 transactions + $255,848 for monitoring and revising rule 10f–3 procedures = $793,752.

of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Michael E. Bartell, Associate Executive Director, Office of Information Technology, Securities and Exchange Commission, Mail Stop 0–4, 450 5th Street, NW, Washington, DC 20549.

Dated: February 7, 2002.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–3628 Filed 2–13–02; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Extension of Existing Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Rule 17a–13, SEC File No. 270–27, OMB Control No. 3235–0035.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval. The Code of Federal Regulations citation to this collection of information is the following rule: 17 CFR 240.17a–13 Quarterly Security Counts to be Made by Certain Exchange Members, Brokers, and Dealers.

Rule 17a–13(b) generally requires that at least once each calendar quarter, all registered brokers and dealers physically examine and count all securities held and account for all other securities not in their possession, but subject to the broker-dealer's control or direction. Any discrepancies between the broker-dealer's securities count and the firm's records must be noted and, within seven days, the unaccounted for difference must be recorded in the firm's records. Rule 17a–13(c) provides that under specified conditions, the securities counts, examination and verification of the broker-dealer's entire list of securities may be conducted on a cyclical basis rather than on a certain date. Although Rule 17a–13 does not require filing a report with the Commission, security count discrepancies must be reported on Form X–17a–5 as required by Rule 17a–5. Rule 17a–13 exempts broker-dealers that limit their business to the sale and redemption of securities of registered investment companies and interests or participation in an insurance company separate account and those who solicit accounts for federally insured savings and loan associations, provided that such persons promptly transmit all funds and securities and hold no customer funds and securities.

The information obtained from Rule 17a–13 is used as an inventory control device to monitor a broker-dealer's ability to account for all securities held, in transfer, in transit, pledged, loaned, borrowed, deposited or otherwise subject to the firm's control or direction. Discrepancies between the securities counts and the broker-dealer's records alert the Commission and the Self Regulatory Organizations (''SROs'') to those firms having problems in their back offices.

Because of the many variations in the amount of securities that broker-dealers are accountable for, it is difficult to develop a meaningful figure for the cost of compliance with Rule 17a–13. Approximately 91% of all registered broker-dealers are subject to Rule 17a–13. Accordingly, approximately 6,579 broker-dealers have obligations under the Rule, and the average time it would take each broker-dealer to comply with the Rule is 100 hours per year, for a total estimated annualized burden of 657,900 hours. It should be noted that a significant number of firms subject to Rule 17a–13 have minimal obligations under the Rule because they do not hold securities. It should further be noted that most broker-dealers would engage in the activities required by Rule 17a–13 even if they were not required to do so.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information 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. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Michael E. Bartell, Associate Executive Director, Office of Information Technology, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549.

Dated: February 7, 2002.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–3629 Filed 2–13–02; 8:45 am]

BILLING CODE 8010–01–U

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–25413; 812–12474]

Maxim Series Fund, Inc., et al.; Notice of Application

February 8, 2002.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from section 15(a) of the Act and rule 18f–2 under the Act.

SUMMARY OF APPLICATION: GW Capital Management, LLC (the ''Manager''), Maxim Series Fund, Inc. (''Maxim'') and Orchard Series Fund (''Orchard'') (Maxim and Orchard each, a ''Fund'' and together, the ''Funds'') request an order that would permit them to enter into and materially amend subadvisory agreements without shareholder approval.

Applicants: Manager, Maxim and Orchard.

Filing Dates: The application was filed on March 9, 2001 and amended on October 5, 2001 and January 14, 2002.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on March 5, 2002, and should be accompanied by proof of service on the applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Commission, 450 Fifth Street, NW., Washington, DC

20549–0609; Applicants, c/o Beverly A. Byrne, Maxim Series Fund, Inc., 8525 East Orchard Road, Greenwood Village, CO 80111.

FOR FURTHER INFORMATION CONTACT: Stacy L. Fuller, Senior Counsel, at (202) 942–0553, or Nadya B. Roytblat, Assistant Director, at (202) 942–0564, Division of Investment Management, Office of Investment Company Regulation.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549–0102, telephone (202) 942–8090.

Applicants' Representations

1. Maxim is a Maryland corporation registered under the Act as an open-end management investment company. Maxim is organized as a series company and currently has 36 separate series. Orchard is a Delaware business trust registered under the Act as an open-end management investment company. Orchard is organized as a series company and currently has six separate series. Each series (''Portfolio'') of Maxim and Orchard has its own distinct investment objectives, policies and restrictions. Shares of Maxim's Portfolios are offered for sale to qualified pension plans and through registered separate accounts as funding vehicles for variable annuity and variable life insurance contracts issued by insurance companies. Shares of Orchard's Portfolios are sold directly to the public, to pension plans and through unregistered separate accounts.[1]

2. The Manager, a Colorado limited liability company and wholly owned subsidiary of Great West Life Insurance and Annuity Company, is registered under the Investment Advisers Act of 1940, as amended (the ''Advisers Act''). The Funds, on behalf of each Portfolio, have each entered into an investment advisory agreement with the Manager (each a ''Management Agreement''), pursuant to which the Manager serves as the investment adviser to the Portfolios. Each Management Agreement has been approved by, in the case of Maxim, a majority of the Fund's board of directors, and in the case of Orchard, a majority of the Fund's board of trustees (each a ''Board'' and together the ''Boards''), including a majority of the directors or trustees (the ''Directors'') who are not ''interested persons,'' as defined in section 2(a)(19) of the Act (''Independent Directors''), of the Fund or the Manager, as well as by each Fund's initial shareholder(s). Under the terms of the Management Agreements, the Manager, subject to oversight by the Boards, has supervisory responsibility for the investment program of each Fund.

3. The Funds and the Manager have entered or will enter into investment advisory agreements (each, an ''Advisory Agreement'') with subadvisers (each, an ''Adviser'') for each of the Portfolios. Under the Advisory Agreements, each Adviser, subject to general supervision by the Manager and the Board, has discretionary authority to invest the portion of a Portfolio's assets allocated to it by the Manager. Currently, Maxim has Advisers for 12 of its 36 Portfolios and Orchard has an Adviser for one of its six Portfolios. Unless exempt from registration, each Adviser is, and any future Adviser will be, registered under the Advisers Act. The Funds pay the Manager a fee based on the value of the average daily net assets of each Portfolio in the Fund.

4. The Manager monitors the Portfolios and the Advisers and makes recommendations to the Boards regarding allocation, and reallocation, of assets between Advisers and is responsible for recommending the hiring, termination and replacement of Advisers. The Manager recommends Advisers based on a number of factors used to evaluate their skills in managing assets pursuant to particular investment objectives. Each Adviser will be paid by the Manager out of the fees received by the Manager from the Funds.

5. Applicants request an order to permit the Manager to enter into and materially amend Advisory Agreements without obtaining shareholder approval. The requested relief will not extend to an Adviser that is an affiliated person, as defined in section 2(a)(3) of the Act, of the Funds or the Manager, other than by reason of serving as an Adviser to one or more of the Portfolios (''Affiliated Adviser''). None of the current Advisers is an Affiliated Adviser.

Applicants' Legal Analysis

1. Section 15(a) of the Act provides, in relevant part, that it is unlawful for any person to act as an investment adviser to a registered investment company except under a written contract that has been approved by the vote of the company's outstanding voting securities. Rule 18f–2 under the Act provides, in relevant part, that each series or class of stock in a series company affected by a matter must approve such matter if the Act requires shareholder approval.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction or any class or classes of persons, securities, or transactions from any provision of the Act, or from any rule thereunder, if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants request an exemption under section 6(c) of the Act from section 15(a) of the Act and rule 18f–2 under the Act to permit them to enter into and materially amend Advisory Agreements without shareholder approval.

3. Applicants assert that the shareholders are relying on the Manager's experience to select one or more Advisers best suited to achieve a Portfolio's desired investment objectives. Applicants assert that, from the perspective of the investor, the role of the Advisers is comparable to that of individual portfolio managers employed by other investment advisory firms. Applicants contend that requiring shareholder approval of each Advisory Agreement would impose costs and unnecessary delays on the Portfolios, and may preclude the Manager from acting promptly in a manner considered advisable by the Board. Applicants note that the Management Agreements will remain fully subject to section 15(a) of the Act and rule 18f–2 under the Act, including the requirements for shareholder approval.

Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. Before a Portfolio may rely on the requested order, the operation of the Portfolio in the manner described in the application will be approved by a majority of the Portfolio's outstanding voting securities (or, if the Portfolio serves as a funding medium for any sub-account of a registered separate account, pursuant to voting instructions provided by the owners of variable annuity

[1] The applicants request that any relief granted pursuant to the application also apply to future Portfolios of the Funds and any other registered open-end management investment companies and their series that (a) are advaised by the Manager or any entity controlling, controlled by, or under common control with the Manager; (b) are managed in a manner consistent with this application; and (c) comply with the terms and conditions in the application (together, the ''Future Investment Companies''). The Funds are the only existing investment companies that currently intend to rely on the requested order. Applicants state that if the name of any Portfolio or Future Investment Company contains the name of an Adviser, the name of the Adviser will be preceded by the name of the Manager.

contracts and variable life insurance policies (''Owners'') who have allocated assets to that sub-account) or, in the case of a Portfolio whose public shareholders (or Owners through a sub-account of a registered separate account) purchase shares on the basis of a prospectus containing the disclosure contemplated by condition 2 below, by the sole initial shareholder(s) before offering shares of that Portfolio to the public (or to Owners through a sub-account of a registered separate account).

2. Each Portfolio relying on the requested order will hold itself out to the public as employing the management structure described in the application. In addition, each Portfolio will disclose in its prospectus the existence, substance, and effect of any order granted pursuant to the application. Such prospectus will prominently disclose that the Manager has the ultimate responsibility (subject to oversight by the Board) to oversee the Advisers and recommend their hiring, termination, and replacement.

3. Within 90 days of the hiring of any new Adviser, the Manager will furnish shareholders (or, if the Portfolio serves as a funding medium for a sub-account of a registered separate account, Owners who have allocated assets to that sub-account) all information about the new Adviser that would be included in a proxy statement, including any change in such disclosure caused by the addition of the new Adviser. The Manager will satisfy this condition by providing shareholders (or Owners) with an information statement meeting the requirements of Regulation 14C, Schedule 14C, and Item 22 of Schedule 14A under the Securities Exchange Act of 1934.

4. The Manager will not enter into an advisory agreement with any Affiliated Adviser without that agreement, including the compensation to be paid thereunder, being approved by the shareholders of the applicable Portfolio (or, if the Portfolio serves as a funding medium for any sub-account of a registered separate account, then by the Owners who have allocated assets to that sub-account).

5. At all times, a majority of each Board will be Independent Directors, and the nomination of new or additional Independent Directors will be at the discretion of the then-existing Independent Directors.

6. When an Adviser change is proposed for a Portfolio with an Affiliated Adviser, the Board, including a majority of the Independent Directors, will make a separate finding, reflected in the Board minutes, that the change is in the best interests of the Portfolio and its shareholders (or, if the Portfolio serves as a funding medium for any sub-account of a registered separate account, in the best interests of the Portfolio and the Owners who have allocated assets to that sub-account), and does not involve a conflict of interest from which the Manager or the Affiliated Adviser derives an inappropriate advantage.

7. The Manager will provide general management services to each Fund and Portfolio, including overall supervisory responsibility for the general management and investment of each Portfolio's assets, and, subject to review and approval by the Board, will: (a) Set each Portfolio's overall investment strategies, (b) evaluate, select, and recommend Advisers to manage all or part of a Portfolio's assets; (c) allocate and, when appropriate, reallocate a Portfolio's assets among multiple Advisers, (d) monitor and evaluate the performance of the Advisers, and (e) implement procedures reasonably designed to ensure that the Advisers comply with each Portfolio's investment objectives, policies, and restrictions.

8. No Director or officer of a Fund, or director, manager or officer of the Manager will own, directly or indirectly (other than through a pooled investment vehicle that is not controlled by such person), any interest in any Adviser, except for: (a) Ownership of interests in the Manager or any entity that controls, is controlled by, or is under common control with the Manager, or (b) ownership of less than 1% of the outstanding securities of any class of equity or debt of a publicly traded company that is either an Adviser or an entity that controls, is controlled by or under common control with an Adviser.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 02–3569 Filed 2–13–02; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45413; File No. SR–Amex–2001–76]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the American Stock Exchange LLC Relating to the Obligations of Specialists and Registered Options Traders

February 7, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 12, 2001, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Amex filed amendments to the proposed rule change on December 17, 2001[3] and January 18, 2002.[4] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to amend Exchange Rules 950, 958 and 958A pertaining to the obligations of specialists and registered options traders. The text of the proposed rule change is set forth below. Additions are in italics; deletions are in brackets.

American Stock Exchange, LLC; Proposed Rule Change

Section 5. Floor Rules Applicable to Options

Rule 950 Rules of General Applicability

(a) through (m) No change.

(n) The provisions of Rule 170 and Commentaries .03 and .04 thereto, shall apply to exchange option transactions.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Amex submitted a new Form 19b–4, which replace and supersedes the original filing in its entirety (''Amendment No. 1'').

[4] Letter from Clarie P. McGrath, Vice President and Deputy General Counsel, Amex, to Elizabeth King, Associate Director, Division of Market Regulation (''Division''), Commission, dated January 16, 2002 (''Amendment No. 2''). Amendment No. 2 amends proposed Amex Rules 950 and 958 to clarify that ''lage order'' means order larger than the size communicated or disseminated pursuant to Exchange Rule 958 or larger than the Exchange's auto-ex eligible size. Amendment No. 2 also make a technical correction to proposed Amex Rule 958(h)(iii).

In addition, the following Commentary shall also apply:

Commentary

.01 No change.

.02 Specialists and registered options traders are required to compete with each other to improve the quoted markets in all series of option classes which they trade. Unless otherwise provided for in Exchange rules, it shall be a violation of just and equitable principles of trade for specialists and registered options traders to determine by agreement the spreads or prices at which they will trade any option class, or the allocation of orders in any option class. In complying with this Rule, the specialist and registered option traders must make independent decisions to determine the spreads or prices at which they will quote and trade any option class. There are, however, certain specific circumstances where to make fair and orderly markets that are competitive with other exchanges and responsive to the needs and expectations of investors, some communication among the specialist and traders may be necessary and appropriate. Therefore, notwithstanding the foregoing:

(a) Specialists are expected to participate in and support Exchange-sponsored automated systems such as automatic quote and execution systems or Exchange-approved equivalents. The variables in the formula used to generate automatically updated quotations for each option class and or series will be determined independently by the specialist. The specialist shall disclose to all registered option traders in an option class the following variables of the formula used to generate automatically updated market quotations for each option class and/or series: option pricing calculation model, volatility, interest rate, and dividends (both declared and anticipated). The specialist may receive input from the registered options traders on any one or all of these variables provided, however, it is within the specialist's sole discretion to make the final, independent decision in determining the variables to be used in the automated quote system. The registered options traders, however, are not required to give input on the variables to the specialist. The Exchange shall have the discretion to exempt specialists using an Exchange-approved proprietary automated quotation updating system from having to disclose proprietary information concerning the variables (but not the variables themselves) used by those systems;

(b) The obligation of the specialists to make competitive markets does not preclude the specialists and registered options traders from making a collective response to a request for a market, provided the member representing such order requests such response and the size of the order is larger than the size communicated or disseminated pursuant to Rule 958A or is larger than the Auto-Ex eligible size parameter.[5] With respect to orders sent through the Exchange's order routing systems that are larger than the size disseminated pursuant to Rule 958A, it is presumed that the member has requested a collective response. The allocation of contracts executed in accordance with this paragraph done in accordance with the Exchange's specialist and registered options trader participation policy; and

(c) In conjunction with their obligation as the responsible broker or dealer pursuant to Exchange Rule 958A and Rule 11Ac1–1 under the Securities Exchange Act of 1934, specialists and registered options traders may collectively agree to the best bid, best offer and aggregate quotation size required to be communicated to the Exchange pursuant to paragraph (c)(i) of Rule 958A.

* * * * *

Rule 958 Options Transactions of Registered Traders

No Registered Trader shall initiate an Exchange option transaction on the Floor for any account in which he has an interest except in accordance with following provisions:

(a) through (g) No change.

(h) Registered options traders and specialists are required to compete with each other to improve the quoted markets in all series of option classes which they trade. Unless otherwise provided for in Exchange rules, it shall be a violation of just and equitable principles of trade for registered options traders and specialists to determine by agreement the spreads or prices at which they will trade any option class, or the allocation of orders in any option class. In complying with this Rule, the registered option traders and specialist must make independent decisions to determine the spreads or prices at which they will quote and trade any option class. There are, however, certain specific circumstances where to make fair and orderly markets that are competitive with other exchanges and responsive to the needs and expectations of investors, some communication among the specialist and registered options traders may be necessary and appropriate. Therefore, notwithstanding the foregoing:

(i) Registered options traders are expected to participate in and support Exchange-sponsored automated systems such as automatic quote and execution systems or Exchange-approved equivalents. The variables in the formula used to generate automatically updated quotations for each option class and or series will be determined by the specialist. The specialist shall disclose to all registered option traders in an option class the following variables of the formula used to generate automatically updated market quotation for each option class and/or series: option pricing calculation model, volatility, interest rate, and dividends (both declared and anticipated). The specialist may receive input from the registered options traders on any one or all of these variables, provided, however, that it is within the specialist's sole discretion to make the final, independent decision in determining the variables to be used in the automated quote system. The registered options traders, however, are not required to give input on the variables to the specialist. The Exchange shall have the discretion to exempt specialists using an Exchange-approved proprietary automated quotation updating system from having to disclose proprietary information concerning the variables (but not the variables themselves) used by those systems;

(ii) *The obligation of registered options traders to make competitive markets does not preclude registered options traders and specialists from making a collective response to a request for a market provided the member representing such order requests such response and the size of the order is larger than the size communicated or disseminated pursuant to Rule 958A or is larger than the Auto-Ex eligible size parameter.[6] With respect to orders sent through the Exchange's order routing systems that are larger than the size disseminated pursuant to Rule 958A, it is presumed that the member has requested a collective response. The allocation of contracts executed in accordance with this paragraph will be done in accordance with the Exchange's*

[5] This requirement would apply to the greater of the size communicated or disseminated pursuant to Rule 958 or the Auto-Ex eligible size parameter. The Exchange plans to file an amendment clarifying this point. Telephone call between Claire P. McGrath, Vice President and Deputy General Counsel, Amex, and Sonia Patton, Special Counsel, Division, Commission (February 5, 2002).

[6] Id.

specialist and registered options trader participation policy; and

(iii) *In conjunction with their obligation as the responsible broker or dealer pursuant to Exchange Rule 958A and Rule 11Ac1–1 under the Securities Exchange Act of 1934, specialists and registered options traders may collectively agree to the best bid, best offer and aggregate quotation size required to be communicated to the Exchange pursuant to paragraph (c)(i) of Rule 958A.*

* * * * *

Rule 958A. Application of the Firm Quote Rule

(a) Definitions—(i) For purposes of this rule the terms ''aggregate quotation size'', ''best bid and best offer'', ''bid and offer'', ''quotation size'', ''quotation vendor'', ''reported security'', ''listed option'', ''option class'', ''option series'' and ''trading rotation'' shall have the meanings set forth in SEC Rule 11Ac1–1.

(ii) For purposes of this rule and SEC Rule 11Ac1–1 as applied to the Exchange and its members, the term ''responsible broker or dealer'' shall mean, with respect to any bid or offer for any listed option made available by the Exchange to quotation vendors, the specialist and any registered options traders constituting the trading crowd in such option series. The specialist and any registered options traders shall collectively be the responsible broker or dealer to the extent of the aggregate quotation size specified. *In conjunction with their obligation as the responsible broker or dealer, specialists and registered options traders may collectively agree to the best bid, best offer and aggregate quotation size required to be communicated to the Exchange pursuant to paragraph (c)(i) of this rule. The allocation of contracts executed in accordance with this rule will be done pursuant to the Exchange's specialist and registered options traders participation policy.*

(b) Through (d) No change.

* * * * *

Commentary

.01 No specialist *or registered options trader* shall be deemed to be a responsible broker or dealer with respect to a published bid or offer that is erroneous as a result of an error or omission made by the Exchange or any quotation vendor. If a published bid or published offer is accurate but the published quotation size (or published aggregate quotation size, as the case may be) associated with it is erroneous as a result of an error or omission made by the Exchange or any quotation vendor, then the specialist *and registered options traders* [who is] responsible for the published bid or published offer shall be obligated [to the extent] *as* set forth in paragraph (c) of Rule 11Ac1–1 but only to the extent of ten contracts.

.02 Absent unusual market conditions, the responsible broker or dealer shall honor any bid or offer then being displayed by quotation vendors which is erroneous, up to the quotation size then being so displayed, which has been displayed for six minutes or more. Provided, however, that the [specialist] *the responsible broker or dealer* shall not be required to honor such a bid or offer which is erroneous as to either price or size or both if:

(i)–(iv)—No change.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Amex has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Exchange Rules 950, 958 and 958A to codify its interpretation that unless otherwise provided for in Exchange rules it is a violation of just and equitable principles of trade for specialists and registered options traders (''traders'') to determine by agreement the spreads or prices at which they will trade any option class, or the allocation of orders in any option class.[7] Thus, specialists and traders are required to compete with each other to improve the quoted markets in all series of option classes which they trade. In meeting this obligation, the specialist and each trader must make independent decisions concerning what markets to quote at any given time and cannot determine by agreement what the quoted market, bid/ask differential or option prices should be. The Exchange believes that there are, however, certain specific circumstances where, in order to make fair and orderly markets that are competitive with other exchanges and responsive to the needs and expectations of investors, some communication among the specialist and traders may be necessary and appropriate. According to the Exchange, these circumstances arise: (1) In connection with the specialist's establishment of parameters used by the Exchange's automated quotation updating system (known as X–TOPS) to automatically generate options quotations in response to changes in the market for the underlying security or index; (2) in responding to customer requests for markets in size, such that the collective efforts of the specialist and traders are necessary in order to be able to fill any resulting order to buy or sell options; and (3) whenever the specialist and traders, in order to fulfill their obligations pursuant to Rule 11Ac1–1 under the Act and Amex Rule 958A, and to be competitive with other exchanges, collectively agree as to the best bid, best offer and aggregate quotation size. The following is a description of the nature and extent of the joint action among the specialist and traders that is permitted under each of these circumstances.

X–TOPS Parameters

Automated quotation updating systems, which are relied upon by the specialist and traders to provide a single immediately updated quotation for each option series, utilize option valuation formulas to generate options quotations based on a number of variables. These variables include the price of the underlying stock, time remaining to expiration, interest rates (or ''cost to carry'', the amount of interest on the money used to pay for the options position during the period prior to expiration of the option series), dividends (both declared and anticipated) and volatility. It is the specialist's obligation to determine for each option class the variables used in the X–TOPS formula. However, the quotations generated and displayed by X–TOPS result in firm quote obligations of the specialist and traders to buy or sell options at quoted prices and sizes. For this reason, the Exchange believes

[7] The Amex is submitting the proposed rule change pursuant to subparagraph IV.B.j of the Commission's September 11, 2000 Order, which requires that certain options exchanges, including the Amex, adopt new, or amend existing, rules to make express any practice or procedure ''whereby market makers trading any particular option class determine by agreement the spreads or option prices at which they will trade nay option class * * *.'' *See* Order Institution Public Administrative Proceedings Pursuant to section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions. Securities Exchange Act Release No. 43268 (September 11, 2000).

that input from the registered options traders to the specialist regarding the variables used in the X–TOPS formula is necessary and appropriate. Proposed Commentary .02 to Exchange Rule 950(n) and proposed paragraph (h) to Exchange Rule 958 reflect this by stating that the specialist (i) shall disclose to all registered option traders in an option class the variables of the formula used to generate automatically updated market quotations for each option class and/or series, and (ii) may receive input from the registered options traders on any one or all of these variables provided, however, that it is within the specialist's sole discretion to make the final independent decision in determining the variables to be used in the X–TOPS formula. Those specialists using an Exchange-approved proprietary system to calculate and generate quotes may be exempt by the Exchange from having to disclose proprietary information concerning the variables (but not the variables themselves) used by their systems.

Joint Responses to Requests for Markets

When a request for a market to buy or sell option contracts in sizes larger than the greater of the Auto-Ex eligible size or the size communicated or disseminated pursuant to Exchange Rule 958A is submitted to the specialists and traders,[8] the Exchange believes that it is typically the case that the customer on whose behalf the request is made would want to know promptly at what single price all of the options represented by the request can be bought or sold. Often in order to compete effectively with other marketplaces also trading the option and with the over-the-counter market in similar products, the Exchange believes that the specialist and traders must collectively provide a response to this kind of request. Proposed Commentary .02 to Exchange Rule 950(n) and proposed new paragraph (h) to Exchange Rule 958 would expressly permit a collective response to the member provided the member requests such a collective response. With respect to orders sent through the Exchange's order routing systems that are larger than the size disseminated pursuant to Exchange Rule 958, it would be presumed that the member has requested a collective response.

In addition, the specialist will sometimes agree to transact the full size of the options order at a specific price and subsequently allocate portions of the order to participating registered options traders. If or when a trade is executed, the contracts will be allocated in accordance with the Exchange's specialist and registered options traders participation policy.[9]

Firm Quote Guarantees

Currently, Amex Rule 958A obligates specialists and traders to be firm for (i) customer orders up to the quotation size being disseminated, and (ii) broker-dealer orders, up to the size established and periodically published by the Exchange. Rule 11Ac1–1 under the Act anticipates that exchanges will disseminate one automatically generated quote for a trading crowd, which necessitates collective action on behalf of the specialist and traders to communicate size to the Exchange. If or when a trade is executed, the contracts will be allocated in accordance with the Exchange's specialist and registered options traders participation policy.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act[10] in general and furthers the objectives of Section 6(b)[11] in particular in that it is designed to promote just and equitable principles of trade, remove impediments to a free and open market and a national market system, and protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Amex consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filings will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to the File No. SR–Amex–2001–76 and should be submitted by March 7, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–3495 Filed 2–13–02; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45417; File No. SR–Amex–00–47]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the American Stock Exchange LLC Relating to Amendment of Exchange Rule 933

February 7, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4[2] thereunder, notice is hereby given that on August 17, 2000, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange

[8] *See supra* note 5.

[9] *See* Securities Exchange Act Release No. 42964 (June 20, 2000) 65 FR 39972 (June 28, 2000) which proposes to codify current practices regarding the participation in option trades executed on the Exchange by registered options traders and specialists.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to amend Exchange Rule 933 to new Commentary .01. Below is the text of the proposed rule change. Proposed new language is *italicized.*

.01 If a member or member organization grants a non-member electronic access to the Exchange's order routing or executions systems through the member's or member organization's order routing systems, and if the non-member uses that access to violate Exchange rules or other applicable regulations, including, but not limited to, the Exchange's ''unbundling'' prohibition, the member or member organization is in violation of Exchange rules if it has either knowingly facilitated the violation or has failed to establish procedures reasonably designed to prevent access to the member or member organization's order routing systems from being used to effect such violation.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Amex has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange represents that it established the Auto-Ex system to provide small customer orders with an immediate single price execution. In 1996, the Exchange adopted Rule 933 to prohibit the ''unbundling'' (*i.e.,* the splitting or dividing-up) of customer option orders to make them fit within the size parameters of the Exchange's Auto-Ex system.[3]

The new Commentary would make explicit the existing implicit obligations of members and member organizations under Rule 933. Thus, members and member organizations that provide their customers with electronic access to the Exchange's order routing and execution systems would be explicitly required to take reasonable steps to ensure that their customers do not unbundle their orders to satisfy Auto-Ex eligibility criteria and to otherwise comply with the Exchange's rules and other applicable regulations. The new Commentary would further provide that members and member organizations may not knowingly facilitate a violation of the Exchange rules (including the unbundling rule) and other applicable regulations by non-members that have electronic access to the Trading Floor through the member organization's order routing systems. The Exchange represents that the Chicago Board Options Exchange (''CBOE'') has already adopted a similar rule,[4] and the Exchange believes that the proposed clarification of Rule 933 will assist members and member organizations in understanding their compliance responsibilities.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act[5] in general, and furthers the objectives of Section 6(b)(5)[6] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the Exchange, it has become effective pursuant to section 19(b)(3)(A)(i) of the Act[7] and subparagraph (f)(1) of Rule 19b–4 thereunder.[8] Although at any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act,[9] the Commission notes that the abrogation period for this proposed rule change has expired. The Commission also notes that concurrently with this notice, it is publishing an order granting accelerated approval to a proposed rule change by the Amex that, among other things, deletes the Commentary that is proposed herein.[10]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be

[3] *See* Securities Exchange Act Release No. 37429 (July 12, 1996), 61 FR 37782 (July 19, 1996) (SR–Amex–96–26).

[4] *See* Securities Exchange Act Release No. 38974 (August 26, 1997), 62 FR 46528 (September 3, 1997) (SR–CBOE–97–32). *See also* CBOE Regulatory Bulletin 00–27, ''Access to Retail Automatic Execution Systems ('RAES'),'' (January 27, 2000).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A)(i).

[8] 17 CFR 240.19b–4(f)(1).

[9] 15 U.S.C. 78s(b)(3)(C).

[10] *See* Securities Exchange Act Release No. 45418 (February 7, 2002) (SR–Amex–2001–96).

available for inspection and copying at the principal office of the Exchange.

All submissions should refer to the File No. SR–Amex–00–47 and should be submitted by March 7, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–3570 Filed 2–13–02; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45427; File No. SR–CBOE–2001–71]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Chicago Board Options Exchange, Inc. to Incorporate Certain Principal Considerations in Determining Sanctions and to Incorporate in the Exchange's Minor Rule Violation Plan Violations of the Exchange's Order Handling Rules

February 8, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 26, 2001, the Chicago Board of Options Exchange, Inc. (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Exchange Rule 17.11 (Judgment and Sanction) to adopt sanctioning guidelines that the Exchange believes will promote consistency and uniformity in determining appropriate remedial sanctions through the resolution of disciplinary matters through offers of settlement or after formal disciplinary hearings. In addition, the Exchange proposes to amend Exchange Rule 17.50 (Imposition of Fines for Minor Rule Violations) to incorporate in its Minor Rule Violation Plan violations of the Exchange's order handling rules. The text of the proposed rule change is available at the CBOE's Office of the Secretary and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

The purpose of the proposed rule change is to amend CBOE Rule 17.11 (Judgment and Sanction) to incorporate certain Principal Considerations in Determining Sanctions (''Principal Considerations'') to promote consistency and uniformity in determining appropriate remedial sanctions through the resolution of disciplinary matters through offers of settlement or after formal disciplinary hearings. In addition, the proposed rule change would amend CBOE Rule 17.50 (Imposition of Fines for Minor Rule Violations) to incorporate in its Minor Rule Violation Plan violations of the Exchange's order handling rules, including violations of firm quote requirements pursuant to Exchange Rule 8.51; failure to promptly book and display limit orders that would improve the disseminated quote pursuant to Exchange Rules 7.7 and 8.85(b); failure to honor the priority of marketable customer orders maintained in the Customer Limit Order Book pursuant to Exchange Rule 6.45; and failure to use due diligence in order execution pursuant to Rules 6.73 and 8.85(b).

The Exchange filed this proposed rule change in accordance with Section IV.B.i of the Commission's September 11, 2000 Order Instituting Administrative Proceedings Pursuant to Section 19(h)(1) of the Securities Exchange Act of 1934 (''Order''),[3] which required the Exchange to adopt rules establishing, or modifying existing, sanctioning guidelines such that they are reasonably designed to effectively enforce compliance with options order handling rules. The Exchange believes that the Principal Considerations, as set forth in proposed Exchange Rule 17.11, codify the historical considerations the Exchange's Business Conduct Committee (''BCC'') has applied in determining appropriate sanctions.

With respect to violations of the Exchange's order handling rules, the Exchange proposes that these violations covered under the plan should be included in a rolling twenty-four month ''look-back'' period. With respect to the failure to submit trade information on time and failure to submit trade information to the price reporter pursuant to Exchange Rule 6.51, the Exchange does not propose to amend the current ''look-back'' period or fine schedule as set forth in Exchange Rule 17.50(g)(4) at this time.[4] With respect to fines imposed upon Market-Makers or Floor Brokers for the conduct resulting in violations of the order handling rules as set forth in Exchange Rule 17.50(g)(5), the following fine schedule would be applied:

Number of offenses in any rolling twenty-four-month period	Fine amount
1st Offense	$500 to $1,500.
2nd Offense ...	$1,000 to $3,000.
3rd Offense	$2,000 to $5,000.
Subsequent Offenses.	$3,500 to $5,000 or Referral to Business Conduct Committee[5].

The Exchange intends to use an automated surveillance program in the detection of order handling violations and a rolling twenty-four month look-back period in the determination of recidivist conduct.[6] As a result, the

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[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 43268 (September 11, 2000), Administrative Proceeding File No. 3–10282.

[4] For violations of any of the Exchange's order handling rules, the BCC would consider the party's entire disciplinary history for purposes of determining whether violations should consitute a first, second or subsequent disciplinary action as set forth in CBOE's Internal BCC Sanction Guidelines. *See* letter from Pat Sexton, Assistant General Counsel, CBOE, to Deborah Lassman Flynn, Assistant Director, Division of Market Regulation (''Division''), Commission, dated February 8, 2002.

[5] The Exchange has agreed to submit an amendment to clarify that after a maximum of 6 offenses, subsequent offenses would be referred to the BCC. *See* telephone conversation between Mary L. Bender, Senior Vice President and Chief Regulatory Officer, CBOE, and Deborah Flynn, Assistant Director, Division, Commission, on February 6, 2002.

[6] The Exchange has agreed to submit an amendment to proposed Rule 17.50(a) to clarify this point. *See* telephone conversation between Mary L. Bender, Senior Vice President and Chief Regulatory Officer, CBOE, and Deborah Flynn, Assistant

Exchange believes it is appropriate, at times, to aggregate individual violations of particular rules and treat such violations as a single offense.[7] The Exchange believes that aggregation would enable its staff to analyze large amounts of regulatory data and craft appropriate remedies, including minor fines, without being held to rigid schedules or being required to bring formal disciplinary action based on a minimal number of surveillance breaks. Similarly, the Exchange would, if no exceptional circumstances are present, impose a fine based upon a determination that there exists a pattern or practice of violative conduct. The Exchange would also be permitted to aggregate similar violations if the conduct was unintentional, incurred no injury to public investors, or the violations resulted from a single systemic problem or cause that has been corrected.

According to the Exchange, the proposed change to Exchange Rule 17.50 would allow any member who is issued a summary fine notice for conduct covered in paragraph (g)(5) of its rule, and also meets one of the levels described below, to have the opportunity to submit one written offer of settlement to the BCC in accordance with the provisions of Exchange Rule 17.8(a) (Submission of Offer), provided, however, that the Interpretations and Polices to Rule 17.8 would not apply to an offer made under Exchange Rule 17.50 and the member would be required to submit the offer within 30 days of the date of service of the written notice informing the member of the fine(s) imposed. The member would also be permitted to appear once before the BCC to make an oral statement in support of the offer. According to the Exchange, this is consistent with the current application of the rule as set forth in Exchange Rule 17.50 and Interpretation and Policy .01(b) under the Exchange's Minor Rule Violation Plan. Under the proposal, a member would be permitted to make one offer of settlement:

(1) When the summary fine amount is greater than $2,500 but not more than $5,000 for a single offense, regardless of whether the single offense is the result of one violation or multiple violations aggregated together; or

(2) When the total fine for multiple offenses is greater than $10,000 in the aggregate and not more than $5,000 for any single offense, again regardless of whether any single offense is the result of one violation or multiple violations aggregated together.

The Exchange notes that to the extent that other Exchange rules or effective Regulatory Circulars include different schedules for summary fines related to the same types of conduct addressed herein, this rule change is intended to supersede all other existing provisions. Should the Commission approve this filing, the Exchange will file proposed rule changes effective upon filing to correct any discrepancies in the provisions of other Exchange rules or Regulatory Circulars.

(2) Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,[8] in general, and furthers the objectives of sections 6(b)(5)[9] and 6(b)(7),[10] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and processing information with respect to transactions in securities, to protect investors and the public interest, and enhances the effectiveness and fairness of the Exchange's disciplinary procedures. Lastly, the Exchange believes that the proposed rule change will refine and enhance the Exchange's Minor Rule Violation Plan to make it more efficient and effective.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

A. By order approve such proposed rule change; or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR–CBOE–2001–71 and should be submitted by March 7, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Secretary.

[FR Doc. 02–3631 Filed 2–13–02; 8:45 am]

BILLING CODE 8010–01–U

Director, Division, Commission, on February 6, 2002.

[7] The Exchange submitted to the Commission a letter, for which it requested confidential treatment, proposing how its regulatory staff would aggregate violations of the order handling rules, where the violations are identified through the Exchange's automated surveillance system. *See* letter from Mary L. Bender, Senior Vice President and Chief Regulatory Officer, CBOE, to John McCarthy, Associate Director, Office of Compliance, Inspections and Examinations, Commission, dated December 21, 2001.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78f(b)(7).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45338; File No. SR–MSRB–2001–07]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of Proposed Rule Change Relating to Minimum Denominations

January 25, 2002.

On October 16, 2001, the Municipal Securities Rulemaking Board (''MSRB'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') and Rule 19b–4 thereunder,[1] a proposed rule change (File No. SR–MSRB–2001–07) concerning minimum denominations consisting of an amendment to its rule G–15 on confirmation, clearance and settlement of transactions with customers, an amendment to its rule G–8 on books and records to be made by brokers, dealers and municipal securities dealers, and an interpretation of its rule G–17 on conduct of municipal securities activities.

The proposed rule change was published for comment in the **Federal Register** on December 28, 2001.[2] The Commission received fifteen comment letters on the MSRB's proposed rule change. This order approves the proposal.

I. Description of the Proposed Rule Change

The MSRB proposed this rule change as a measure to ensure that dealers observe the minimum denominations stated in the official documents of municipal securities issues. Official documents for municipal securities issues may state a ''minimum denomination'' larger than the normal $5,000 par value. For example, an issuer may state a high minimum denomination (typically $100,000) to qualify for one of several exemptions from Rule 15c2–12's [3] requirement to file certain disclosure documents. Additionally, an issuer may set high minimum denominations because of a concern that the securities may not be appropriate for those retail investors who would be likely to purchase securities in relatively small amounts.

Several issuers have expressed concern to the MSRB upon discovering that their issues with high minimum denominations were trading in the secondary market in transaction amounts much lower than the stated minimum denomination. Based on information obtained from the MSRB Transaction Reporting Program, it appears that there are significant numbers of these types of transactions. In the past, brokers, dealers and municipal securities dealers (collectively ''dealers'') effecting such transactions likely would have noticed the problem when attempting to make delivery of a certificate to the customer. Generally, the transfer agent would not have been able to honor a request for a certificate with a par value below the minimum denomination. However, the increased use of book-entry deliveries and safekeeping arrangements for retail customers largely preclude the need for individual certificates for customers and there is no other systemic screening to identify transactions that are in below-minimum denomination amounts. Today, municipal securities predominantly stay in a book-entry environment, with ownership recorded on the books and records of depositories and other nominees, a restriction on the par value of certificates does not effectively restrict the size of transactions.

The MSRB believes that it is appropriate for the rule to be prospective in this manner so that issuers, dealers and other market participants will be aware of the secondary market implications of high minimum denominations at the time the decision is made to incorporate them into an issue's terms. Accordingly, the proposed rule change includes an amendment to MSRB rule G–15 that would prohibit transactions in below-minimum denomination amounts for securities issued after June 1, 2002, with two limited exceptions.

The general prohibition of the rule G–15 amendment is designed to prevent dealers from effecting transactions that break up securities positions into amounts below the issue's denomination. The two exceptions in the amendment to rule G–15 are designed to help preserve liquidity of customers' below-minimum denomination positions that may occur through actions other than a dealer effecting transactions in below-minimum denomination amounts.[4] First, a dealer may purchase a below-minimum denomination position from a customer provided that the customer liquidates his/her entire position. Second, a dealer may sell such a liquidated position to another customer but would be required to provide written disclosure, either on the confirmation or separately, to the effect that the security position is below the minimum denomination and that liquidity may be adversely affected by this fact.

Under MSRB rule G–8, on books and records, customer confirmations must be kept for three years in a dealer's books and records. To ensure consistency in the recordkeeping requirements for separate written disclosures given to a customer under the rule G–15 amendment and the recordkeeping requirements for customer confirmations, the proposed rule change includes an amendment to rule G–8 that would require dealers to keep a record of these separate written disclosures for a minimum of three years.

Although certain written disclosures would be required, after the trade, for those transactions done under the second exemption to the rule G–15 amendment, the MSRB also seeks to address a more general need for time-of-trade disclosure in the proposed rule change. Rule G–17 states: ''In the conduct of its municipal securities activities, each broker, dealer, and municipal securities dealer shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice.'' The MSRB has interpreted this rule to mean, among other things, that dealers are required to disclose, at or before the sale of municipal securities to a customer, all material facts concerning the transaction, including a complete description of the security. The proposed rule change includes an interpretation of rule G–17 stating that any time a dealer is selling to a customer a quantity of municipal securities below the minimum denomination for the issue, the dealer should consider this to be a material fact about the transaction. The MSRB believes that a dealer's failure to disclose such a material fact to the customer, and to explain how this could affect the liquidity of the customer's position, generally would constitute a violation of the dealer's duty under rule G–17 to disclose all material facts about the transaction to the customer.

[1] 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b–4 thereunder.

[2] See Release No. 34–45174 (December 19, 2001), 66 FR 67342.

[3] 17 CFR 240.15c2–12.

[4] A below-minimum denomination position may be created, for example, by call provisions that allow calls in amounts less than the minimum denomination, investment advisors who may split positions they purchase among several clients or the division of an estate as a result of a death or divorce. Such below-minimum denomination positions also may be created as a result of a gift.

While the rule G–15 amendment applies only to municipal securities issued after June 1, 2002, the interpretation of rule G–17 applies to all transactions in municipal securities regardless of the date of issuance of the security traded. This helps ensure that all future investors are made aware at or prior to the time of trade that the securities position they are about to purchase is below the minimum denomination and that the liquidity of that position may be adversely affected by this fact.

II. Summary of Comments

The Commission received fifteen comments letters on the proposal.[5] All of the letters received favored the proposal. Collectively, the comment letters asserted that the proposal balanced the enforcement of bondholder protections without impairing liquidity of bonds currently held in unauthorized denominations by unsuspecting investors.[6] All but three of the commenters preferred a retroactive application; nevertheless, they supported the proposal's prospective enforcement of bondholders' protections.[7]

III. Discussion

The Commission must approve a proposed MSRB rule change if the Commission finds that the MSRB's proposal is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that govern the MSRB.[8] The language of section 15(b)(2)(C) of the Exchange Act requires that the MSRB's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principals of trade, to foster cooperation and coordination with persons engaged in regulating, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national system, and, in general, to protect investors and the public interest.[9]

After careful review, the Commission finds that the MSRB's proposed rule change concerning minimum denominations meets this standard. The minimum denominations proposal consists of an amendment to MSRB Rule G–15 on confirmation, clearance and settlement of transactions with customers, an amendment to MSRB Rule G–8 on books and records to be made by brokers, dealers and municipal securities dealers, and an interpretation of MSRB Rule G–17 on conduct of municipal securities activities. The Commission believes that this proposed rule change is consistent with the requirements of the Exchange Act, and the rules and regulations thereunder, in particular, section 15B(b)(2)(C).

IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Exchange Act that the proposed rule change (SR–MSRB–2001–07) be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–2588 Filed 2–13–02; 8:45 am]

BILLING CODE 8010–01–P

[5] See letter from Rebecca Floyd, Executive Vice President and General Counsel, Kansas Development Finance Authority to Office of the Secretary, Commission, dated January 14, 2002; letter from Neil P. Moss, Executive Director, Idaho Health Facilities Authority to Office of the Secretary, Commission, dated January 14, 2002; letter from Corinne M. Johnson, Executive Director, Colorado Health Facilities Authority to Office of the Secretary, Commission, dated January 14, 2002; letter from Edith F. Behr, President, National Council of Health Facilities Finance Authorities to Office of the Secretary, Commission, dated January 14, 2002; letter from Edith F. Behr, Executive Director, New Jersey Health Care Facilities Financing Authority to Office of the Secretary, Commission, dated January 14, 2002; letter from Larry Nines, Executive Director, Wisconsin Health and Educational Facilities Authority to Office of the Secretary, Commission, dated January 15, 2002; letter form Christopher B. Taylor, Auditor and Advisor, Department of Health and Human Services, The North Carolina Medical Care Commission to Office of the Secretary, Commission, dated January 15, 2002; letter from Don A. Templeton, Executive Director, South Dakota Health and Educational Facilities Authority to Office of the Secretary, Commission, dated January 15, 2002; letter from Robert E. Donovan, Executive Director, Rhode Island Health and Educational Building Corporation to Office of the Secretary, Commission, dated January 15, 2002; letter from David C. Bliss, Executive Director, New Hampshire Health and Education Facilities Authority to Office of the Secretary, Commission, dated January 15, 2002; letter from Malcolm S. Rode, Executive Director, Vermont Educational and Health Buildings Financing Agency, dated January 15, 2002; letter from Jill H. Tanner, Executive Director, Indiana Health Facilities Financing Authority to Office of the Secretary, Commission, dated January 16, 2002; letter from Kim Herman, Executive Director, Washington Higher Education Facilities Authority to Office of the Secretary, Commission, dated January 16, 2002; letter from Mary R. Jeka, Acting Executive Director, Massachusetts Health and Educational Facilities Authority to Office of the Secretary, Commission, dated January 16, 2002; and letter from Michael J. Stanard, Executive Director, Missouri Health and Educational Facilities Authority to Office of the Secretary, Commission, dated January 16, 2002.

[6] *See* note 4, *supra*.

[7] *See* note 4, *supra* (not including the letter from Missouri Health and Educational Facilities Authority; the letter from National Council of Health Facilities Finance Authority, and the letter from Washington Higher Education Facilities Authority).

[8] Additionally, in approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[9] 15 U.S.C. 78o–4(b)(2)(c).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45421; File No. SR–Phlx–2001–114]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Aggregation of Individual Violations of Exchange Order Handling Rules and Option Floor Procedure Advices

February 7, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 18, 2001, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Exchange Rule 960.2(f), Determination to Initiate Charges, and Exchange Rule 970 concerning the Exchange's minor rule violation enforcement and reporting plan (''Minor Rule Plan''),[3] by clarifying that the Exchange may aggregate, or ''batch,'' individual violations of Exchange order handling rules and Option Floor Procedure

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Exchange Rule 970 sets forth the criteria for the imposition of a fine (not to exceed $2,500) on any member, member organization, or any partner, officer, director or person employed by or associated with any member or member organization, for any violation of a Floor Procedure Advice, which violation the Exchange shall have determined is minor in nature. Such a fine is imposed in lieu of commencing a ''disciplinary proceeding'' as that term is used in Exchange Rules 960.1–960.12. Minor Rule Plan fines are subject to Rule 19d–1 under the Act.

Advices (''OFPAs'')[4] and consider such ''batched'' violations as a single offense.

The proposed rules would also expressly provide that, as an alternative to ''batching'' of order handling violations, in certain circumstances in which the Exchange determines that there exists a pattern or practice of violative conduct without exceptional circumstances, or when any single instance of violative conduct without exceptional circumstances is deemed to be egregious, the Exchange may refer the matter to the Business Conduct Committee (''BCC'') for possible disciplinary action.

The text of the proposed rule change is available at the Phlx's Office of the Secretary and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

The purpose of the proposed rule change is to clarify that the Exchange may consider an aggregate number of violations of order handling rules and OFPAs[5] as one single offense for purposes of initiating disciplinary action under Exchange rules, or imposing fines pursuant to fine schedules set forth in the relevant OFPAs under the Exchange's Minor Rule Plan.[6] The Exchange believes that such aggregation of order handling violations would enable the Exchange's Market Surveillance Department to identify, through exception reporting and through on-floor surveillance,[7] members and member organizations that fail to meet acceptable compliance thresholds for such rules and OFPAs, and to determine whether to impose fines pursuant to the Exchange's Minor Rule Plan or refer the matter to the BCC for consideration of formal disciplinary action.[8]

The proposed rule change contemplates that aggregation of order handling violations in every instance may not be appropriate. The proposed rule change provides two alternatives to aggregation. First, the Exchange may refer the matter to the BCC for possible disciplinary action when the Exchange determines that there exists a pattern or practice of violative conduct without exceptional circumstances. The Exchange believes that the provision relating to a pattern or practice of order handling violations would enable it to identify and discipline repeat offenders, and should ultimately deter such conduct and encourage member organizations to remain compliant with the requirement.

As a second alternative to aggregation, the proposed rules would provide that, when any single instance of violative conduct without exceptional circumstances is deemed to be egregious, the Exchange may refer the matter to the BCC for possible disciplinary action. The Exchange could determine that a single instance of violative conduct is so flagrant that such an instance would not be appropriate for aggregation under the proposed rule change.[9] The Exchange believes that this provision would allow it to discipline egregious offenders appropriately and expeditiously when the offense rises above the aggregation threshold.

The Exchange believes that the aggregation proposal, in conjunction with the alternatives to aggregation relating to a pattern or practice of order handling violations or an egregious order handling violation, provide it with the means to enforce Exchange order handling rules in a manner that should ultimately deter such conduct and result in fewer violations.

(2) Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,[10] in general, and furthers the objectives of section 6(b)(5) of the Act,[11] in particular, in that it is designed to perfect the mechanisms of a free and open market and the national market system, protect investors and the public interest and promote just and equitable principles of trade by codifying the way in which order handling violations will be enforced.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and

[4] The Exchange has agreed to amend the proposed rule change to clarify that ''batching'' of violations can only occur where the Exchange uses automated surveillance to detect violations. *See* telephone conversation between Edith Hallahan, First Vice President and Deputy General Counsel, Phlx, and Deborah Lassman Flynn, Assistant Director, Division of Market Regulation (''Division''), Commission, on February 7, 2002.

[5] Specifically, the Exchange proposes to ''batch'' violations of Exchange Rules 1051 (concerning the requirement that a member or member organization initiating an options transaction must report or ensure that the transaction is reported within 90 seconds of execution to the tape) and Exchange Rule 1082 (concerning the requirement that quotes be firm for both price and size, and the requirement that marketable orders received in a size greater than the disseminated size be executed in their entirety or up to the disseminated size within 30 seconds); OFPA A–1 (concerning the requirement that a specialist shall use due diligence to ensure that the best available bid and offer is displayed for those option series in which he is assigned); OFPA F–2 (the aforementioned 90-second trade reporting requirement under the Exchange's Minor Rule Plan); and other OFPAs, pursuant to its Numerical Criteria for Bringing Cases for Violation of Phlx Order Handling Rules.

[6] The Exchange filed this proposed rule change in accordance with the provisions of Section IV.B.i of the Commission's September 11, 2000 Order Instituting Administrative Proceedings Pursuant to Section 19(h)(1) of the Act, which required the Exchange to adopt rules establishing, or modifying existing, sanctioning guidelines such that they are reasonably designed to effectively enforce compliance with options order handling rules. *See* Securities Exchange Act Release No. 43268 (September 11, 2000), Administrative Proceeding File No. 3–10282 (the ''Order'').

[7] *See supra* note 4.

[8] The Exchange submitted to the Commission a letter, for which it requested confidential treatment, proposing how its regulatory staff would aggregate violations of the order handling rules, where the violations are identified through the Exchange's automated surveillance system. *See* letter from Anne Exline Starr, First Vice President Regulatory Group, Phlx, to John McCarthy, Associate Director, Office of Compliance, Inspections and Examinations, Commission, and Deborah Lassman Flynn, Assistant Director, Division, Commission, dated January 30, 2002.

[9] For example, the Exchange states that in the event that it discovers through investigation that a single violation or a pattern or practice of violations of Exchange order handling rules is the result of intentional conduct on the part of a member organization, nothing would preclude the Exchange from referring such a matter directly to the Business Conduct Committee for possible disciplinary action.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

A. By order approve such proposed rule change; or

B.Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR–Phlx-2001–114 and should be submitted by March 7, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Secretary.

[FR Doc. 02–3630 Filed 2–13–02; 8:45 am]

BILLING CODE 8010–01–U

[12] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Sunrise Airlines, Inc. d/b/a Flair Airlines of its Intent To Resume Operations

AGENCY: Office of the Secretary, Department of Transportation.

ACTION: Notice of Order to Show Cause (Order 2002–2–5) Docket OST–2001–8695.

SUMMARY: The Department of Transportation is directing all interested persons to show cause why it should not issue an order finding Sunrise Airlines, Inc., fit, willing, and able to resume scheduled passenger operations as a commuter air carrier, subject to conditions.

DATES: Persons wishing to file objections should do so no later than February 22, 2002.

ADDRESSES: Objections and answers to objections should be filed in Docket OST–2001–8695 and addressed to the Department of Transportation Dockets (SVC–124, Room PL–401), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, and should be served upon the parties listed in Attachment A to the order.

FOR FURTHER INFORMATION CONTACT: Ms. Delores King, Air Carrier Fitness Division (X–56, Room 6401), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366–2343.

Dated: February 8, 2002.

Read C. Van De Water,

Assistant Secretary for Aviation, and International Affairs.

[FR Doc. 02–3620 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2002–11]

Petitions for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption part 11 of Title 14, Code of Federal Regulations (14 CFR), this notice contains a summary of certain petitions seeking relief from specified requirements of 14 CFR, dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received on or before March 6, 2002.

ADDRESSES: Send comments on any petition 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–2001–11097 at the beginning 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 the petition, any comments received, and any final disposition 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 (telephone 1–800–647–5527) 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: Sandy Buchanan-Sumter (202) 267–7271, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR §§ 11.85 and 11.91.

Issued in Washington, DC, on February 11, 2002.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

Petitions for Exemption

Docket No.: FAA–2001–11097.
Petitioner: Business Jet Services.
Section of 14 CFR Affected: 14 CFR § 135.145.
Description of Relief Sought: To permit Business Jet Services to place turbo-jet airplanes in service without conducting proving flights.

[FR Doc. 02–3637 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[RSPA–2002–11270, Notice No. 02–4]

Advisory Notice; Enhancing the Security of Hazardous Materials in Transportation

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Advisory notice.

SUMMARY: This notice advises shippers and carriers of voluntary measures to enhance the security of hazardous materials shipments during

transportation. The notice addresses personnel, facility, and en route security issues and includes contact points for obtaining additional, more detailed information.

FOR FURTHER INFORMATION CONTACT: Susan Gorsky, Office of Hazardous Materials Standards, Research and Special Programs Administration, telephone (202) 366–8553.

SUPPLEMENTARY INFORMATION: As a result of the terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001, and subsequent threats related to biological materials, the Research and Special Programs Administration (RSPA, we) is engaged in a broad review of government and industry hazardous materials transportation safety and security programs. As part of this review, we established the Hazardous Materials Direct Action Group (Hazmat DAG). The Hazmat DAG met with representatives of the hazardous materials industry, emergency response community, and state governments to discuss transportation security issues in the wake of the September 11 attacks and continuing terrorist threats.

In the wrong hands, hazardous materials pose a significant security threat, particularly those that may be used as weapons of mass destruction. Persons who offer, transport, or store hazardous materials in transit should review their security measures and make any necessary adjustments to ensure the security of hazardous materials shipments.

Based in part on discussions in the Hazmat DAG and on the results of our initial internal review of ongoing security programs and practices, we identified a number of actions for persons involved in the transportation of hazardous materials to implement to enhance security. You should consider actions commensurate with the level of threat posed by the specific hazardous materials you handle. These possible actions are not government regulations or mandates. However, we strongly suggest that you consider implementation of the following measures as appropriate to your industry and operations.

I. Security Plan

The most important action a shipper or carrier should consider is the development and implementation of a security plan. You can use a risk management model to assess security risks and develop appropriate measures to reduce or eliminate risk. Most risk management models utilize the following steps:

(1) Identify areas of concern and partners that may be affected or with whom coordination may be appropriate;

(2) Assemble detailed information on system operations;

(3) Identify control points where interventions can reduce or eliminate risk;

(4) Select and prioritize options to meet identified security goals;

(5) Take action to implement the strategy;

(6) Verify implementation of the strategy; and

(7) Evaluate the effectiveness of the strategy to determine whether additional actions are necessary.

You may first want to list materials you handle, and identify those materials with the potential to be used as weapons of mass destruction or targets of opportunity. Then, consider a review of your current activities and operations from a transportation security perspective. Ask yourself, ''What are we doing now? What could go wrong? What can we do differently?'' The next step is to consider how to reduce the risks you have identified. For hazardous materials transportation, a security plan likely will focus on personnel, facility, and en route security issues. To assist you in performing appropriate risk assessments, we posted a Risk Management Self-Evaluation Framework on our website (*http://hazmat.dot.gov*).

II. Personnel Security

Your employees can be one of your most critical assets as you endeavor to improve the security of your shipping or transportation operations. You should consider taking one or more of the following actions:

- Assure your employees are familiar with your security plan and properly trained in its implementation. Training should include company security objectives, specific security procedures, employee responsibilities, and organizational security structure.
- Encourage your employees to report suspicious incidents or events.
- Implement routine security inspections.
- Convene regular employee/management meetings on security measures and awareness.
- Have an internal communication system to inform your staff of events, facts, trends, updates, and the like. Because Internet communications may be accessed by others, consider alternative methods for communicating sensitive information.

At the same time, you should be aware of the possibility that someone you hire may pose a potential security risk. You should consider establishing a process to verify the information provided by applicants on application forms or resumes, including checking with former and current employers and personal references provided by job applicants.

III. Facility Security

You should consider taking one or more of the following steps to prevent unauthorized access to your facility:

- Establish partnerships with local law enforcement officials, emergency responders and other public safety agencies with jurisdiction over your facility. Through such relationships, you can learn about threats, trends, and successful and unsuccessful security programs.
- Request a review of your facility and security program by local law enforcement officials.
- Restrict the availability of information related to your facility and the materials you handle. Encourage authorities in possession of information about your facility to limit disclosure of that information on a need-to-know basis.
- Add security guards and increase off-hours patrols by security or law enforcement personnel.
- Improve fencing around your facility. Check the adequacy of locks and other protective equipment. Consider equipping access gates with timed closure devices. Conduct frequent inspections.
- Install additional lights, alarm systems, or surveillance cameras.
- Restrict access to a single entry or gate.
- Place limits on visitor access; require visitors to register and show photo identification and have someone accompany visitors at all times.
- Require employees to display identification cards or badges.
- Conduct security spot checks of personnel and vehicles.
- Upgrade security procedures for handling pick-ups and deliveries at your facilities. Verify all paperwork and require pick-ups and deliveries to be handled only by appointment with known vendors. Require vendors to call before a delivery and to provide the driver's name and vehicle number. Accept packages and deliveries only at the facility front gate.
- Secure hazardous materials in locked buildings or fenced areas. Have a sign-out system for keys.
- Secure valves, manways, and other fixtures on transportation equipment when not in use. Lock all vehicle and delivery trailer doors when not in use. Secure all rail, truck, and barge

containers when stored at your location. Use tamper-resistant or tamper-evident seals and locks on cargo compartment openings.

• Periodically inventory the quantity of hazardous materials you have on site in order to recognize if a theft has occurred.

• Keep records of security incidents. Review records to identify trends and potential vulnerabilities.

• Report any suspicious incidents or individuals to your local Federal Bureau of Investigation (FBI) office and to local law enforcement officials.

IV. En Route Security

Shippers and carriers can work together to assure the security of hazardous materials shipments en route from origin to destination:

• Shippers should assess the transportation modes or combinations of modes available for transporting specific materials and select the most appropriate method of transportation to assure efficient and secure movement of product from origin to destination.

• Know your carriers. Have a system for qualifying the carriers used to transport hazardous materials. Use carrier safety ratings, assessments, safety surveys, or audits and ask the carrier to provide information on security measures it has implemented. Verify the carrier has an appropriate employee hiring and review process, including background checks, and an on-going security training program.

• Verify the identity of carrier and/or driver prior to loading a hazardous material. Ask the driver for photo identification and commercial drivers license and compare with information provided by the carrier. Ask the driver to tell you the name of the consignee and the destination for the material and confirm with your records before releasing shipments.

• Identify preferred and alternative routing, including acceptable deviations. Strive to minimize product exposures to communities or populated areas, including downtown areas; avoid tunnels and bridges where possible; and expedite transportation of the shipment to its final destination.

• Minimize stops en route; if you must stop, select locations with adequate lighting on well-traveled roads and check your vehicle after each stop to make sure nothing has been tampered with. Consider using two drivers or driver relays to minimize stops during the trip. Avoid layovers, particularly for high hazard materials.

• Shippers and rail carriers should cooperate to assure the security of rail cars stored temporarily on leased track.

• If materials must be stored during transportation, make sure they are stored in secure facilities.

• Train drivers in how to avoid highjacking or stolen cargo—keep vehicles locked when parked and avoid casual conversations with strangers about cargoes and routes.

• Consider if a guard or escort for a specific shipment or hazardous material is appropriate.

• Consider utilizing advanced technology to track or protect shipments en route to their destinations. For example, you may wish to install tractor and trailer anti-theft devices or utilize satellite tracking or surveillance systems. As an alternative, consider frequent checks with drivers by cell phone to ensure everything is in order.

• Install tamper-proof seals on all valves and package or container openings.

• Establish a communication system with transport vehicles and operators, including a crisis communication system with primary and back-up means of communication among the shipper, carrier, and law enforcement and emergency response officials.

• Implement a system for a customer to alert the shipper if a hazardous materials shipment is not received when expected. When products are delivered, check the carrier's identity with shipping documents provided by the shipper.

• Get to know your customers and their hazardous materials programs. If you suspect you shipped or delivered a hazardous material to someone who may intend to use it for a criminal purpose, notify your local FBI office or local law enforcement officials.

• Report any suspicious incidents or individuals to your local FBI office and to local law enforcement officials.

V. Additional Information

Up-to-date information is a key element of any security plan. You should consider methods to: (1) Gather as much data as you can about your own operations and those of other businesses with similar product lines and transportation patterns; (2) develop a communications network to share best practices and lessons learned; (3) share information on security incidents to determine if there is a pattern of activities that, when considered in isolation are not significant, but when taken as a whole generate concern; and (4) revise your security plans as necessary to take account of changed circumstances and new information.

The following resources may be helpful:

Federal Agencies

Research and Special Programs Administration, U.S. Department of Transportation, 400 7th Street, SW., Washington, DC 20590, Telephone: 800–467–4922 (Hazardous Materials Information Center), *hazmat.dot.gov* (Hazmat Safety Homepage)

Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, Telephone: 202–366–4000, *www.faa.gov*

Federal Motor Carrier Safety Administration, U.S. Department of Transportation, 400 7th Street, SW., Washington, DC 20590, Telephone, *www.fmcsa.dot.gov*

Federal Railroad Administration, U.S. Department of Transportation, 1120 Vermont Ave., NW., Washington, DC 20590, Telephone, *www.fra.dot.gov*

United States Coast Guard, 2100 Second Street, SW., Washington, DC 20593, Telephone: 202–267–2229, *www.uscg.mil*

Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, Telephone: 202–260–2090, *www.epa.gov*

Occupational Safety and Health Administration, 200 Constitution Avenue, NW., Washington, DC 20210, Telephone, *www.osha.gov*

Industry Associations and Organizations

American Chemistry Council, 1300 Wilson Boulevard, Arlington, Virginia 22209, Telephone: 703–741–5000, *www.americanchemistry.com*

American Petroleum Institute, 1220 L Street, NW., Washington, DC 20005, Telephone: 202–682–8000, *www.api.org*

American Society for Industrial Security, 1625 Prince Street, Alexandria, Virginia 22314, Telephone: 703–519–6200, *www.asisonline.org*

American Trucking Associations, 2200 Mill Road, Alexandria, Virginia 22314, Telephone: 703–838–1700, *www.truckline.com*

Association of American Railroads, 50 F Street, NW., Washington, DC 20001–1564, Telephone: 202–639–2100, *www.aar.org*

Center for Chemical Process Safety, American Institute of Chemical Engineers, 3 Park Ave, New York, N.Y. 10016–5991, Telephone: 212–591–7319, *www.aiche.org/ccps*

Chlorine Institute, Suite 506, 2001 L Street, NW., Washington, DC 20036, Telephone: 202–775–2790, *www.cl2.com*

Compressed Gas Association, Suite 1004, 1725 Jefferson David Highway, Arlington, Virginia 22202, Telephone: 703–412–0900, *www.cganet.com*

Fertilizer Institute, Union Center Plaza, Suite 430, 820 First Street, NE, Washington, DC 20002, Telephone: 202–962–0490, *www.tfi.org*

Institute of Makers of Explosives, Suite 310, 1120 19th Street, NW., Washington, DC 20036, Telephone: 202–429–9280, *www.ime.org*

National Association of Chemical Distributors, Suite 1250, 1560 Wilson Boulevard, Arlington, Virginia 22209, Telephone: 703–527–6223, *www.nacd.com*

National Propane Gas Association, Suite 100, 600 Eisenhower Lane, Lisle, Illinois 60532, Telephone: 630–515–0600, *www.npga.org*

National Tank Truck Carriers, 2200 Mill Road, Alexandria, Virginia 22314, Telephone: 703–838–1960, *www.tanktransport.com*

Security Industry Association, 635 Slaters Lane, Alexandria, Virginia 22314, *www.siaonline.org*

Synthetic Organic Chemical Manufacturers Association, Suite 700, 1850 M Street, NW., Washington, DC 20036, Telephone: 202–721–4100, *www.socma.com*

The above listing is by no means exhaustive; other government and private organizations have developed or are developing hazardous materials transportation security guidelines.

Issued in Washington, DC, on February 10, 2002.

Robert A. McGuire,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 02–3636 Filed 2–13–02; 8:45 am]

BILLING CODE 4910–60–P

Federal Register

Thursday,
February 14, 2002

Part II

Environmental Protection Agency

40 CFR Parts 63, 266, and 270

NESHAP: Standards for Hazardous Air Pollutants for Hazardous Waste Combustors; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63, 266, and 270

[FRL–7143–4]

RIN 2050–AE79

NESHAP: Standards for Hazardous Air Pollutants for Hazardous Waste Combustors (Final Amendments Rule)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA established standards for hazardous waste-burning cement kilns, lightweight aggregate kilns, and incinerators on September 30, 1999 (NESHAP: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors) pursuant to section 112(d) of the Clean Air Act (CAA). This rule included not only the standards themselves, but a battery of provisions setting out the means by which the standards would be implemented. Following promulgation of this final rule, the regulated community, through informal comments, raised numerous issues on specific requirements of the rule relating to provisions implementing the emission standards. In response to these concerns, we proposed and requested comment on changes to discrete provisions in the final rule on July 3, 2001. Today's action finalizes some of the amendments proposed in that notice. These amendments do not change the numerical emission standards, but rather focus on improvements to the implementation of the emission standards, primarily in the areas of compliance, testing and monitoring. A related final rule establishing interim emission standards was published in the **Federal Register** on February 13, 2002.

EFFECTIVE DATE: This rule is effective on February 14, 2002. The incorporation by reference of a publication listed in this rule is approved by the Director of the Federal Register as of February 14, 2002.

ADDRESSES: You may view the docket to this rulemaking in the RCRA Information Center (RIC), located at Crystal Gateway I, First Floor, 1235 Jefferson Davis Highway, Arlington, VA. The docket number is F–2002–RC6F–FFFFF. The RIC is open from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. To review docket materials, we recommend that you make an appointment by calling (703) 603–9230. You may copy a maximum of 100 pages from any regulatory docket at no charge. Additional copies cost $0.15/page.

FOR FURTHER INFORMATION CONTACT: For general information, call the RCRA Call Center at 1–800–424–9346 or TDD 1–800–553–7672 (hearing impaired). Callers within the Washington Metropolitan Area must dial 703–412–9810 or TDD 703–412–3323 (hearing impaired). The RCRA Call Center is open Monday–Friday, 9 am to 4 pm, Eastern Standard Time. For more information, contact Frank Behan at 703–308–8476, *behan.frank@epa.gov,* or Michael Galbraith at 703–605–0567, *galbraith.michael@epa.gov,* or write to them at the Office of Solid Waste, 5302W, U.S. EPA, Ariel Rios Building, 1200 Pennsylvania Avenue, NW, Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

Acronyms Used in the Rule

APCD—Air pollution control device
ASME—American Society of Mechanical Engineers
CAA—Clean Air Act
CEMS—Continuous emissions monitors/monitoring system
COMS—Continuous opacity monitoring system
CFR—Code of Federal Regulations
DOC—Documentation of Compliance
DRE—Destruction and removal efficiency
dscf—Dry standard cubic feet
dscm—Dry standard cubic meter
EPA/USEPA—United States Environmental Protection Agency
gr—Grains
HAP—Hazardous air pollutant
HWC—Hazardous waste combustor
MACT—Maximum Achievable Control Technology
NESHAP—National Emission Standards for HAPs
ng—Nanograms
NIC—Notice of Intent to Comply
NOC—Notification of compliance
OPL—Operating parameter limit
PM—Particulate matter
POHC—Principal organic hazardous constituent
ppmv—Parts per million by volume
psig—Pounds per square inch gage
RCRA—Resource Conservation and Recovery Act
TEQ—Toxicity equivalence

Official Record. The official record is the paper record maintained at the address in **ADDRESSES** above.

Supporting Materials Availability on the Internet. Supporting materials are available on the Internet. To access the information electronically from the World Wide Web (WWW), type website *http://www.epa.gov/epaoswer/hazwaste/combust.*

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Part One—What Events Led up to This Rule?

I. What Is the Background of This Rule?

A. What Is the Phase I Rule?

Today's notice finalizes specific changes to the NESHAP: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors (Phase I) rule, published September 30, 1999 (64 FR 52828). In the Phase I final rule, we adopted National Emission Standards for Hazardous Air Pollutants to control emissions of hazardous air pollutants (HAPs) from burning hazardous waste in incinerators, cement kilns, and lightweight aggregate kilns pursuant to section 112(d) of the Clean Air Act (CAA), which provisions require that the emission standards reflect the performance of best available control technology. *Cement Kiln Recycling Coalition* v. *EPA,* 255 F. 3d 855, 857 (D.C. Cir. 2001). This level of control is usually referred to as MACT, maximum available control technology. *Id.* at 859. These standards apply to the three major categories of hazardous waste burners—incinerators, cement kilns, and lightweight aggregate kilns. For purposes of today's rule, we refer to these three categories collectively as hazardous waste combustors (HWC).

More information on the Phase I HWC MACT rule is available electronically from the World Wide Web at *www.epa.gov/hwcmact.*

B. How Did the Court's Opinion To Vacate the Rule and Petitioners Joint Motion To Stay the Mandate Affect Phase I and Today's Rule?

A number of parties, representing interests of both industrial sources and of the environmental community, sought judicial review of the emission standards and certain related provisions. Petitions for review have also been filed challenging certain of the implementation provisions of the rule, but these petitions have been severed from the litigation dealing with the emission standards, and all litigation on these challenges has been stayed by consent of the parties.

As described in the ''interim standards'' final rule in yesterday's **Federal Register**, the D.C. Circuit, in the case challenging emission standards, found that EPA had failed to explain adequately how its methodology for calculating so-called MACT floors satisfied the requirements of section 112(d)(3). *Cement Kiln Recycling Coalition,* 255 F. 3d 855 (D.C. Cir. 2001).

On October 19, 2001, we, together with all other petitioners that challenged the hazardous waste combustor emission standards, filed a joint motion asking the Court to stay the issuance of its mandate for four months to allow us time to develop interim standards. Although neither the opinion, nor the litigation, deals with the implementation provisions at issue in this rulemaking,[1] these issues became a part of post-July 24 discussions between EPA and the petitioners. As part of the joint agreement and joint motion to the court which resulted from those discussions, we agreed to promulgate by February 14, 2002 several of the compliance and implementation amendments to the rule which we proposed on July 3, 2001 (66 FR 35126). Further information on this process is found in the ''interim standards'' final rule in yesterday's **Federal Register**, and the joint motion can be viewed and/or downloaded from EPA's Hazardous Waste Combustion website *http://www.epa.gov/epaoswer/hazwaste/combust/preamble.htm.*

II. Which Proposed Amendments Are Included in This Rule?

After promulgation of the Phase I rule, commenters (primarily the regulated community) raised numerous potential issues through informal comments, during EPA-conducted implementation workshops (which are open to the general public), and during litigation settlement discussions. After considering the issues raised, we proposed 33 amendments to the Phase I rule on July 3, 2001 (66 FR 35126, 35087, and 35124). Nine of these proposed amendments were promulgated in a Direct Final rule,[2] and 14 are being finalized today. Ten amendments will be considered as we proceed with a rulemaking on the final replacement standards scheduled to be promulgated by June 14, 2005.

In a separate notice published in the **Federal Register** on July 3, 2001, we took direct final action on certain amendments to the Sept. 1999 Phase I rule (66 FR 35087). We published the direct final rule without prior proposal because we viewed those amendments as being noncontroversial. We stated that we would withdraw any amendments from the direct final rulemaking that received adverse comments and instead, would seek comment on those amendments through the ''parallel'' proposal that was published on July 3, 2001 (66 FR 35124).

The following tables include information on all the amendments from the July 3, 2001 proposals.

[1] As noted above, virtually all issues involving implementation provisions were severed and assigned separate case numbers, and so were not before the panel which decided *Cement Kiln Recycling Coalition.*

[2] Thirteen amendments were promulgated on July 3, 2001 in a direct final rule contingent upon the Agency not receiving adverse comment on the amendments. See 66 FR 35087. The Agency received adverse comment on four amendments, and issued a partial withdrawal of the direct final rule on October 15, 2001 (66 FR 52361) that withdrew promulgation of those four amendments.

COMBUSTION MACT AMENDMENTS: DIRECT FINAL RULE

No.	Title of amendment	Approach to address amendment
I	Hazardous Waste Residence Time	No adverse comments received. The amendment became effective on Oct. 16, 2001.
II	Deletion of One-time Notification of Compliance with Alternative Clean Air Act Standards.	No adverse comments received. The amendment became effective on Oct. 16, 2001.
III	Use of DRE Data in Lieu of Testing	Adverse comments were received, thus the amendment was proposed in the ''parallel'' proposal, and is being promulgated in this rule.
IV	Time Extension for Waiving PM and Opacity Standards to Correlate PM CEMs.	No adverse comments received.The amendment became effective on Oct. 16, 2001.
V	Alternative Hydrocarbon Monitoring Location for Short Cement Kilns Burning Hazardous Waste at Locations Other Than the ''Hot'' End of the Kiln.	Adverse comments were received, thus the amendment was proposed in the ''parallel'' proposal, and is being promulgated in this rule.
VI	Alternative to the Particulate Matter Standard for Incinerators Feeding Low Levels of Metals.	No adverse comments received. The amendment became effective on Oct. 16, 2001.
VII	Deletion of Baghouse Inspection Requirements	Adverse comments were received, thus the amendment was proposed in the ''parallel'' proposal, and is being promulgated in this rule.
VIII	Feedstream Analysis for Organic HAPs	Adverse comments were received, thus the amendment was proposed in the ''parallel'' proposal, and is being promulgated in this rule.
IX	Revisions to the Metals Feedrate Extrapolation Procedures	No adverse comments received. The amendment became effective on Oct. 16, 2001.
X	Feedrate Limits for Undetectable Constituents	No adverse comments received. The amendment became effective on Oct. 16, 2001.
XI	Revisions to Assist Early Compliance	No adverse comments received. The amendment became effective on Oct. 16, 2001.
XII	Accuracy Requirements for Weight Measurement Devices	No adverse comments received. The amendment became effective on Oct. 16, 2001.
XIII	Deletion of Requirement for Establishing a Scrubber Liquid Minimum pH Operator Parameter Limit for Mercury Control for Wet Scrubbers.	No adverse comments received. The amendment became effective on Oct. 16, 2001.

COMBUSTION MACT AMENDMENTS

Proposed Rule

No.	Title of amendment	Approach to address amendment
I	Definition of Research, Development, and Demonstration Sources.	The amendment will be addressed in a future MACT rule.
II	Identification of an Organics Residence Time That Independent From and Shorter Than the Hazardous Waste Residence Time.	The amendment is will be addressed in a future MACT rule.
III	Controls on APCDs After the Hazardous Waste Residence Time Has Expired.	The amendment will be addressed in a future MACT rule.
IV	Instantaneous Monitoring of Combustion Zone Pressure	The amendment is promulgated in today's rule.
V	Operator Training and Certification	The amendment is promulgated in today's rule.
VI	Bag Leak Detection System	The amendment is promulgated in today's rule.
VII	Time Extensions for Performance Testing If the Test Plan Has Not Been Approved.	The amendment is promulgated in today's rule.
VIII	Flexibility in Operations During Confirmatory Performance Testing for Dioxin/Furans.	The amendment is promulgated in today's rule.
IX	Waiving Operating Parameter Limits During Performance Testing.	The amendment is promulgated in today's rule.
X	Method 23 as an Alternative to Method 0023A for Dioxin/Furans.	The amendment will be addressed in a future MACT rule.
XI	Calibration Requirements for Thermocouples	The amendment is promulgated in today's rule.
XII	Alternative Approach to Establish Operating Parameter Limits	The amendment will be addressed in a future MACT rule.
XIII	Extrapolation of Operating Parameter Limits	The amendment will be addressed in a future MACT rule.
XIV	Limit on Minimum Combustion Chamber Temperature for Cement Kilns.	The amendment will be addressed in a future MACT rule.
XV	Revisions to Operating Requirements for Activated Carbon Injection and Carbon Bed Systems.	The amendment is promulgated in today's rule.
XVI	Clarification of Requirements to Confirm Carbon Bed Age	Amendment is promulgated in today's rule.
XVII	Revisions to Operating Parameter Limits for Wet Scrubbers	The amendment will be addressed in a future MACT rule.
XVIII	Reproposal of kVA Limits for Electrostatic Precipitators and Request for Comment on Approaches to Ensure Baghouse Performance.	The amendment will be addressed in a future MACT rule.
XIX	How to Comply Temporarily with Alternative, Otherwise Applicable MACT Standards.	Amendment is promulgated in today's rule.

COMBUSTION MACT AMENDMENTS—Continued

Proposed Rule

No.	Title of amendment	Approach to address amendment
XX	RCRA Permitting Requirements for Sources Entering the RCRA Process Post-Rule Promulgation.	The amendment will be addressed in a future MACT rule.

Part Two—What Revisions, Proposed in the Parallel Proposal, Are We Making Today?

I. What Previous DRE Test Results May You Use To Demonstrate Compliance With the MACT DRE Standard

A. Why Are We Deleting the Age Restriction for Using Data in Lieu of Performing a DRE Test?

Today we are revising the September 1999 final rule to allow sources that inject hazardous waste only in the flame zone to use any previous destruction and removal efficiency (DRE) test results to document compliance with the DRE standard, provided the data meet our quality assurance/quality control requirements. These revisions do not affect sources that inject hazardous waste in places other than the normal flame zone.

Prior to today's change, we allowed data that were no older than five years to be used to document compliance with the DRE standard. However, stakeholders observed that sources that inject hazardous waste only in the flame zone need only document compliance with the DRE requirement once for the life of the source under September 1999 final rule, provided the test continues to be representative of current design and operating conditions. Stakeholders reasoned that, given that a single test is acceptable to document compliance with the DRE standard for the life of the source, the rule should allow use of DRE data older than five years to document compliance with the standard. We agree with stakeholders' concerns. Accordingly, in the parallel proposal to the direct final rule, we proposed to allow any DRE results (that meet QA/QC requirements and that continue to represent the design and operation of the source), irrespective of how old the tests are, to be used in lieu of having the source perform a new DRE test. All comments we received on this issue were favorable.

This change does not apply to sources that inject hazardous waste outside of the flame zone because the September 1999 final rule requires that these sources document compliance with the DRE standard every five years. These sources may use DRE test results that are no older than five years old to document compliance with the initial DRE test, and are required to perform a new test every five years. Although we explained in the preamble to the July 3, 2001 proposal that the revision discussed above applies only to sources that feed hazardous waste in the flame zone, one commenter notes that the proposed rule did not make a distinction between sources that feed waste in the flame zone versus other sources. We agree with this commenter and have corrected this oversight in today's amendment.

B. Why Are We Expanding the Type of Allowable DRE Test Results To Include Any Results That Pass QA/QC?

The September 1999 final rule restricts the DRE test data that can be used in lieu of performing a new test to data obtained in support of a previous RCRA permit issuance or reissuance. We did this because we wanted to ensure that the DRE data used met the quality assurance/quality control requirements applicable to data used to demonstrate compliance with the standards under the RCRA permit process. Stakeholders, however, expressed concerns that data meeting EPA's quality requirements can be generated outside the RCRA permit process. For example, a source might perform some type of CAA performance testing. This testing potentially could have the same level of oversight, and the same quality, as data obtained during the RCRA permit process.

We agree with stakeholders' concerns. In the parallel proposal to the direct final rule, we proposed to allow other DRE data provided that the data were obtained with the same level of oversight and quality as those data obtained during the RCRA permitting process. All commenters agree with this proposal and we are promulgating this amendment as proposed.

II. What Are the Hydrocarbon Monitoring Requirements for Short Cement Kilns Burning Hazardous Waste at Locations Other Than the ''Hot'' End of the Kiln?

We are revising the requirements of § 63.1206(b)(13) to allow short, dry process cement kilns to continuously monitor hydrocarbons in both the alkali by-pass duct and at a ''preheater tower combustion gas monitoring location'' as an alternative to hydrocarbon monitoring in the main stack. These revisions are identical to those proposed (in the parallel proposal to the direct final rule (66 FR 35124 and 35092)). Accordingly, we are revising the requirements of § 63.1206(b)(13)(i) and adding the definition for a ''preheater tower combustion gas monitoring location'' to § 63.1201(a) as proposed.

Prior to today's action, § 63.1206(b)(13)(i) required new and existing cement kilns to comply with a main stack hydrocarbon standard of 20 ppmv if hazardous waste is fed at a location other than the kiln end where fuels are normally fired and products are normally discharged (this is also described as the ''hot'' end of the kiln). These other locations can include firing hazardous waste at midkiln, at the upper end of the kiln where raw materials are fed, or in the calciner. As explained in the final rule promulgated on September 30, 1999, we concluded that it would not be appropriate for cement kilns to comply with a hydrocarbon standard in the by-pass duct if hazardous waste is fed at a location downstream (relative to the direction of flue gas flow) of the by-pass sampling location. We stated that such operation would result in combustion of hazardous waste that would not be monitored by a hydrocarbon monitor (64 FR 52971).

Today's rule establishes an alternative to the main stack hydrocarbon standard of 20 ppmv for short, dry process cement kilns. Specifically, we are finalizing an alternative hydrocarbon standard of 10 ppmv measured continuously both in the alkali by-pass duct and at a preheater tower combustion gas monitoring location. This alternative monitoring approach satisfies our concern that the combustion of hazardous waste is monitored continuously by a hydrocarbon monitor.

One commenter opposed the proposed revisions to the hydrocarbon monitoring requirements and stated that the provision inappropriately establishes a separate category for short, dry process cement kilns and weakens the hydrocarbon standard by allowing for an increase in emissions. Three other

commenters supported the proposed changes to allow short, dry process cement kilns to continuously monitor hydrocarbons in the alkali by-pass duct and at the preheater tower combustion gas monitoring location.

We disagree with the commenter that this hydrocarbon monitoring alternative establishes a separate subcategory for short, dry process cement kilns. The final rule promulgated on September 30, 1999 (64 FR at 52885–52888) established different hydrocarbon and carbon monoxide standards for cement kilns with and without by-pass sampling systems. See §§ 63.1204(a)(5)(i) and (ii). All the existing short, dry process cement kilns burning hazardous waste are equipped with a by-pass duct and are subject to the hydrocarbon and carbon monoxide standards of § 63.1204(a)(5)(i). Today's final rule thus does not create a new subcategory for short, dry process cement kilns.

We also disagree with the commenter that the alternative hydrocarbon monitoring requirements weaken the hydrocarbon standard resulting in increased hydrocarbon emissions. We note that the hydrocarbon emission standard for the hydrocarbon monitoring alternative (10 ppmv) is more stringent than the hydrocarbon standard in the main stack (20 ppmv). All hydrocarbon emissions from the combustion of hazardous wastes would be reflected in the hydrocarbon measurements in the by-pass duct and at the preheater tower monitoring location and would decrease with improved combustion efficiency. As a result, this reflects MACT control or better because the hydrocarbon standard under the alternative is more stringent. As a result, one likely outcome of the alternative is that sources may burn hazardous waste under more efficient conditions.

We recognize, however, that a source electing the hydrocarbon monitoring alternative could substitute for its normal raw materials with other raw materials containing higher trace levels of organics. This monitoring alternative wouldn't detect higher concentrations of hydrocarbons emitted from the main stack (associated with the new raw materials) even though hydrocarbon concentrations originating from the combustion of hazardous waste remains the same. This substitution scenario is unlikely to occur for cement kilns because these facilities are sited near the primary raw material source to avoid transportation costs. Transporting large quantities of an alternative sources of raw material(s) is likely to be prohibitively costly. Moreover, we anticipate that any potential concerns associated with such raw material substitutions can be addressed in a site-specific risk assessment conducted as part of the RCRA permitting process. See *Horsehead Resource Development Co.* v. *Browner,* 16 F.3d 1246, 1262–63 (D.C. Cir. 1994) (EPA may permissibly regulate combined emissions from burning both hazardous wastes and non-wastes from boilers and industrial furnaces pursuant to its RCRA authority).

Accordingly, we are revising the requirements of § 63.1206(b)(13)(i) and adding the definition for a ''preheater tower combustion gas monitoring location'' to § 63.1201(a).

III. Why Are We Deleting the Baghouse Inspection Requirements?

As proposed (66 FR 35124 and 35096), we are deleting the prescribed baghouse inspection requirements of § 63.1206(c)(7)(ii)(B)(1–10) applicable to incinerators and lightweight aggregate kilns. We find that the general operation and maintenance plan requirements under § 63.1206(c)(7)(i) and the use of a bag leak detector are adequate to ensure proper operation and maintenance of the baghouse. We believe that generic, prescriptive requirements (e.g., monthly inspection of bags, bag connections and the interior of the baghouse for physical integrity) may impose burdensome cost without commensurate benefits because such requirements may be inappropriate for the particular source. In lieu of complying with generic requirements, each source is required to develop monitoring and inspection procedures and to include those procedures in the general operation and maintenance plan.

We are also deleting the requirements of § 63.1206(c)(7)(ii)(A) and § 63.1207(f)(1)(xv) requiring submittal of the baghouse operations and maintenance plans to the Administrator. We had already determined that the general operation and maintenance plan required under § 63.1206(c)(7)(i) need not be submitted to the Administrator for review and approval. Therefore, we find no need to now single out the baghouse operation and maintenance plan for review and approval, since sources must continuously operate a bag leak detector system that identifies baghouse malfunctions.

Most comments favored the revision. One commenter, however, favors retaining the inspection provisions, and states that inspections trigger preventive maintenance, prevent malfunctions, and identify sources of fugitive emissions. We believe that site-specific baghouse inspection and monitoring provisions included in the operation and maintenance plan, coupled with a bag leak detector system, will ensure proper operation and maintenance of the baghouse because a bag leak detection system is a state-of-the-art monitoring system that ensures that the baghouse continues to operate in a manner consistent with good air pollution control practices. See also 64 FR 52908, September 30, 1999. The operation and maintenance plan must be included in the operating record and is subject to review by the inspectors to determine whether it is adequate to ensure the baghouse is operated and maintained in a manner consistent with good air pollution control practices for minimizing emissions at least to the levels required by all relevant standards. §§ 63.1206(c)(7) and 63.6(e). We do not regard further requirements as necessary to assure proper baghouse operation and maintenance.

IV. What Are the Requirements for Feedstream Analysis of Organic HAPs?

In the parallel proposal to the direct final rule (66 FR 35124 and 35096), we intended to clarify the requirements for feedstream analysis of organic HAPs for compliance with the DRE standard. Section 63.1207(f) requires you to obtain ''an analysis of each feedstream, including hazardous waste, other fuels, and industrial feedstocks, as fired, that includes: * * * an identification of such organic hazardous air pollutants that are present in the feedstream, except that you need not analyze for organic hazardous air pollutants that would reasonably not be expected to be found in the feedstream.'' Following promulgation of the rule, stakeholders expressed concern about whether we had sought to require an analysis of all waste feedstreams or only the hazardous waste feedstreams. Stakeholders also brought to our attention that there were certain implications of requiring an analysis of CAA HAPs rather than RCRA Appendix VIII organic compounds, and stated that the requirement for continued analysis of organic HAPs every five years for the comprehensive performance test is overly burdensome if a source qualifies to comply with the DRE standard with a one-time emissions test.

We addressed stakeholders' concerns in the proposed rule as follows. First, we addressed the implications of selecting POHCs from the list of organic CAA HAPs rather than from the list of RCRA organic compounds for demonstrating compliance with the DRE standard. One stakeholder questioned whether RCRA DRE test data can be used in lieu of MACT DRE testing if the

POHCs selected during the RCRA test are not organic HAPs under the CAA. Another question was how to ensure DRE of those organic HAPs for which thermal stability data are not available. In response, we stated that, to satisfy the MACT DRE standard, sources must ensure that the POHCs used to demonstrate compliance are representative of the most difficult to destroy organic compounds in their hazardous waste feedstream. For instance, the most difficult to destroy POHCs used for RCRA DRE testing would also be representative of the most difficult to destroy CAA organic HAPs. *See* 66 FR 35097.

Second, we responded to questions on the frequency for analyzing organic HAP compounds in hazardous waste feedstreams. Stakeholders had questioned why analysis of waste streams for organic HAP compounds must be included with the site-specific test plan for comprehensive performance testing every five years once a source has demonstrated compliance with the DRE standard with a one-time test under the conditions of § 63.1206(b)(7)(i). In the proposal, we agreed with stakeholders that the comprehensive analysis required by § 63.1207(f)(1)(ii)(A) is not necessary in all cases. As a result, we proposed to add § 63.1207(f)(1)(ii)(D) to allow regulatory officials to waive the comprehensive analysis of organic compounds, provided that the POHCs used to demonstrate compliance with the DRE standard continue to be representative of the organic HAPs being fed to the combustor. See 66 FR 35097.

Third, we clarified that we intended to require analysis of organic HAPs in the hazardous waste feedstreams only. Section 63.1207(f)(1)(ii)(A) could be read to imply that sources must analyze all feedstreams for organic HAPs. We proposed to amend this section to reflect our true intent not to require analysis for all feedstreams. *See* 66 FR 35097.

The majority of commenters on the proposal agree with the clarifications. However, one commenter asserts that POHCs should be selected considering organic HAPs in all feedstreams, not just hazardous waste feedstreams. The commenter reasons that approval of a comprehensive performance test plan without knowledge of the organic HAPs in all feedstreams could result in selecting POHCs that do not represent the most difficult to destroy organic compounds in all feedstreams. Thus, the DRE test may not ensure destruction of the most difficult to destroy compounds fed to the combustor. The commenter also suggests that the analysis for HAPs in all waste streams should be required because one or more of the POHCs selected based on hazardous waste feedstream analysis may also be present in nonhazardous waste streams. If the feedrate of POHCs in nonhazardous waste feedstreams are not accounted for during DRE testing, the DRE calculation will be conservatively low because more POHCs will be fed than accounted for in the calculation. In summary, the commenter's first concern addresses the analysis of feedstreams for HAPs for POHC selection prior to conducting the performance test, while the second concern addresses the analysis of feedstreams for HAPs that are chosen as POHCs for purposes of calculating DRE during the performance test.

With respect to commenter's first concern, we disagree with the need to consider organic HAPs in all feedstreams for POHC selection. We adopted the DRE requirement from existing RCRA requirements where it applies only to hazardous waste feeds,[3] and did so to satisfy section 3004 (o)(1)(B) of RCRA, which requires EPA to retain a DRE requirement for *hazardous waste.* Also, repromulgation of the RCRA requirement as a CAA standard saves the administrative burden of separate RCRA DRE permitting. See 64 FR at 52847. In addition, even if all feedstreams were considered for POHC selection, we conclude that organic HAPs in fossil fuels and raw materials would not be selected as the POHCs of greatest concern considering the types and concentration of those organic HAPs relative to the types and concentration of organic HAPs in hazardous waste feedstreams. Finally, we note that owners and operators typically select the same POHCs to demonstrate DRE regardless of the hazardous waste present. These POHCs are among the most difficult compounds to destroy of any organic compounds. Thus, presence of organic HAPs in nonhazardous waste feedstreams is generally moot because they would not suggest any different POHCs.

With respect to the commenter's second concern, we agree that the DRE calculation will be conservatively low if POHCs are present in nonhazardous waste feedstreams and not accounted for in the calculation. However, we are not aware that this has been a problem for sources trying to show compliance with DRE. Therefore, based upon the commenter's two concerns, we think the proposed clarifications are appropriate.

[3] For example, the DRE requirements of § 266.104 for cement kilns and lightweight aggregate kilns apply to hazardous waste feedstreams only, not fossil fuel or raw material feedstreams.

Part Three—What Revisions, Proposed in the Technical Amendments Proposal, Are We Making in Today's Rule?

I. What Revisions Are We Making to the Combustion System Leak Provisions?

We are making several revisions to the combustion system leak provisions. First, we are amending the definition of an instantaneous pressure monitor to better clarify that the intent of the combustion system leak requirements is to prevent fugitive emissions from the combustion of hazardous waste rather than from nonhazardous feedstreams. The revised definition also clarifies that instantaneous pressure monitors must detect and record pressure at a frequency adequate to detect combustion system leak events, as determined on a site-specific basis. *See* § 63.1201(a) and § 63.1209(p). Second, you must specify the method that you plan to use to control combustion system leaks in the performance test workplan and Notification of Compliance. See § 1206(c)(5)(ii). Finally, in response to numerous comments, today's rule also adopts a provision that will allow you, upon prior written approval of the Administrator, to use other techniques to monitor pressure that can be demonstrated to prevent fugitive emissions without the use of instantaneous pressure limits. See § 63.1206(c)(5)(i)(D).

A. What Did We Propose To Change?

The September 1999 final rule requires you to control combustion system leaks by either: (1) Keeping the combustion zone sealed; (2) maintaining the maximum combustion zone pressure lower than the ambient pressure using an instantaneous monitor; or (3) using an alternative means to provide control of system leaks. After publication of the final rule, stakeholders expressed concern that the requirement to maintain the combustion zone pressure lower than ambient pressure (option 2 above) could result in an overly prescriptive requirement. Stakeholders believe this regulatory language can be interpreted to require you to monitor and record combustion zone pressure at a frequency of every 50 milliseconds. Stakeholders also requested that we clarify that combustion system leaks refer to fugitive emissions resulting from the combustion of hazardous waste, and not fugitive emissions that originate from nonhazardous process streams

(*e.g.,* the clinker product at a cement kiln).

In response to the above concerns, we proposed several amendments to the combustion system leak provisions. 66 FR at 35132. First, we proposed to modify the definition of an instantaneous pressure monitor to read as follows: ''Instantaneous monitoring for combustion system leak control means detecting and recording pressure without use of an averaging period, at a frequency adequate to detect combustion system leak events from hazardous waste combustion.''

Second, we proposed to revise the automatic waste feed cutoff regulatory language to read as follows: ''If you comply with the requirements for combustion system leaks under § 63.1206(c)(5) by maintaining the maximum combustion chamber zone pressure lower than ambient pressure to prevent combustion system leaks from hazardous waste combustion, you must perform instantaneous monitoring of pressure and the automatic waste feed cutoff system must be engaged when negative pressure is not adequately maintained.''

Third, we proposed that you must specify the method used to control combustion system leaks in the performance test workplan and notification of compliance. If you control combustion system leaks by maintaining the combustion zone pressure lower than ambient pressure using an instantaneous monitor, we also proposed that you must specify the monitoring and recording frequency of the pressure monitor, and specify how the monitoring approach will be integrated into the automatic waste feed cutoff system.

Stakeholders also suggested that we allow averaging of the pressure readings over short periods of time, e.g., a 5-second rolling average updated every second, in demonstrating the combustion system is maintained below ambient pressure. As result, we requested comment on whether such a monitoring approach is appropriate.

B. What Were Commenters' Reactions to the Proposed Amendments?

We received no adverse comments on the proposed amendments that: (1) Require you to specify the method that will be used to control combustion system leaks in the performance test workplan and notification of compliance; and (2) revise the automatic waste feed cutoff provision that addresses combustion system leak events. We are finalizing these proposed amendments in today's rulemaking.

The majority of commenters supported the proposed amendment to the definition of instantaneous monitoring. Many of those supporting this amendment, however, were opposed to the concept of requiring instantaneous pressure limits altogether (see discussion below). One commenter expressed concern that the definition of instantaneous monitoring can still be interpreted to require you to monitor pressure as often as once every 50 milliseconds. Although the proposed definition of instantaneous monitoring clarifies that monitoring frequency should be adequate to detect combustion system leaks, the language does not specify what is considered to be an appropriate frequency. We conclude that such specificity in regulations would not be appropriate because sources differ substantially in design and operation such that different monitoring frequencies may be needed to prevent fugitive emissions. As a result, we are adopting, unchanged, the proposed revision to the definition of instantaneous monitoring.

Rather than specify a minimum monitoring frequency in the regulations, we clarify here that we do not intend for the instantaneous monitoring requirements to require a pressure monitoring frequency as often as once as every 50 milliseconds. We believe a reasonable pressure monitoring frequency that could meet the intent of the instantaneous monitoring definition is once every second, and a reasonable pressure recording frequency could be once every minute, provided that: (1) the automatic waste feed cutoff is engaged when a one-second reading exceeds ambient pressure; (2) you record in the operating record when any such event occurs; and (3) the pressure reading that is recorded every minute represents the highest one-second observation during the previous minute.

C. What Were Commenters' Objections to Instantaneous Pressure Limits?

Commenters disagree with the premise that a positive pressure event equates to a release of fugitive emissions, citing examples of positive pressure events that, based on system design and operation, do not result in fugitive emissions. They claim the rule as currently written will discourage innovative engineering solutions that would minimize fugitive emissions (e.g., installation of new kiln seals) because of the presumption that any positive pressure excursion results in an automatic waste feed cutoff.

We acknowledge that positive pressure events do not necessarily result in fugitive emissions. For example, there are state-of-the-art rotary kiln seal designs (such as shrouded and pressurized seals) which are capable of handling positive pressures without fugitive releases. Specifically, we are aware of rotary kilns operated at the U.S. Department of Energy (USDOE) Savannah River Site and USDOE Oak Ridge Site that have been used for radioactive and hazardous waste treatment which are designed to prevent the release of radioactive materials. The Savannah River kiln uses multiple graphite seals with pressurized chambers between the seals to prevent out-leakage at kiln pressures up to the pressure in the seal chamber (10 psig). The Oak Ridge kiln uses overlapping spring plate seals to form an air seal, and is designed to withstand positive pressures up to 2 psig. *See* Support Document for Fugitive Emission Control, February, 2002 for more information.

However, we believe these kilns are highly unusual, and that other conventional rotary kilns used in the hazardous waste combustion industry may not have seals which are designed for such positive pressure operation. In fact, we believe that, for most rotary kilns in current service, positive pressure events can result in fugitive releases. The level of such fugitive releases will be dependent on factors including the magnitude of the pressure excursion and the design and operation of the kiln.

Nonetheless, we agree that explicit restrictions on positive pressure events could discourage you from implementing innovative methods to prevent fugitive emissions, and we agree that instantaneous negative pressure limits may be not warranted for all hazardous waste combustion sources. A solution that was recommended by several commenters would amend the pressure monitoring requirements by including a provision that will, upon prior written approval of the Administrator, allow you to use other techniques to monitor pressure which can be demonstrated to prevent fugitive emissions without the use of instantaneous pressure limits. Such a provision would clarify that you can use a compliance approach that does not require pressure to be maintained below ambient on an instantaneous basis provided you demonstrate that the method prevents fugitive emissions. We agree that this recommended amendment is reasonable and appropriate. Today's rule adopts this revision to the combustion system leak provisions.

Many commenters believe instantaneous pressure monitoring

requirements will increase the number of automatic waste feed cutoffs, resulting in rapid switching between use of supplementary fuel and hazardous waste fuel. The instantaneous pressure monitoring requirements could thus have a negative impact, resulting in increased use of fossil fuel and, because of the non-steady-state nature of combustion conditions associated with the rapid switching of fuels, increased pollutant emissions. Commenters claim the use of short averaging periods, time delays, or damping of the transmitter response times would allow properly designed facilities to handle these types of pressure changes while still minimizing fugitive emissions.

We believe automatic waste feed cutoffs are appropriate non-compliance deterrents, and are necessary whenever you exceed an emission standard or operating requirement (e.g., when fugitive emissions occur). If you repeatedly exceed the emission standards you should modify your operating practices and/or design of the unit to minimize the number of exceedances. However, we agree that needless triggering of automatic waste feed cutoffs when you are not exceeding an emission standard may provide less environmental protection, not more. As previously discussed, there may be instances when positive pressure events do not result in combustion system leaks. We believe the provision we are adopting that will allow you to use other techniques to monitor pressure that can be demonstrated to prevent fugitive emissions adequately addresses these commenters' concerns.

Several commenters suggest we abandon the instantaneous pressure monitoring requirement altogether and use the existing RCRA fugitive emission regulatory language in § 264.345.[4] One commenter agrees that there are some units where instantaneous negative pressure limits are desirable to minimize fugitive emissions. Other commenters claim we should abandon the instantaneous monitoring requirements because we require different levels of protection across different regulations. Specifically, the instantaneous pressure monitoring requirements in the Hazardous Waste Combustor MACT rule appear to reflect a zero tolerance for combustion system leaks while the requirements of the RCRA Subpart BB regulations covering air emissions for equipment leaks are less restrictive for the same types of wastes. One commenter states that the instantaneous pressure monitoring requirements should be abandoned because we have not demonstrated combustion system leaks present health risks.

We believe that combustion system leaks must be prevented whenever it is reasonably possible. This is the approach currently required by existing RCRA hazardous waste incinerator and boiler and industrial furnace rules. *See* §§ 264.345(d)(2) and 266.103(h)(2). Instantaneous pressure monitoring without the use of averaging periods is an appropriate, demonstrated compliance strategy option that achieves this goal. As a result, we cannot agree to drop the instantaneous monitoring requirements for all facilities. However, as previously stated, instantaneous pressure monitoring requirements may not be warranted for all hazardous waste combustion sources to prevent combustion system leaks and we are including a provision that allows you to use other techniques to monitor pressure which can be demonstrated to prevent fugitive emissions.

We acknowledge the differences between the RCRA Subpart BB and MACT combustion system leak requirements. The MACT provisions are designed to assure compliance with the hazardous waste combustor emission standards and to assure that you operate in a manner consistent with good air pollution control practices. CAA Section 112(d) MACT emission standards and good air pollution control practices are generally technology specific and dependent on the type of regulated unit—they are not risk-based standards. Fugitive emissions from open tanks, pumps and valves will not be regulated the same as fugitive emissions from hazardous waste combustors because they are different devices that practically must use different pollution abatement systems.[5] Therefore, we do not agree with the commenters' assertions that there is an inappropriate disparity between the Subpart BB and MACT requirements.

One commenter believes that a five second pressure averaging or delay period is adequate for most sources, but for systems with high performance or double seals, a longer time could be warranted and for systems with less effective seals, a shorter period could be appropriate. Another commenter believes that we should allow you to average the positive pressure events over a time period not to exceed 15 seconds. A third comment recommends that the averaging period be no longer than a half of a second.

We disagree that a pressure averaging time not to exceed either five or fifteen seconds would be appropriate for all sources. The pressure monitoring technique that adequately prevents combustion system leaks is site-specific and will be dependent on many factors, including combustion chamber type and design, kiln seal design, hazardous waste feed practices, etc. If you choose to implement a pressure averaging compliance approach, today's adopted amendment requires you, on a site-specific basis, to demonstrate that the averaging period adequately prevents fugitive emissions.

Finally, one commenter states that EPA should not require chemical demilitarization facilities to maintain negative pressures in the combustion chamber at all times due to the energetic nature of the feedstream. The commenter states that although it is not possible to eliminate all transient pressure spikes in chemical demilitarization furnaces, the commenter believes the engineering features of the units and the air containment systems address environmental concerns. Furthermore, the commenter asserts that fugitive emissions that are released from these units into the containment rooms are controlled to better than a 99.9999% destruction removal efficiency, and suggests this meets or exceeds the control level that would be achieved if those same emissions had passed through the air pollution control system.

The chemical demilitarization facilities are unique because: (1) They thermally treat chemical agents; and (2) the combustion units are located in enclosed rooms where the air is exhausted through a bank of carbon filters specifically designed to control fugitive emissions. We are convinced that combustion system leaks should be prevented whenever it is reasonably possible, even considering the fact that the fugitive emissions are controlled by a secondary device. We consider this necessary because of the toxicity of these wastes, and because we believe such an approach is consistent with current good air pollution control practices.[6]

[4] We note the § 264.345 language does not explicitly require instantaneous pressure monitoring.

[5] For example, fugitive emissions from combustors are generally controlled by maintaining a negative combustion chamber pressure to ensure the organic wastes remain in the unit at the elevated temperatures to achieve organic destruction. Fugitive emissions from tanks and valves are generally controlled with containment systems (tank covers or vapor recovery systems), periodic leak inspections, etc.

[6] We believe minimizing fugitive emissions whenever reasonably possible to be consistent with good air pollution practices because this best

Continued

Because it appears that these facilities may be designed to adequately control the fugitive emissions that are released from the combustion units, a pressure monitoring scheme that does not include the use of instantaneous limits may be warranted.[7] We note that there are two existing regulatory mechanisms that allow you to implement a fugitive emission control compliance approach other than one that uses instantaneous pressure limits. First, § 63.1206(c)(5)((i)(C) allows you to use an alternative means to provide control of combustion system leaks equivalent to maintenance of combustion zone pressure lower than ambient pressure, upon prior written approval of the Administrator. Also, the alternative monitoring provisions of § 63.1209(g)(1) allow you to petition the regulatory official for approval to use alternative monitoring methods. As previously discussed, we are amending the pressure monitoring requirements to include a provision that will, upon prior written approval of the Administrator, allow the use of other techniques to monitor pressure which can be demonstrated to prevent fugitive emissions without the use of instantaneous pressure limits.

II. What Revisions Are We Making to the Operator Training and Certification Requirements ?

On July 3, 2001 (*see* 66 FR 35132–34), we proposed changes to the operator training and certification requirements of § 63.1206(c)(6). Today we are finalizing those changes as proposed. These changes revise the rule to: (1) Allow incinerator control room operators to be trained and certified under either a site-specific, source-developed and implemented program; or the American Society of Mechanical Engineers (ASME) program; or a state program; (2) for sources that choose to use the ASME program, require only provisional ASME certification by the compliance date for existing facilities, and by the date of assuming duties for new employees; (3) delete the requirement to provide control room operator training and certification for shift supervisors; (4) require control room operators to complete an annual review or refresher course covering prescribed topics to maintain certification; and (5) clarify that a certified control room operator must be on duty at the source at all times the source is in operation.

As explained at proposal, the ASME program comprises of testing in two parts. The ASME administers a comprehensive, generic, written test addressing operations of various types of incinerators and their pollution control systems, and awards provisional certification to operators passing this test. Full certification is awarded later after an operator with provisional certification passes an on-site, site-specific oral examination. The ASME does not implement any training programs for these tests, and also does not require any annual review or refresher course to maintain certification. Under today's rule, each source is required to impart requisite training to its operators to pass the tests administered either by the ASME, or by the source itself; and also to implement an annual review or refresher course, described in detail at proposal.

Most commenters strongly favor all the revisions. One commenter, however, states that deleting certification requirements for shift supervisors is unwise and can lead to increased emissions, and that the certified supervisors can fill in during absences of the operator. We were not persuaded by this comment. Today's revision mandates the presence of a certified operator at all times the source is in operation. Because there will always be some periods of absence of any particular operator (due to vacation time, sickness etc.), the source will prepare plans for such periods and record them in the training and certification program, that is a part of the operating record. Since many sources are operated 24 hours a day, 7 days a week, and there is more than one operator in the control room (with one being the chief or head operator), we believe each source will train and certify several operators, and plan their rotational assignments according to their needs. It is the responsibility of each source to plan whether to utilize the shift supervisor, or a deputy of the chief control room operator during any absences. Of course, if a shift supervisor is used for such occasions, the shift supervisor must be trained and certified as a control room operator.

One commenter states that no state programs for control room operators are available. We agree that state programs may not be available, but believe that some states are either considering developing their own operator programs, or actively review, approve and oversee the facility-developed site-specific training programs. We do not want to foreclose any opportunity either to the sources, or to the states in this matter.

Another commenter states that the preamble to the proposal stipulates a written test, and does not mention use of equivalent techniques such as a computerized test. We agree that a computerized test or other testing approach equivalent to a written test may be appropriate and note that the regulation does not require use of a written test. If you plan to use an alternative to a written test, however, you should describe the testing approach in your training and certification program.

III. What Time Extensions for Testing Are Available If the Comprehensive Performance Test Plan Has Not Been Approved?

As proposed on July 3, 2001 (66 FR at 35135), we are revising the September 1999 rule to allow you to perform your comprehensive performance test later than you otherwise must if the permitting authority has not approved your test plan. To get a time extension, you must petition the permitting authority for a time period not to exceed six months. This petition may be renewed for a total time extension of one year. Permitting authorities should grant these extensions if the source has acted in good faith. You must, however, perform your test no later than one year after the test date (or sooner if your time extension expires before one year) that would have applied if the test plan had been approved in a timely manner.

In the final rule, we made no provision for having the test date delayed. We stated that sources would have to perform their comprehensive performance test within 6 months of the compliance date regardless of whether the test plan had been approved. At the time we stated that ''if permit officials nevertheless fail to act within the nine month review and approval period, a source could argue that this failure is tacit approval of the plan and that later 'second guessing' is not allowed.'' See 64 FR at 52912. However, stakeholders noted that there is nothing to prohibit a permitting official from disapproving a plan after the actual test had been performed. If this occurs, the source

ensures the organic waste remains in the combustion unit for a duration of time, and at an elevated temperature, necessary to achieve adequate organic destruction.

[7] The information provided by the commenter that describes the control efficiency for released fugitive emissions does not contain the level of detail that would allow us to conclusively evaluate the commenter's assertions. For example, no information was provided explaining whether comparable carbon removal efficiencies would be achieved for such low organic concentration levels that result after the fugitive emissions are diluted by the containment room air (as compared to the destruction and removal efficiency in the combustor). The level of review is more appropriately conducted by the local regulatory official.

would be required to rerun a test based on the revised test plan.

Combustion source owners are very concerned about this potential scenario. They point out that comprehensive performance tests are very expensive, often several hundreds of thousands of dollars for a commercial source, and possibly more than a million dollars at a government installation due to the unique circumstances encountered while burning munitions or mixed waste. Therefore, we agree with stakeholders that a comprehensive performance test should not have to be rerun when circumstances prevent the permitting official from approving the test plan in a timely manner.

We proposed an amendment to the final rule that we believe addresses stakeholders' concerns. The proposed amendment specifically allowed sources to petition the Administrator under § 63.7(h) to waive the test requirement for up to six months if the test plan is not approved. This will give the permitting official an additional six months to act on the test plan. The source also could request a second waiver of up to six months if the plan is not approved following the initial six month period. You would qualify for this waiver if you submitted your test and evaluation plans on time, and made a good faith effort to accommodate any comments you received on those plans. The proposed amendment also describes the procedures for obtaining the waiver, what documentation you must include in the waiver, and how to involve the public.

We are promulgating this amendment as proposed. All but two commenters support the amendment. The commenters opposing the amendment are concerned that, despite as much as a 12-month respite from testing, the source might still have to perform a test after those 12 months without an approved test plan. Many commenters that support the proposed amendment also mention this concern. However, while we are sympathetic to the legitimate need for a time extension due to circumstances preventing the permitting authority to approve or deny the test plan, we continue to ''believe that an open-ended test date will not provide an incentive for either sources or regulatory officials to resolve differences related to a test plan, thereby unnecessarily delaying testing.'' See 66 FR at 35135 for our previous discussion on this issue. None of the commenters provide information on this issue beyond what was available at the time the final rule was promulgated. Therefore, our belief at the time of the final rule that the test date should not be open-ended, has not changed, nor do we have any basis to believe that any extension beyond one year is needed.

IV. What Flexibility Is Provided in Operations During Confirmatory Testing for Dioxin/Furans?

On July 3, 2001 (see 66 FR at 35136), we proposed changes to the requirements for confirmatory performance testing for dioxin/furan to provide flexibility in operations during confirmatory testing. Today we are finalizing those changes as proposed, and are making an additional revision to clarify which historical data are used to calculate normal operating values. These changes to § 63.1207(g)(2) revise the rule to: (1) Allow approval in the test plan of operations under a wider range for a particular parameter based on information justifying that operating within the required range may be problematic; and (2) allow the Administrator to accept test results based on operations outside of the range specified in the confirmatory test plan. Under the existing rule, sources are required to operate so that carbon monoxide or hydrocarbon levels, and operating parameter limits associated with the dioxin/furan emission standard, are within the range of the average values over the previous 12 months up to the maximum or minimum value, as appropriate, that is allowed. Stakeholders expressed concern that it was difficult to control operation of the combustor to the required range for each operating parameter simultaneously. In particular, they stated it will be difficult to operate within a potentially narrow range of carbon monoxide levels for sources that normally operate close to the 100 ppmv limit, because carbon monoxide levels are dependent on many combustion-related factors and cannot be directly ''dialed in'' as can be done for other parameters (e.g., activated carbon injection feedrate).

Today's amendment to § 63.1207(g)(2) also allows the Administrator to accept test results based on operations outside of the range specified in the test plan when a source did not anticipate a problem in maintaining the operating levels within the required range (and therefore did not request advance approval to do so), but because of unforeseen factors, was unable to maintain the required range. This provision would give permit writers discretion to accept emissions data obtained when operating outside of the prescribed range so that sources would not have to incur the costs of an additional confirmatory test. In determining whether to accept test results from operations outside of the range specified in the test plan, permit writers would consider factors including: (1) the magnitude and duration of the deviation from the required range; (2) the historical range of the parameter (e.g., the range between the 10th and 90th percentile time-weighted average values for the parameter); (3) the proximity of the emission test results to the standard; and (4) the reason for not maintaining the required range. These factors determine whether the operations are reasonably representative of normal operations and how important it may be that test operations are truly representative of normal operations.

Most commenters support the proposed amendment, and we are revising § 63.1207(g)(2) as proposed with one minor change. The September 1999 final rule required you to exclude data pertaining to malfunctions, monitor calibrations, and nonhazardous waste operations when calculating normal operating levels. Today we are also requiring you to exclude data pertaining to startup and shutdown operations as well when calculating these averages. We did not propose to explicitly exclude you from using startup and shutdown data because you were previously not allowed to burn hazardous waste during these events. We conclude this change is now necessary given that some sources may, in limited circumstances, burn hazardous waste during startup and shutdown as a result of the changes to the startup, shutdown, and malfunction compliance requirements.

One commenter suggests that we should not require sources to exclude data pertaining to nonhazardous waste operations when calculating these averages. The commenter states that the amount of time sources operate while not burning hazardous waste is negligible and would not affect the calculated average values. We acknowledge that the time you operate while not burning hazardous waste (while also not in startup, shutdown, or malfunction mode) may be negligible, and thus may not significantly affect the calculated average values. However, we believe the data acquisition systems in use today are readily capable of omitting these data when calculating the averages, and excluding nonhazardous waste operating data is preferable. As a result, we conclude no change is necessary.

V. How Can You Waive Operating Parameter Limits During Performance Testing and Pretesting?

Section 63.1207(h) automatically waives operating parameter limits (OPLs) during subsequent comprehensive performance tests under an approved performance test plan. Stakeholders raised two concerns that we addressed in the proposed rule: (1) OPLs defined in the Documentation of Compliance should be waived during the initial comprehensive performance test and associated pretesting; and (2) OPLs should be waived during testing and pretesting irrespective of whether the test plan has been approved. 66 FR at 35136–37.

A. How Can You Waive OPLs During the Initial Comprehensive Performance Test?

We explained in the proposed rule why the rule need not be revised to waive OPLs during the initial comprehensive performance, or associated pretesting. This is because the OPLs are defined in the Documentation of Compliance (DOC) prior to the initial comprehensive performance test, and you may revise the DOC at any time prior to submitting the Notification of Compliance. To widen the operating envelope by making the OPLs less stringent, you need only provide information in the operating record justifying why operating under the less stringent OPLs is likely to ensure compliance with the emission standards. You would revise the DOC accordingly, and record the DOC in the operating record. Review and approval by regulatory officials is not required.

An industry commenter states the rule should be revised to explicitly waive the OPLs defined in the DOC during the initial performance test because revising the DOC and providing support that the revised OPLs ensure compliance with the emission standards may not be a simple process. We do not agree, and the commenter did not elaborate on why revising the DOC would be burdensome. Moreover, we note that the supporting information required for DOC modification must be developed and included in the performance test plan as justification to deviate from the current OPLs when the plan is submitted for review and approval.

We conclude that it is not necessary to revise the rule to waive OPLs during the initial comprehensive performance test and associated pretesting because you may revise the OPLs in the Documentation of Compliance at any time.

B. How Can You Waive OPLs During Subsequent Comprehensive Performance Tests?

Section 63.1207(h) waives operating parameter limits (OPLs) during subsequent comprehensive performance tests under an approved performance test plan. In our proposal, we addressed the potential situation where you are facing the deadline for conducting the comprehensive performance test but the test plan has not been approved and regulatory officials have not extended the compliance date. We proposed to revise the rule to waive OPLs during subsequent comprehensive performance testing and associated pretesting, provided that you record the emission test results of the pretesting. We reasoned that the emission test results would confirm whether you were in compliance with the emission standards when operating under the less stringent OPLs.

Most commenters agree with the proposal but noted that: (1) We revised § 63.1207(h)(2) to waive OPLs during pretesting provided that emission test results are recorded but neglected to revise § 63.1207(h)(1) that waives OPLs under the performance test only when there is an approved test plan; and (2) in revising § 63.1207(h)(2), we excluded a phrase added in a technical correction (see 65 FR at 42293 (July 10, 2000)) allowing the Administrator to renew the 720 hour limit on pretesting. Both omissions were inadvertent, and we include them in today's final rule.

One commenter states that OPLs should not be waived if the test plan is not approved by EPA. We disagree. The OPLs are waived only during pretesting or performance testing where the source is conducting emissions testing and recording the results of the tests. This documentation of compliance or noncompliance with the emission standards serves as an incentive to operate the source under alternative OPLs that ensure compliance with the standards.

We conclude it is appropriate to revise the rule as proposed to waive OPLs during subsequent comprehensive performance testing and pretesting (provided that emissions test results during pretesting are recorded) and to allow the Administrator to renew the 720 hour limit on pretesting as promulgated in the July 10, 2000 technical correction. *See* revised §§ 63.1207(h).

VI. What Are the Calibration Requirements for Temperature Measurement Devices?

The September 1999 final rule requires that thermocouples and other temperature measurement devices, such as pyrometers, must be recalibrated every three months. However, stakeholders are concerned that recalibrating these devices every three months can be particularly burdensome and offers little environmental benefit (i.e., among other things, no better assurance of compliance with the actual emission standards) over a less frequent calibration interval. In the July 2001 proposal, we discussed stakeholders' concerns and requested more information on the need for, and burden associated with, calibrating temperature measurement devices. See 66 FR at 35138. We also indicated that analysis of comments may lead us to conclude that § 63.1209(b)(2)(i) should be deleted in lieu of a requirement that each source develop an appropriate calibration procedure and frequency and include that information in the evaluation plan required by § 63.8(e)(3)(i).

Nearly all commenters agree with the need to provide flexibility in calibration frequency. Rather than delete § 63.1209(b)(2)(i), however, commenters suggest that we revise that provision to require calibration of temperature measurement devices using the manufacturer's procedures and calibration frequency. Also, commenters suggest that the calibration be performed at least once a year, unless a less frequent optical pyrometer calibration interval is approved by the Administrator.

We agree with commenters' suggestions and are revising § 63.1209(b)(2)(i) accordingly.

VII. What Changes Are We Making to the Particulate Matter Operating Requirements for Sources Using Activated Carbon Injection and Carbon Beds?

We are amending two provisions that apply to activated carbon injection and carbon bed operating systems. First, we are deleting the regulatory language that requires sources using activated carbon injection systems to limit the particulate matter emissions to levels achieved during the comprehensive performance test. We instead are requiring these sources to establish operating limits on the particulate matter control device to assure compliance with both the mercury and dioxin/furan emission standards. Second, we are deleting the requirement for sources equipped with carbon beds to establish particulate

matter operating parameter limits for purposes of ensuring compliance with dioxin/furan and mercury emission standards.

We explained at proposal that it is inappropriate to explicitly require a site-specific particulate matter limit if a carbon injection system is used because the rule does not require continuous monitoring of particulate matter emissions. 66 FR at 35141. The use of a site-specific particulate matter limit was originally thought to go in tandem with a requirement to use particulate matter continuous emission monitors. Because we do not require sources to use particulate matter CEMS for compliance purposes, however, we concluded these site-specific particulate matter limits were inappropriate, and proposed to delete this requirement. We instead proposed to require these sources to establish operating limits on the particulate matter control device consistent with the approach used to control particulate emissions for compliance assurance with the semivolatile and low volatile metals emission standards.

The proposal also explained that particulate matter control downstream of a carbon bed is not needed to ensure compliance with the dioxin/furan and mercury emission standards. We noted that most, if not all, carbon bed systems in use today are positioned downstream from particulate matter control devices to minimize particulate buildup in the carbon bed. Carbon beds are also designed so that carbon leakage into the flue gas is minimized. As a result, we proposed to delete the language that requires sources equipped with carbon beds to control particulate matter emissions to ensure compliance with the dioxin/furan and mercury standards.

We received no adverse comments on these proposed amendments. We are, therefore, adopting the proposed revisions in today's rulemaking.

VIII. How May You Comply Temporarily With Alternative, Otherwise Applicable MACT Standards?

Section 63.1206(b)(1)(ii), as revised (66 FR 35087 (July 3, 2001)), allows you to stop complying with the emission standards and operating requirements of Subpart EEE temporarily after the hazardous waste residence time has expired and to comply with otherwise applicable Clean Air Act requirements promulgated under Sections 112 and 129, provided you document in the operating record that you are complying with those alternative standards. If the Agency has not promulgated Clean Air Act Section 112 or 129 MACT standards for the nonhazardous waste burning class of sources in a particular source category, there are no otherwise applicable MACT standards for the source.

Stakeholders asked for clarification on the procedures during a transition between Subpart EEE standards and the otherwise applicable Section 112 or 129 MACT standards. In the July 3, 2001 proposed rule (66 FR at 35145–46) we explained that: (1) sources are affected sources only under Subpart EEE with respect to stack emissions, even when complying with the otherwise applicable MACT standards under an alternative mode of operation under § 63.1209(q); and (2) sources that elect to comply with otherwise applicable MACT standards after the hazardous waste residence time has expired must include all requirements of those MACT standards, not just operating limits, in the operating record, the Documentation of Compliance, the Notification of Compliance, and the title V permit application. We also proposed a revised approach to calculate rolling averages for compliance with operating parameter limits when changing modes of operation. We discuss these issues below, including comments received and our final determinations.

A. What Are the Implications of Being an Affected Source Only Under Subpart EEE?

At proposal, we explained that sources that invoke § 63.1206(b)(1)(ii) to become temporarily exempt from the emission standards and operating requirements of Subpart EEE remain an affected source under Subpart EEE (and only Subpart EEE) with respect to stack emissions requirements until the source meets the requirements specified in Table 1 to § 63.1200 for no longer being an affected source. To implement this clarification, we proposed to require you to define the period of compliance with the otherwise applicable Clean Air Act requirements promulgated under Sections 112 and 129 as an alternative mode of operation under § 63.1209(q). Thus, during this mode of operation, you would be exempt from the emission standards and operating requirements of Subpart EEE, except the requirements for the otherwise applicable Section 112 and 129 MACT standards you specify under § 63.1209(q).

We also proposed to revise the rule to clarify that otherwise applicable Section 112 and 129 MACT standards are ''applicable requirements'' under Subpart EEE if you elect to operate under that mode of operation after the hazardous waste residence time has expired. Because the source is an affected source only under Subpart EEE, those alternative, otherwise applicable MACT standards must be specified in a manner that is enforceable under Subpart EEE. Consequently, you must specify those alternative, otherwise applicable MACT standards, including not only the operating parameter limits under the Section 112 and 129 standards, but also the associated monitoring and compliance requirements and notification, reporting, and recordkeeping requirements, in the operating record under § 63.1209(q), the Documentation of Compliance (DOC) under § 63.1211(d), the Notification of Compliance (NOC) under § 63.1207(j), and the title V permit application.[8]

Commenters generally agree with our proposed approach to implement the alternative, otherwise applicable Section 112 and 129 MACT requirements after the hazardous waste residence time has expired. One commenter suggests, however, that we clarify that, if the Agency has not promulgated Section 112 or 129 MACT requirements applicable to the source, the source is exempt from operating requirements during that mode of operation. We agree with the commenter and addressed this situation in the proposal in footnote 37 (66 FR at 35145). If the Agency has not promulgated Section 112 or 129 MACT requirements applicable to the source, the source is exempt from operating requirements under the alternative, otherwise applicable MACT standards mode of operation provided that: (1) The hazardous waste residence time has expired; and (2) the source establishes this mode of operation under § 63.1209(q) and notes in the operating record when it enters and leaves this mode of operation. The source must nonetheless identify this mode of operation (i.e., where it is exempt from operating requirements) in the DOC, NOC, and title V permit application to assist compliance assurance.[9]

One commenter also suggests that the rule should be revised to waive the automatic waste feed cutoff requirements under § 63.1206(c)(3) when a source elects to continue operating under the Subpart EEE emission standards and operating requirements even though the hazardous waste residence time has

[8] We also noted in the proposal that, under § 70.6(a)(9), the title V permit must contain terms and conditions for all reasonably anticipated modes of operation, and thus, must contain the alternative, otherwise applicable MACT requirements.

[9] Please note such source could conceivably be subject to case-by-case permitting under section 112(j)(2) or 112(g)(2).

expired (i.e., the source elects not to comply with the alternative, otherwise applicable MACT standards). The commenter reasons that, because the hazardous waste residence time has expired, there is no need to require compliance with the hazardous waste feed cutoff requirements. We conclude that no regulatory revisions are needed because it is self-evident which provisions are applicable after the hazardous waste residence time has expired. For example, it is self-evident that the general requirements of § 63.1209(c)(3)(i) for the automatic waste feed cutoff system to cutoff the hazardous waste feed are not applicable, because hazardous waste is not being fed. Other requirements continue to be applicable, however. For example, § 63.1206(c)(3)(iii) continues to apply because it requires you to continue monitoring operating parameter limits after a cutoff and prohibits you from restarting the hazardous waste feed until the operating parameters and emission levels are within the specified limits.

After considering comments on the proposed rule, we conclude that, as proposed, § 63.1209(q) should be revised to add paragraph (q)(1) to provide requirements for operating under otherwise applicable Section 112 and 129 MACT standards.

B. How Are Rolling Averages Calculated When Changing Modes of Operation?

Section 63.1209(q) as originally promulgated requires you to begin calculating rolling averages anew (i.e., without considering previous recordings) when you begin complying with the operating parameter limits for an alternative mode of operation. We now believe this approach is problematic as it was to be implemented. As you change modes of operation, you would not be able to calculate a 60-minute rolling average, for example, until you had collected 60 one-minute average recordings for the parameter. Thus, for the initial hour after changing a mode of operation, you would not be able to document compliance with the operating parameter limits. To address this concern, we proposed that you would use the most recent continuous monitoring system recordings when operating under a mode of operation to calculate rolling averages when renewing operations under that same mode. Under this approach, to calculate an hourly rolling average when you changed to an alternative mode of operation, you would add the first one-minute average recording to the 59 one-minute average recordings when you last operated under that mode of operation. Thus, rolling averages could be calculated after the first minute of renewing operations under a mode of operation.

Several commenters express concern that the proposed approach of retrieving one-minute average recordings from when you last operated under that mode of operation to calculate a rolling average can place a significant burden on a source's data acquisition system. The data acquisition system would be required to store and retrieve 59 minutes from a mode of operation under which the source may operate only infrequently. This approach would increase the memory requirements of a source's data acquisition system and increase programming efforts and costs because of the increased number of data registers used for storage.

Commenters suggest two alternative approaches to calculate rolling averages when changing modes of operation. One alternative, the ''Start Anew'' approach, is the currently promulgated approach, but it would be implemented differently. The other alternative approach, the ''Seamless Transition'' approach, is an approach that we discussed in a footnote in the July 3, 2001 proposed rule. We agree with commenters' concerns about allowing only one approach to calculate rolling averages after a transition to a new mode of operation (i.e., the ''Retrieval Approach''), and have promulgated all three approaches, as discussed below, because they are equally effective. You may use any of these approaches.

1. How Does the Retrieval Approach Work?

The retrieval approach works as described above and in the July 3, 2001 proposed rule. You use the most recent continuous monitoring system recordings when operating under a mode of operation to calculate rolling averages when renewing operations under that mode. Although this approach may be burdensome in some situations as commenters state, it may be preferable in some situations to the other two approaches discussed below. See new § 63.1209(q)(2)(i).

2. How Does the Start Anew Approach Work?

Under the start anew approach, you calculate rolling averages anew without considering previous recordings. This is the currently promulgated approach. See old § 63.1209(q) and new § 63.1209(q)(2)(ii).

Under today's rule, however, you are required to implement the approach differently. As discussed above, this approach is problematic if implemented as currently required because you are not able to calculate an hourly rolling average, for example, until you record 60 one-minute average values for a parameter under the new mode of operation. During that hiatus, you cannot document compliance with the OPLs. Under today's rule, to calculate an hourly rolling average after changing a mode of operation, you must calculate the hourly rolling average as the average of the available one-minute values for the parameter until enough one-minute values are available to calculate an hourly rolling average. Similarly, to calculate a 12-hour rolling average immediately after changing a mode of operation, you must calculate the 12-hour rolling average as the average of the available one-minute values for the parameter until enough one-minute values are available to calculate a 12-hour rolling average. *See* new § 63.1209(q)(2)(ii). This is a conservative approach to calculating rolling averages because you are not able to use the full averaging period to lessen the impact of abnormally high one-minute recordings until you accumulate, for example, 60 one-minute averages for the hourly rolling average.

You may not transition to a new mode of operation using this approach if the most recent operation in that mode resulted in an exceedance of an applicable emission standard measured with a CEMS or operating parameter limit prior to the hazardous waste residence time expiring. This condition ensures that sources cannot avoid compliance with § 63.1206(c)(3)(iii) after an automatic waste feed cutoff by ignoring the parameter recordings that occurred when hazardous waste was in the combustion chamber and the OPLs were exceeded, and then quickly restarting the hazardous waste feed once the operating parameters and emission levels are within the specified limits.[10] The purpose of this provision is to provide an additional incentive to avoid exceedances when hazardous waste is in the combustion chamber by delaying restart of the hazardous waste feed until the operating parameters (and emissions measured with a CEMS) are within the limits.

3. How Does the Seamless Transition Approach Work?

Several commenters recommend the seamless transition approach that we discussed in footnote 41 in the July 3, 2001 proposal. 66 FR at 35146. Under this approach, you continue calculating

[10] See letter form Jim Berlow, USEPA, to Michelle Luck, Cement Kiln Recycling Coalition, dated June 21, 2001 (in the docket for this rulemaking).

rolling averages using data from the previous operating mode provided that both the operating limits and the averaging period for the parameter are the same for both modes of operation. We agree that this approach is an appropriate alternative and finalize it as new § 63.1209(q)(2)(iii). Note, however, that if parameter recordings from a previous mode of operation where you may not be burning hazardous waste contribute to an exceedance in the new mode of operation when you are burning hazardous waste and hazardous waste remains in the combustion chamber, you have nonetheless exceeded an emission standard or operating limit when hazardous waste is in the combustion chamber.

IX. What Are the Procedures for Allowing Use of Less Sensitive Bag Leak Detection Systems?

In the July 2001 proposed rule, we requested comment on whether the bag leak detection system requirements should be revised to explicitly allow sources to petition the Administrator to use bag leak detection monitors that have detection limits higher than 1.0 milligrams per actual cubic meter as required by the September 1999 final rule. See 66 FR at 35134. We reasoned that less sensitive bag leak detectors would be acceptable in situations where the detector could nonetheless detect subtle changes in baseline, normal mass emissions of particulate matter. In determining whether the detector is sensitive enough to detect subtle changes in baseline, normal mass emissions, the permitting authority could consider information such as results of site-specific tests that document the detector provides a measurable and repeatable change in opacity output with an increase in particulate matter mass emissions at normal emission levels.

All commenters support this revision, saying that we should explicitly allow a source to petition the Agency using the alternative monitoring provisions under § 63.1209(g)(1) to use a less sensitive bag leak detector. Therefore, we are revising new § 63.1206(c)(7)(ii)(A)(1) by appending it with the following phrase: ''* * * unless a source demonstrates, pursuant to the procedures in § 63.1209(g)(1), that a higher sensitivity would adequately detect bag leaks.''

Part Four-What Technical Corrections Are Being Made in Today's Rule?

I. What Corrections Are We Making to Part 63, Subpart EEE?

We are making several corrections to 40 CFR part 63, Subpart EEE, published on September 30, 1999.

A. Several Typographical Errors Are Corrected

In today's rule, we correct a typographical error shown in entry (2) in Table 1 to § 63.1200 by replacing the word ''extent'' with ''extend.''

We also revise by italicizing several paragraph numbers and headings that will make the regulatory text easier to read. The paragraphs revised include §§ 63.1206(b)(5)(i)(C)(1), 63.1209(g)(1)(B)(1) through (3), 63.1209(g)(1)(C)(1) and (2), 63.1209(l)(1), 63.1209(m)(3), 63.1209(n)(4), and 63.1209(o)(1).

We also correct several typographical errors. We correct § 63.1207(f)(1)(x) by removing an extra ''))'' from the paragraph. Section 63.1207(m)(4)(i) is corrected by capitalizing ''Notification of Compliance.'' We correct a typographical error in the first sentence of § 63.1209(b)(5)(iii)(A) by removing the word ''to'' before the word ''monitoring.'' The typographical error in the heading of paragraph § 63.1209(k)(8)(ii) is also corrected. We revise the paragraph heading from ''mum time in-use'' to ''Maximum time in-use.'' Finally, we correct a typographical error in the first sentence of § 63.1213(a) by replacing the word ''data'' with ''date.''

B. Several Citations Are Corrected

In the May 14, 2001 rule, we removed the Notice of Intent to Comply (NIC) provisions that were vacated in *Chemical Manufacturers Association* v. *EPA,* 217 F.3d 861 (D.C. Cir. 2000). When we removed the NIC requirements from §§ 63.1210 and 63.1211 and redesignated follow-on paragraphs in those sections, we did not also revise several references to the redesignated paragraphs of §§ 63.1210 and 63.1211. The paragraphs revised include §§ 63.1206(b)(11), 63.1206(c)(1)(i), 63.1207(j)(1)(ii), 63.1207(j)(3), 63.1209(a)(1)(ii)(A), 63.1209(f)(1), and 266.100(b)(1).

In the May 14, 2001 rule, we also made changes to the compliance dates provisions of § 63.1206(a). However, when we redesignated paragraph (a)(3) to (a)(2) in that rule, we inadvertently failed also to revise a cite within old paragraph (a)(3). Today's rule corrects the reference in § 63.1206(a)(2) from paragraph (a)(3)(ii) to (a)(2)(ii).

We also correct an incorrect citation in § 63.1207(f)(1)(xvii). This paragraph inadvertently refers to § 63.1209(m)(5)(i) instead of § 63.1209(n)(5)(i). We make that correction today.

Finally, we correct an incorrect citation in § 63.1207(m)(4)(ii). This paragraph inadvertently refers to § 63.1207(m)(3)(iv) instead of § 63.1207(m)(4)(i). We make that correction today.

II. What Correction Are We Making to § 266.100?

We are making two corrections to § 266.100(d) to correct errors made when we promulgated the September 30, 1999 final rule. When we added § 266.100(b) to address integration of the MACT standards and redesignated paragraphs (b), (c), (d), (e), and (f), as (c), (d), (e), (f), and (g), respectively, we did not revise several references within these paragraphs. Today's rule revises the reference to old paragraph (c)(2) in paragraph (d)(1)(i)(B) to (d)(2); the reference to old paragraph (c)(1)(iii) in paragraph (d)(2)(i) to (d)(1)(iii); the reference to old paragraph (c)(1)(iii) in paragraph (d)(2)(ii) to (d)(1)(iii); the reference to old paragraphs (c)(1) and (c)(3) in paragraph (d)(3) to (d)(1) and (d)(3), respectively; the reference to old paragraph (c)(1) in paragraph (d)(3)(i) to (d)(1); and the reference to old paragraphs (c)(3) and (c)(1)(ii) in paragraph (d)(3)(i)(D) to (d)(3) and (d)(1)(ii), respectively.

In addition, when we added § 266.100(h) in the September 30, 1999 final rule to provide reduced sampling and analysis and notification and recordkeeping requirements for secondary lead smelters complying with the Secondary Lead Smelting NESHAP, we inadvertently deleted regulatory language in old paragraph (c)(3) that was redesignated paragraph (d)(3). We restore that regulatory language in (d)(3) today.

Finally, we correct a reference in § 266.100(a) from paragraphs (b), (c), (d), and (f) to paragraphs (b), (c), (d), (g), and (h).

III. What Correction Are We Making to § 270.42(j)(1): Combustion Facility Changes To Meet Part 63 MACT Standards?

We are correcting an error in the RCRA permitting regulations relating to the vacature of the Notification of Intent to Comply (NIC) and its associated requirements. On October 11, 2000, the D.C. Circuit issued a mandate to vacate the Notification of Intent to Comply provisions of 40 CFR part 63, Subpart EEE (Chemical Manufacturers Association v. EPA, 217 F. 3d 861, D.C.

Cir. 2000). We subsequently directed the Office of the Federal Register to remove those provisions from the Code of Federal Regulations on May 14, 2001 (66 FR 24270). Since sources were required to comply with the NIC requirements in order to be eligible for the RCRA Streamlined Permit Modification procedure, we also modified § 270.42(j)(1) to address the court's mandate.

Previously, § 270.42(j)(1) required owners or operators to first comply with the NIC requirements of § 63.1210 before requesting a streamlined RCRA permit modification. Sources were required to submit their final NICs by October 2, 2000. Since the court's mandate was not issued until after existing sources were required to submit their NICs, we determined that the court's action did not impact the sources' eligibility for a streamlined RCRA permit modification, provided, of course, that they submitted their NICs by October 2, 2000, as required by the rule. To clarify this in the regulatory language, we revised § 270.42(j)(1) to state that owners or operators must have complied with the Notification of Intent to Comply requirements of § 63.1210 that were in effect prior to May 14, 2001 in order to request a streamlined permit modification. In doing so, we incorrectly referred to the date that we removed the NIC provisions from the federal regulations (May 14, 2001) as the date on which those provisions were no longer in effect. Instead, we should have referenced the date of the court's mandate (October 11, 2000). The removal of the requirements from the federal regulations was only a ministerial action in acknowledgment of the court's October 11, 2000 order to vacate. Thus, in today's rulemaking, we are correcting the referenced date in § 270.42(j)(1) from May 14, 2001 to October 11, 2000.

IV. What Correction Are We Making to Table 1 to Subpart EEE—General Provisions Applicable to Subpart EEE?

Table 1 to Subpart EEE identifies which General Provisions provided under Subpart A, Part 63, are not applicable to hazardous waste combustors. We are amending that table to: (1) conform to revisions to Subpart EEE promulgated in a related final rule establishing interim emission standards and which was published in the **Federal Register** on February 13, 2002; (2) to make several other technical corrections; and (3) to clarify the explanation of the applicability of the General Provisions.

We are making the following specific corrections to Table 1 to Subpart EEE:

a. The applicability explanations for §§ 63.6(e), (f), and (h), and 63.7(e) are corrected to acknowledge that the emission standards and operating requirements of Subpart EEE do not apply during startup, shutdown, and malfunctions;

b. The applicability explanation for § 63.7(a) is clarified to note that § 63.1207(e)(3) allows you to petition the Administrator under § 63.7(h) to provide an extension of time to conduct a performance test;

c. The applicability explanation for § 63.8(c) is revised to correct the reference to § 63.1211(c) rather than § 63.1211(d);

d. The applicability explanations for §§ 63.8(c) and (g) are revised to delete the reference to applicability only to cement kilns because it is self-evident that only cement kilns are subject to an opacity emission standard under Subpart EEE. Further, if other sources were to use a COMS under alternative monitoring or other provisions, those sources would be required to comply with § 63.8(c); and

e. The applicability explanation for § 63.9(f) is corrected to require compliance with that paragraph for sources that are allowed under § 63.1209(a)(1)(v) to use visible determinations of opacity for compliance in lieu of a COMS.

Part Five—What Are the Analytical and Regulatory Requirements?

I. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, EPA must determine whether a regulatory action is significant and, therefore, subject to comprehensive review by the Office of Management and Budget (OMB), and the other provisions of the Executive Order. A significant regulatory action is defined by the Order as one that may:

Have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

—Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

—Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or rights and obligations or recipients thereof; or

—Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

Today's final action was submitted to OMB for review and confirmation. Pursuant to the terms of the Executive Order, the Agency, in conjunction with OMB has determined that today's final amendments rule does not represent a ''significant regulatory action.'' Today's final action does not meet any of the criteria identified above. Changes to this section of the Preamble made in response to OMB suggestions or recommendations are documented in the public record.

The aggregate annualized social cost for this final rule are less than $100 million. Furthermore, this rule is not expected to adversely effect, 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. The benefits to human health and the environment resulting from today's final rule have not been monetized but are believed to be less than $100 million per year.

II. What Economic and Equity Analyses Were Completed in Support of the Proposed Rule?

We prepared two economic support documents for the July 3, 2001 proposed rule: Assessment of Potential Costs, Benefits and Other Impacts, NESHAP: Standards for Hazardous Air Pollutants for Hazardous Waste Combustors—Technical Amendments to the Final Rule: NESHAP: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors, September 30, 1999, dated May, 2001, and Regulatory Flexibility Screening Analysis (RFSA) For NESHAP: Standards for Hazardous Air Pollutants for Hazardous Waste Combustors Technical Amendments to the Final Rule: NESHAP: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors, September 30, 1999, dated May, 2001. Both documents are available in the docket established for the July 3, 2001 action.

The Assessment document addressed both the thirteen direct final amendments and the twenty proposed amendments. Three of the proposed amendments in the direct final rule are finalized in today's rule and are projected to result in cost savings. Our analysis found that the amendment revising the alternative to the particulate matter standard for incinerators resulted in the single most significant projected cost savings. This amendment accounted for an estimated 77 percent, or $707,500, of the total quantifiable annual cost savings of $918,500. The direct final amendment addressing

feedstream analysis was projected to result in annual cost savings of $180,000, while the amendment on deletion of one-time notification of compliance accounted for the remaining cost savings. The total projected cost burden associated with the July 3, 2001 direct final amendments was estimated at $8,700 per year. The analysis found that most of the cost burdens are easily quantifiable, whereas many of the cost savings were not readily quantifiable and, are therefore not included in the aggregate estimate.

We were able to develop a quantified cost savings estimate for only one of the twenty proposed amendments in the Assessment. The amendment addressing method 23 as an alternative to method 0023A for dioxin/furans was projected to result in cost savings of $102,600 per year. Five of the twenty proposed amendments were projected to result in an aggregate quantifiable cost burden of $361,100 per year. Approximately 45 percent of this increased cost burden would be on the government. The proposed amendment revising the operator training and certification provisions was estimated to account for 84 percent of the total estimated cost burden.

No measurable impacts were projected in any of the following categories related to equity and regulatory concerns: environmental justice; children's health protection; unfunded mandates; tribal governments; and regulatory takings.

The RFSA document prepared in support of the July 3, 2001 actions analyzed potential impacts to small entities associated with both the direct final and proposed amendments. Based on our worst-case scenario, we found that there would not be a significant economic impact on any of the small business combustor companies subject to rule (amendment) requirements.

III. What Substantive Comments Were Received on the Cost/Economic Aspects of Proposed Rule?

We received no substantive comments on the cost/economic issues associated with either the direct final or proposed amendments. Selected commenters, however, incorporated minor references to cost issues as part of their comments on other issues. One commenter indicated that unnecessary testing cost increases and complications would result without the flexibility to use DRE data in lieu of testing. The incorporation of this amendment into today's final rule relieves this cost concern. Two commenters indicated support for the Agency's proposed amendment that would allow use of site-specific operator training and certification programs. This flexibility was supported as a means of avoiding the burden and complications associated with training requirements established under the final rule. The incorporation of this amendment into today's final rule addresses this cost concern.

Four commenters referenced cost issues associated with the amendment addressing the time extension for performance testing. These commenters generally supported the amendment but felt, in some cases, that it did not go far enough to address unforeseen circumstances and to mitigate the concerns associated with the potential for unnecessary performance testing and related costs. We are sensitive to these concerns; however, we continue to believe that an open-ended test date will not provide an incentive for either sources or regulatory officials to resolve differences related to the test plan. We believe that this stimulus will help mitigate unnecessary cost impacts.

IV. What Are the Potential Costs and Benefits of Today's Final Rule?

The value of any regulatory action is traditionally measured by the net change in social welfare that it generates. A rule that generates positive net welfare would be advantageous to society and should be promulgated. A rule that results in negative net welfare to society should be avoided, assuming all other factors are equal.

We have assessed the impacts of this final rule in our economic support document: Assessment of Potential Costs, Benefits and Other Impacts, and, Regulatory Flexibility Screening Analysis (RFSA) for NESHAP: Standards for Hazardous Air Pollutants for Hazardous Waste Combustors; Final Rule—Amendments to the NESHAP: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors: Final Rule, September 30, 1999, dated January 2, 2002. This document is available in the docket established in support of today's action. A brief summary of findings is presented below.

Today's rule revises several requirements promulgated in the September 30, 1999 rule. Cost impacts associated with the final amendments are not fully quantifiable. All amendments, however, are projected to result in zero cost impacts or national annual net cost savings to industry, as projected from the baseline of the September 30, 1999 rule. The total cost burden to government associated with the final amendments is estimated at $160,000 per year. No quantifiable benefits and/or environmental implications have been identified.

V. What Consideration Was Given to Small Entities Under the 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 final rule on small entities, a small entity is defined either by the number of employees or by the annual dollar amount of sales/revenues. The level at which an entity is considered small is determined for each NAICS code by the Small Business Administration (SBA).

The Agency has examined the potential effects today's final rule may have on small entities, as required by the RFA/SBREFA. We have found that four of the final amendments are projected to result in measurable cost impacts. The amendment addressing feedstream analysis for organic HAPs would result in cost savings but we expect that only larger operations would be impacted. The other three final amendments are projected to result in a measurable cost burden. Of these three, only the amendment addressing operator training and certification may potentially result in a cost burden to small hazardous waste combustors. Under an assumed worst-case, or high end cost scenario, we estimate maximum total costs on each ''small'' hazardous waste combustor company to average $25,700 ($154,000/6 = $25,700 per ''small'' source). Based on this high cost scenario, impacts on an individual small company basis would be no more than 0.71 percent of the annual gross sales. This figure is less than our threshold of 1 percent for determination of potentially significant economic impact. This amendment, however, was designed to ultimately provide regulatory relief. The lack of available data prevented us from quantifying cost savings potentially associated with this amendment. Overall impacts are likely to be considerably less than the 0.71 percent ''high-end'' estimate presented here. Based on this analysis we believe that it is reasonable to conclude that

there would not be a significant economic impact to any of the small business combustor companies potentially subject to rule requirements. After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Full details of the small entity analysis are presented in our report: Assessment of Potential Costs, Benefits and Other Impacts, and, Regulatory Flexibility Screening Analysis (RFSA) for NESHAP: Standards for Hazardous Air Pollutants for Hazardous Waste Combustors; Final Rule—Amendments to the NESHAPS: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors: Final Rule, September 30, 1999, dated January 2, 2002. This document is available in the docket established in support of today's action.

VI. Was the Unfunded Mandates Reform Act Considered In This Final Rule?

Executive Order 12875, ''Enhancing the Intergovernmental Partnership'' (October 26, 1993), calls on federal agencies to provide a statement supporting the need to issue any regulation containing an unfunded federal mandate and describing prior consultation with representatives of affected state, local, and tribal governments. Signed into law on March 22, 1995, the Unfunded Mandates Reform Act (UMRA) supersedes Executive Order 12875, reiterating the previously established directives while also imposing additional requirements for federal agencies issuing any regulation containing an unfunded mandate.

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 to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any single 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.

Today's final rule is not subject to the requirements of UMRA. Today's final rule will not result in $100 million or more in expenditures. The aggregate annualized social costs for today's final rule are projected to be less than one million dollars. Furthermore, today's rule is not subject to the requirements of section 203 of UMRA. Section 203 requires agencies to develop a small government Agency plan before establishing any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments. We have determined that this rule will not significantly or uniquely affect small governments.

VII. Were Equity Issues and Children's Health Considered In This Final Rule?

By applicable executive order, we are required to consider the impacts of today's rule with regard to environmental justice and children's health.

(1) Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks'

''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be ''economically significant'' as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. Today's final rule is not subject to the Executive Order because it is not economically significant, as defined in Executive Order 12866.

(2) Executive Order 12898: Environmental Justice

Executive Order 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Population'' (February 11, 1994), is designed to address the environmental and human health conditions of minority and low-income populations. EPA is committed to addressing environmental justice concerns and has assumed a leadership role in environmental justice initiatives to enhance environmental quality for all citizens of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, income, or net worth bears disproportionately high and adverse human health and environmental impacts as a result of EPA's policies, programs, and activities. In response to Executive Order 12898, and to concerns voiced by many groups outside the Agency, EPA's Office of Solid Waste and Emergency Response (OSWER) formed an Environmental Justice Task Force to analyze the array of environmental justice issues specific to waste programs and to develop an overall strategy to identify and address these issues (OSWER Directive No. 9200.3–17). We have no data indicating that today's final rule would result in disproportionately negative impacts on minority or low income communities.

VIII. What Consideration Was Given to Tribal Governments In This Final Rule?

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

Today's final rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on

the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in the Order. Today's rule will not significantly or uniquely affect the communities of Indian tribal governments, nor impose substantial direct compliance costs on them.

IX. Were Federalism Implications Considered in Today's Final Rule?

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'' are 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.''

Today's 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 the Order. Thus, Executive Order 13132 does not apply to this rule.

X. Were Energy Impacts Considered?

Executive Order 13211, ''Actions Concerning Regulations That Affect Energy Supply, Distribution, or Use'' (May 18, 2001), addresses the need for regulatory actions to more fully consider the potential energy impacts of the proposed rule and resulting actions. Under the Order, agencies are required to prepare a Statement of Energy Effects when a regulatory action may have significant adverse effects on energy supply, distribution, or use, including impacts on price and foreign supplies. Additionally, the requirements obligate agencies to consider reasonable alternatives to regulatory actions with adverse affects and the impacts the alternatives might have upon energy supply, distribution, or use.

Today's final rule is not likely to have any significant adverse impact on factors affecting energy supply. We believe that Executive Order 13211 is not relevant to this action.

XI. Paperwork Reduction Act

We have prepared an Information Collection Request (ICR) document (ICR No. 1773.07) listing the information collection requirements of this final rule, and have submitted it for approval to the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* OMB has assigned a control number 2050–0171 for this ICR. A copy of this ICR may be obtained from Sandy Farmer, OPIA Regulatory Information Division, U.S. Environment Protection Agency (2137), 1200 Pennsylvania Avenue, NW., Washington DC 20460, or by calling (202) 260–2740.

The public burden associated with this final rule (which is under the Clean Air Act) is projected to affect approximately 171 HWC units and is estimated to average 7.6 hours per respondent annually. The reporting and recordkeeping cost burden is estimated to average $440 per respondent annually. Burden means total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a Federal agency. That 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.

XII. National Technology Transfer and Advancement Act of 1995

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Pub L. No. 104–113, § 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 standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This final rule does not require the implementation of technical standards, as defined above; thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

XIII. The Congressional Review Act (5 U.S.C. 801 et seq., as Added by the Small Business Regulatory Enforcement Fairness Act of 1996)

Is Today's Final Action Subject to Congressional Review?

The Congressional Review Act, 5 U.S.C. § 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major Rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. § 804(2). This final rule will become effective on February 14, 2002.

Part Six—Delegation Implications

I. What Is the Authority for the Final Amendment Rule?

Unlike the September 30, 1999 Final HWC NESHAP rule, this rule does not include any significant changes or additions affecting the RCRA program. This Final Amendment Rule amends the promulgated standards located in 40 CFR part 63, subpart EEE. Therefore, this discussion pertains only to delegation of amendments to State, Local, and Tribal (S/L/T) agencies pursuant to the CAA program.

Section 112(l) of the CAA allows us to delegate the authority to S/L/T programs to implement and enforce emission standards for pollutants subject to section 112 regulations. Thus, a S/L/T agency that receives 112(l) delegation can implement and enforce the amendments being made today. A S/L/T agency also can implement the amendments for Title V major sources (see 40 CFR 70.2) via their Title V authority because it is independent of their delegation status. By having an approved Title V program, the S/L/T agency has demonstrated that it has the legal authority, resources, and expertise to implement and enforce standards for section 112 pollutants.

As before, we encourage S/L/T agencies to apply for and receive 112(l) delegation for this rule. The key advantages afforded to S/L/T agencies

who receive delegation are that they become the primary enforcement authority and can exercise delegable provision authorities. Additionally, it ensures clear and consistent requirements for affected sources and regulators. For example, a source need only report compliance assurance monitoring to its primary enforcement authority.

State, Local, and Tribal agencies still have the ability to choose which delegation options to use when applying for delegation of Federal authorities for this rule. The 112(l) delegation process begins when the S/L/T agency applies for delegation of a section 112 rule without changes (straight delegation), by rule adjustment, substitution of requirements, state program approval (SPA), or equivalency by permit (EBP).[11] Also, the partial approval option is available for any S/L/T who cannot or chooses not to take full delegation of an entire standard. The drawback to this option is that it can create inconsistent requirements since the S/L/T agency will enforce portions of the standard, while we will enforce the remaining portions.

II. Why Should I Apply for Delegation of This Rule?

This rule will be effective upon promulgation. As with the Phase I NESHAP, a S/L/T agency will need to incorporate the amendments of this rule into a major source's new, renewed, or revised Title V permit regardless of whether it has received delegation. However, by receiving delegation of 112(l), a S/L/T agency can approve minor changes to a Federal NESHAP. For instance, it can substitute an emission limitation that is more stringent than a Federal standard.

In light of the benefits afforded to a S/L/T agency if it receives 112(l) delegation, we recognize that the process of applying for and receiving delegation can be a lengthy one. This may be especially true for those agencies that do not have established agreements in place to receive automatic delegation of unchanged standards. There are agencies who choose to utilize the delegation options provided under 112(l), which are not as straightforward as the unchanged standards. In these cases, the review period required when applying for one of the delegation options combined with a state's legislative proceedings, are factors that can prolong the delegation process. Therefore, we encourage the S/L/T agency to do what makes sense given circumstances relevant to timing issues and resource needs.

List of Subjects

40 CFR Part 63

Air pollution control, Hazardous substances, Incorporation by reference Reporting and recordkeeping requirements.

40 CFR Part 266

Energy, Environmental Protection Agency, Hazardous waste, Recycling, Reporting and recordkeeping requirements.

40 CFR Part 270

Administrative practice and procedure, Confidential business information, Environmental Protection Agency, Hazardous materials transportation, Hazardous waste, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Dated: February 7, 2002.

Christine Todd Whitman,

Administrator.

For the reasons set out in the preamble, title 40, chapter I, of the Code of Federal Regulations is amended as follows:

PART 63—NATIONAL EMISSIONS STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

1. The authority citation for part 63 continues to read as follows:

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

2. Section 63.14 is amended by adding paragraph (i) to read as follows:

§ 63.14 Incorporations by reference.

* * * * *

(i) *ASME standard number QHO–1–1994 and QHO–1a–1996 Addenda.* This standard is titled as ''Standard for the Qualification and Certification of Hazardous Waste Incinerator Operators.'' The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy of this document from the American Society of Mechanical Engineers, 345 East 47th Street, New York, N.Y. 10017. You may inspect a copy at the RCRA Information Center, Crystal Gateway One, 1235 Jefferson Davis Highway, Arlington, VA 22202, or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

3. Section 63.1200 is amended by revising entry (2) in Table 1 in paragraph (b) to read as follows:

§ 63.1200 Who is subject to these regulations?

* * * * *

(b) * * *

TABLE 1 TO § 63.1200.—HAZARDOUS WASTE COMBUSTORS EXEMPT FROM SUBPART EEE

If * * *	And If * * *	Then * * *
* * * * * * *		
(2) You are a research, development, and demonstration source.	You operate for no longer than one year after first burning hazardous waste (Note that the Administrator can extend this one-year restriction on a case-by-case basis upon your written request documenting when you first burned hazardous waste and the justification for needing additional time to perform research, development, or demonstration operations).	You are not subject to this subpart (Subpart EEE). This exemption applies even if there is a hazardous waste combustor at the plant site that is regulated under this subpart. You still, however, remain subject to § 270.65 of this chapter.
* * * * * * *		

[11] Refer to Hazardous Air Pollutants: Amendments to the Approval of State Programs and Delegation of Federal Authorities; Final Rule at 65 FR 55810 or the CAA Delegation for the HWC NESHAP fact sheet at *www.epa.gov/epaoswer/hazwaste/combust/toolkit/coverpage.htm* for further information on delegation procedures.

* * * * *

4. Section 63.1201 is amended by adding the definition of ''Preheater tower combustion gas monitoring location'' to paragraph (a) in alphabetical order to read as follows:

§ 63.1201 Definitions and acronyms used in this subpart.

(a) * * *

Preheater tower combustion gas monitoring location means a location within the preheater tower of a dry process cement kiln downstream (in terms of gas flow) of all hazardous waste firing locations and where a representative sample of combustion gas to measure combustion efficiency can be monitored.

* * * * *

5. Section 63.1204 is amended by revising paragraph (d)(1)(iii) to read as follows:

§ 63.1204 What are the standards for hazardous waste burning cement kilns?

* * * * *

(d) * * *

(1) * * *

(iii) You must calculate rolling averages for operating parameter limits as provided by § 63.1209(q)(2).

* * * * *

6. Section 63.1206 is amended by:

a. Revising the first sentence of paragraph (a)(2)(i).

b. Redesignating paragraph (a)(4) as (a)(3).

c. Revising paragraphs (b)(5)(i)(C)(*1*), (b)(6)(i) and (b)(6)(ii), (b)(7), (b)(11), and (b)(13)(i).

d. Revising paragraphs (c)(1)(i) introductory text, (c)(5)(i)(C), (c)(6), and (c)(7)(ii).

e. Adding paragraph (c)(5)(i)(D).

The revisions and additions read as follows:

§ 63.1206 When and how must you comply with the standards and operating requirements?

(a) * * *

(2) * * *

(i) If you commenced construction or reconstruction of your hazardous waste combustor after April 19, 1996, you must comply with this subpart by the later of September 30, 1999 or the date the source starts operations, except as provided by paragraph (a)(2)(ii) of this section. * * *

* * * * *

(b) * * *

(5) * * *

(i) * * *

(C) * * *

(*1*) Except as provided by paragraph (b)(5)(i)(C)(*2*) of this section, after the change and prior to submitting the notification of compliance, you must not burn hazardous waste for more than a total of 720 hours (renewable at the discretion of the Administrator) and only for the purposes of pretesting or comprehensive performance testing. Pretesting is defined at § 63.1207(h)(2)(i) and (ii).

* * * * *

(6) * * *

(i) If a DRE test performed pursuant to § 63.1207(c)(2) is acceptable as documentation of compliance with the DRE standard, you may use the highest hourly rolling average hydrocarbon level achieved during the DRE test runs to document compliance with the hydrocarbon standard. An acceptable DRE test is any test for which the data and results are determined to meet quality assurance objectives (on a site-specific basis) such that the results adequately demonstrate compliance with the DRE standard.

(ii) If during this acceptable DRE test you did not obtain hydrocarbon emissions data sufficient to document compliance with the hydrocarbon standard, you must either:

(A) Perform, as part of the performance test, an ''equivalent DRE test'' to document compliance with the hydrocarbon standard. An equivalent DRE test is comprised of a minimum of three runs each with a minimum duration of one hour during which you operate the combustor as close as reasonably possible to the operating parameter limits that you established based on the initial DRE test. You must use the highest hourly rolling average hydrocarbon emission level achieved during the equivalent DRE test to document compliance with the hydrocarbon standard; or

(B) Perform a DRE test as part of the performance test.

(7) *Compliance with the DRE standard.* (i) Except as provided in paragraphs (b)(7)(ii) and (b)(7)(iii) of this section:

(A) You must document compliance with the Destruction and Removal Efficiency (DRE) standard under §§ 63.1203 through 63.1205 only once provided that you do not modify the source after the DRE test in a manner that could affect the ability of the source to achieve the DRE standard.

(B) You may use any DRE test data that documents that your source achieves the required level of DRE provided:

(*1*) You have not modified the design or operation of your source in a manner that could effect the ability of your source to achieve the DRE standard since the DRE test was performed; and,

(*2*) The DRE test data meet quality assurance objectives determined on a site-specific basis.

(ii) Sources that feed hazardous waste at a location in the combustion system other than the normal flame zone must demonstrate compliance with the DRE standard during each comprehensive performance test;

(iii) For sources that do not use DRE previous testing to document conformance with the DRE standard pursuant to § 63.1207(c)(2), you must perform DRE testing during the initial comprehensive performance test.

* * * * *

(11) *Calculation of hazardous waste residence time.* You must calculate the hazardous waste residence time and include the calculation in the performance test plan under § 63.1207(f) and the operating record. You must also provide the hazardous waste residence time in the Documentation of Compliance under § 63.1211(c) and the Notification of Compliance under §§ 63.1207(j) and 63.1210(b).

* * * * *

(13) * * *

(i) Cement kilns that feed hazardous waste at a location other than the end where products are normally discharged and where fuels are normally fired must comply with the carbon monoxide and hydrocarbon standards of § 63.1204 as follows:

(A) For existing sources, you must not discharge or cause combustion gases to be emitted into the atmosphere that contain either:

(*1*) Hydrocarbons in the main stack in excess of 20 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; or

(*2*) Hydrocarbons both in the by-pass duct and at a preheater tower combustion gas monitoring location in excess of 10 parts per million by volume, at each location, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; or

(*3*) If the only firing location of hazardous waste upstream (in terms of gas flow) of the point where combustion gases are diverted into the bypass duct is at the kiln end where products are normally discharged, then both hydrocarbons at the preheater tower combustion gas monitoring location in excess of 10 parts per million by volume, over an hourly rolling average

(monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane, and either hydrocarbons in the by-pass duct in excess of 10 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane, or carbon monoxide in excess of 100 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, and corrected to 7 percent oxygen. If you comply with the carbon monoxide standard of 100 parts per million by volume in the by-pass duct, then you must also not discharge or cause combustion gases to be emitted into the atmosphere that contain hydrocarbons in the by-pass duct in excess of 10 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane, at any time during the destruction and removal efficiency (DRE) test runs or their equivalent as provided by § 63.1206(b)(7).

(B) For new sources, you must not discharge or cause combustion gases to be emitted into the atmosphere that contain either:

(*1*) Hydrocarbons in the main stack in excess of 20 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; or

(*2*)(*i*) Hydrocarbons both in the by-pass duct and at a preheater tower combustion gas monitoring location in excess of 10 parts per million by volume, at each location, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane, and

(*ii*) Hydrocarbons in the main stack, if construction of the kiln commenced after April 19, 1996 at a plant site where a cement kiln (whether burning hazardous waste or not) did not previously exist, to 50 parts per million by volume, over a 30-day block average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; or

(*3*)(*i*) If the only firing location of hazardous waste upstream (in terms of gas flow) of the point where combustion gases are diverted into the bypass duct is at the kiln end where products are normally discharged, then both hydrocarbons at the preheater tower combustion gas monitoring location in excess of 10 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane, and either hydrocarbons in the by-pass duct in excess of 10 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane, or carbon monoxide in excess of 100 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, and corrected to 7 percent oxygen. If you comply with the carbon monoxide standard of 100 parts per million by volume in the by-pass duct, then you must also not discharge or cause combustion gases to be emitted into the atmosphere that contain hydrocarbons in the by-pass duct in excess of 10 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane, at any time during the destruction and removal efficiency (DRE) test runs or their equivalent as provided by § 63.1206(b)(7).

(*ii*) If construction of the kiln commenced after April 19, 1996 at a plant site where a cement kiln (whether burning hazardous waste or not) did not previously exist, hydrocarbons are limited to 50 parts per million by volume, over a 30-day block average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane.

* * * * *

(c)* * * (1) * * * (i) You must operate only under the operating requirements specified in the Documentation of Compliance under § 63.1211(c) or the Notification of Compliance under §§ 63.1207(j) and 63.1210(b), except:

* * * * *

(5) * * *

(i) * * *

(C) Upon prior written approval of the Administrator, an alternative means of control to provide control of combustion system leaks equivalent to maintenance of combustion zone pressure lower than ambient pressure; or

(D) Upon prior written approval of the Administrator, other technique(s) which can be demonstrated to prevent fugitive emissions without use of instantaneous pressure limits; and

* * * * *

(6) *Operator training and certification*. (i) You must establish training programs for all categories of personnel whose activities may reasonably be expected to directly affect emissions of hazardous air pollutants from the source. Such persons include, but are not limited to, chief facility operators, control room operators, continuous monitoring system operators, persons that sample and analyze feedstreams, persons that manage and charge feedstreams to the combustor, persons that operate emission control devices, and ash and waste handlers. Each training program shall be of a technical level commensurate with the person's job duties specified in the training manual. Each commensurate training program shall require an examination to be administered by the instructor at the end of the training course. Passing of this test shall be deemed the ''certification'' for personnel, except that, for control room operators, the training and certification program shall be as specified in paragraphs (c)(6)(iii) through (c)(6)(vi) of this section.

(ii) You must ensure that the source is operated and maintained at all times by persons who are trained and certified to perform these and any other duties that may affect emissions of hazardous air pollutants. A certified control room operator must be on duty at the site at all times the source is in operation.

(iii) Hazardous waste incinerator control room operators must:

(A) Be trained and certified under a site-specific, source-developed and implemented program that meets the requirements of paragraph (c)(6)(v) of this section; or

(B) Be trained under the requirements of, and certified under, the American Society of Mechanical Engineers Standard Number QHO–1–1994 and QHO–1a–1996 Addenda (incorporated by reference—see § 63.14(e)). If you choose to use the ASME program:

(*1*) Control room operators must, prior to the compliance date, achieve provisional certification, and must submit an application to ASME and be scheduled for the full certification exam. Within one year of the compliance date, control room operators must achieve full certification;

(*2*) New operators and operators of new sources must, before assuming their

duties, achieve provisional certification, and must submit an application to ASME, and be scheduled for the full certification exam. Within one year of assuming their duties, these operators must achieve full certification; or

(C) Be trained and certified under a State program.

(iv) Cement kiln and lightweight aggregate kiln control room operators must be trained and certified under:

(A) A site-specific, source-developed and implemented program that meets the requirements of paragraph (c)(6)(v) of this section; or

(B) A State program.

(v) Site-specific, source developed and implemented training programs for control room operators must include the following elements:

(A) Training on the following subjects:

(*1*) Environmental concerns, including types of emissions;

(*2*) Basic combustion principles, including products of combustion;

(*3*) Operation of the specific type of combustor used by the operator, including proper startup, waste firing, and shutdown procedures;

(*4*) Combustion controls and continuous monitoring systems;

(*5*) Operation of air pollution control equipment and factors affecting performance;

(*6*) Inspection and maintenance of the combustor, continuous monitoring systems, and air pollution control devices;

(*7*) Actions to correct malfunctions or conditions that may lead to malfunction;

(*8*) Residue characteristics and handling procedures; and

(*9*) Applicable Federal, state, and local regulations, including Occupational Safety and Health Administration workplace standards; and

(B) An examination designed and administered by the instructor; and

(C) Written material covering the training course topics that may serve as reference material following completion of the course.

(vi) To maintain control room operator qualification under a site-specific, source developed and implemented training program as provided by paragraph (c)(6)(v) of this section, control room operators must complete an annual review or refresher course covering, at a minimum, the following topics:

(A) Update of regulations;

(B) Combustor operation, including startup and shutdown procedures, waste firing, and residue handling;

(C) Inspection and maintenance;

(D) Responses to malfunctions or conditions that may lead to malfunction; and

(E) Operating problems encountered by the operator.

(vii) You must record the operator training and certification program in the operating record.

(7) * * *

(ii) *Bag leak detection system requirements for baghouses at lightweight aggregate kilns and incinerators.* If you own or operate a hazardous waste incinerator or hazardous waste burning lightweight aggregate kiln equipped with a baghouse (fabric filter), you must continuously operate a bag leak detection system that meets the specifications and requirements of paragraph (c)(7)(ii)(A) of this section and you must comply with the corrective measures requirements of paragraph (c)(7)(ii)(B) of this section:

(A) *Bag leak detection system specification and requirements. (1)* The bag leak detection system must be certified by the manufacturer to be capable of continuously detecting and recording particulate matter emissions at concentrations of 1.0 milligrams per actual cubic meter unless you demonstrate, pursuant to procedures in § 63.1209(a)(1), that a higher sensitivity would adequately detect bag leaks;

(*2*) The bag leak detection system shall provide output of relative particulate matter loadings;

(*3*) The bag leak detection system shall be equipped with an alarm system that will sound an audible alarm when an increase in relative particulate loadings is detected over a preset level;

(*4*) The bag leak detection system shall be installed and operated in a manner consistent with available written guidance from the U.S. Environmental Protection Agency or, in the absence of such written guidance, the manufacturer's written specifications and recommendations for installation, operation, and adjustment of the system;

(*5*) The initial adjustment of the system shall, at a minimum, consist of establishing the baseline output by adjusting the sensitivity (range) and the averaging period of the device, and establishing the alarm set points and the alarm delay time;

(*6*) Following initial adjustment, you must not adjust the sensitivity or range, averaging period, alarm set points, or alarm delay time, except as detailed in the operation and maintenance plan required under paragraph (c)(7)(i) of this section. You must not increase the sensitivity by more than 100 percent or decrease the sensitivity by more than 50 percent over a 365 day period unless such adjustment follows a complete baghouse inspection which demonstrates the baghouse is in good operating condition;

(*7*) For negative pressure or induced air baghouses, and positive pressure baghouses that are discharged to the atmosphere through a stack, the bag leak detector shall be installed downstream of the baghouse and upstream of any wet acid gas scrubber; and

(*8*) Where multiple detectors are required, the system's instrumentation and alarm system may be shared among the detectors.

(B) *Bag leak detection system corrective measures requirements.* The operating and maintenance plan required by paragraph (c)(7)(i) of this section must include a corrective measures plan that specifies the procedures you will follow in the case of a bag leak detection system alarm. The corrective measures plan must include, at a minimum, the procedures used to determine and record the time and cause of the alarm as well as the corrective measures taken to correct the control device malfunction or minimize emissions as specified below. Failure to initiate the corrective measures required by this paragraph is failure to ensure compliance with the emission standards in this subpart.

(*1*) You must initiate the procedures used to determine the cause of the alarm within 30 minutes of the time the alarm first sounds; and

(*2*) You must alleviate the cause of the alarm by taking the necessary corrective measure(s) which may include, but are not to be limited to, the following measures:

(*i*) Inspecting the baghouse for air leaks, torn or broken filter elements, or any other malfunction that may cause an increase in emissions;

(*ii*) Sealing off defective bags or filter media;

(*iii*) Replacing defective bags or filter media, or otherwise repairing the control device;

(*iv*) Sealing off a defective baghouse compartment;

(*v*) Cleaning the bag leak detection system probe, or otherwise repairing the bag leak detection system; or

(*vi*) Shutting down the combustor.

7. Section 63.1207 is amended by:

a. Revising paragraph (c)(2)(i).

b. Adding paragraph (c)(2)(iv).

c. Adding paragraph (e)(3).

d. Revising paragraphs (f)(1)(ii)(A), (f)(1)(ii)(B), (f)(1)(ii)(C), (f)(1)(x) introductory text, and (f)(1)(xvii).

e. Adding paragraph (f)(1)(ii)(D).

f. Removing and reserving paragraph (f)(1)(xv).

g. Revising paragraphs (g)(2)(i) and (g)(2)(ii).

h. Adding paragraph (g)(2)(v).

i. Revising paragraphs (h)(1) and (h)(2) introductory text.

j. Revising paragraphs (j)(1)(ii) and (j)(3).

k. Revising paragraphs (m)(4)(i) and (m)(4)(ii).

The revisions and additions read as follows:

§ 63.1207 What are the performance testing requirements?

* * * * *

(c) * * *

(2) * * * (i) You may request that previous emissions test data serve as documentation of conformance with the emission standards of this subpart provided that the previous testing:

(A) Was initiated after 54 months prior to the compliance date, except as provided by paragraphs (c)(2)(iii) or (c)(2)(iv) of this section;

(B) Results in data that meet quality assurance objectives (determined on a site-specific basis) such that the results demonstrate compliance with the applicable standards;

(C) Was in conformance with the requirements of paragraph (g)(1) of this section; and

(D) Was sufficient to establish the applicable operating parameter limits under § 63.1209.

* * * * *

(iv) The data in lieu test age restriction provided in paragraph (c)(2)(i)(A) of this section does not apply to DRE data provided you do not feed hazardous waste at a location in the combustion system other than the normal flame zone.

* * * * *

(e) * * *

(3) *Petitions for time extension if Administrator fails to approve or deny test plans.* You may petition the Administrator under § 63.7(h) to obtain a ''waiver'' of any performance test—initial or periodic performance test; comprehensive or confirmatory test. The ''waiver'' would be implemented as an extension of time to conduct the performance test at a later date.

(i) *Qualifications for the waiver.* (A) You may not petition the Administrator for a waiver under this section if the Administrator has issued a notification of intent to deny your test plan(s) under § 63.7(c)(3)(i)(B);

(B) You must submit a site-specific emissions testing plan and a continuous monitoring system performance evaluation test plan at least one year before a comprehensive performance test is scheduled to begin as required by paragraph (c)(1) of this section, or at least 60 days before a confirmatory performance test is scheduled to begin as required by paragraph (d) of this section. The test plans must include all required documentation, including the substantive content requirements of paragraph (f) of this section and § 63.8(e); and

(C) You must make a good faith effort to accommodate the Administrator's comments on the test plans.

(ii) *Procedures for obtaining a waiver and duration of the waiver:* (A) You must submit to the Administrator a waiver petition or request to renew the petition under § 63.7(h) separately for each source at least 60 days prior to the scheduled date of the performance test;

(B) The Administrator will approve or deny the petition within 30 days of receipt and notify you promptly of the decision;

(C) The Administrator will not approve an individual waiver petition for a duration exceeding 6 months;

(D) The Administrator will include a sunset provision in the waiver ending the waiver within 6 months;

(E) You may submit a revised petition to renew the waiver under § 63.7(h)(3)(iii) at least 60 days prior to the end date of the most recently approved waiver petition;

(F) The Administrator may approve a revised petition for a total waiver period up to 12 months.

(iii) *Content of the waiver.* (A) You must provide documentation to enable the Administrator to determine that the source is meeting the relevant standard(s) on a continuous basis as required by § 63.7(h)(2). For extension requests for the initial comprehensive performance test, you must submit your Documentation of Compliance to assist the Administrator in making this determination.

(B) You must include in the petition information justifying your request for a waiver, such as the technical or economic infeasibility, or the impracticality, of the affected source performing the required test, as required by § 63.7(h)(3)(iii).

(iv) P*ublic notice.* You must notify the public (e.g., distribute public mailing list) of your petition to waive a performance test.

* * * * *

(f) * * *

(1) * * *

(ii) * * *

(A) Except as provided by paragraph (f)(1)(ii)(D) of this section, an identification of such organic hazardous air pollutants that are present in each hazardous waste feedstream. You need not analyze for organic hazardous air pollutants that would reasonably not be expected to be found in the feedstream. You must identify any constituents you exclude from analysis and explain the basis for excluding them. You must conduct the feedstream analysis according to § 63.1208(b)(8);

(B) An approximate quantification of such identified organic hazardous air pollutants in the hazardous waste feedstreams, within the precision produced by analytical procedures of § 63.1208(b)(8); and

(C) A description of blending procedures, if applicable, prior to firing the hazardous waste feedstream, including a detailed analysis of the materials prior to blending, and blending ratios.

(D) The Administrator may approve on a case-by-case basis a hazardous waste feedstream analysis for organic hazardous air pollutants in lieu of the analysis required under paragraph (f)(1)(ii)(A) of this section if the reduced analysis is sufficient to ensure that the POHCs used to demonstrate compliance with the applicable DRE standard of § 63.1203, § 63.1204, or § 63.1205, continue to be representative of the organic hazardous air pollutants in your hazardous waste feedstreams;

* * * * *

(x) If you are requesting to extrapolate metal feedrate limits from comprehensive performance test levels under §§ 63.1209(l)(1)(i) or 63.1209(n)(2)(ii)(A):

* * * * *

(xvii) If you propose to use a surrogate for measuring or monitoring gas flowrate, you must document in the comprehensive performance test plan that the surrogate adequately correlates with gas flowrate, as required by paragraph (m)(7) of this section, and § 63.1209(j)(2), (k)(3), (m)(2)(i), (n)(5)(i), and (o)(2)(i).

* * * * *

(g) * * *

(2) * * *

(i) Carbon monoxide (or hydrocarbon) CEMS emissions levels must be within the range of the average value to the maximum value allowed, except as provided by paragraph (g)(2)(iv) of this section. The average value is defined as the sum of the hourly rolling average values recorded (each minute) over the previous 12 months, divided by the number of rolling averages recorded during that time. The average value must not include calibration data, startup data, shutdown data, malfunction data, and data obtained when not burning hazardous waste;

(ii) Each operating limit (specified in § 63.1209) established to maintain

compliance with the dioxin/furan emission standard must be held within the range of the average value over the previous 12 months and the maximum or minimum, as appropriate, that is allowed, except as provided by paragraph (g)(2)(iv) of this section. The average value is defined as the sum of the rolling average values recorded over the previous 12 months, divided by the number of rolling averages recorded during that time. The average value must not include calibration data, startup data, shutdown data, malfunction data, and data obtained when not burning hazardous waste;

* * * * *

(v) The Administrator may approve an alternative range to that required by paragraphs (g)(2)(i) and (ii) of this section if you document in the confirmatory performance test plan that it may be problematic to maintain the required range during the test. In addition, when making the finding of compliance, the Administrator may consider test conditions outside of the range specified in the test plan based on a finding that you could not reasonably maintain the range specified in the test plan and considering factors including whether the time duration and level of the parameter when operations were out of the specified range were such that operations during the confirmatory test are determined to be reasonably representative of normal operations. In addition, the Administrator will consider the proximity of the emission test results to the standard.

* * * * *

(h) * * * (1) Current operating parameter limits established under § 63.1209 are waived during subsequent comprehensive performance testing.

(2) Current operating parameter limits are also waived during pretesting prior to comprehensive performance testing for an aggregate time not to exceed 720 hours of operation (renewable at the discretion of the Administrator) under an approved test plan or if the source records the results of the pretesting. Pretesting means:

* * * * *

(j) * * *

(1) * * *

(ii) Upon postmark of the Notification of Compliance, you must comply with all operating requirements specified in the Notification of Compliance in lieu of the limits specified in the Documentation of Compliance required under § 63.1211(c).

* * * * *

(3) See §§ 63.7(g), 63.9(h), and 63.1210(b) for additional requirements pertaining to the Notification of Compliance (*e.g.,* you must include results of performance tests in the Notification of Compliance).

* * * * *

(m) * * *

(4) * * *

(i) Identify in the Notification of Compliance a minimum gas flowrate limit and a maximum feedrate limit of mercury, semivolatile metals, low volatile metals, and/or total chlorine and chloride from all feedstreams that ensures the MTEC as calculated in paragraph (m)(2)(iii) of this section is below the applicable emission standard; and

(ii) Interlock the minimum gas flowrate limit and maximum feedrate limit of paragraph (m)(4)(i) of this section to the AWFCO system to stop hazardous waste burning when the gas flowrate or mercury, semivolatile metals, low volatile metals, and/or total chlorine and chloride feedrate exceeds the limits of paragraph (m)(4)(i) of this section.

* * * * *

8. Section 63.1209 is amended by:

a. Revising paragraph (a)(1)(ii)(A).

b. Revising paragraphs (b)(2)(i) and (b)(5)(iii)(A).

c. Revising paragraph (f)(1).

d. Revising paragraphs (g)(1)(iii)(B)(*1*), (g)(1)(iii)(B)(*2*), (g)(1)(iii)(B)(*3*), (g)(1)(iii)(C)(*1*), and (g)(1)(iii)(C)(*2*).

e. Revising paragraphs (k)(5) and (k)(8)(ii).

f. Revising paragraphs (l)(1) introductory text, (l)(3), and (l)(4).

g. Revising paragraph (m)(3).

h. Revising paragraph (n)(4).

i. Revising paragraph (o)(1).

j. Revising paragraph (q).

The revisions read as follows:

§ 63.1209 What are the monitoring requirements?

(a) * * *

(1) * * *

(ii) * * *

(A) You must maintain and operate each COMS in accordance with the requirements of § 63.8(c) except for the requirements under § 63.8(c)(3). The requirements of § 63.1211(c) shall be complied with instead of § 63.8(c)(3); and

* * * * *

(b) * * *

(2) * * *

(i) *Calibration of thermocouples and pyrometers.* The calibration of thermocouples must be verified at a frequency and in a manner consistent with manufacturer specifications, but no less frequent than once per year. You must operate and maintain optical pyrometers in accordance with manufacturer specifications unless otherwise approved by the Administrator. You must calibrate optical pyrometers in accordance with the frequency and procedures recommended by the manufacturer, but no less frequent than once per year, unless otherwise approved by the Administrator. And,

* * * * *

(5) * * *

(iii) * * * (A) Except as provided by paragraph (b)(5)(iii)(B) of this section, you must continue monitoring operating parameter limits with a CMS when the hazardous waste feed is cutoff if the source is operating. You must not resume feeding hazardous waste if an operating parameter exceeds its limit.

* * * * *

(f) * * *

(1) *Section 63.8(c)(3).* The requirements of § 63.1211(c), that requires CMSs to be installed, calibrated, and operational on the compliance date, shall be complied with instead of section 63.8(c)(3);

* * * * *

(g) * * *

(1) * * *

(iii) * * *

(B) * * *

(*1*) Data or information justifying your request for an alternative monitoring requirement (or for a waiver of an operating parameter limit), such as the technical or economic infeasibility or the impracticality of using the required approach;

(*2*) A description of the proposed alternative monitoring requirement, including the operating parameter to be monitored, the monitoring approach/technique (*e.g.,* type of detector, monitoring location), the averaging period for the limit, and how the limit is to be calculated; and

(*3*) Data or information documenting that the alternative monitoring requirement would provide equivalent or better assurance of compliance with the relevant emission standard, or that it is the monitoring requirement that best assures compliance with the standard and that is technically and economically practicable.

(C) * * *

(*1*) Notice of the information and findings on which the intended disapproval is based; and

(*2*) Notice of opportunity for you to present additional information to the Administrator before final action on the request. At the time the Administrator notifies you of intention to disapprove the request, the Administrator will specify how much time you will have after being notified of the intended

disapproval to submit the additional information.

* * * * *

(k) * * *

(5) *Particulate matter operating limit.* If your combustor is equipped with an activated carbon injection system, you must establish operating parameter limits on the particulate matter control device as specified by paragraph (m)(1) of this section;

* * * * *

(8) * * *

(ii) *Maximum time in-use.* You must replace a catalytic oxidizer with a new catalytic oxidizer when it has reached the maximum service time specified by the manufacturer.

* * * * *

(l) * * *

(1) *Feedrate of total mercury.* You must establish a 12-hour rolling average limit for the total feedrate of mercury in all feedstreams as the average of the test run averages, unless mercury feedrate limits are extrapolated from performance test feedrate levels under the following provisions.

* * * * *

(3) *Activated carbon injection.* If your combustor is equipped with an activated carbon injection system, you must establish operating parameter limits prescribed by paragraphs (k)(5) and (k)(6) of this section.

(4) *Activated carbon bed.* If your combustor is equipped with an activated carbon bed system, you must comply with the requirements of (k)(7) of this section to assure compliance with the mercury emission standard.

(m) * * *

(3) *Maximum ash feedrate.* Owners and operators of hazardous waste incinerators must establish a maximum ash feedrate limit as the average of the test run averages.

(n) * * *

(4) *Maximum total chlorine and chloride feedrate.* You must establish a 12-hour rolling average limit for the feedrate of total chlorine and chloride in all feedstreams as the average of the test run averages.

* * * * *

(o) * * *

(1) *Feedrate of total chlorine and chloride.* You must establish a 12-hour rolling average limit for the total feedrate of chlorine (organic and inorganic) in all feedstreams as the average of the test run averages.

* * * * *

(q) *Operating under different modes of operation.* If you operate under different modes of operation, you must establish operating parameter limits for each mode. You must document in the operating record when you change a mode of operation and begin complying with the operating limits for an alternative mode of operation.

(1) *Operating under otherwise applicable standards after the hazardous waste residence time has transpired.* As provided by § 63.1206(b)(1)(ii), you may operate under otherwise applicable requirements promulgated under sections 112 and 129 of the Clean Air Act in lieu of the substantive requirements of this subpart.

(i) The otherwise applicable requirements promulgated under sections 112 and 129 of the Clean Air Act are applicable requirements under this subpart.

(ii) You must specify (e.g., by reference) the otherwise applicable requirements as a mode of operation in your Documentation of Compliance under § 63.1211(c), your Notification of Compliance under § 63.1207(j), and your title V permit application. These requirements include the otherwise applicable requirements governing emission standards, monitoring and compliance, and notification, reporting, and recordkeeping.

(2) *Calculating rolling averages under different modes of operation.* When you transition to a different mode of operation, you must calculate rolling averages as follows:

(i) *Retrieval approach.* Calculate rolling averages anew using the continuous monitoring system values previously recorded for that mode of operation (i.e., you ignore continuous monitoring system values subsequently recorded under other modes of operation when you transition back to a mode of operation); or

(ii) *Start anew.* Calculate rolling averages anew without considering previous recordings.

(A) Rolling averages must be calculated as the average of the available one-minute values for the parameter until enough one-minute values are available to calculate hourly or 12-hour rolling averages, whichever is applicable to the parameter.

(B) You may not transition to a new mode of operation using this approach if the most recent operation in that mode resulted in an exceedance of an applicable emission standard measured with a CEMS or operating parameter limit prior to the hazardous waste residence time expiring; or

(iii) *Seamless transition.* Continue calculating rolling averages using data from the previous operating mode provided that both the operating limit and the averaging period for the parameter are the same for both modes of operation.

9. Section 63.1210 is amended by revising paragraph (a) to read as follows:

§ 63.1210 What are the notification requirements?

(a) *Summary of requirements.* (1) You must submit the following notifications to the Administrator:

Reference	Notification
63.9(b)	Initial notifications that you are subject to Subpart EEE of this Part.
63.9(d)	Notification that you are subject to special compliance requirements.
63.9(j)	Notification and documentation of any change in information already provided under § 63.9.
63.1206(b)(5)(i)	Notification of changes in design, operation, or maintenance.
63.1207(e), 63.9(e), 63.9(g)(1) and (3)	Notification of performance test and continuous monitoring system evaluation, including the performance test plan and CMS performance evaluation plan.[1]
63.1210(b), 63.1207(j), 63.1207(k), 63.1207(l), 63.9(h), 63.10(d)(2), 63.10(e)(2).	Notification of compliance, including results of performance tests and continuous monitoring system performance evaluations.

[1] You may also be required on a case-by-case basis to submit a feedstream analysis plan under § 63.1209(c)(3).

(2) You must submit the following notifications to the Administrator if you request or elect to comply with alternative requirements:

Reference	Notification, request, petition, or application
63.9(i)	You may request an adjustment to time periods or postmark deadlines for submittal and review of required information.

Reference	Notification, request, petition, or application
63.10(e)(3)(ii)	You may request to reduce the frequency of excess emissions and CMS performance reports.
63.10(f)	You may request to waive recordkeeping or reporting requirements.
63.1204(d)(2)(iii)	Notification that you elect to comply with the emission averaging requirements for cement kilns with in-line raw mills.
63.1204(e)(2)(iii)	Notification that you elect to comply with the emission averaging requirements for preheater or preheater/precalciner kilns with dual stacks.
63.1206(b)(4), 63.1213, 63.6(i), 63.9(c)	You may request an extension of the compliance date for up to one year.
63.1206(b)(5)(i)(C)	You may request to burn hazardous waste for more than 720 hours and for purposes other than testing or pretesting after making a change in the design or operation that could affect compliance with emission standards and prior to submitting a revised Notification of Compliance.
63.1206(b)(8)(iii)(B)	If you elect to conduct particulate matter CEMS correlation testing and wish to have federal particulate matter and opacity standards and associated operating limits waived during the testing, you must notify the Administrator by submitting the correlation test plan for review and approval.
63.1206(b)(8)(v)	You may request approval to have the particulate matter and opacity standards and associated operating limits and conditions waived for more than 96 hours for a correlation test.
63.1206(b)(9)	Owners and operators of lightweight aggregate kilns may request approval of alternative emission standards for mercury, semivolatile metal, low volatile metal, and hydrochloric acid/chlorine gas under certain conditions.
63.1206(b)(10)	Owners and operators of cement kilns may request approval of alternative emission standards for mercury, semivolatile metal, low volatile metal, and hydrochloric acid/chlorine gas under certain conditions.
63.1206(b)(14)	Owners and operators of incinerators may elect to comply with an alternative to the particulate matter standard.
63.1206(b)(15)	Owners and operators of cement and lightweight aggregate kilns may request to comply with the alternative to the interim standards for mercury.
63.1206(c)(2)(ii)(C)	You may request to make changes to the startup, shutdown, and malfunction plan.
63.1206(c)(5)(i)(C)	You may request an alternative means of control to provide control of combustion system leaks.
63.1206(c)(5)(i)(D)	You may request other techniques to prevent fugitive emissions without use of instantaneous pressure limits.
63.1207(c)(2)	You may request to base initial compliance on data in lieu of a comprehensive performance test.
63.1207(d)(3)	You may request more than 60 days to complete a performance test if additional time is needed for reasons beyond your control.
63.1207(e)(3), 63.7(h)	You may request a time extension if the Administrator fails to approve or deny your test plan.
63.1207(h)(2)	You may request to waive current operating parameter limits during pretesting for more than 720 hours.
63.1207(f)(1)(ii)(D)	You may request a reduced hazardous waste feedstream analysis for organic hazardous air pollutants if the reduced analysis continues to be representative of organic hazardous air pollutants in your hazardous waste feedstreams.
63.1207(g)(2)(v)	You may request to operate under a wider operating range for a parameter during confirmatory performance testing.
63.1207(i)	You may request up to a one-year time extension for conducting a performance test (other than the initial comprehensive performance test) to consolidate testing with other state or federally-required testing.
63.1207(j)(4)	You may request more than 90 days to submit a Notification of Compliance after completing a performance test if additional time is needed for reasons beyond your control.
63.1207(l)(3)	After failure of a performance test, you may request to burn hazardous waste for more than 720 hours and for purposes other than testing or pretesting.
63.1209(a)(5), 63.8(f)	You may request: (A.) Approval of alternative monitoring methods for compliance with standards that are monitored with a CEMS; and (B.) approval to use a CEMS in lieu of operating parameter limits.
63.1209(g)(1)	You may request approval of: (A.) Alternative monitoring methods, except for standards that you must monitor with a continuous emission monitoring system (CEMS) and except for requests to use a CEMS in lieu of operating parameter limits; or (B.) a waiver of an operating parameter limit.
63.1209(l)(1)	You may request to extrapolate mercury feedrate limits.
63.1209(n)(2)(ii)	You may request to extrapolate semivolatile and low volatile metal feedrate limits.
63.1211(d)	You may request to use data compression techniques to record data on a less frequent basis than required by § 63.1209.

* * * * * * *

10. Section 63.1211 is amended by revising paragraphs (a) and (b) to read as follows:

§ 63.1211 What are the recordkeeping and reporting requirements?

(a) *Summary of reporting requirements.* You must submit the following reports to the Administrator:

Reference	Report
63.10(d)(4)	Compliance progress reports, if required as a condition of an extension of the compliance date granted under § 63.6(i).
63.10(d)(5)(i)	Periodic startup, shutdown, and malfunction reports.
63.10(d)(5)(ii)	Immediate startup, shutdown, and malfunction reports.
63.10(e)(3)	Excessive emissions and continuous monitoring system performance report and summary report.
63.1206(c)(2)(ii)(B)	Startup, shutdown, and malfunction plan.
63.1206(c)(3)(vi)	Excessive exceedances reports.
63.1206(c)(4)(iv)	Emergency safety vent opening reports.

(b) *Summary of recordkeeping requirements.* You must retain the following in the operating record:

Reference	Document, data, or information
63.1200, 63.10(b) and (c)	General. Information required to document and maintain compliance with the regulations of Subpart EEE, including data recorded by continuous monitoring systems (CMS), and copies of all notifications, reports, plans, and other documents submitted to the Administrator.
63.1204(d)(1)(ii)	Documentation of mode of operation changes for cement kilns with in-line raw mills.
63.1204(d)(2)(ii)	Documentation of compliance with the emission averaging requirements for cement kilns with in-line raw mills.
63.1204(e)(2)(ii)	Documentation of compliance with the emission averaging requirements for preheater or preheater/precalciner kilns with dual stacks.
63.1206(b)(1)(ii)	If you elect to comply with all applicable requirements and standards promulgated under authority of the Clean Air Act, including Sections 112 and 129, in lieu of the requirements of Subpart EEE when not burning hazardous waste, you must document in the operating record that you are in compliance with those requirements.
63.1206(b)(5)(ii)	Documentation that a change will not adversely affect compliance with the emission standards or operating requirements.
63.1206(b)(11)	Calculation of hazardous waste residence time.
63.1206(c)(2)	Startup, shutdown, and malfunction plan.
63.1206(c)(2)(v)(A)	Documentation of your investigation and evaluation of excessive exceedances during malfunctions.
63.1206(c)(3)(v)	Corrective measures for any automatic waste feed cutoff that results in an exceedance of an emission standard or operating parameter limit.
63.1206(c)(3)(vii)	Documentation and results of the automatic waste feed cutoff operability testing.
63.1206(c)(4)(ii)	Emergency safety vent operating plan.
63.1206(c)(4)(iii)	Corrective measures for any emergency safety vent opening.
63.1206(c)(5)(ii)	Method used for control of combustion system leaks.
63.1206(c)(6)	Operator training and certification program.
63.1206(c)(7)(i)(D)	Operation and maintenance plan.
63.1209(c)(2)	Feedstream analysis plan.
63.1209(k)(6)(iii), 63.1209(k)(7)(ii), 63.1209(k)(9)(ii), 63.1209(o)(4)(iii).	Documentation that a substitute activated carbon, dioxin/furan formation reaction inhibitor, or dry scrubber sorbent will provide the same level of control as the original material.
63.1209(k)(7)(i)(C)	Results of carbon bed performance monitoring.
63.1209(q)	Documentation of changes in modes of operation.
63.1211(c)	Documentation of compliance.

* * * * *

11. Section 63.1213 is amended by revising the first sentence of paragraph (a) to read as follows:

§ 63.1213 How can the compliance date be extended to install pollution prevention or waste minimization controls?

(a) *Applicability.* You may request from the Administrator or State with an approved title V program an extension of the compliance date of up to one year. * * *

* * * * *

12. Table 1 to Subpart EEE is amended to read as follows:

TABLE 1 TO SUBPART EEE.—GENERAL PROVISIONS APPLICABLE TO SUBPART EEE

Reference	Applies to subpart EEE	Explanation
63.1	Yes.	
63.2	Yes.	
63.3	Yes.	
63.4	Yes..	
63.5	Yes.	

TABLE 1 TO SUBPART EEE.—GENERAL PROVISIONS APPLICABLE TO SUBPART EEE—Continued

Reference	Applies to subpart EEE	Explanation
63.6(a), (b), (c), (d), and (e).	Yes.	
63.6(f)	Yes	Except that the performance test requirements of Sec. 63.1207 apply instead of § 63.6(f)(2)(iii)(B).
63.6(g) and (h)	Yes.	
63.6(i)	Yes	Section 63.1213 specifies that the compliance date may also be extended for inability to install necessary emission control equipment by the compliance date because of implementation of pollution prevention or waste minimization controls.
63.6(j)	Yes.	
63.7(a)	Yes	Except § 63.1207(e)(3) allows you to petition the Administrator under § 63.7(h) to provide an extension of time to conduct a performance test.
63.7(b)	Yes	Except § 63.1207(e) requires you to submit the site-specific test plan for approval at least one year before the comprehensive performance test is scheduled to begin.
63.7(c)	Yes	Except § 63.1207(e) requires you to submit the site-specific test plan (including the quality assurance provisions under § 63.7(c)) for approval at least one year before the comprehensive performance test is scheduled to begin.
63.7(d)	Yes.	
63.7(e)	Yes	Except § 63.1207 prescribes operations during performance testing and § 63.1209 specifies operating limits that will be established during performance testing (such that testing is likely to be representative of the extreme range of normal performance).
63.7(f)	Yes.	
63.7(g)	Yes	Except § 63.1207(j) requiring that you submit the results of the performance test (and the notification of compliance) within 90 days of completing the test, unless the Administrator grants a time extension, applies instead of § 63.7(g)(1).
63.7(h)	Yes	Except § 63.1207(c)(2) allows data in lieu of the initial comprehensive performance test, and § 63.1207(m) provides a waiver of certain performance tests. You must submit requests for these waivers with the site-specific test plan.
63.8(a) and (b)	Yes.	
63.8(c)	Yes	Except: (1) § 63.1211(c) that requires you to install, calibrate, and operate CMS by the compliance date applies instead of § 63.8(c)(3); and (2) the performance specifications for CO, HC, and O2 CEMS in subpart B, of this chapter requiring that the detectors measure the sample concentration at least once every 15 seconds for calculating an average emission level once every 60 seconds apply instead of § 63.8(c)(4)(ii).
63.8(d)	Yes.	
63.8(e)	Yes	Except § 63.1207(e) requiring you to submit the site-specific comprehensive performance test plan and the CMS performance evaluation test plan for approval at least one year prior to the planned test date applies instead of §§ 63.8(e)(2) and (3)(iii).
63.8(f) and (g)	Yes.	
63.9(a)	Yes.	
63.9(b)	Yes	*Note:* Section 63.9(b)(1)(ii) pertains to notification requirements for area sources that become a major source, and § 63.9(b)(2)(v) requires a major source determination. Although area sources are subject to all provisions of this subpart (Subpart EEE), these sections nonetheless apply because the major source determination may affect the applicability of part 63 standards or title V permit requirements to other sources (i.e., other than a hazardous waste combustor) of hazardous air pollutants at the facility.
63.9(c) and (d)	Yes.	
63.9(e)	Yes	Except § 63.1207(e) which requires you to submit the comprehensive performance test plan for approval one year prior to the planned performance test date applies instead of § 63.9(e).
63.9(f)	Yes	Section 63.9(f) applies if you are allowed under § 63.1209(a)(1)(v) to use visible determination of opacity for compliance in lieu of a COMS.
63.9(g)	Yes	Except § 63.9(g)(2) pertaining to COMS does not apply.
63.9(h)	Yes	Except § 63.1207(j) requiring you to submit the notification of compliance within 90 days of completing a performance test unless the Administrator grants a time extension applies instead of § 63.9(h)(2)(iii). Note: Even though area sources are subject to this subpart, the major source determination required by § 63.9(h)(2)(i)(E) is applicable to hazardous waste combustors for the reasons discussed above.
63.9(i) and (j)	Yes.	
63.10	Yes	Except reports of performance test results required under § 63.10(d)(2) may be submitted up to 90 days after completion of the test.
63.11	No.	
63.12–63.15	Yes.	

PART 266—STANDARDS FOR THE MANAGEMENT OF SPECIFIC HAZARDOUS WASTES AND SPECIFIC TYPES OF HAZARDOUS WASTE MANAGEMENT FACILITIES

1. The authority citation for part 266 continues to read as follows:

Authority: Secs. 1006, 2002(a), 3004, 6905, 6906, 6912, 6922, 6924, 6925, and 6937.

2. Section 266.100 is amended by:

a. Revising the first sentence of paragraph (a).

b. Revising the first sentence of paragraph (b)(1).

c. Revising paragraphs (d)(1)(i)(B), (d)(2)(i), (d)(2)(ii), (d)(3) introductory text, (d)(3)(i) introductory text, and (d)(3)(i)(D).

The revisions read as follows:

§ 266.100 Applicability.

(a) The regulations of this subpart apply to hazardous waste burned or processed in a boiler or industrial furnace (as defined in § 260.10 of this chapter) irrespective of the purpose of burning or processing, except as provided by paragraphs (b), (c), (d), (g), and (h) of this section.* * *

* * * * *

(b) * * * (1) Except as provided by paragraph (b)(2) of this section, the standards of this part no longer apply when an affected source demonstrates compliance with the maximum achievable control technology (MACT) requirements of part 63, subpart EEE, of this chapter by conducting a comprehensive performance test and submitting to the Administrator a Notification of Compliance under §§ 63.1207(j) and 63.1210(b) of this chapter documenting compliance with the requirements of part 63, subpart EEE, of this chapter.* * *

* * * * *

(d) * * *

(1) * * *

(i) * * *

(B) The hazardous waste is burned solely for metal recovery consistent with the provisions of paragraph (d)(2) of this section;

* * * * *

(2) * * *

(i) The hazardous waste has a total concentration of organic compounds listed in part 261, appendix VIII, of this chapter exceeding 500 ppm by weight, as-fired, and so is considered to be burned for destruction. The concentration of organic compounds in a waste as-generated may be reduced to the 500 ppm limit by *bona fide* treatment that removes or destroys organic constituents. Blending for dilution to meet the 500 ppm limit is prohibited and documentation that the waste has not been impermissibly diluted must be retained in the records required by paragraph (d)(1)(iii) of this section; or

(ii) The hazardous waste has a heating value of 5,000 Btu/lb or more, as-fired, and so is considered to be burned as fuel. The heating value of a waste as-generated may be reduced to below the 5,000 Btu/lb limit by *bona fide* treatment that removes or destroys organic constituents. Blending for dilution to meet the 5,000 Btu/lb limit is prohibited and documentation that the waste has not been impermissibly diluted must be retained in the records required by paragraph (d)(1)(iii) of this section.

(3) To be exempt from §§ 266.102 through 266.111, an owner or operator of a lead or nickel-chromium or mercury recovery furnace (except for owners or operators of lead recovery furnaces subject to regulation under the Secondary Lead Smelting NESHAP) or a metal recovery furnace that burns baghouse bags used to capture metallic dusts emitted by steel manufacturing, must provide a one-time written notice to the Director identifying each hazardous waste burned and specifying whether the owner or operator claims an exemption for each waste under this paragraph or paragraph (d)(1) of this section. The owners or operator must comply with the requirements of paragraph (d)(1) of this section for those wastes claimed to be exempt under that paragraph and must comply with the requirements below for those wastes claimed to be exempt under this paragraph (d)(3).

(i) The hazardous wastes listed in appendices XI, XII, and XIII, part 266, and baghouse bags used to capture metallic dusts emitted by steel manufacturing are exempt from the requirements of paragraph (d)(1) of this section, provided that:

* * * * *

(D) The owner or operator certifies in the one-time notice that hazardous waste is burned under the provisions of paragraph (d)(3) of this section and that sampling and analysis will be conducted or other information will be obtained as necessary to ensure continued compliance with these requirements. Sampling and analysis shall be conducted according to paragraph (d)(1)(ii) of this section and records to document compliance with paragraph (d)(3) of this section shall be kept for at least three years.

* * * * *

PART 270—EPA ADMINISTERED PERMIT PROGRAMS: THE HAZARDOUS WASTE PERMIT PROGRAM

1. The authority citation for part 270 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912, 6924, 6925, 6927, 6939, and 6974.

2. Section 270.42 is amended by revising paragraph (j)(1) to read as follows:

§ 270.42 Permit modifications at the request of the permittee.

* * * * *

(j) * * *

(1) Facility owners or operators must have complied with the Notification of Intent to Comply (NIC) requirements of 40 CFR 63.1210 that were in effect prior to October 11, 2000, (See 40 CFR Part 63 Revised as of July 1, 2000) in order to request a permit modification under this section.

* * * * *

[FR Doc. 02–3373 Filed 2–13–02; 8:45 am]

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Federal Register

Thursday,
February 14, 2002

Part II

Environmental Protection Agency

40 CFR Parts 63, 266, and 270

NESHAP: Standards for Hazardous Air Pollutants for Hazardous Waste Combustors; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63, 266, and 270

[FRL–7143–4]

RIN 2050–AE79

NESHAP: Standards for Hazardous Air Pollutants for Hazardous Waste Combustors (Final Amendments Rule)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA established standards for hazardous waste-burning cement kilns, lightweight aggregate kilns, and incinerators on September 30, 1999 (NESHAP: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors) pursuant to section 112(d) of the Clean Air Act (CAA). This rule included not only the standards themselves, but a battery of provisions setting out the means by which the standards would be implemented. Following promulgation of this final rule, the regulated community, through informal comments, raised numerous issues on specific requirements of the rule relating to provisions implementing the emission standards. In response to these concerns, we proposed and requested comment on changes to discrete provisions in the final rule on July 3, 2001. Today's action finalizes some of the amendments proposed in that notice. These amendments do not change the numerical emission standards, but rather focus on improvements to the implementation of the emission standards, primarily in the areas of compliance, testing and monitoring. A related final rule establishing interim emission standards was published in the **Federal Register** on February 13, 2002.

EFFECTIVE DATE: This rule is effective on February 14, 2002. The incorporation by reference of a publication listed in this rule is approved by the Director of the Federal Register as of February 14, 2002.

ADDRESSES: You may view the docket to this rulemaking in the RCRA Information Center (RIC), located at Crystal Gateway I, First Floor, 1235 Jefferson Davis Highway, Arlington, VA. The docket number is F–2002–RC6F–FFFFF. The RIC is open from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. To review docket materials, we recommend that you make an appointment by calling (703) 603–9230. You may copy a maximum of 100 pages from any regulatory docket at no charge. Additional copies cost $0.15/page.

FOR FURTHER INFORMATION CONTACT: For general information, call the RCRA Call Center at 1–800–424–9346 or TDD 1–800–553–7672 (hearing impaired). Callers within the Washington Metropolitan Area must dial 703–412–9810 or TDD 703–412–3323 (hearing impaired). The RCRA Call Center is open Monday–Friday, 9 am to 4 pm, Eastern Standard Time. For more information, contact Frank Behan at 703–308–8476, *behan.frank@epa.gov,* or Michael Galbraith at 703–605–0567, *galbraith.michael@epa.gov,* or write to them at the Office of Solid Waste, 5302W, U.S. EPA, Ariel Rios Building, 1200 Pennsylvania Avenue, NW, Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

Acronyms Used in the Rule

APCD—Air pollution control device
ASME—American Society of Mechanical Engineers
CAA—Clean Air Act
CEMS—Continuous emissions monitors/monitoring system
COMS—Continuous opacity monitoring system
CFR—Code of Federal Regulations
DOC—Documentation of Compliance
DRE—Destruction and removal efficiency
dscf—Dry standard cubic feet
dscm—Dry standard cubic meter
EPA/USEPA—United States Environmental Protection Agency
gr—Grains
HAP—Hazardous air pollutant
HWC—Hazardous waste combustor
MACT—Maximum Achievable Control Technology
NESHAP—National Emission Standards for HAPs
ng—Nanograms
NIC—Notice of Intent to Comply
NOC—Notification of compliance
OPL—Operating parameter limit
PM—Particulate matter
POHC—Principal organic hazardous constituent
ppmv—Parts per million by volume
psig—Pounds per square inch gage
RCRA—Resource Conservation and Recovery Act
TEQ—Toxicity equivalence

Official Record. The official record is the paper record maintained at the address in **ADDRESSES** above.

Supporting Materials Availability on the Internet. Supporting materials are available on the Internet. To access the information electronically from the World Wide Web (WWW), type website *http://www.epa.gov/epaoswer/hazwaste/combust.*

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Part One—What Events Led up to This Rule?

I. What Is the Background of This Rule?

A. What Is the Phase I Rule?

Today's notice finalizes specific changes to the NESHAP: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors (Phase I) rule, published September 30, 1999 (64 FR 52828). In the Phase I final rule, we adopted National Emission Standards for Hazardous Air Pollutants to control emissions of hazardous air pollutants (HAPs) from burning hazardous waste in incinerators, cement kilns, and lightweight aggregate kilns pursuant to section 112(d) of the Clean Air Act (CAA), which provisions require that the emission standards reflect the performance of best available control technology. *Cement Kiln Recycling Coalition* v. *EPA,* 255 F. 3d 855, 857 (D.C. Cir. 2001). This level of control is usually referred to as MACT, maximum available control technology. *Id.* at 859. These standards apply to the three major categories of hazardous waste burners—incinerators, cement kilns, and lightweight aggregate kilns. For purposes of today's rule, we refer to these three categories collectively as hazardous waste combustors (HWC).

More information on the Phase I HWC MACT rule is available electronically from the World Wide Web at *www.epa.gov/hwcmact.*

B. How Did the Court's Opinion To Vacate the Rule and Petitioners Joint Motion To Stay the Mandate Affect Phase I and Today's Rule?

A number of parties, representing interests of both industrial sources and of the environmental community, sought judicial review of the emission standards and certain related provisions. Petitions for review have also been filed challenging certain of the implementation provisions of the rule, but these petitions have been severed from the litigation dealing with the emission standards, and all litigation on these challenges has been stayed by consent of the parties.

As described in the ''interim standards'' final rule in yesterday's **Federal Register**, the D.C. Circuit, in the case challenging emission standards, found that EPA had failed to explain adequately how its methodology for calculating so-called MACT floors satisfied the requirements of section 112(d)(3). *Cement Kiln Recycling Coalition,* 255 F. 3d 855 (D.C. Cir. 2001).

On October 19, 2001, we, together with all other petitioners that challenged the hazardous waste combustor emission standards, filed a joint motion asking the Court to stay the issuance of its mandate for four months to allow us time to develop interim standards. Although neither the opinion, nor the litigation, deals with the implementation provisions at issue in this rulemaking,[1] these issues became a part of post-July 24 discussions between EPA and the petitioners. As part of the joint agreement and joint motion to the court which resulted from those discussions, we agreed to promulgate by February 14, 2002 several of the compliance and implementation amendments to the rule which we proposed on July 3, 2001 (66 FR 35126). Further information on this process is found in the ''interim standards'' final rule in yesterday's **Federal Register**, and the joint motion can be viewed and/or downloaded from EPA's Hazardous Waste Combustion website *http://www.epa.gov/epaoswer/hazwaste/combust/preamble.htm.*

II. Which Proposed Amendments Are Included in This Rule?

After promulgation of the Phase I rule, commenters (primarily the regulated community) raised numerous potential issues through informal comments, during EPA-conducted implementation workshops (which are open to the general public), and during litigation settlement discussions. After considering the issues raised, we proposed 33 amendments to the Phase I rule on July 3, 2001 (66 FR 35126, 35087, and 35124). Nine of these proposed amendments were promulgated in a Direct Final rule,[2] and 14 are being finalized today. Ten amendments will be considered as we proceed with a rulemaking on the final replacement standards scheduled to be promulgated by June 14, 2005.

In a separate notice published in the **Federal Register** on July 3, 2001, we took direct final action on certain amendments to the Sept. 1999 Phase I rule (66 FR 35087). We published the direct final rule without prior proposal because we viewed those amendments as being noncontroversial. We stated that we would withdraw any amendments from the direct final rulemaking that received adverse comments and instead, would seek comment on those amendments through the ''parallel'' proposal that was published on July 3, 2001 (66 FR 35124).

The following tables include information on all the amendments from the July 3, 2001 proposals.

[1] As noted above, virtually all issues involving implementation provisions were severed and assigned separate case numbers, and so were not before the panel which decided *Cement Kiln Recycling Coalition.*

[2] Thirteen amendments were promulgated on July 3, 2001 in a direct final rule contingent upon the Agency not receiving adverse comment on the amendments. See 66 FR 35087. The Agency received adverse comment on four amendments, and issued a partial withdrawal of the direct final rule on October 15, 2001 (66 FR 52361) that withdrew promulgation of those four amendments.

COMBUSTION MACT AMENDMENTS: DIRECT FINAL RULE

No.	Title of amendment	Approach to address amendment
I	Hazardous Waste Residence Time	No adverse comments received. The amendment became effective on Oct. 16, 2001.
II	Deletion of One-time Notification of Compliance with Alternative Clean Air Act Standards.	No adverse comments received. The amendment became effective on Oct. 16, 2001.
III	Use of DRE Data in Lieu of Testing	Adverse comments were received, thus the amendment was proposed in the ''parallel'' proposal, and is being promulgated in this rule.
IV	Time Extension for Waiving PM and Opacity Standards to Correlate PM CEMs.	No adverse comments received.The amendment became effective on Oct. 16, 2001.
V	Alternative Hydrocarbon Monitoring Location for Short Cement Kilns Burning Hazardous Waste at Locations Other Than the ''Hot'' End of the Kiln.	Adverse comments were received, thus the amendment was proposed in the ''parallel'' proposal, and is being promulgated in this rule.
VI	Alternative to the Particulate Matter Standard for Incinerators Feeding Low Levels of Metals.	No adverse comments received. The amendment became effective on Oct. 16, 2001.
VII	Deletion of Baghouse Inspection Requirements	Adverse comments were received, thus the amendment was proposed in the ''parallel'' proposal, and is being promulgated in this rule.
VIII	Feedstream Analysis for Organic HAPs	Adverse comments were received, thus the amendment was proposed in the ''parallel'' proposal, and is being promulgated in this rule.
IX	Revisions to the Metals Feedrate Extrapolation Procedures	No adverse comments received. The amendment became effective on Oct. 16, 2001.
X	Feedrate Limits for Undetectable Constituents	No adverse comments received. The amendment became effective on Oct. 16, 2001.
XI	Revisions to Assist Early Compliance	No adverse comments received. The amendment became effective on Oct. 16, 2001.
XII	Accuracy Requirements for Weight Measurement Devices	No adverse comments received. The amendment became effective on Oct. 16, 2001.
XIII	Deletion of Requirement for Establishing a Scrubber Liquid Minimum pH Operator Parameter Limit for Mercury Control for Wet Scrubbers.	No adverse comments received. The amendment became effective on Oct. 16, 2001.

COMBUSTION MACT AMENDMENTS

Proposed Rule

No.	Title of amendment	Approach to address amendment
I	Definition of Research, Development, and Demonstration Sources.	The amendment will be addressed in a future MACT rule.
II	Identification of an Organics Residence Time That Independent From and Shorter Than the Hazardous Waste Residence Time.	The amendment is will be addressed in a future MACT rule.
III	Controls on APCDs After the Hazardous Waste Residence Time Has Expired.	The amendment will be addressed in a future MACT rule.
IV	Instantaneous Monitoring of Combustion Zone Pressure	The amendment is promulgated in today's rule.
V	Operator Training and Certification	The amendment is promulgated in today's rule.
VI	Bag Leak Detection System	The amendment is promulgated in today's rule.
VII	Time Extensions for Performance Testing If the Test Plan Has Not Been Approved.	The amendment is promulgated in today's rule.
VIII	Flexibility in Operations During Confirmatory Performance Testing for Dioxin/Furans.	The amendment is promulgated in today's rule.
IX	Waiving Operating Parameter Limits During Performance Testing.	The amendment is promulgated in today's rule.
X	Method 23 as an Alternative to Method 0023A for Dioxin/Furans.	The amendment will be addressed in a future MACT rule.
XI	Calibration Requirements for Thermocouples	The amendment is promulgated in today's rule.
XII	Alternative Approach to Establish Operating Parameter Limits	The amendment will be addressed in a future MACT rule.
XIII	Extrapolation of Operating Parameter Limits	The amendment will be addressed in a future MACT rule.
XIV	Limit on Minimum Combustion Chamber Temperature for Cement Kilns.	The amendment will be addressed in a future MACT rule.
XV	Revisions to Operating Requirements for Activated Carbon Injection and Carbon Bed Systems.	The amendment is promulgated in today's rule.
XVI	Clarification of Requirements to Confirm Carbon Bed Age	Amendment is promulgated in today's rule.
XVII	Revisions to Operating Parameter Limits for Wet Scrubbers	The amendment will be addressed in a future MACT rule.
XVIII	Reproposal of kVA Limits for Electrostatic Precipitators and Request for Comment on Approaches to Ensure Baghouse Performance.	The amendment will be addressed in a future MACT rule.
XIX	How to Comply Temporarily with Alternative, Otherwise Applicable MACT Standards.	Amendment is promulgated in today's rule.

COMBUSTION MACT AMENDMENTS—Continued

Proposed Rule

No.	Title of amendment	Approach to address amendment
XX	RCRA Permitting Requirements for Sources Entering the RCRA Process Post-Rule Promulgation.	The amendment will be addressed in a future MACT rule.

Part Two—What Revisions, Proposed in the Parallel Proposal, Are We Making Today?

I. What Previous DRE Test Results May You Use To Demonstrate Compliance With the MACT DRE Standard

A. Why Are We Deleting the Age Restriction for Using Data in Lieu of Performing a DRE Test?

Today we are revising the September 1999 final rule to allow sources that inject hazardous waste only in the flame zone to use any previous destruction and removal efficiency (DRE) test results to document compliance with the DRE standard, provided the data meet our quality assurance/quality control requirements. These revisions do not affect sources that inject hazardous waste in places other than the normal flame zone.

Prior to today's change, we allowed data that were no older than five years to be used to document compliance with the DRE standard. However, stakeholders observed that sources that inject hazardous waste only in the flame zone need only document compliance with the DRE requirement once for the life of the source under September 1999 final rule, provided the test continues to be representative of current design and operating conditions. Stakeholders reasoned that, given that a single test is acceptable to document compliance with the DRE standard for the life of the source, the rule should allow use of DRE data older than five years to document compliance with the standard. We agree with stakeholders' concerns. Accordingly, in the parallel proposal to the direct final rule, we proposed to allow any DRE results (that meet QA/QC requirements and that continue to represent the design and operation of the source), irrespective of how old the tests are, to be used in lieu of having the source perform a new DRE test. All comments we received on this issue were favorable.

This change does not apply to sources that inject hazardous waste outside of the flame zone because the September 1999 final rule requires that these sources document compliance with the DRE standard every five years. These sources may use DRE test results that are no older than five years old to document compliance with the initial DRE test, and are required to perform a new test every five years. Although we explained in the preamble to the July 3, 2001 proposal that the revision discussed above applies only to sources that feed hazardous waste in the flame zone, one commenter notes that the proposed rule did not make a distinction between sources that feed waste in the flame zone versus other sources. We agree with this commenter and have corrected this oversight in today's amendment.

B. Why Are We Expanding the Type of Allowable DRE Test Results To Include Any Results That Pass QA/QC?

The September 1999 final rule restricts the DRE test data that can be used in lieu of performing a new test to data obtained in support of a previous RCRA permit issuance or reissuance. We did this because we wanted to ensure that the DRE data used met the quality assurance/quality control requirements applicable to data used to demonstrate compliance with the standards under the RCRA permit process. Stakeholders, however, expressed concerns that data meeting EPA's quality requirements can be generated outside the RCRA permit process. For example, a source might perform some type of CAA performance testing. This testing potentially could have the same level of oversight, and the same quality, as data obtained during the RCRA permit process.

We agree with stakeholders' concerns. In the parallel proposal to the direct final rule, we proposed to allow other DRE data provided that the data were obtained with the same level of oversight and quality as those data obtained during the RCRA permitting process. All commenters agree with this proposal and we are promulgating this amendment as proposed.

II. What Are the Hydrocarbon Monitoring Requirements for Short Cement Kilns Burning Hazardous Waste at Locations Other Than the ''Hot'' End of the Kiln?

We are revising the requirements of § 63.1206(b)(13) to allow short, dry process cement kilns to continuously monitor hydrocarbons in both the alkali by-pass duct and at a ''preheater tower combustion gas monitoring location'' as an alternative to hydrocarbon monitoring in the main stack. These revisions are identical to those proposed (in the parallel proposal to the direct final rule (66 FR 35124 and 35092)). Accordingly, we are revising the requirements of § 63.1206(b)(13)(i) and adding the definition for a ''preheater tower combustion gas monitoring location'' to § 63.1201(a) as proposed.

Prior to today's action, § 63.1206(b)(13)(i) required new and existing cement kilns to comply with a main stack hydrocarbon standard of 20 ppmv if hazardous waste is fed at a location other than the kiln end where fuels are normally fired and products are normally discharged (this is also described as the ''hot'' end of the kiln). These other locations can include firing hazardous waste at midkiln, at the upper end of the kiln where raw materials are fed, or in the calciner. As explained in the final rule promulgated on September 30, 1999, we concluded that it would not be appropriate for cement kilns to comply with a hydrocarbon standard in the by-pass duct if hazardous waste is fed at a location downstream (relative to the direction of flue gas flow) of the by-pass sampling location. We stated that such operation would result in combustion of hazardous waste that would not be monitored by a hydrocarbon monitor (64 FR 52971).

Today's rule establishes an alternative to the main stack hydrocarbon standard of 20 ppmv for short, dry process cement kilns. Specifically, we are finalizing an alternative hydrocarbon standard of 10 ppmv measured continuously both in the alkali by-pass duct and at a preheater tower combustion gas monitoring location. This alternative monitoring approach satisfies our concern that the combustion of hazardous waste is monitored continuously by a hydrocarbon monitor.

One commenter opposed the proposed revisions to the hydrocarbon monitoring requirements and stated that the provision inappropriately establishes a separate category for short, dry process cement kilns and weakens the hydrocarbon standard by allowing for an increase in emissions. Three other

commenters supported the proposed changes to allow short, dry process cement kilns to continuously monitor hydrocarbons in the alkali by-pass duct and at the preheater tower combustion gas monitoring location.

We disagree with the commenter that this hydrocarbon monitoring alternative establishes a separate subcategory for short, dry process cement kilns. The final rule promulgated on September 30, 1999 (64 FR at 52885–52888) established different hydrocarbon and carbon monoxide standards for cement kilns with and without by-pass sampling systems. See §§ 63.1204(a)(5)(i) and (ii). All the existing short, dry process cement kilns burning hazardous waste are equipped with a by-pass duct and are subject to the hydrocarbon and carbon monoxide standards of § 63.1204(a)(5)(i). Today's final rule thus does not create a new subcategory for short, dry process cement kilns.

We also disagree with the commenter that the alternative hydrocarbon monitoring requirements weaken the hydrocarbon standard resulting in increased hydrocarbon emissions. We note that the hydrocarbon emission standard for the hydrocarbon monitoring alternative (10 ppmv) is more stringent than the hydrocarbon standard in the main stack (20 ppmv). All hydrocarbon emissions from the combustion of hazardous wastes would be reflected in the hydrocarbon measurements in the by-pass duct and at the preheater tower monitoring location and would decrease with improved combustion efficiency. As a result, this reflects MACT control or better because the hydrocarbon standard under the alternative is more stringent. As a result, one likely outcome of the alternative is that sources may burn hazardous waste under more efficient conditions.

We recognize, however, that a source electing the hydrocarbon monitoring alternative could substitute for its normal raw materials with other raw materials containing higher trace levels of organics. This monitoring alternative wouldn't detect higher concentrations of hydrocarbons emitted from the main stack (associated with the new raw materials) even though hydrocarbon concentrations originating from the combustion of hazardous waste remains the same. This substitution scenario is unlikely to occur for cement kilns because these facilities are sited near the primary raw material source to avoid transportation costs. Transporting large quantities of an alternative sources of raw material(s) is likely to be prohibitively costly. Moreover, we anticipate that any potential concerns associated with such raw material substitutions can be addressed in a site-specific risk assessment conducted as part of the RCRA permitting process. See *Horsehead Resource Development Co.* v. *Browner,* 16 F.3d 1246, 1262–63 (D.C. Cir. 1994) (EPA may permissibly regulate combined emissions from burning both hazardous wastes and non-wastes from boilers and industrial furnaces pursuant to its RCRA authority).

Accordingly, we are revising the requirements of § 63.1206(b)(13)(i) and adding the definition for a ''preheater tower combustion gas monitoring location'' to § 63.1201(a).

III. Why Are We Deleting the Baghouse Inspection Requirements?

As proposed (66 FR 35124 and 35096), we are deleting the prescribed baghouse inspection requirements of § 63.1206(c)(7)(ii)(B)(1–10) applicable to incinerators and lightweight aggregate kilns. We find that the general operation and maintenance plan requirements under § 63.1206(c)(7)(i) and the use of a bag leak detector are adequate to ensure proper operation and maintenance of the baghouse. We believe that generic, prescriptive requirements (e.g., monthly inspection of bags, bag connections and the interior of the baghouse for physical integrity) may impose burdensome cost without commensurate benefits because such requirements may be inappropriate for the particular source. In lieu of complying with generic requirements, each source is required to develop monitoring and inspection procedures and to include those procedures in the general operation and maintenance plan.

We are also deleting the requirements of § 63.1206(c)(7)(ii)(A) and § 63.1207(f)(1)(xv) requiring submittal of the baghouse operations and maintenance plans to the Administrator. We had already determined that the general operation and maintenance plan required under § 63.1206(c)(7)(i) need not be submitted to the Administrator for review and approval. Therefore, we find no need to now single out the baghouse operation and maintenance plan for review and approval, since sources must continuously operate a bag leak detector system that identifies baghouse malfunctions.

Most comments favored the revision. One commenter, however, favors retaining the inspection provisions, and states that inspections trigger preventive maintenance, prevent malfunctions, and identify sources of fugitive emissions. We believe that site-specific baghouse inspection and monitoring provisions included in the operation and maintenance plan, coupled with a bag leak detector system, will ensure proper operation and maintenance of the baghouse because a bag leak detection system is a state-of-the-art monitoring system that ensures that the baghouse continues to operate in a manner consistent with good air pollution control practices. See also 64 FR 52908, September 30, 1999. The operation and maintenance plan must be included in the operating record and is subject to review by the inspectors to determine whether it is adequate to ensure the baghouse is operated and maintained in a manner consistent with good air pollution control practices for minimizing emissions at least to the levels required by all relevant standards. §§ 63.1206(c)(7) and 63.6(e). We do not regard further requirements as necessary to assure proper baghouse operation and maintenance.

IV. What Are the Requirements for Feedstream Analysis of Organic HAPs?

In the parallel proposal to the direct final rule (66 FR 35124 and 35096), we intended to clarify the requirements for feedstream analysis of organic HAPs for compliance with the DRE standard. Section 63.1207(f) requires you to obtain ''an analysis of each feedstream, including hazardous waste, other fuels, and industrial feedstocks, as fired, that includes: * * * an identification of such organic hazardous air pollutants that are present in the feedstream, except that you need not analyze for organic hazardous air pollutants that would reasonably not be expected to be found in the feedstream.'' Following promulgation of the rule, stakeholders expressed concern about whether we had sought to require an analysis of all waste feedstreams or only the hazardous waste feedstreams. Stakeholders also brought to our attention that there were certain implications of requiring an analysis of CAA HAPs rather than RCRA Appendix VIII organic compounds, and stated that the requirement for continued analysis of organic HAPs every five years for the comprehensive performance test is overly burdensome if a source qualifies to comply with the DRE standard with a one-time emissions test.

We addressed stakeholders' concerns in the proposed rule as follows. First, we addressed the implications of selecting POHCs from the list of organic CAA HAPs rather than from the list of RCRA organic compounds for demonstrating compliance with the DRE standard. One stakeholder questioned whether RCRA DRE test data can be used in lieu of MACT DRE testing if the

POHCs selected during the RCRA test are not organic HAPs under the CAA. Another question was how to ensure DRE of those organic HAPs for which thermal stability data are not available. In response, we stated that, to satisfy the MACT DRE standard, sources must ensure that the POHCs used to demonstrate compliance are representative of the most difficult to destroy organic compounds in their hazardous waste feedstream. For instance, the most difficult to destroy POHCs used for RCRA DRE testing would also be representative of the most difficult to destroy CAA organic HAPs. *See* 66 FR 35097.

Second, we responded to questions on the frequency for analyzing organic HAP compounds in hazardous waste feedstreams. Stakeholders had questioned why analysis of waste streams for organic HAP compounds must be included with the site-specific test plan for comprehensive performance testing every five years once a source has demonstrated compliance with the DRE standard with a one-time test under the conditions of § 63.1206(b)(7)(i). In the proposal, we agreed with stakeholders that the comprehensive analysis required by § 63.1207(f)(1)(ii)(A) is not necessary in all cases. As a result, we proposed to add § 63.1207(f)(1)(ii)(D) to allow regulatory officials to waive the comprehensive analysis of organic compounds, provided that the POHCs used to demonstrate compliance with the DRE standard continue to be representative of the organic HAPs being fed to the combustor. See 66 FR 35097.

Third, we clarified that we intended to require analysis of organic HAPs in the hazardous waste feedstreams only. Section 63.1207(f)(1)(ii)(A) could be read to imply that sources must analyze all feedstreams for organic HAPs. We proposed to amend this section to reflect our true intent not to require analysis for all feedstreams. *See* 66 FR 35097.

The majority of commenters on the proposal agree with the clarifications. However, one commenter asserts that POHCs should be selected considering organic HAPs in all feedstreams, not just hazardous waste feedstreams. The commenter reasons that approval of a comprehensive performance test plan without knowledge of the organic HAPs in all feedstreams could result in selecting POHCs that do not represent the most difficult to destroy organic compounds in all feedstreams. Thus, the DRE test may not ensure destruction of the most difficult to destroy compounds fed to the combustor. The commenter also suggests that the analysis for HAPs in all waste streams should be required because one or more of the POHCs selected based on hazardous waste feedstream analysis may also be present in nonhazardous waste streams. If the feedrate of POHCs in nonhazardous waste feedstreams are not accounted for during DRE testing, the DRE calculation will be conservatively low because more POHCs will be fed than accounted for in the calculation. In summary, the commenter's first concern addresses the analysis of feedstreams for HAPs for POHC selection prior to conducting the performance test, while the second concern addresses the analysis of feedstreams for HAPs that are chosen as POHCs for purposes of calculating DRE during the performance test.

With respect to commenter's first concern, we disagree with the need to consider organic HAPs in all feedstreams for POHC selection. We adopted the DRE requirement from existing RCRA requirements where it applies only to hazardous waste feeds,[3] and did so to satisfy section 3004 (o)(1)(B) of RCRA, which requires EPA to retain a DRE requirement for *hazardous waste.* Also, repromulgation of the RCRA requirement as a CAA standard saves the administrative burden of separate RCRA DRE permitting. See 64 FR at 52847. In addition, even if all feedstreams were considered for POHC selection, we conclude that organic HAPs in fossil fuels and raw materials would not be selected as the POHCs of greatest concern considering the types and concentration of those organic HAPs relative to the types and concentration of organic HAPs in hazardous waste feedstreams. Finally, we note that owners and operators typically select the same POHCs to demonstrate DRE regardless of the hazardous waste present. These POHCs are among the most difficult compounds to destroy of any organic compounds. Thus, presence of organic HAPs in nonhazardous waste feedstreams is generally moot because they would not suggest any different POHCs.

With respect to the commenter's second concern, we agree that the DRE calculation will be conservatively low if POHCs are present in nonhazardous waste feedstreams and not accounted for in the calculation. However, we are not aware that this has been a problem for sources trying to show compliance with DRE. Therefore, based upon the commenter's two concerns, we think the proposed clarifications are appropriate.

[3] For example, the DRE requirements of § 266.104 for cement kilns and lightweight aggregate kilns apply to hazardous waste feedstreams only, not fossil fuel or raw material feedstreams.

Part Three—What Revisions, Proposed in the Technical Amendments Proposal, Are We Making in Today's Rule?

I. What Revisions Are We Making to the Combustion System Leak Provisions?

We are making several revisions to the combustion system leak provisions. First, we are amending the definition of an instantaneous pressure monitor to better clarify that the intent of the combustion system leak requirements is to prevent fugitive emissions from the combustion of hazardous waste rather than from nonhazardous feedstreams. The revised definition also clarifies that instantaneous pressure monitors must detect and record pressure at a frequency adequate to detect combustion system leak events, as determined on a site-specific basis. *See* § 63.1201(a) and § 63.1209(p). Second, you must specify the method that you plan to use to control combustion system leaks in the performance test workplan and Notification of Compliance. See § 1206(c)(5)(ii). Finally, in response to numerous comments, today's rule also adopts a provision that will allow you, upon prior written approval of the Administrator, to use other techniques to monitor pressure that can be demonstrated to prevent fugitive emissions without the use of instantaneous pressure limits. See § 63.1206(c)(5)(i)(D).

A. What Did We Propose To Change?

The September 1999 final rule requires you to control combustion system leaks by either: (1) Keeping the combustion zone sealed; (2) maintaining the maximum combustion zone pressure lower than the ambient pressure using an instantaneous monitor; or (3) using an alternative means to provide control of system leaks. After publication of the final rule, stakeholders expressed concern that the requirement to maintain the combustion zone pressure lower than ambient pressure (option 2 above) could result in an overly prescriptive requirement. Stakeholders believe this regulatory language can be interpreted to require you to monitor and record combustion zone pressure at a frequency of every 50 milliseconds. Stakeholders also requested that we clarify that combustion system leaks refer to fugitive emissions resulting from the combustion of hazardous waste, and not fugitive emissions that originate from nonhazardous process streams

(*e.g.,* the clinker product at a cement kiln).

In response to the above concerns, we proposed several amendments to the combustion system leak provisions. 66 FR at 35132. First, we proposed to modify the definition of an instantaneous pressure monitor to read as follows: ''Instantaneous monitoring for combustion system leak control means detecting and recording pressure without use of an averaging period, at a frequency adequate to detect combustion system leak events from hazardous waste combustion.''

Second, we proposed to revise the automatic waste feed cutoff regulatory language to read as follows: ''If you comply with the requirements for combustion system leaks under § 63.1206(c)(5) by maintaining the maximum combustion chamber zone pressure lower than ambient pressure to prevent combustion system leaks from hazardous waste combustion, you must perform instantaneous monitoring of pressure and the automatic waste feed cutoff system must be engaged when negative pressure is not adequately maintained.''

Third, we proposed that you must specify the method used to control combustion system leaks in the performance test workplan and notification of compliance. If you control combustion system leaks by maintaining the combustion zone pressure lower than ambient pressure using an instantaneous monitor, we also proposed that you must specify the monitoring and recording frequency of the pressure monitor, and specify how the monitoring approach will be integrated into the automatic waste feed cutoff system.

Stakeholders also suggested that we allow averaging of the pressure readings over short periods of time, e.g., a 5-second rolling average updated every second, in demonstrating the combustion system is maintained below ambient pressure. As result, we requested comment on whether such a monitoring approach is appropriate.

B. What Were Commenters' Reactions to the Proposed Amendments?

We received no adverse comments on the proposed amendments that: (1) Require you to specify the method that will be used to control combustion system leaks in the performance test workplan and notification of compliance; and (2) revise the automatic waste feed cutoff provision that addresses combustion system leak events. We are finalizing these proposed amendments in today's rulemaking.

The majority of commenters supported the proposed amendment to the definition of instantaneous monitoring. Many of those supporting this amendment, however, were opposed to the concept of requiring instantaneous pressure limits altogether (see discussion below). One commenter expressed concern that the definition of instantaneous monitoring can still be interpreted to require you to monitor pressure as often as once every 50 milliseconds. Although the proposed definition of instantaneous monitoring clarifies that monitoring frequency should be adequate to detect combustion system leaks, the language does not specify what is considered to be an appropriate frequency. We conclude that such specificity in regulations would not be appropriate because sources differ substantially in design and operation such that different monitoring frequencies may be needed to prevent fugitive emissions. As a result, we are adopting, unchanged, the proposed revision to the definition of instantaneous monitoring.

Rather than specify a minimum monitoring frequency in the regulations, we clarify here that we do not intend for the instantaneous monitoring requirements to require a pressure monitoring frequency as often as once as every 50 milliseconds. We believe a reasonable pressure monitoring frequency that could meet the intent of the instantaneous monitoring definition is once every second, and a reasonable pressure recording frequency could be once every minute, provided that: (1) the automatic waste feed cutoff is engaged when a one-second reading exceeds ambient pressure; (2) you record in the operating record when any such event occurs; and (3) the pressure reading that is recorded every minute represents the highest one-second observation during the previous minute.

C. What Were Commenters' Objections to Instantaneous Pressure Limits?

Commenters disagree with the premise that a positive pressure event equates to a release of fugitive emissions, citing examples of positive pressure events that, based on system design and operation, do not result in fugitive emissions. They claim the rule as currently written will discourage innovative engineering solutions that would minimize fugitive emissions (e.g., installation of new kiln seals) because of the presumption that any positive pressure excursion results in an automatic waste feed cutoff.

We acknowledge that positive pressure events do not necessarily result in fugitive emissions. For example, there are state-of-the-art rotary kiln seal designs (such as shrouded and pressurized seals) which are capable of handling positive pressures without fugitive releases. Specifically, we are aware of rotary kilns operated at the U.S. Department of Energy (USDOE) Savannah River Site and USDOE Oak Ridge Site that have been used for radioactive and hazardous waste treatment which are designed to prevent the release of radioactive materials. The Savannah River kiln uses multiple graphite seals with pressurized chambers between the seals to prevent out-leakage at kiln pressures up to the pressure in the seal chamber (10 psig). The Oak Ridge kiln uses overlapping spring plate seals to form an air seal, and is designed to withstand positive pressures up to 2 psig. *See* Support Document for Fugitive Emission Control, February, 2002 for more information.

However, we believe these kilns are highly unusual, and that other conventional rotary kilns used in the hazardous waste combustion industry may not have seals which are designed for such positive pressure operation. In fact, we believe that, for most rotary kilns in current service, positive pressure events can result in fugitive releases. The level of such fugitive releases will be dependent on factors including the magnitude of the pressure excursion and the design and operation of the kiln.

Nonetheless, we agree that explicit restrictions on positive pressure events could discourage you from implementing innovative methods to prevent fugitive emissions, and we agree that instantaneous negative pressure limits may be not warranted for all hazardous waste combustion sources. A solution that was recommended by several commenters would amend the pressure monitoring requirements by including a provision that will, upon prior written approval of the Administrator, allow you to use other techniques to monitor pressure which can be demonstrated to prevent fugitive emissions without the use of instantaneous pressure limits. Such a provision would clarify that you can use a compliance approach that does not require pressure to be maintained below ambient on an instantaneous basis provided you demonstrate that the method prevents fugitive emissions. We agree that this recommended amendment is reasonable and appropriate. Today's rule adopts this revision to the combustion system leak provisions.

Many commenters believe instantaneous pressure monitoring

requirements will increase the number of automatic waste feed cutoffs, resulting in rapid switching between use of supplementary fuel and hazardous waste fuel. The instantaneous pressure monitoring requirements could thus have a negative impact, resulting in increased use of fossil fuel and, because of the non-steady-state nature of combustion conditions associated with the rapid switching of fuels, increased pollutant emissions. Commenters claim the use of short averaging periods, time delays, or damping of the transmitter response times would allow properly designed facilities to handle these types of pressure changes while still minimizing fugitive emissions.

We believe automatic waste feed cutoffs are appropriate non-compliance deterrents, and are necessary whenever you exceed an emission standard or operating requirement (e.g., when fugitive emissions occur). If you repeatedly exceed the emission standards you should modify your operating practices and/or design of the unit to minimize the number of exceedances. However, we agree that needless triggering of automatic waste feed cutoffs when you are not exceeding an emission standard may provide less environmental protection, not more. As previously discussed, there may be instances when positive pressure events do not result in combustion system leaks. We believe the provision we are adopting that will allow you to use other techniques to monitor pressure that can be demonstrated to prevent fugitive emissions adequately addresses these commenters' concerns.

Several commenters suggest we abandon the instantaneous pressure monitoring requirement altogether and use the existing RCRA fugitive emission regulatory language in § 264.345.[4] One commenter agrees that there are some units where instantaneous negative pressure limits are desirable to minimize fugitive emissions. Other commenters claim we should abandon the instantaneous monitoring requirements because we require different levels of protection across different regulations. Specifically, the instantaneous pressure monitoring requirements in the Hazardous Waste Combustor MACT rule appear to reflect a zero tolerance for combustion system leaks while the requirements of the RCRA Subpart BB regulations covering air emissions for equipment leaks are less restrictive for the same types of wastes. One commenter states that the instantaneous pressure monitoring requirements should be abandoned because we have not demonstrated combustion system leaks present health risks.

We believe that combustion system leaks must be prevented whenever it is reasonably possible. This is the approach currently required by existing RCRA hazardous waste incinerator and boiler and industrial furnace rules. *See* §§ 264.345(d)(2) and 266.103(h)(2). Instantaneous pressure monitoring without the use of averaging periods is an appropriate, demonstrated compliance strategy option that achieves this goal. As a result, we cannot agree to drop the instantaneous monitoring requirements for all facilities. However, as previously stated, instantaneous pressure monitoring requirements may not be warranted for all hazardous waste combustion sources to prevent combustion system leaks and we are including a provision that allows you to use other techniques to monitor pressure which can be demonstrated to prevent fugitive emissions.

We acknowledge the differences between the RCRA Subpart BB and MACT combustion system leak requirements. The MACT provisions are designed to assure compliance with the hazardous waste combustor emission standards and to assure that you operate in a manner consistent with good air pollution control practices. CAA Section 112(d) MACT emission standards and good air pollution control practices are generally technology specific and dependent on the type of regulated unit—they are not risk-based standards. Fugitive emissions from open tanks, pumps and valves will not be regulated the same as fugitive emissions from hazardous waste combustors because they are different devices that practically must use different pollution abatement systems.[5] Therefore, we do not agree with the commenters' assertions that there is an inappropriate disparity between the Subpart BB and MACT requirements.

One commenter believes that a five second pressure averaging or delay period is adequate for most sources, but for systems with high performance or double seals, a longer time could be warranted and for systems with less effective seals, a shorter period could be appropriate. Another commenter believes that we should allow you to average the positive pressure events over a time period not to exceed 15 seconds. A third comment recommends that the averaging period be no longer than a half of a second.

We disagree that a pressure averaging time not to exceed either five or fifteen seconds would be appropriate for all sources. The pressure monitoring technique that adequately prevents combustion system leaks is site-specific and will be dependent on many factors, including combustion chamber type and design, kiln seal design, hazardous waste feed practices, etc. If you choose to implement a pressure averaging compliance approach, today's adopted amendment requires you, on a site-specific basis, to demonstrate that the averaging period adequately prevents fugitive emissions.

Finally, one commenter states that EPA should not require chemical demilitarization facilities to maintain negative pressures in the combustion chamber at all times due to the energetic nature of the feedstream. The commenter states that although it is not possible to eliminate all transient pressure spikes in chemical demilitarization furnaces, the commenter believes the engineering features of the units and the air containment systems address environmental concerns. Furthermore, the commenter asserts that fugitive emissions that are released from these units into the containment rooms are controlled to better than a 99.9999% destruction removal efficiency, and suggests this meets or exceeds the control level that would be achieved if those same emissions had passed through the air pollution control system.

The chemical demilitarization facilities are unique because: (1) They thermally treat chemical agents; and (2) the combustion units are located in enclosed rooms where the air is exhausted through a bank of carbon filters specifically designed to control fugitive emissions. We are convinced that combustion system leaks should be prevented whenever it is reasonably possible, even considering the fact that the fugitive emissions are controlled by a secondary device. We consider this necessary because of the toxicity of these wastes, and because we believe such an approach is consistent with current good air pollution control practices.[6]

[4] We note the § 264.345 language does not explicitly require instantaneous pressure monitoring.

[5] For example, fugitive emissions from combustors are generally controlled by maintaining a negative combustion chamber pressure to ensure the organic wastes remain in the unit at the elevated temperatures to achieve organic destruction. Fugitive emissions from tanks and valves are generally controlled with containment systems (tank covers or vapor recovery systems), periodic leak inspections, etc.

[6] We believe minimizing fugitive emissions whenever reasonably possible to be consistent with good air pollution practices because this best

Continued

Because it appears that these facilities may be designed to adequately control the fugitive emissions that are released from the combustion units, a pressure monitoring scheme that does not include the use of instantaneous limits may be warranted.[7] We note that there are two existing regulatory mechanisms that allow you to implement a fugitive emission control compliance approach other than one that uses instantaneous pressure limits. First, § 63.1206(c)(5)((i)(C) allows you to use an alternative means to provide control of combustion system leaks equivalent to maintenance of combustion zone pressure lower than ambient pressure, upon prior written approval of the Administrator. Also, the alternative monitoring provisions of § 63.1209(g)(1) allow you to petition the regulatory official for approval to use alternative monitoring methods. As previously discussed, we are amending the pressure monitoring requirements to include a provision that will, upon prior written approval of the Administrator, allow the use of other techniques to monitor pressure which can be demonstrated to prevent fugitive emissions without the use of instantaneous pressure limits.

II. What Revisions Are We Making to the Operator Training and Certification Requirements ?

On July 3, 2001 (*see* 66 FR 35132–34), we proposed changes to the operator training and certification requirements of § 63.1206(c)(6). Today we are finalizing those changes as proposed. These changes revise the rule to: (1) Allow incinerator control room operators to be trained and certified under either a site-specific, source-developed and implemented program; or the American Society of Mechanical Engineers (ASME) program; or a state program; (2) for sources that choose to use the ASME program, require only provisional ASME certification by the compliance date for existing facilities, and by the date of assuming duties for new employees; (3) delete the requirement to provide control room operator training and certification for shift supervisors; (4) require control room operators to complete an annual review or refresher course covering prescribed topics to maintain certification; and (5) clarify that a certified control room operator must be on duty at the source at all times the source is in operation.

As explained at proposal, the ASME program comprises of testing in two parts. The ASME administers a comprehensive, generic, written test addressing operations of various types of incinerators and their pollution control systems, and awards provisional certification to operators passing this test. Full certification is awarded later after an operator with provisional certification passes an on-site, site-specific oral examination. The ASME does not implement any training programs for these tests, and also does not require any annual review or refresher course to maintain certification. Under today's rule, each source is required to impart requisite training to its operators to pass the tests administered either by the ASME, or by the source itself; and also to implement an annual review or refresher course, described in detail at proposal.

Most commenters strongly favor all the revisions. One commenter, however, states that deleting certification requirements for shift supervisors is unwise and can lead to increased emissions, and that the certified supervisors can fill in during absences of the operator. We were not persuaded by this comment. Today's revision mandates the presence of a certified operator at all times the source is in operation. Because there will always be some periods of absence of any particular operator (due to vacation time, sickness etc.), the source will prepare plans for such periods and record them in the training and certification program, that is a part of the operating record. Since many sources are operated 24 hours a day, 7 days a week, and there is more than one operator in the control room (with one being the chief or head operator), we believe each source will train and certify several operators, and plan their rotational assignments according to their needs. It is the responsibility of each source to plan whether to utilize the shift supervisor, or a deputy of the chief control room operator during any absences. Of course, if a shift supervisor is used for such occasions, the shift supervisor must be trained and certified as a control room operator.

One commenter states that no state programs for control room operators are available. We agree that state programs may not be available, but believe that some states are either considering developing their own operator programs, or actively review, approve and oversee the facility-developed site-specific training programs. We do not want to foreclose any opportunity either to the sources, or to the states in this matter.

Another commenter states that the preamble to the proposal stipulates a written test, and does not mention use of equivalent techniques such as a computerized test. We agree that a computerized test or other testing approach equivalent to a written test may be appropriate and note that the regulation does not require use of a written test. If you plan to use an alternative to a written test, however, you should describe the testing approach in your training and certification program.

III. What Time Extensions for Testing Are Available If the Comprehensive Performance Test Plan Has Not Been Approved?

As proposed on July 3, 2001 (66 FR at 35135), we are revising the September 1999 rule to allow you to perform your comprehensive performance test later than you otherwise must if the permitting authority has not approved your test plan. To get a time extension, you must petition the permitting authority for a time period not to exceed six months. This petition may be renewed for a total time extension of one year. Permitting authorities should grant these extensions if the source has acted in good faith. You must, however, perform your test no later than one year after the test date (or sooner if your time extension expires before one year) that would have applied if the test plan had been approved in a timely manner.

In the final rule, we made no provision for having the test date delayed. We stated that sources would have to perform their comprehensive performance test within 6 months of the compliance date regardless of whether the test plan had been approved. At the time we stated that ''if permit officials nevertheless fail to act within the nine month review and approval period, a source could argue that this failure is tacit approval of the plan and that later 'second guessing' is not allowed.'' See 64 FR at 52912. However, stakeholders noted that there is nothing to prohibit a permitting official from disapproving a plan after the actual test had been performed. If this occurs, the source

ensures the organic waste remains in the combustion unit for a duration of time, and at an elevated temperature, necessary to achieve adequate organic destruction.

[7] The information provided by the commenter that describes the control efficiency for released fugitive emissions does not contain the level of detail that would allow us to conclusively evaluate the commenter's assertions. For example, no information was provided explaining whether comparable carbon removal efficiencies would be achieved for such low organic concentration levels that result after the fugitive emissions are diluted by the containment room air (as compared to the destruction and removal efficiency in the combustor). The level of review is more appropriately conducted by the local regulatory official.

would be required to rerun a test based on the revised test plan.

Combustion source owners are very concerned about this potential scenario. They point out that comprehensive performance tests are very expensive, often several hundreds of thousands of dollars for a commercial source, and possibly more than a million dollars at a government installation due to the unique circumstances encountered while burning munitions or mixed waste. Therefore, we agree with stakeholders that a comprehensive performance test should not have to be rerun when circumstances prevent the permitting official from approving the test plan in a timely manner.

We proposed an amendment to the final rule that we believe addresses stakeholders' concerns. The proposed amendment specifically allowed sources to petition the Administrator under § 63.7(h) to waive the test requirement for up to six months if the test plan is not approved. This will give the permitting official an additional six months to act on the test plan. The source also could request a second waiver of up to six months if the plan is not approved following the initial six month period. You would qualify for this waiver if you submitted your test and evaluation plans on time, and made a good faith effort to accommodate any comments you received on those plans. The proposed amendment also describes the procedures for obtaining the waiver, what documentation you must include in the waiver, and how to involve the public.

We are promulgating this amendment as proposed. All but two commenters support the amendment. The commenters opposing the amendment are concerned that, despite as much as a 12-month respite from testing, the source might still have to perform a test after those 12 months without an approved test plan. Many commenters that support the proposed amendment also mention this concern. However, while we are sympathetic to the legitimate need for a time extension due to circumstances preventing the permitting authority to approve or deny the test plan, we continue to ''believe that an open-ended test date will not provide an incentive for either sources or regulatory officials to resolve differences related to a test plan, thereby unnecessarily delaying testing.'' See 66 FR at 35135 for our previous discussion on this issue. None of the commenters provide information on this issue beyond what was available at the time the final rule was promulgated. Therefore, our belief at the time of the final rule that the test date should not be open-ended, has not changed, nor do we have any basis to believe that any extension beyond one year is needed.

IV. What Flexibility Is Provided in Operations During Confirmatory Testing for Dioxin/Furans?

On July 3, 2001 (see 66 FR at 35136), we proposed changes to the requirements for confirmatory performance testing for dioxin/furan to provide flexibility in operations during confirmatory testing. Today we are finalizing those changes as proposed, and are making an additional revision to clarify which historical data are used to calculate normal operating values. These changes to § 63.1207(g)(2) revise the rule to: (1) Allow approval in the test plan of operations under a wider range for a particular parameter based on information justifying that operating within the required range may be problematic; and (2) allow the Administrator to accept test results based on operations outside of the range specified in the confirmatory test plan. Under the existing rule, sources are required to operate so that carbon monoxide or hydrocarbon levels, and operating parameter limits associated with the dioxin/furan emission standard, are within the range of the average values over the previous 12 months up to the maximum or minimum value, as appropriate, that is allowed. Stakeholders expressed concern that it was difficult to control operation of the combustor to the required range for each operating parameter simultaneously. In particular, they stated it will be difficult to operate within a potentially narrow range of carbon monoxide levels for sources that normally operate close to the 100 ppmv limit, because carbon monoxide levels are dependent on many combustion-related factors and cannot be directly ''dialed in'' as can be done for other parameters (e.g., activated carbon injection feedrate).

Today's amendment to § 63.1207(g)(2) also allows the Administrator to accept test results based on operations outside of the range specified in the test plan when a source did not anticipate a problem in maintaining the operating levels within the required range (and therefore did not request advance approval to do so), but because of unforeseen factors, was unable to maintain the required range. This provision would give permit writers discretion to accept emissions data obtained when operating outside of the prescribed range so that sources would not have to incur the costs of an additional confirmatory test. In determining whether to accept test results from operations outside of the range specified in the test plan, permit writers would consider factors including: (1) the magnitude and duration of the deviation from the required range; (2) the historical range of the parameter (e.g., the range between the 10th and 90th percentile time-weighted average values for the parameter); (3) the proximity of the emission test results to the standard; and (4) the reason for not maintaining the required range. These factors determine whether the operations are reasonably representative of normal operations and how important it may be that test operations are truly representative of normal operations.

Most commenters support the proposed amendment, and we are revising § 63.1207(g)(2) as proposed with one minor change. The September 1999 final rule required you to exclude data pertaining to malfunctions, monitor calibrations, and nonhazardous waste operations when calculating normal operating levels. Today we are also requiring you to exclude data pertaining to startup and shutdown operations as well when calculating these averages. We did not propose to explicitly exclude you from using startup and shutdown data because you were previously not allowed to burn hazardous waste during these events. We conclude this change is now necessary given that some sources may, in limited circumstances, burn hazardous waste during startup and shutdown as a result of the changes to the startup, shutdown, and malfunction compliance requirements.

One commenter suggests that we should not require sources to exclude data pertaining to nonhazardous waste operations when calculating these averages. The commenter states that the amount of time sources operate while not burning hazardous waste is negligible and would not affect the calculated average values. We acknowledge that the time you operate while not burning hazardous waste (while also not in startup, shutdown, or malfunction mode) may be negligible, and thus may not significantly affect the calculated average values. However, we believe the data acquisition systems in use today are readily capable of omitting these data when calculating the averages, and excluding nonhazardous waste operating data is preferable. As a result, we conclude no change is necessary.

V. How Can You Waive Operating Parameter Limits During Performance Testing and Pretesting?

Section 63.1207(h) automatically waives operating parameter limits (OPLs) during subsequent comprehensive performance tests under an approved performance test plan. Stakeholders raised two concerns that we addressed in the proposed rule: (1) OPLs defined in the Documentation of Compliance should be waived during the initial comprehensive performance test and associated pretesting; and (2) OPLs should be waived during testing and pretesting irrespective of whether the test plan has been approved. 66 FR at 35136–37.

A. How Can You Waive OPLs During the Initial Comprehensive Performance Test?

We explained in the proposed rule why the rule need not be revised to waive OPLs during the initial comprehensive performance, or associated pretesting. This is because the OPLs are defined in the Documentation of Compliance (DOC) prior to the initial comprehensive performance test, and you may revise the DOC at any time prior to submitting the Notification of Compliance. To widen the operating envelope by making the OPLs less stringent, you need only provide information in the operating record justifying why operating under the less stringent OPLs is likely to ensure compliance with the emission standards. You would revise the DOC accordingly, and record the DOC in the operating record. Review and approval by regulatory officials is not required.

An industry commenter states the rule should be revised to explicitly waive the OPLs defined in the DOC during the initial performance test because revising the DOC and providing support that the revised OPLs ensure compliance with the emission standards may not be a simple process. We do not agree, and the commenter did not elaborate on why revising the DOC would be burdensome. Moreover, we note that the supporting information required for DOC modification must be developed and included in the performance test plan as justification to deviate from the current OPLs when the plan is submitted for review and approval.

We conclude that it is not necessary to revise the rule to waive OPLs during the initial comprehensive performance test and associated pretesting because you may revise the OPLs in the Documentation of Compliance at any time.

B. How Can You Waive OPLs During Subsequent Comprehensive Performance Tests?

Section 63.1207(h) waives operating parameter limits (OPLs) during subsequent comprehensive performance tests under an approved performance test plan. In our proposal, we addressed the potential situation where you are facing the deadline for conducting the comprehensive performance test but the test plan has not been approved and regulatory officials have not extended the compliance date. We proposed to revise the rule to waive OPLs during subsequent comprehensive performance testing and associated pretesting, provided that you record the emission test results of the pretesting. We reasoned that the emission test results would confirm whether you were in compliance with the emission standards when operating under the less stringent OPLs.

Most commenters agree with the proposal but noted that: (1) We revised § 63.1207(h)(2) to waive OPLs during pretesting provided that emission test results are recorded but neglected to revise § 63.1207(h)(1) that waives OPLs under the performance test only when there is an approved test plan; and (2) in revising § 63.1207(h)(2), we excluded a phrase added in a technical correction (see 65 FR at 42293 (July 10, 2000)) allowing the Administrator to renew the 720 hour limit on pretesting. Both omissions were inadvertent, and we include them in today's final rule.

One commenter states that OPLs should not be waived if the test plan is not approved by EPA. We disagree. The OPLs are waived only during pretesting or performance testing where the source is conducting emissions testing and recording the results of the tests. This documentation of compliance or noncompliance with the emission standards serves as an incentive to operate the source under alternative OPLs that ensure compliance with the standards.

We conclude it is appropriate to revise the rule as proposed to waive OPLs during subsequent comprehensive performance testing and pretesting (provided that emissions test results during pretesting are recorded) and to allow the Administrator to renew the 720 hour limit on pretesting as promulgated in the July 10, 2000 technical correction. *See* revised §§ 63.1207(h).

VI. What Are the Calibration Requirements for Temperature Measurement Devices?

The September 1999 final rule requires that thermocouples and other temperature measurement devices, such as pyrometers, must be recalibrated every three months. However, stakeholders are concerned that recalibrating these devices every three months can be particularly burdensome and offers little environmental benefit (i.e., among other things, no better assurance of compliance with the actual emission standards) over a less frequent calibration interval. In the July 2001 proposal, we discussed stakeholders' concerns and requested more information on the need for, and burden associated with, calibrating temperature measurement devices. See 66 FR at 35138. We also indicated that analysis of comments may lead us to conclude that § 63.1209(b)(2)(i) should be deleted in lieu of a requirement that each source develop an appropriate calibration procedure and frequency and include that information in the evaluation plan required by § 63.8(e)(3)(i).

Nearly all commenters agree with the need to provide flexibility in calibration frequency. Rather than delete § 63.1209(b)(2)(i), however, commenters suggest that we revise that provision to require calibration of temperature measurement devices using the manufacturer's procedures and calibration frequency. Also, commenters suggest that the calibration be performed at least once a year, unless a less frequent optical pyrometer calibration interval is approved by the Administrator.

We agree with commenters' suggestions and are revising § 63.1209(b)(2)(i) accordingly.

VII. What Changes Are We Making to the Particulate Matter Operating Requirements for Sources Using Activated Carbon Injection and Carbon Beds?

We are amending two provisions that apply to activated carbon injection and carbon bed operating systems. First, we are deleting the regulatory language that requires sources using activated carbon injection systems to limit the particulate matter emissions to levels achieved during the comprehensive performance test. We instead are requiring these sources to establish operating limits on the particulate matter control device to assure compliance with both the mercury and dioxin/furan emission standards. Second, we are deleting the requirement for sources equipped with carbon beds to establish particulate

matter operating parameter limits for purposes of ensuring compliance with dioxin/furan and mercury emission standards.

We explained at proposal that it is inappropriate to explicitly require a site-specific particulate matter limit if a carbon injection system is used because the rule does not require continuous monitoring of particulate matter emissions. 66 FR at 35141. The use of a site-specific particulate matter limit was originally thought to go in tandem with a requirement to use particulate matter continuous emission monitors. Because we do not require sources to use particulate matter CEMS for compliance purposes, however, we concluded these site-specific particulate matter limits were inappropriate, and proposed to delete this requirement. We instead proposed to require these sources to establish operating limits on the particulate matter control device consistent with the approach used to control particulate emissions for compliance assurance with the semivolatile and low volatile metals emission standards.

The proposal also explained that particulate matter control downstream of a carbon bed is not needed to ensure compliance with the dioxin/furan and mercury emission standards. We noted that most, if not all, carbon bed systems in use today are positioned downstream from particulate matter control devices to minimize particulate buildup in the carbon bed. Carbon beds are also designed so that carbon leakage into the flue gas is minimized. As a result, we proposed to delete the language that requires sources equipped with carbon beds to control particulate matter emissions to ensure compliance with the dioxin/furan and mercury standards.

We received no adverse comments on these proposed amendments. We are, therefore, adopting the proposed revisions in today's rulemaking.

VIII. How May You Comply Temporarily With Alternative, Otherwise Applicable MACT Standards?

Section 63.1206(b)(1)(ii), as revised (66 FR 35087 (July 3, 2001)), allows you to stop complying with the emission standards and operating requirements of Subpart EEE temporarily after the hazardous waste residence time has expired and to comply with otherwise applicable Clean Air Act requirements promulgated under Sections 112 and 129, provided you document in the operating record that you are complying with those alternative standards. If the Agency has not promulgated Clean Air Act Section 112 or 129 MACT standards for the nonhazardous waste burning class of sources in a particular source category, there are no otherwise applicable MACT standards for the source.

Stakeholders asked for clarification on the procedures during a transition between Subpart EEE standards and the otherwise applicable Section 112 or 129 MACT standards. In the July 3, 2001 proposed rule (66 FR at 35145–46) we explained that: (1) sources are affected sources only under Subpart EEE with respect to stack emissions, even when complying with the otherwise applicable MACT standards under an alternative mode of operation under § 63.1209(q); and (2) sources that elect to comply with otherwise applicable MACT standards after the hazardous waste residence time has expired must include all requirements of those MACT standards, not just operating limits, in the operating record, the Documentation of Compliance, the Notification of Compliance, and the title V permit application. We also proposed a revised approach to calculate rolling averages for compliance with operating parameter limits when changing modes of operation. We discuss these issues below, including comments received and our final determinations.

A. What Are the Implications of Being an Affected Source Only Under Subpart EEE?

At proposal, we explained that sources that invoke § 63.1206(b)(1)(ii) to become temporarily exempt from the emission standards and operating requirements of Subpart EEE remain an affected source under Subpart EEE (and only Subpart EEE) with respect to stack emissions requirements until the source meets the requirements specified in Table 1 to § 63.1200 for no longer being an affected source. To implement this clarification, we proposed to require you to define the period of compliance with the otherwise applicable Clean Air Act requirements promulgated under Sections 112 and 129 as an alternative mode of operation under § 63.1209(q). Thus, during this mode of operation, you would be exempt from the emission standards and operating requirements of Subpart EEE, except the requirements for the otherwise applicable Section 112 and 129 MACT standards you specify under § 63.1209(q).

We also proposed to revise the rule to clarify that otherwise applicable Section 112 and 129 MACT standards are ''applicable requirements'' under Subpart EEE if you elect to operate under that mode of operation after the hazardous waste residence time has expired. Because the source is an affected source only under Subpart EEE, those alternative, otherwise applicable MACT standards must be specified in a manner that is enforceable under Subpart EEE. Consequently, you must specify those alternative, otherwise applicable MACT standards, including not only the operating parameter limits under the Section 112 and 129 standards, but also the associated monitoring and compliance requirements and notification, reporting, and recordkeeping requirements, in the operating record under § 63.1209(q), the Documentation of Compliance (DOC) under § 63.1211(d), the Notification of Compliance (NOC) under § 63.1207(j), and the title V permit application.[8]

Commenters generally agree with our proposed approach to implement the alternative, otherwise applicable Section 112 and 129 MACT requirements after the hazardous waste residence time has expired. One commenter suggests, however, that we clarify that, if the Agency has not promulgated Section 112 or 129 MACT requirements applicable to the source, the source is exempt from operating requirements during that mode of operation. We agree with the commenter and addressed this situation in the proposal in footnote 37 (66 FR at 35145). If the Agency has not promulgated Section 112 or 129 MACT requirements applicable to the source, the source is exempt from operating requirements under the alternative, otherwise applicable MACT standards mode of operation provided that: (1) The hazardous waste residence time has expired; and (2) the source establishes this mode of operation under § 63.1209(q) and notes in the operating record when it enters and leaves this mode of operation. The source must nonetheless identify this mode of operation (i.e., where it is exempt from operating requirements) in the DOC, NOC, and title V permit application to assist compliance assurance.[9]

One commenter also suggests that the rule should be revised to waive the automatic waste feed cutoff requirements under § 63.1206(c)(3) when a source elects to continue operating under the Subpart EEE emission standards and operating requirements even though the hazardous waste residence time has

[8] We also noted in the proposal that, under § 70.6(a)(9), the title V permit must contain terms and conditions for all reasonably anticipated modes of operation, and thus, must contain the alternative, otherwise applicable MACT requirements.

[9] Please note such source could conceivably be subject to case-by-case permitting under section 112(j)(2) or 112(g)(2).

expired (i.e., the source elects not to comply with the alternative, otherwise applicable MACT standards). The commenter reasons that, because the hazardous waste residence time has expired, there is no need to require compliance with the hazardous waste feed cutoff requirements. We conclude that no regulatory revisions are needed because it is self-evident which provisions are applicable after the hazardous waste residence time has expired. For example, it is self-evident that the general requirements of § 63.1209(c)(3)(i) for the automatic waste feed cutoff system to cutoff the hazardous waste feed are not applicable, because hazardous waste is not being fed. Other requirements continue to be applicable, however. For example, § 63.1206(c)(3)(iii) continues to apply because it requires you to continue monitoring operating parameter limits after a cutoff and prohibits you from restarting the hazardous waste feed until the operating parameters and emission levels are within the specified limits.

After considering comments on the proposed rule, we conclude that, as proposed, § 63.1209(q) should be revised to add paragraph (q)(1) to provide requirements for operating under otherwise applicable Section 112 and 129 MACT standards.

B. How Are Rolling Averages Calculated When Changing Modes of Operation?

Section 63.1209(q) as originally promulgated requires you to begin calculating rolling averages anew (i.e., without considering previous recordings) when you begin complying with the operating parameter limits for an alternative mode of operation. We now believe this approach is problematic as it was to be implemented. As you change modes of operation, you would not be able to calculate a 60-minute rolling average, for example, until you had collected 60 one-minute average recordings for the parameter. Thus, for the initial hour after changing a mode of operation, you would not be able to document compliance with the operating parameter limits. To address this concern, we proposed that you would use the most recent continuous monitoring system recordings when operating under a mode of operation to calculate rolling averages when renewing operations under that same mode. Under this approach, to calculate an hourly rolling average when you changed to an alternative mode of operation, you would add the first one-minute average recording to the 59 one-minute average recordings when you last operated under that mode of operation. Thus, rolling averages could be calculated after the first minute of renewing operations under a mode of operation.

Several commenters express concern that the proposed approach of retrieving one-minute average recordings from when you last operated under that mode of operation to calculate a rolling average can place a significant burden on a source's data acquisition system. The data acquisition system would be required to store and retrieve 59 minutes from a mode of operation under which the source may operate only infrequently. This approach would increase the memory requirements of a source's data acquisition system and increase programming efforts and costs because of the increased number of data registers used for storage.

Commenters suggest two alternative approaches to calculate rolling averages when changing modes of operation. One alternative, the ''Start Anew'' approach, is the currently promulgated approach, but it would be implemented differently. The other alternative approach, the ''Seamless Transition'' approach, is an approach that we discussed in a footnote in the July 3, 2001 proposed rule. We agree with commenters' concerns about allowing only one approach to calculate rolling averages after a transition to a new mode of operation (i.e., the ''Retrieval Approach''), and have promulgated all three approaches, as discussed below, because they are equally effective. You may use any of these approaches.

1. How Does the Retrieval Approach Work?

The retrieval approach works as described above and in the July 3, 2001 proposed rule. You use the most recent continuous monitoring system recordings when operating under a mode of operation to calculate rolling averages when renewing operations under that mode. Although this approach may be burdensome in some situations as commenters state, it may be preferable in some situations to the other two approaches discussed below. See new § 63.1209(q)(2)(i).

2. How Does the Start Anew Approach Work?

Under the start anew approach, you calculate rolling averages anew without considering previous recordings. This is the currently promulgated approach. See old § 63.1209(q) and new § 63.1209(q)(2)(ii).

Under today's rule, however, you are required to implement the approach differently. As discussed above, this approach is problematic if implemented as currently required because you are not able to calculate an hourly rolling average, for example, until you record 60 one-minute average values for a parameter under the new mode of operation. During that hiatus, you cannot document compliance with the OPLs. Under today's rule, to calculate an hourly rolling average after changing a mode of operation, you must calculate the hourly rolling average as the average of the available one-minute values for the parameter until enough one-minute values are available to calculate an hourly rolling average. Similarly, to calculate a 12-hour rolling average immediately after changing a mode of operation, you must calculate the 12-hour rolling average as the average of the available one-minute values for the parameter until enough one-minute values are available to calculate a 12-hour rolling average. *See* new § 63.1209(q)(2)(ii). This is a conservative approach to calculating rolling averages because you are not able to use the full averaging period to lessen the impact of abnormally high one-minute recordings until you accumulate, for example, 60 one-minute averages for the hourly rolling average.

You may not transition to a new mode of operation using this approach if the most recent operation in that mode resulted in an exceedance of an applicable emission standard measured with a CEMS or operating parameter limit prior to the hazardous waste residence time expiring. This condition ensures that sources cannot avoid compliance with § 63.1206(c)(3)(iii) after an automatic waste feed cutoff by ignoring the parameter recordings that occurred when hazardous waste was in the combustion chamber and the OPLs were exceeded, and then quickly restarting the hazardous waste feed once the operating parameters and emission levels are within the specified limits.[10] The purpose of this provision is to provide an additional incentive to avoid exceedances when hazardous waste is in the combustion chamber by delaying restart of the hazardous waste feed until the operating parameters (and emissions measured with a CEMS) are within the limits.

3. How Does the Seamless Transition Approach Work?

Several commenters recommend the seamless transition approach that we discussed in footnote 41 in the July 3, 2001 proposal. 66 FR at 35146. Under this approach, you continue calculating

[10] See letter form Jim Berlow, USEPA, to Michelle Luck, Cement Kiln Recycling Coalition, dated June 21, 2001 (in the docket for this rulemaking).

rolling averages using data from the previous operating mode provided that both the operating limits and the averaging period for the parameter are the same for both modes of operation. We agree that this approach is an appropriate alternative and finalize it as new § 63.1209(q)(2)(iii). Note, however, that if parameter recordings from a previous mode of operation where you may not be burning hazardous waste contribute to an exceedance in the new mode of operation when you are burning hazardous waste and hazardous waste remains in the combustion chamber, you have nonetheless exceeded an emission standard or operating limit when hazardous waste is in the combustion chamber.

IX. What Are the Procedures for Allowing Use of Less Sensitive Bag Leak Detection Systems?

In the July 2001 proposed rule, we requested comment on whether the bag leak detection system requirements should be revised to explicitly allow sources to petition the Administrator to use bag leak detection monitors that have detection limits higher than 1.0 milligrams per actual cubic meter as required by the September 1999 final rule. See 66 FR at 35134. We reasoned that less sensitive bag leak detectors would be acceptable in situations where the detector could nonetheless detect subtle changes in baseline, normal mass emissions of particulate matter. In determining whether the detector is sensitive enough to detect subtle changes in baseline, normal mass emissions, the permitting authority could consider information such as results of site-specific tests that document the detector provides a measurable and repeatable change in opacity output with an increase in particulate matter mass emissions at normal emission levels.

All commenters support this revision, saying that we should explicitly allow a source to petition the Agency using the alternative monitoring provisions under § 63.1209(g)(1) to use a less sensitive bag leak detector. Therefore, we are revising new § 63.1206(c)(7)(ii)(A)(1) by appending it with the following phrase: ''* * * unless a source demonstrates, pursuant to the procedures in § 63.1209(g)(1), that a higher sensitivity would adequately detect bag leaks.''

Part Four-What Technical Corrections Are Being Made in Today's Rule?

I. What Corrections Are We Making to Part 63, Subpart EEE?

We are making several corrections to 40 CFR part 63, Subpart EEE, published on September 30, 1999.

A. Several Typographical Errors Are Corrected

In today's rule, we correct a typographical error shown in entry (2) in Table 1 to § 63.1200 by replacing the word ''extent'' with ''extend.''

We also revise by italicizing several paragraph numbers and headings that will make the regulatory text easier to read. The paragraphs revised include §§ 63.1206(b)(5)(i)(C)(1), 63.1209(g)(1)(B)(1) through (3), 63.1209(g)(1)(C)(1) and (2), 63.1209(l)(1), 63.1209(m)(3), 63.1209(n)(4), and 63.1209(o)(1).

We also correct several typographical errors. We correct § 63.1207(f)(1)(x) by removing an extra ''))'' from the paragraph. Section 63.1207(m)(4)(i) is corrected by capitalizing ''Notification of Compliance.'' We correct a typographical error in the first sentence of § 63.1209(b)(5)(iii)(A) by removing the word ''to'' before the word ''monitoring.'' The typographical error in the heading of paragraph § 63.1209(k)(8)(ii) is also corrected. We revise the paragraph heading from ''mum time in-use'' to ''Maximum time in-use.'' Finally, we correct a typographical error in the first sentence of § 63.1213(a) by replacing the word ''data'' with ''date.''

B. Several Citations Are Corrected

In the May 14, 2001 rule, we removed the Notice of Intent to Comply (NIC) provisions that were vacated in *Chemical Manufacturers Association* v. *EPA,* 217 F.3d 861 (D.C. Cir. 2000). When we removed the NIC requirements from §§ 63.1210 and 63.1211 and redesignated follow-on paragraphs in those sections, we did not also revise several references to the redesignated paragraphs of §§ 63.1210 and 63.1211. The paragraphs revised include §§ 63.1206(b)(11), 63.1206(c)(1)(i), 63.1207(j)(1)(ii), 63.1207(j)(3), 63.1209(a)(1)(ii)(A), 63.1209(f)(1), and 266.100(b)(1).

In the May 14, 2001 rule, we also made changes to the compliance dates provisions of § 63.1206(a). However, when we redesignated paragraph (a)(3) to (a)(2) in that rule, we inadvertently failed also to revise a cite within old paragraph (a)(3). Today's rule corrects the reference in § 63.1206(a)(2) from paragraph (a)(3)(ii) to (a)(2)(ii).

We also correct an incorrect citation in § 63.1207(f)(1)(xvii). This paragraph inadvertently refers to § 63.1209(m)(5)(i) instead of § 63.1209(n)(5)(i). We make that correction today.

Finally, we correct an incorrect citation in § 63.1207(m)(4)(ii). This paragraph inadvertently refers to § 63.1207(m)(3)(iv) instead of § 63.1207(m)(4)(i). We make that correction today.

II. What Correction Are We Making to § 266.100?

We are making two corrections to § 266.100(d) to correct errors made when we promulgated the September 30, 1999 final rule. When we added § 266.100(b) to address integration of the MACT standards and redesignated paragraphs (b), (c), (d), (e), and (f), as (c), (d), (e), (f), and (g), respectively, we did not revise several references within these paragraphs. Today's rule revises the reference to old paragraph (c)(2) in paragraph (d)(1)(i)(B) to (d)(2); the reference to old paragraph (c)(1)(iii) in paragraph (d)(2)(i) to (d)(1)(iii); the reference to old paragraph (c)(1)(iii) in paragraph (d)(2)(ii) to (d)(1)(iii); the reference to old paragraphs (c)(1) and (c)(3) in paragraph (d)(3) to (d)(1) and (d)(3), respectively; the reference to old paragraph (c)(1) in paragraph (d)(3)(i) to (d)(1); and the reference to old paragraphs (c)(3) and (c)(1)(ii) in paragraph (d)(3)(i)(D) to (d)(3) and (d)(1)(ii), respectively.

In addition, when we added § 266.100(h) in the September 30, 1999 final rule to provide reduced sampling and analysis and notification and recordkeeping requirements for secondary lead smelters complying with the Secondary Lead Smelting NESHAP, we inadvertently deleted regulatory language in old paragraph (c)(3) that was redesignated paragraph (d)(3). We restore that regulatory language in (d)(3) today.

Finally, we correct a reference in § 266.100(a) from paragraphs (b), (c), (d), and (f) to paragraphs (b), (c), (d), (g), and (h).

III. What Correction Are We Making to § 270.42(j)(1): Combustion Facility Changes To Meet Part 63 MACT Standards?

We are correcting an error in the RCRA permitting regulations relating to the vacature of the Notification of Intent to Comply (NIC) and its associated requirements. On October 11, 2000, the D.C. Circuit issued a mandate to vacate the Notification of Intent to Comply provisions of 40 CFR part 63, Subpart EEE (Chemical Manufacturers Association v. EPA, 217 F. 3d 861, D.C.

Cir. 2000). We subsequently directed the Office of the Federal Register to remove those provisions from the Code of Federal Regulations on May 14, 2001 (66 FR 24270). Since sources were required to comply with the NIC requirements in order to be eligible for the RCRA Streamlined Permit Modification procedure, we also modified § 270.42(j)(1) to address the court's mandate.

Previously, § 270.42(j)(1) required owners or operators to first comply with the NIC requirements of § 63.1210 before requesting a streamlined RCRA permit modification. Sources were required to submit their final NICs by October 2, 2000. Since the court's mandate was not issued until after existing sources were required to submit their NICs, we determined that the court's action did not impact the sources' eligibility for a streamlined RCRA permit modification, provided, of course, that they submitted their NICs by October 2, 2000, as required by the rule. To clarify this in the regulatory language, we revised § 270.42(j)(1) to state that owners or operators must have complied with the Notification of Intent to Comply requirements of § 63.1210 that were in effect prior to May 14, 2001 in order to request a streamlined permit modification. In doing so, we incorrectly referred to the date that we removed the NIC provisions from the federal regulations (May 14, 2001) as the date on which those provisions were no longer in effect. Instead, we should have referenced the date of the court's mandate (October 11, 2000). The removal of the requirements from the federal regulations was only a ministerial action in acknowledgment of the court's October 11, 2000 order to vacate. Thus, in today's rulemaking, we are correcting the referenced date in § 270.42(j)(1) from May 14, 2001 to October 11, 2000.

IV. What Correction Are We Making to Table 1 to Subpart EEE—General Provisions Applicable to Subpart EEE?

Table 1 to Subpart EEE identifies which General Provisions provided under Subpart A, Part 63, are not applicable to hazardous waste combustors. We are amending that table to: (1) conform to revisions to Subpart EEE promulgated in a related final rule establishing interim emission standards and which was published in the **Federal Register** on February 13, 2002; (2) to make several other technical corrections; and (3) to clarify the explanation of the applicability of the General Provisions.

We are making the following specific corrections to Table 1 to Subpart EEE:

a. The applicability explanations for §§ 63.6(e), (f), and (h), and 63.7(e) are corrected to acknowledge that the emission standards and operating requirements of Subpart EEE do not apply during startup, shutdown, and malfunctions;

b. The applicability explanation for § 63.7(a) is clarified to note that § 63.1207(e)(3) allows you to petition the Administrator under § 63.7(h) to provide an extension of time to conduct a performance test;

c. The applicability explanation for § 63.8(c) is revised to correct the reference to § 63.1211(c) rather than § 63.1211(d);

d. The applicability explanations for §§ 63.8(c) and (g) are revised to delete the reference to applicability only to cement kilns because it is self-evident that only cement kilns are subject to an opacity emission standard under Subpart EEE. Further, if other sources were to use a COMS under alternative monitoring or other provisions, those sources would be required to comply with § 63.8(c); and

e. The applicability explanation for § 63.9(f) is corrected to require compliance with that paragraph for sources that are allowed under § 63.1209(a)(1)(v) to use visible determinations of opacity for compliance in lieu of a COMS.

Part Five—What Are the Analytical and Regulatory Requirements?

I. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, EPA must determine whether a regulatory action is significant and, therefore, subject to comprehensive review by the Office of Management and Budget (OMB), and the other provisions of the Executive Order. A significant regulatory action is defined by the Order as one that may:

Have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

—Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

—Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or rights and obligations or recipients thereof; or

—Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

Today's final action was submitted to OMB for review and confirmation. Pursuant to the terms of the Executive Order, the Agency, in conjunction with OMB has determined that today's final amendments rule does not represent a ''significant regulatory action.'' Today's final action does not meet any of the criteria identified above. Changes to this section of the Preamble made in response to OMB suggestions or recommendations are documented in the public record.

The aggregate annualized social cost for this final rule are less than $100 million. Furthermore, this rule is not expected to adversely effect, 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. The benefits to human health and the environment resulting from today's final rule have not been monetized but are believed to be less than $100 million per year.

II. What Economic and Equity Analyses Were Completed in Support of the Proposed Rule?

We prepared two economic support documents for the July 3, 2001 proposed rule: Assessment of Potential Costs, Benefits and Other Impacts, NESHAP: Standards for Hazardous Air Pollutants for Hazardous Waste Combustors—Technical Amendments to the Final Rule: NESHAP: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors, September 30, 1999, dated May, 2001, and Regulatory Flexibility Screening Analysis (RFSA) For NESHAP: Standards for Hazardous Air Pollutants for Hazardous Waste Combustors Technical Amendments to the Final Rule: NESHAP: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors, September 30, 1999, dated May, 2001. Both documents are available in the docket established for the July 3, 2001 action.

The Assessment document addressed both the thirteen direct final amendments and the twenty proposed amendments. Three of the proposed amendments in the direct final rule are finalized in today's rule and are projected to result in cost savings. Our analysis found that the amendment revising the alternative to the particulate matter standard for incinerators resulted in the single most significant projected cost savings. This amendment accounted for an estimated 77 percent, or $707,500, of the total quantifiable annual cost savings of $918,500. The direct final amendment addressing

feedstream analysis was projected to result in annual cost savings of $180,000, while the amendment on deletion of one-time notification of compliance accounted for the remaining cost savings. The total projected cost burden associated with the July 3, 2001 direct final amendments was estimated at $8,700 per year. The analysis found that most of the cost burdens are easily quantifiable, whereas many of the cost savings were not readily quantifiable and, are therefore not included in the aggregate estimate.

We were able to develop a quantified cost savings estimate for only one of the twenty proposed amendments in the Assessment. The amendment addressing method 23 as an alternative to method 0023A for dioxin/furans was projected to result in cost savings of $102,600 per year. Five of the twenty proposed amendments were projected to result in an aggregate quantifiable cost burden of $361,100 per year. Approximately 45 percent of this increased cost burden would be on the government. The proposed amendment revising the operator training and certification provisions was estimated to account for 84 percent of the total estimated cost burden.

No measurable impacts were projected in any of the following categories related to equity and regulatory concerns: environmental justice; children's health protection; unfunded mandates; tribal governments; and regulatory takings.

The RFSA document prepared in support of the July 3, 2001 actions analyzed potential impacts to small entities associated with both the direct final and proposed amendments. Based on our worst-case scenario, we found that there would not be a significant economic impact on any of the small business combustor companies subject to rule (amendment) requirements.

III. What Substantive Comments Were Received on the Cost/Economic Aspects of Proposed Rule?

We received no substantive comments on the cost/economic issues associated with either the direct final or proposed amendments. Selected commenters, however, incorporated minor references to cost issues as part of their comments on other issues. One commenter indicated that unnecessary testing cost increases and complications would result without the flexibility to use DRE data in lieu of testing. The incorporation of this amendment into today's final rule relieves this cost concern. Two commenters indicated support for the Agency's proposed amendment that would allow use of site-specific operator training and certification programs. This flexibility was supported as a means of avoiding the burden and complications associated with training requirements established under the final rule. The incorporation of this amendment into today's final rule addresses this cost concern.

Four commenters referenced cost issues associated with the amendment addressing the time extension for performance testing. These commenters generally supported the amendment but felt, in some cases, that it did not go far enough to address unforeseen circumstances and to mitigate the concerns associated with the potential for unnecessary performance testing and related costs. We are sensitive to these concerns; however, we continue to believe that an open-ended test date will not provide an incentive for either sources or regulatory officials to resolve differences related to the test plan. We believe that this stimulus will help mitigate unnecessary cost impacts.

IV. What Are the Potential Costs and Benefits of Today's Final Rule?

The value of any regulatory action is traditionally measured by the net change in social welfare that it generates. A rule that generates positive net welfare would be advantageous to society and should be promulgated. A rule that results in negative net welfare to society should be avoided, assuming all other factors are equal.

We have assessed the impacts of this final rule in our economic support document: Assessment of Potential Costs, Benefits and Other Impacts, and, Regulatory Flexibility Screening Analysis (RFSA) for NESHAP: Standards for Hazardous Air Pollutants for Hazardous Waste Combustors; Final Rule—Amendments to the NESHAP: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors: Final Rule, September 30, 1999, dated January 2, 2002. This document is available in the docket established in support of today's action. A brief summary of findings is presented below.

Today's rule revises several requirements promulgated in the September 30, 1999 rule. Cost impacts associated with the final amendments are not fully quantifiable. All amendments, however, are projected to result in zero cost impacts or national annual net cost savings to industry, as projected from the baseline of the September 30, 1999 rule. The total cost burden to government associated with the final amendments is estimated at $160,000 per year. No quantifiable benefits and/or environmental implications have been identified.

V. What Consideration Was Given to Small Entities Under the 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 final rule on small entities, a small entity is defined either by the number of employees or by the annual dollar amount of sales/revenues. The level at which an entity is considered small is determined for each NAICS code by the Small Business Administration (SBA).

The Agency has examined the potential effects today's final rule may have on small entities, as required by the RFA/SBREFA. We have found that four of the final amendments are projected to result in measurable cost impacts. The amendment addressing feedstream analysis for organic HAPs would result in cost savings but we expect that only larger operations would be impacted. The other three final amendments are projected to result in a measurable cost burden. Of these three, only the amendment addressing operator training and certification may potentially result in a cost burden to small hazardous waste combustors. Under an assumed worst-case, or high end cost scenario, we estimate maximum total costs on each ''small'' hazardous waste combustor company to average $25,700 ($154,000/6 = $25,700 per ''small'' source). Based on this high cost scenario, impacts on an individual small company basis would be no more than 0.71 percent of the annual gross sales. This figure is less than our threshold of 1 percent for determination of potentially significant economic impact. This amendment, however, was designed to ultimately provide regulatory relief. The lack of available data prevented us from quantifying cost savings potentially associated with this amendment. Overall impacts are likely to be considerably less than the 0.71 percent ''high-end'' estimate presented here. Based on this analysis we believe that it is reasonable to conclude that

there would not be a significant economic impact to any of the small business combustor companies potentially subject to rule requirements. After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Full details of the small entity analysis are presented in our report: Assessment of Potential Costs, Benefits and Other Impacts, and, Regulatory Flexibility Screening Analysis (RFSA) for NESHAP: Standards for Hazardous Air Pollutants for Hazardous Waste Combustors; Final Rule—Amendments to the NESHAPS: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors: Final Rule, September 30, 1999, dated January 2, 2002. This document is available in the docket established in support of today's action.

VI. Was the Unfunded Mandates Reform Act Considered In This Final Rule?

Executive Order 12875, ''Enhancing the Intergovernmental Partnership'' (October 26, 1993), calls on federal agencies to provide a statement supporting the need to issue any regulation containing an unfunded federal mandate and describing prior consultation with representatives of affected state, local, and tribal governments. Signed into law on March 22, 1995, the Unfunded Mandates Reform Act (UMRA) supersedes Executive Order 12875, reiterating the previously established directives while also imposing additional requirements for federal agencies issuing any regulation containing an unfunded mandate.

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 to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any single 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.

Today's final rule is not subject to the requirements of UMRA. Today's final rule will not result in $100 million or more in expenditures. The aggregate annualized social costs for today's final rule are projected to be less than one million dollars. Furthermore, today's rule is not subject to the requirements of section 203 of UMRA. Section 203 requires agencies to develop a small government Agency plan before establishing any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments. We have determined that this rule will not significantly or uniquely affect small governments.

VII. Were Equity Issues and Children's Health Considered In This Final Rule?

By applicable executive order, we are required to consider the impacts of today's rule with regard to environmental justice and children's health.

(1) Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks'

''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be ''economically significant'' as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. Today's final rule is not subject to the Executive Order because it is not economically significant, as defined in Executive Order 12866.

(2) Executive Order 12898: Environmental Justice

Executive Order 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Population'' (February 11, 1994), is designed to address the environmental and human health conditions of minority and low-income populations. EPA is committed to addressing environmental justice concerns and has assumed a leadership role in environmental justice initiatives to enhance environmental quality for all citizens of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, income, or net worth bears disproportionately high and adverse human health and environmental impacts as a result of EPA's policies, programs, and activities. In response to Executive Order 12898, and to concerns voiced by many groups outside the Agency, EPA's Office of Solid Waste and Emergency Response (OSWER) formed an Environmental Justice Task Force to analyze the array of environmental justice issues specific to waste programs and to develop an overall strategy to identify and address these issues (OSWER Directive No. 9200.3–17). We have no data indicating that today's final rule would result in disproportionately negative impacts on minority or low income communities.

VIII. What Consideration Was Given to Tribal Governments In This Final Rule?

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

Today's final rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on

the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in the Order. Today's rule will not significantly or uniquely affect the communities of Indian tribal governments, nor impose substantial direct compliance costs on them.

IX. Were Federalism Implications Considered in Today's Final Rule?

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'' are 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.''

Today's 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 the Order. Thus, Executive Order 13132 does not apply to this rule.

X. Were Energy Impacts Considered?

Executive Order 13211, ''Actions Concerning Regulations That Affect Energy Supply, Distribution, or Use'' (May 18, 2001), addresses the need for regulatory actions to more fully consider the potential energy impacts of the proposed rule and resulting actions. Under the Order, agencies are required to prepare a Statement of Energy Effects when a regulatory action may have significant adverse effects on energy supply, distribution, or use, including impacts on price and foreign supplies. Additionally, the requirements obligate agencies to consider reasonable alternatives to regulatory actions with adverse affects and the impacts the alternatives might have upon energy supply, distribution, or use.

Today's final rule is not likely to have any significant adverse impact on factors affecting energy supply. We believe that Executive Order 13211 is not relevant to this action.

XI. Paperwork Reduction Act

We have prepared an Information Collection Request (ICR) document (ICR No. 1773.07) listing the information collection requirements of this final rule, and have submitted it for approval to the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* OMB has assigned a control number 2050–0171 for this ICR. A copy of this ICR may be obtained from Sandy Farmer, OPIA Regulatory Information Division, U.S. Environment Protection Agency (2137), 1200 Pennsylvania Avenue, NW., Washington DC 20460, or by calling (202) 260–2740.

The public burden associated with this final rule (which is under the Clean Air Act) is projected to affect approximately 171 HWC units and is estimated to average 7.6 hours per respondent annually. The reporting and recordkeeping cost burden is estimated to average $440 per respondent annually. Burden means total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a Federal agency. That 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.

XII. National Technology Transfer and Advancement Act of 1995

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Pub L. No. 104–113, § 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 standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This final rule does not require the implementation of technical standards, as defined above; thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

XIII. The Congressional Review Act (5 U.S.C. 801 et seq., as Added by the Small Business Regulatory Enforcement Fairness Act of 1996)

Is Today's Final Action Subject to Congressional Review?

The Congressional Review Act, 5 U.S.C. § 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major Rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. § 804(2). This final rule will become effective on February 14, 2002.

Part Six—Delegation Implications

I. What Is the Authority for the Final Amendment Rule?

Unlike the September 30, 1999 Final HWC NESHAP rule, this rule does not include any significant changes or additions affecting the RCRA program. This Final Amendment Rule amends the promulgated standards located in 40 CFR part 63, subpart EEE. Therefore, this discussion pertains only to delegation of amendments to State, Local, and Tribal (S/L/T) agencies pursuant to the CAA program.

Section 112(l) of the CAA allows us to delegate the authority to S/L/T programs to implement and enforce emission standards for pollutants subject to section 112 regulations. Thus, a S/L/T agency that receives 112(l) delegation can implement and enforce the amendments being made today. A S/L/T agency also can implement the amendments for Title V major sources (see 40 CFR 70.2) via their Title V authority because it is independent of their delegation status. By having an approved Title V program, the S/L/T agency has demonstrated that it has the legal authority, resources, and expertise to implement and enforce standards for section 112 pollutants.

As before, we encourage S/L/T agencies to apply for and receive 112(l) delegation for this rule. The key advantages afforded to S/L/T agencies

who receive delegation are that they become the primary enforcement authority and can exercise delegable provision authorities. Additionally, it ensures clear and consistent requirements for affected sources and regulators. For example, a source need only report compliance assurance monitoring to its primary enforcement authority.

State, Local, and Tribal agencies still have the ability to choose which delegation options to use when applying for delegation of Federal authorities for this rule. The 112(l) delegation process begins when the S/L/T agency applies for delegation of a section 112 rule without changes (straight delegation), by rule adjustment, substitution of requirements, state program approval (SPA), or equivalency by permit (EBP).[11] Also, the partial approval option is available for any S/L/T who cannot or chooses not to take full delegation of an entire standard. The drawback to this option is that it can create inconsistent requirements since the S/L/T agency will enforce portions of the standard, while we will enforce the remaining portions.

II. Why Should I Apply for Delegation of This Rule?

This rule will be effective upon promulgation. As with the Phase I NESHAP, a S/L/T agency will need to incorporate the amendments of this rule into a major source's new, renewed, or revised Title V permit regardless of whether it has received delegation. However, by receiving delegation of 112(l), a S/L/T agency can approve minor changes to a Federal NESHAP. For instance, it can substitute an emission limitation that is more stringent than a Federal standard.

In light of the benefits afforded to a S/L/T agency if it receives 112(l) delegation, we recognize that the process of applying for and receiving delegation can be a lengthy one. This may be especially true for those agencies that do not have established agreements in place to receive automatic delegation of unchanged standards. There are agencies who choose to utilize the delegation options provided under 112(l), which are not as straightforward as the unchanged standards. In these cases, the review period required when applying for one of the delegation options combined with a state's legislative proceedings, are factors that can prolong the delegation process. Therefore, we encourage the S/L/T agency to do what makes sense given circumstances relevant to timing issues and resource needs.

List of Subjects

40 CFR Part 63

Air pollution control, Hazardous substances, Incorporation by reference Reporting and recordkeeping requirements.

40 CFR Part 266

Energy, Environmental Protection Agency, Hazardous waste, Recycling, Reporting and recordkeeping requirements.

40 CFR Part 270

Administrative practice and procedure, Confidential business information, Environmental Protection Agency, Hazardous materials transportation, Hazardous waste, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Dated: February 7, 2002.

Christine Todd Whitman,

Administrator.

For the reasons set out in the preamble, title 40, chapter I, of the Code of Federal Regulations is amended as follows:

PART 63—NATIONAL EMISSIONS STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

1. The authority citation for part 63 continues to read as follows:

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

2. Section 63.14 is amended by adding paragraph (i) to read as follows:

§ 63.14 Incorporations by reference.

* * * * *

(i) *ASME standard number QHO–1–1994 and QHO–1a–1996 Addenda.* This standard is titled as ''Standard for the Qualification and Certification of Hazardous Waste Incinerator Operators.'' The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy of this document from the American Society of Mechanical Engineers, 345 East 47th Street, New York, N.Y. 10017. You may inspect a copy at the RCRA Information Center, Crystal Gateway One, 1235 Jefferson Davis Highway, Arlington, VA 22202, or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

3. Section 63.1200 is amended by revising entry (2) in Table 1 in paragraph (b) to read as follows:

§ 63.1200 Who is subject to these regulations?

* * * * *

(b) * * *

TABLE 1 TO § 63.1200.—HAZARDOUS WASTE COMBUSTORS EXEMPT FROM SUBPART EEE

If * * *	And If * * *	Then * * *
* * * * * * *		
(2) You are a research, development, and demonstration source.	You operate for no longer than one year after first burning hazardous waste (Note that the Administrator can extend this one-year restriction on a case-by-case basis upon your written request documenting when you first burned hazardous waste and the justification for needing additional time to perform research, development, or demonstration operations).	You are not subject to this subpart (Subpart EEE). This exemption applies even if there is a hazardous waste combustor at the plant site that is regulated under this subpart. You still, however, remain subject to § 270.65 of this chapter.
* * * * * * *		

[11] Refer to Hazardous Air Pollutants: Amendments to the Approval of State Programs and Delegation of Federal Authorities; Final Rule at 65 FR 55810 or the CAA Delegation for the HWC NESHAP fact sheet at *www.epa.gov/epaoswer/hazwaste/combust/toolkit/coverpage.htm* for further information on delegation procedures.

* * * * *

4. Section 63.1201 is amended by adding the definition of ''Preheater tower combustion gas monitoring location'' to paragraph (a) in alphabetical order to read as follows:

§ 63.1201 Definitions and acronyms used in this subpart.

(a) * * *

Preheater tower combustion gas monitoring location means a location within the preheater tower of a dry process cement kiln downstream (in terms of gas flow) of all hazardous waste firing locations and where a representative sample of combustion gas to measure combustion efficiency can be monitored.

* * * * *

5. Section 63.1204 is amended by revising paragraph (d)(1)(iii) to read as follows:

§ 63.1204 What are the standards for hazardous waste burning cement kilns?

* * * * *

(d) * * *

(1) * * *

(iii) You must calculate rolling averages for operating parameter limits as provided by § 63.1209(q)(2).

* * * * *

6. Section 63.1206 is amended by:

a. Revising the first sentence of paragraph (a)(2)(i).

b. Redesignating paragraph (a)(4) as (a)(3).

c. Revising paragraphs (b)(5)(i)(C)(*1*), (b)(6)(i) and (b)(6)(ii), (b)(7), (b)(11), and (b)(13)(i).

d. Revising paragraphs (c)(1)(i) introductory text, (c)(5)(i)(C), (c)(6), and (c)(7)(ii).

e. Adding paragraph (c)(5)(i)(D).

The revisions and additions read as follows:

§ 63.1206 When and how must you comply with the standards and operating requirements?

(a) * * *

(2) * * *

(i) If you commenced construction or reconstruction of your hazardous waste combustor after April 19, 1996, you must comply with this subpart by the later of September 30, 1999 or the date the source starts operations, except as provided by paragraph (a)(2)(ii) of this section. * * *

* * * * *

(b) * * *

(5) * * *

(i) * * *

(C) * * *

(*1*) Except as provided by paragraph (b)(5)(i)(C)(*2*) of this section, after the change and prior to submitting the notification of compliance, you must not burn hazardous waste for more than a total of 720 hours (renewable at the discretion of the Administrator) and only for the purposes of pretesting or comprehensive performance testing. Pretesting is defined at § 63.1207(h)(2)(i) and (ii).

* * * * *

(6) * * *

(i) If a DRE test performed pursuant to § 63.1207(c)(2) is acceptable as documentation of compliance with the DRE standard, you may use the highest hourly rolling average hydrocarbon level achieved during the DRE test runs to document compliance with the hydrocarbon standard. An acceptable DRE test is any test for which the data and results are determined to meet quality assurance objectives (on a site-specific basis) such that the results adequately demonstrate compliance with the DRE standard.

(ii) If during this acceptable DRE test you did not obtain hydrocarbon emissions data sufficient to document compliance with the hydrocarbon standard, you must either:

(A) Perform, as part of the performance test, an ''equivalent DRE test'' to document compliance with the hydrocarbon standard. An equivalent DRE test is comprised of a minimum of three runs each with a minimum duration of one hour during which you operate the combustor as close as reasonably possible to the operating parameter limits that you established based on the initial DRE test. You must use the highest hourly rolling average hydrocarbon emission level achieved during the equivalent DRE test to document compliance with the hydrocarbon standard; or

(B) Perform a DRE test as part of the performance test.

(7) *Compliance with the DRE standard.* (i) Except as provided in paragraphs (b)(7)(ii) and (b)(7)(iii) of this section:

(A) You must document compliance with the Destruction and Removal Efficiency (DRE) standard under §§ 63.1203 through 63.1205 only once provided that you do not modify the source after the DRE test in a manner that could affect the ability of the source to achieve the DRE standard.

(B) You may use any DRE test data that documents that your source achieves the required level of DRE provided:

(*1*) You have not modified the design or operation of your source in a manner that could effect the ability of your source to achieve the DRE standard since the DRE test was performed; and,

(*2*) The DRE test data meet quality assurance objectives determined on a site-specific basis.

(ii) Sources that feed hazardous waste at a location in the combustion system other than the normal flame zone must demonstrate compliance with the DRE standard during each comprehensive performance test;

(iii) For sources that do not use DRE previous testing to document conformance with the DRE standard pursuant to § 63.1207(c)(2), you must perform DRE testing during the initial comprehensive performance test.

* * * * *

(11) *Calculation of hazardous waste residence time.* You must calculate the hazardous waste residence time and include the calculation in the performance test plan under § 63.1207(f) and the operating record. You must also provide the hazardous waste residence time in the Documentation of Compliance under § 63.1211(c) and the Notification of Compliance under §§ 63.1207(j) and 63.1210(b).

* * * * *

(13) * * *

(i) Cement kilns that feed hazardous waste at a location other than the end where products are normally discharged and where fuels are normally fired must comply with the carbon monoxide and hydrocarbon standards of § 63.1204 as follows:

(A) For existing sources, you must not discharge or cause combustion gases to be emitted into the atmosphere that contain either:

(*1*) Hydrocarbons in the main stack in excess of 20 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; or

(*2*) Hydrocarbons both in the by-pass duct and at a preheater tower combustion gas monitoring location in excess of 10 parts per million by volume, at each location, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; or

(*3*) If the only firing location of hazardous waste upstream (in terms of gas flow) of the point where combustion gases are diverted into the bypass duct is at the kiln end where products are normally discharged, then both hydrocarbons at the preheater tower combustion gas monitoring location in excess of 10 parts per million by volume, over an hourly rolling average

(monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane, and either hydrocarbons in the by-pass duct in excess of 10 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane, or carbon monoxide in excess of 100 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, and corrected to 7 percent oxygen. If you comply with the carbon monoxide standard of 100 parts per million by volume in the by-pass duct, then you must also not discharge or cause combustion gases to be emitted into the atmosphere that contain hydrocarbons in the by-pass duct in excess of 10 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane, at any time during the destruction and removal efficiency (DRE) test runs or their equivalent as provided by § 63.1206(b)(7).

(B) For new sources, you must not discharge or cause combustion gases to be emitted into the atmosphere that contain either:

(*1*) Hydrocarbons in the main stack in excess of 20 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; or

(*2*)(*i*) Hydrocarbons both in the by-pass duct and at a preheater tower combustion gas monitoring location in excess of 10 parts per million by volume, at each location, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane, and

(*ii*) Hydrocarbons in the main stack, if construction of the kiln commenced after April 19, 1996 at a plant site where a cement kiln (whether burning hazardous waste or not) did not previously exist, to 50 parts per million by volume, over a 30-day block average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; or

(*3*)(*i*) If the only firing location of hazardous waste upstream (in terms of gas flow) of the point where combustion gases are diverted into the bypass duct is at the kiln end where products are normally discharged, then both hydrocarbons at the preheater tower combustion gas monitoring location in excess of 10 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane, and either hydrocarbons in the by-pass duct in excess of 10 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane, or carbon monoxide in excess of 100 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, and corrected to 7 percent oxygen. If you comply with the carbon monoxide standard of 100 parts per million by volume in the by-pass duct, then you must also not discharge or cause combustion gases to be emitted into the atmosphere that contain hydrocarbons in the by-pass duct in excess of 10 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane, at any time during the destruction and removal efficiency (DRE) test runs or their equivalent as provided by § 63.1206(b)(7).

(*ii*) If construction of the kiln commenced after April 19, 1996 at a plant site where a cement kiln (whether burning hazardous waste or not) did not previously exist, hydrocarbons are limited to 50 parts per million by volume, over a 30-day block average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane.

* * * * *

(c)* * * (1) * * * (i) You must operate only under the operating requirements specified in the Documentation of Compliance under § 63.1211(c) or the Notification of Compliance under §§ 63.1207(j) and 63.1210(b), except:

* * * * *

(5) * * *

(i) * * *

(C) Upon prior written approval of the Administrator, an alternative means of control to provide control of combustion system leaks equivalent to maintenance of combustion zone pressure lower than ambient pressure; or

(D) Upon prior written approval of the Administrator, other technique(s) which can be demonstrated to prevent fugitive emissions without use of instantaneous pressure limits; and

* * * * *

(6) *Operator training and certification*. (i) You must establish training programs for all categories of personnel whose activities may reasonably be expected to directly affect emissions of hazardous air pollutants from the source. Such persons include, but are not limited to, chief facility operators, control room operators, continuous monitoring system operators, persons that sample and analyze feedstreams, persons that manage and charge feedstreams to the combustor, persons that operate emission control devices, and ash and waste handlers. Each training program shall be of a technical level commensurate with the person's job duties specified in the training manual. Each commensurate training program shall require an examination to be administered by the instructor at the end of the training course. Passing of this test shall be deemed the ''certification'' for personnel, except that, for control room operators, the training and certification program shall be as specified in paragraphs (c)(6)(iii) through (c)(6)(vi) of this section.

(ii) You must ensure that the source is operated and maintained at all times by persons who are trained and certified to perform these and any other duties that may affect emissions of hazardous air pollutants. A certified control room operator must be on duty at the site at all times the source is in operation.

(iii) Hazardous waste incinerator control room operators must:

(A) Be trained and certified under a site-specific, source-developed and implemented program that meets the requirements of paragraph (c)(6)(v) of this section; or

(B) Be trained under the requirements of, and certified under, the American Society of Mechanical Engineers Standard Number QHO–1–1994 and QHO–1a–1996 Addenda (incorporated by reference—see § 63.14(e)). If you choose to use the ASME program:

(*1*) Control room operators must, prior to the compliance date, achieve provisional certification, and must submit an application to ASME and be scheduled for the full certification exam. Within one year of the compliance date, control room operators must achieve full certification;

(*2*) New operators and operators of new sources must, before assuming their

duties, achieve provisional certification, and must submit an application to ASME, and be scheduled for the full certification exam. Within one year of assuming their duties, these operators must achieve full certification; or

(C) Be trained and certified under a State program.

(iv) Cement kiln and lightweight aggregate kiln control room operators must be trained and certified under:

(A) A site-specific, source-developed and implemented program that meets the requirements of paragraph (c)(6)(v) of this section; or

(B) A State program.

(v) Site-specific, source developed and implemented training programs for control room operators must include the following elements:

(A) Training on the following subjects:

(*1*) Environmental concerns, including types of emissions;

(*2*) Basic combustion principles, including products of combustion;

(*3*) Operation of the specific type of combustor used by the operator, including proper startup, waste firing, and shutdown procedures;

(*4*) Combustion controls and continuous monitoring systems;

(*5*) Operation of air pollution control equipment and factors affecting performance;

(*6*) Inspection and maintenance of the combustor, continuous monitoring systems, and air pollution control devices;

(*7*) Actions to correct malfunctions or conditions that may lead to malfunction;

(*8*) Residue characteristics and handling procedures; and

(*9*) Applicable Federal, state, and local regulations, including Occupational Safety and Health Administration workplace standards; and

(B) An examination designed and administered by the instructor; and

(C) Written material covering the training course topics that may serve as reference material following completion of the course.

(vi) To maintain control room operator qualification under a site-specific, source developed and implemented training program as provided by paragraph (c)(6)(v) of this section, control room operators must complete an annual review or refresher course covering, at a minimum, the following topics:

(A) Update of regulations;

(B) Combustor operation, including startup and shutdown procedures, waste firing, and residue handling;

(C) Inspection and maintenance;

(D) Responses to malfunctions or conditions that may lead to malfunction; and

(E) Operating problems encountered by the operator.

(vii) You must record the operator training and certification program in the operating record.

(7) * * *

(ii) *Bag leak detection system requirements for baghouses at lightweight aggregate kilns and incinerators.* If you own or operate a hazardous waste incinerator or hazardous waste burning lightweight aggregate kiln equipped with a baghouse (fabric filter), you must continuously operate a bag leak detection system that meets the specifications and requirements of paragraph (c)(7)(ii)(A) of this section and you must comply with the corrective measures requirements of paragraph (c)(7)(ii)(B) of this section:

(A) *Bag leak detection system specification and requirements. (1)* The bag leak detection system must be certified by the manufacturer to be capable of continuously detecting and recording particulate matter emissions at concentrations of 1.0 milligrams per actual cubic meter unless you demonstrate, pursuant to procedures in § 63.1209(a)(1), that a higher sensitivity would adequately detect bag leaks;

(*2*) The bag leak detection system shall provide output of relative particulate matter loadings;

(*3*) The bag leak detection system shall be equipped with an alarm system that will sound an audible alarm when an increase in relative particulate loadings is detected over a preset level;

(*4*) The bag leak detection system shall be installed and operated in a manner consistent with available written guidance from the U.S. Environmental Protection Agency or, in the absence of such written guidance, the manufacturer's written specifications and recommendations for installation, operation, and adjustment of the system;

(*5*) The initial adjustment of the system shall, at a minimum, consist of establishing the baseline output by adjusting the sensitivity (range) and the averaging period of the device, and establishing the alarm set points and the alarm delay time;

(*6*) Following initial adjustment, you must not adjust the sensitivity or range, averaging period, alarm set points, or alarm delay time, except as detailed in the operation and maintenance plan required under paragraph (c)(7)(i) of this section. You must not increase the sensitivity by more than 100 percent or decrease the sensitivity by more than 50 percent over a 365 day period unless such adjustment follows a complete baghouse inspection which demonstrates the baghouse is in good operating condition;

(*7*) For negative pressure or induced air baghouses, and positive pressure baghouses that are discharged to the atmosphere through a stack, the bag leak detector shall be installed downstream of the baghouse and upstream of any wet acid gas scrubber; and

(*8*) Where multiple detectors are required, the system's instrumentation and alarm system may be shared among the detectors.

(B) *Bag leak detection system corrective measures requirements.* The operating and maintenance plan required by paragraph (c)(7)(i) of this section must include a corrective measures plan that specifies the procedures you will follow in the case of a bag leak detection system alarm. The corrective measures plan must include, at a minimum, the procedures used to determine and record the time and cause of the alarm as well as the corrective measures taken to correct the control device malfunction or minimize emissions as specified below. Failure to initiate the corrective measures required by this paragraph is failure to ensure compliance with the emission standards in this subpart.

(*1*) You must initiate the procedures used to determine the cause of the alarm within 30 minutes of the time the alarm first sounds; and

(*2*) You must alleviate the cause of the alarm by taking the necessary corrective measure(s) which may include, but are not to be limited to, the following measures:

(*i*) Inspecting the baghouse for air leaks, torn or broken filter elements, or any other malfunction that may cause an increase in emissions;

(*ii*) Sealing off defective bags or filter media;

(*iii*) Replacing defective bags or filter media, or otherwise repairing the control device;

(*iv*) Sealing off a defective baghouse compartment;

(*v*) Cleaning the bag leak detection system probe, or otherwise repairing the bag leak detection system; or

(*vi*) Shutting down the combustor.

7. Section 63.1207 is amended by:

a. Revising paragraph (c)(2)(i).

b. Adding paragraph (c)(2)(iv).

c. Adding paragraph (e)(3).

d. Revising paragraphs (f)(1)(ii)(A), (f)(1)(ii)(B), (f)(1)(ii)(C), (f)(1)(x) introductory text, and (f)(1)(xvii).

e. Adding paragraph (f)(1)(ii)(D).

f. Removing and reserving paragraph (f)(1)(xv).

g. Revising paragraphs (g)(2)(i) and (g)(2)(ii).

h. Adding paragraph (g)(2)(v).

i. Revising paragraphs (h)(1) and (h)(2) introductory text.

j. Revising paragraphs (j)(1)(ii) and (j)(3).

k. Revising paragraphs (m)(4)(i) and (m)(4)(ii).

The revisions and additions read as follows:

§ 63.1207 What are the performance testing requirements?

* * * * *

(c) * * *

(2) * * * (i) You may request that previous emissions test data serve as documentation of conformance with the emission standards of this subpart provided that the previous testing:

(A) Was initiated after 54 months prior to the compliance date, except as provided by paragraphs (c)(2)(iii) or (c)(2)(iv) of this section;

(B) Results in data that meet quality assurance objectives (determined on a site-specific basis) such that the results demonstrate compliance with the applicable standards;

(C) Was in conformance with the requirements of paragraph (g)(1) of this section; and

(D) Was sufficient to establish the applicable operating parameter limits under § 63.1209.

* * * * *

(iv) The data in lieu test age restriction provided in paragraph (c)(2)(i)(A) of this section does not apply to DRE data provided you do not feed hazardous waste at a location in the combustion system other than the normal flame zone.

* * * * *

(e) * * *

(3) *Petitions for time extension if Administrator fails to approve or deny test plans.* You may petition the Administrator under § 63.7(h) to obtain a ''waiver'' of any performance test—initial or periodic performance test; comprehensive or confirmatory test. The ''waiver'' would be implemented as an extension of time to conduct the performance test at a later date.

(i) *Qualifications for the waiver.* (A) You may not petition the Administrator for a waiver under this section if the Administrator has issued a notification of intent to deny your test plan(s) under § 63.7(c)(3)(i)(B);

(B) You must submit a site-specific emissions testing plan and a continuous monitoring system performance evaluation test plan at least one year before a comprehensive performance test is scheduled to begin as required by paragraph (c)(1) of this section, or at least 60 days before a confirmatory performance test is scheduled to begin as required by paragraph (d) of this section. The test plans must include all required documentation, including the substantive content requirements of paragraph (f) of this section and § 63.8(e); and

(C) You must make a good faith effort to accommodate the Administrator's comments on the test plans.

(ii) *Procedures for obtaining a waiver and duration of the waiver:* (A) You must submit to the Administrator a waiver petition or request to renew the petition under § 63.7(h) separately for each source at least 60 days prior to the scheduled date of the performance test;

(B) The Administrator will approve or deny the petition within 30 days of receipt and notify you promptly of the decision;

(C) The Administrator will not approve an individual waiver petition for a duration exceeding 6 months;

(D) The Administrator will include a sunset provision in the waiver ending the waiver within 6 months;

(E) You may submit a revised petition to renew the waiver under § 63.7(h)(3)(iii) at least 60 days prior to the end date of the most recently approved waiver petition;

(F) The Administrator may approve a revised petition for a total waiver period up to 12 months.

(iii) *Content of the waiver.* (A) You must provide documentation to enable the Administrator to determine that the source is meeting the relevant standard(s) on a continuous basis as required by § 63.7(h)(2). For extension requests for the initial comprehensive performance test, you must submit your Documentation of Compliance to assist the Administrator in making this determination.

(B) You must include in the petition information justifying your request for a waiver, such as the technical or economic infeasibility, or the impracticality, of the affected source performing the required test, as required by § 63.7(h)(3)(iii).

(iv) P*ublic notice.* You must notify the public (e.g., distribute public mailing list) of your petition to waive a performance test.

* * * * *

(f) * * *

(1) * * *

(ii) * * *

(A) Except as provided by paragraph (f)(1)(ii)(D) of this section, an identification of such organic hazardous air pollutants that are present in each hazardous waste feedstream. You need not analyze for organic hazardous air pollutants that would reasonably not be expected to be found in the feedstream. You must identify any constituents you exclude from analysis and explain the basis for excluding them. You must conduct the feedstream analysis according to § 63.1208(b)(8);

(B) An approximate quantification of such identified organic hazardous air pollutants in the hazardous waste feedstreams, within the precision produced by analytical procedures of § 63.1208(b)(8); and

(C) A description of blending procedures, if applicable, prior to firing the hazardous waste feedstream, including a detailed analysis of the materials prior to blending, and blending ratios.

(D) The Administrator may approve on a case-by-case basis a hazardous waste feedstream analysis for organic hazardous air pollutants in lieu of the analysis required under paragraph (f)(1)(ii)(A) of this section if the reduced analysis is sufficient to ensure that the POHCs used to demonstrate compliance with the applicable DRE standard of § 63.1203, § 63.1204, or § 63.1205, continue to be representative of the organic hazardous air pollutants in your hazardous waste feedstreams;

* * * * *

(x) If you are requesting to extrapolate metal feedrate limits from comprehensive performance test levels under §§ 63.1209(l)(1)(i) or 63.1209(n)(2)(ii)(A):

* * * * *

(xvii) If you propose to use a surrogate for measuring or monitoring gas flowrate, you must document in the comprehensive performance test plan that the surrogate adequately correlates with gas flowrate, as required by paragraph (m)(7) of this section, and § 63.1209(j)(2), (k)(3), (m)(2)(i), (n)(5)(i), and (o)(2)(i).

* * * * *

(g) * * *

(2) * * *

(i) Carbon monoxide (or hydrocarbon) CEMS emissions levels must be within the range of the average value to the maximum value allowed, except as provided by paragraph (g)(2)(iv) of this section. The average value is defined as the sum of the hourly rolling average values recorded (each minute) over the previous 12 months, divided by the number of rolling averages recorded during that time. The average value must not include calibration data, startup data, shutdown data, malfunction data, and data obtained when not burning hazardous waste;

(ii) Each operating limit (specified in § 63.1209) established to maintain

compliance with the dioxin/furan emission standard must be held within the range of the average value over the previous 12 months and the maximum or minimum, as appropriate, that is allowed, except as provided by paragraph (g)(2)(iv) of this section. The average value is defined as the sum of the rolling average values recorded over the previous 12 months, divided by the number of rolling averages recorded during that time. The average value must not include calibration data, startup data, shutdown data, malfunction data, and data obtained when not burning hazardous waste;

* * * * *

(v) The Administrator may approve an alternative range to that required by paragraphs (g)(2)(i) and (ii) of this section if you document in the confirmatory performance test plan that it may be problematic to maintain the required range during the test. In addition, when making the finding of compliance, the Administrator may consider test conditions outside of the range specified in the test plan based on a finding that you could not reasonably maintain the range specified in the test plan and considering factors including whether the time duration and level of the parameter when operations were out of the specified range were such that operations during the confirmatory test are determined to be reasonably representative of normal operations. In addition, the Administrator will consider the proximity of the emission test results to the standard.

* * * * *

(h) * * * (1) Current operating parameter limits established under § 63.1209 are waived during subsequent comprehensive performance testing.

(2) Current operating parameter limits are also waived during pretesting prior to comprehensive performance testing for an aggregate time not to exceed 720 hours of operation (renewable at the discretion of the Administrator) under an approved test plan or if the source records the results of the pretesting. Pretesting means:

* * * * *

(j) * * *

(1) * * *

(ii) Upon postmark of the Notification of Compliance, you must comply with all operating requirements specified in the Notification of Compliance in lieu of the limits specified in the Documentation of Compliance required under § 63.1211(c).

* * * * *

(3) See §§ 63.7(g), 63.9(h), and 63.1210(b) for additional requirements pertaining to the Notification of Compliance (*e.g.,* you must include results of performance tests in the Notification of Compliance).

* * * * *

(m) * * *

(4) * * *

(i) Identify in the Notification of Compliance a minimum gas flowrate limit and a maximum feedrate limit of mercury, semivolatile metals, low volatile metals, and/or total chlorine and chloride from all feedstreams that ensures the MTEC as calculated in paragraph (m)(2)(iii) of this section is below the applicable emission standard; and

(ii) Interlock the minimum gas flowrate limit and maximum feedrate limit of paragraph (m)(4)(i) of this section to the AWFCO system to stop hazardous waste burning when the gas flowrate or mercury, semivolatile metals, low volatile metals, and/or total chlorine and chloride feedrate exceeds the limits of paragraph (m)(4)(i) of this section.

* * * * *

8. Section 63.1209 is amended by:

a. Revising paragraph (a)(1)(ii)(A).

b. Revising paragraphs (b)(2)(i) and (b)(5)(iii)(A).

c. Revising paragraph (f)(1).

d. Revising paragraphs (g)(1)(iii)(B)(*1*), (g)(1)(iii)(B)(*2*), (g)(1)(iii)(B)(*3*), (g)(1)(iii)(C)(*1*), and (g)(1)(iii)(C)(*2*).

e. Revising paragraphs (k)(5) and (k)(8)(ii).

f. Revising paragraphs (l)(1) introductory text, (l)(3), and (l)(4).

g. Revising paragraph (m)(3).

h. Revising paragraph (n)(4).

i. Revising paragraph (o)(1).

j. Revising paragraph (q).

The revisions read as follows:

§ 63.1209 What are the monitoring requirements?

(a) * * *

(1) * * *

(ii) * * *

(A) You must maintain and operate each COMS in accordance with the requirements of § 63.8(c) except for the requirements under § 63.8(c)(3). The requirements of § 63.1211(c) shall be complied with instead of § 63.8(c)(3); and

* * * * *

(b) * * *

(2) * * *

(i) *Calibration of thermocouples and pyrometers.* The calibration of thermocouples must be verified at a frequency and in a manner consistent with manufacturer specifications, but no less frequent than once per year. You must operate and maintain optical pyrometers in accordance with manufacturer specifications unless otherwise approved by the Administrator. You must calibrate optical pyrometers in accordance with the frequency and procedures recommended by the manufacturer, but no less frequent than once per year, unless otherwise approved by the Administrator. And,

* * * * *

(5) * * *

(iii) * * * (A) Except as provided by paragraph (b)(5)(iii)(B) of this section, you must continue monitoring operating parameter limits with a CMS when the hazardous waste feed is cutoff if the source is operating. You must not resume feeding hazardous waste if an operating parameter exceeds its limit.

* * * * *

(f) * * *

(1) *Section 63.8(c)(3).* The requirements of § 63.1211(c), that requires CMSs to be installed, calibrated, and operational on the compliance date, shall be complied with instead of section 63.8(c)(3);

* * * * *

(g) * * *

(1) * * *

(iii) * * *

(B) * * *

(*1*) Data or information justifying your request for an alternative monitoring requirement (or for a waiver of an operating parameter limit), such as the technical or economic infeasibility or the impracticality of using the required approach;

(*2*) A description of the proposed alternative monitoring requirement, including the operating parameter to be monitored, the monitoring approach/technique (*e.g.,* type of detector, monitoring location), the averaging period for the limit, and how the limit is to be calculated; and

(*3*) Data or information documenting that the alternative monitoring requirement would provide equivalent or better assurance of compliance with the relevant emission standard, or that it is the monitoring requirement that best assures compliance with the standard and that is technically and economically practicable.

(C) * * *

(*1*) Notice of the information and findings on which the intended disapproval is based; and

(*2*) Notice of opportunity for you to present additional information to the Administrator before final action on the request. At the time the Administrator notifies you of intention to disapprove the request, the Administrator will specify how much time you will have after being notified of the intended

disapproval to submit the additional information.

* * * * *

(k) * * *

(5) *Particulate matter operating limit.* If your combustor is equipped with an activated carbon injection system, you must establish operating parameter limits on the particulate matter control device as specified by paragraph (m)(1) of this section;

* * * * *

(8) * * *

(ii) *Maximum time in-use.* You must replace a catalytic oxidizer with a new catalytic oxidizer when it has reached the maximum service time specified by the manufacturer.

* * * * *

(l) * * *

(1) *Feedrate of total mercury.* You must establish a 12-hour rolling average limit for the total feedrate of mercury in all feedstreams as the average of the test run averages, unless mercury feedrate limits are extrapolated from performance test feedrate levels under the following provisions.

* * * * *

(3) *Activated carbon injection.* If your combustor is equipped with an activated carbon injection system, you must establish operating parameter limits prescribed by paragraphs (k)(5) and (k)(6) of this section.

(4) *Activated carbon bed.* If your combustor is equipped with an activated carbon bed system, you must comply with the requirements of (k)(7) of this section to assure compliance with the mercury emission standard.

(m) * * *

(3) *Maximum ash feedrate.* Owners and operators of hazardous waste incinerators must establish a maximum ash feedrate limit as the average of the test run averages.

(n) * * *

(4) *Maximum total chlorine and chloride feedrate.* You must establish a 12-hour rolling average limit for the feedrate of total chlorine and chloride in all feedstreams as the average of the test run averages.

* * * * *

(o) * * *

(1) *Feedrate of total chlorine and chloride.* You must establish a 12-hour rolling average limit for the total feedrate of chlorine (organic and inorganic) in all feedstreams as the average of the test run averages.

* * * * *

(q) *Operating under different modes of operation.* If you operate under different modes of operation, you must establish operating parameter limits for each mode. You must document in the operating record when you change a mode of operation and begin complying with the operating limits for an alternative mode of operation.

(1) *Operating under otherwise applicable standards after the hazardous waste residence time has transpired.* As provided by § 63.1206(b)(1)(ii), you may operate under otherwise applicable requirements promulgated under sections 112 and 129 of the Clean Air Act in lieu of the substantive requirements of this subpart.

(i) The otherwise applicable requirements promulgated under sections 112 and 129 of the Clean Air Act are applicable requirements under this subpart.

(ii) You must specify (e.g., by reference) the otherwise applicable requirements as a mode of operation in your Documentation of Compliance under § 63.1211(c), your Notification of Compliance under § 63.1207(j), and your title V permit application. These requirements include the otherwise applicable requirements governing emission standards, monitoring and compliance, and notification, reporting, and recordkeeping.

(2) *Calculating rolling averages under different modes of operation.* When you transition to a different mode of operation, you must calculate rolling averages as follows:

(i) *Retrieval approach.* Calculate rolling averages anew using the continuous monitoring system values previously recorded for that mode of operation (i.e., you ignore continuous monitoring system values subsequently recorded under other modes of operation when you transition back to a mode of operation); or

(ii) *Start anew.* Calculate rolling averages anew without considering previous recordings.

(A) Rolling averages must be calculated as the average of the available one-minute values for the parameter until enough one-minute values are available to calculate hourly or 12-hour rolling averages, whichever is applicable to the parameter.

(B) You may not transition to a new mode of operation using this approach if the most recent operation in that mode resulted in an exceedance of an applicable emission standard measured with a CEMS or operating parameter limit prior to the hazardous waste residence time expiring; or

(iii) *Seamless transition.* Continue calculating rolling averages using data from the previous operating mode provided that both the operating limit and the averaging period for the parameter are the same for both modes of operation.

9. Section 63.1210 is amended by revising paragraph (a) to read as follows:

§ 63.1210 What are the notification requirements?

(a) *Summary of requirements.* (1) You must submit the following notifications to the Administrator:

Reference	Notification
63.9(b)	Initial notifications that you are subject to Subpart EEE of this Part.
63.9(d)	Notification that you are subject to special compliance requirements.
63.9(j)	Notification and documentation of any change in information already provided under § 63.9.
63.1206(b)(5)(i)	Notification of changes in design, operation, or maintenance.
63.1207(e), 63.9(e), 63.9(g)(1) and (3)	Notification of performance test and continuous monitoring system evaluation, including the performance test plan and CMS performance evaluation plan.[1]
63.1210(b), 63.1207(j), 63.1207(k), 63.1207(l), 63.9(h), 63.10(d)(2), 63.10(e)(2).	Notification of compliance, including results of performance tests and continuous monitoring system performance evaluations.

[1] You may also be required on a case-by-case basis to submit a feedstream analysis plan under § 63.1209(c)(3).

(2) You must submit the following notifications to the Administrator if you request or elect to comply with alternative requirements:

Reference	Notification, request, petition, or application
63.9(i)	You may request an adjustment to time periods or postmark deadlines for submittal and review of required information.

Reference	Notification, request, petition, or application
63.10(e)(3)(ii)	You may request to reduce the frequency of excess emissions and CMS performance reports.
63.10(f)	You may request to waive recordkeeping or reporting requirements.
63.1204(d)(2)(iii)	Notification that you elect to comply with the emission averaging requirements for cement kilns with in-line raw mills.
63.1204(e)(2)(iii)	Notification that you elect to comply with the emission averaging requirements for preheater or preheater/precalciner kilns with dual stacks.
63.1206(b)(4), 63.1213, 63.6(i), 63.9(c)	You may request an extension of the compliance date for up to one year.
63.1206(b)(5)(i)(C)	You may request to burn hazardous waste for more than 720 hours and for purposes other than testing or pretesting after making a change in the design or operation that could affect compliance with emission standards and prior to submitting a revised Notification of Compliance.
63.1206(b)(8)(iii)(B)	If you elect to conduct particulate matter CEMS correlation testing and wish to have federal particulate matter and opacity standards and associated operating limits waived during the testing, you must notify the Administrator by submitting the correlation test plan for review and approval.
63.1206(b)(8)(v)	You may request approval to have the particulate matter and opacity standards and associated operating limits and conditions waived for more than 96 hours for a correlation test.
63.1206(b)(9)	Owners and operators of lightweight aggregate kilns may request approval of alternative emission standards for mercury, semivolatile metal, low volatile metal, and hydrochloric acid/chlorine gas under certain conditions.
63.1206(b)(10)	Owners and operators of cement kilns may request approval of alternative emission standards for mercury, semivolatile metal, low volatile metal, and hydrochloric acid/chlorine gas under certain conditions.
63.1206(b)(14)	Owners and operators of incinerators may elect to comply with an alternative to the particulate matter standard.
63.1206(b)(15)	Owners and operators of cement and lightweight aggregate kilns may request to comply with the alternative to the interim standards for mercury.
63.1206(c)(2)(ii)(C)	You may request to make changes to the startup, shutdown, and malfunction plan.
63.1206(c)(5)(i)(C)	You may request an alternative means of control to provide control of combustion system leaks.
63.1206(c)(5)(i)(D)	You may request other techniques to prevent fugitive emissions without use of instantaneous pressure limits.
63.1207(c)(2)	You may request to base initial compliance on data in lieu of a comprehensive performance test.
63.1207(d)(3)	You may request more than 60 days to complete a performance test if additional time is needed for reasons beyond your control.
63.1207(e)(3), 63.7(h)	You may request a time extension if the Administrator fails to approve or deny your test plan.
63.1207(h)(2)	You may request to waive current operating parameter limits during pretesting for more than 720 hours.
63.1207(f)(1)(ii)(D)	You may request a reduced hazardous waste feedstream analysis for organic hazardous air pollutants if the reduced analysis continues to be representative of organic hazardous air pollutants in your hazardous waste feedstreams.
63.1207(g)(2)(v)	You may request to operate under a wider operating range for a parameter during confirmatory performance testing.
63.1207(i)	You may request up to a one-year time extension for conducting a performance test (other than the initial comprehensive performance test) to consolidate testing with other state or federally-required testing.
63.1207(j)(4)	You may request more than 90 days to submit a Notification of Compliance after completing a performance test if additional time is needed for reasons beyond your control.
63.1207(l)(3)	After failure of a performance test, you may request to burn hazardous waste for more than 720 hours and for purposes other than testing or pretesting.
63.1209(a)(5), 63.8(f)	You may request: (A.) Approval of alternative monitoring methods for compliance with standards that are monitored with a CEMS; and (B.) approval to use a CEMS in lieu of operating parameter limits.
63.1209(g)(1)	You may request approval of: (A.) Alternative monitoring methods, except for standards that you must monitor with a continuous emission monitoring system (CEMS) and except for requests to use a CEMS in lieu of operating parameter limits; or (B.) a waiver of an operating parameter limit.
63.1209(l)(1)	You may request to extrapolate mercury feedrate limits.
63.1209(n)(2)(ii)	You may request to extrapolate semivolatile and low volatile metal feedrate limits.
63.1211(d)	You may request to use data compression techniques to record data on a less frequent basis than required by § 63.1209.

* * * * * * *

10. Section 63.1211 is amended by revising paragraphs (a) and (b) to read as follows:

§ 63.1211 What are the recordkeeping and reporting requirements?

(a) *Summary of reporting requirements.* You must submit the following reports to the Administrator:

Reference	Report
63.10(d)(4)	Compliance progress reports, if required as a condition of an extension of the compliance date granted under § 63.6(i).
63.10(d)(5)(i)	Periodic startup, shutdown, and malfunction reports.
63.10(d)(5)(ii)	Immediate startup, shutdown, and malfunction reports.
63.10(e)(3)	Excessive emissions and continuous monitoring system performance report and summary report.
63.1206(c)(2)(ii)(B)	Startup, shutdown, and malfunction plan.
63.1206(c)(3)(vi)	Excessive exceedances reports.
63.1206(c)(4)(iv)	Emergency safety vent opening reports.

(b) *Summary of recordkeeping requirements.* You must retain the following in the operating record:

Reference	Document, data, or information
63.1200, 63.10(b) and (c)	General. Information required to document and maintain compliance with the regulations of Subpart EEE, including data recorded by continuous monitoring systems (CMS), and copies of all notifications, reports, plans, and other documents submitted to the Administrator.
63.1204(d)(1)(ii)	Documentation of mode of operation changes for cement kilns with in-line raw mills.
63.1204(d)(2)(ii)	Documentation of compliance with the emission averaging requirements for cement kilns with in-line raw mills.
63.1204(e)(2)(ii)	Documentation of compliance with the emission averaging requirements for preheater or preheater/precalciner kilns with dual stacks.
63.1206(b)(1)(ii)	If you elect to comply with all applicable requirements and standards promulgated under authority of the Clean Air Act, including Sections 112 and 129, in lieu of the requirements of Subpart EEE when not burning hazardous waste, you must document in the operating record that you are in compliance with those requirements.
63.1206(b)(5)(ii)	Documentation that a change will not adversely affect compliance with the emission standards or operating requirements.
63.1206(b)(11)	Calculation of hazardous waste residence time.
63.1206(c)(2)	Startup, shutdown, and malfunction plan.
63.1206(c)(2)(v)(A)	Documentation of your investigation and evaluation of excessive exceedances during malfunctions.
63.1206(c)(3)(v)	Corrective measures for any automatic waste feed cutoff that results in an exceedance of an emission standard or operating parameter limit.
63.1206(c)(3)(vii)	Documentation and results of the automatic waste feed cutoff operability testing.
63.1206(c)(4)(ii)	Emergency safety vent operating plan.
63.1206(c)(4)(iii)	Corrective measures for any emergency safety vent opening.
63.1206(c)(5)(ii)	Method used for control of combustion system leaks.
63.1206(c)(6)	Operator training and certification program.
63.1206(c)(7)(i)(D)	Operation and maintenance plan.
63.1209(c)(2)	Feedstream analysis plan.
63.1209(k)(6)(iii), 63.1209(k)(7)(ii), 63.1209(k)(9)(ii), 63.1209(o)(4)(iii).	Documentation that a substitute activated carbon, dioxin/furan formation reaction inhibitor, or dry scrubber sorbent will provide the same level of control as the original material.
63.1209(k)(7)(i)(C)	Results of carbon bed performance monitoring.
63.1209(q)	Documentation of changes in modes of operation.
63.1211(c)	Documentation of compliance.

* * * * *

11. Section 63.1213 is amended by revising the first sentence of paragraph (a) to read as follows:

§ 63.1213 How can the compliance date be extended to install pollution prevention or waste minimization controls?

(a) *Applicability.* You may request from the Administrator or State with an approved title V program an extension of the compliance date of up to one year. * * *

* * * * *

12. Table 1 to Subpart EEE is amended to read as follows:

TABLE 1 TO SUBPART EEE.—GENERAL PROVISIONS APPLICABLE TO SUBPART EEE

Reference	Applies to subpart EEE	Explanation
63.1	Yes.	
63.2	Yes.	
63.3	Yes.	
63.4	Yes..	
63.5	Yes.	

TABLE 1 TO SUBPART EEE.—GENERAL PROVISIONS APPLICABLE TO SUBPART EEE—Continued

Reference	Applies to subpart EEE	Explanation
63.6(a), (b), (c), (d), and (e).	Yes.	
63.6(f)	Yes	Except that the performance test requirements of Sec. 63.1207 apply instead of § 63.6(f)(2)(iii)(B).
63.6(g) and (h)	Yes.	
63.6(i)	Yes	Section 63.1213 specifies that the compliance date may also be extended for inability to install necessary emission control equipment by the compliance date because of implementation of pollution prevention or waste minimization controls.
63.6(j)	Yes.	
63.7(a)	Yes	Except § 63.1207(e)(3) allows you to petition the Administrator under § 63.7(h) to provide an extension of time to conduct a performance test.
63.7(b)	Yes	Except § 63.1207(e) requires you to submit the site-specific test plan for approval at least one year before the comprehensive performance test is scheduled to begin.
63.7(c)	Yes	Except § 63.1207(e) requires you to submit the site-specific test plan (including the quality assurance provisions under § 63.7(c)) for approval at least one year before the comprehensive performance test is scheduled to begin.
63.7(d)	Yes.	
63.7(e)	Yes	Except § 63.1207 prescribes operations during performance testing and § 63.1209 specifies operating limits that will be established during performance testing (such that testing is likely to be representative of the extreme range of normal performance).
63.7(f)	Yes.	
63.7(g)	Yes	Except § 63.1207(j) requiring that you submit the results of the performance test (and the notification of compliance) within 90 days of completing the test, unless the Administrator grants a time extension, applies instead of § 63.7(g)(1).
63.7(h)	Yes	Except § 63.1207(c)(2) allows data in lieu of the initial comprehensive performance test, and § 63.1207(m) provides a waiver of certain performance tests. You must submit requests for these waivers with the site-specific test plan.
63.8(a) and (b)	Yes.	
63.8(c)	Yes	Except: (1) § 63.1211(c) that requires you to install, calibrate, and operate CMS by the compliance date applies instead of § 63.8(c)(3); and (2) the performance specifications for CO, HC, and O2 CEMS in subpart B, of this chapter requiring that the detectors measure the sample concentration at least once every 15 seconds for calculating an average emission level once every 60 seconds apply instead of § 63.8(c)(4)(ii).
63.8(d)	Yes.	
63.8(e)	Yes	Except § 63.1207(e) requiring you to submit the site-specific comprehensive performance test plan and the CMS performance evaluation test plan for approval at least one year prior to the planned test date applies instead of §§ 63.8(e)(2) and (3)(iii).
63.8(f) and (g)	Yes.	
63.9(a)	Yes.	
63.9(b)	Yes	*Note:* Section 63.9(b)(1)(ii) pertains to notification requirements for area sources that become a major source, and § 63.9(b)(2)(v) requires a major source determination. Although area sources are subject to all provisions of this subpart (Subpart EEE), these sections nonetheless apply because the major source determination may affect the applicability of part 63 standards or title V permit requirements to other sources (i.e., other than a hazardous waste combustor) of hazardous air pollutants at the facility.
63.9(c) and (d)	Yes.	
63.9(e)	Yes	Except § 63.1207(e) which requires you to submit the comprehensive performance test plan for approval one year prior to the planned performance test date applies instead of § 63.9(e).
63.9(f)	Yes	Section 63.9(f) applies if you are allowed under § 63.1209(a)(1)(v) to use visible determination of opacity for compliance in lieu of a COMS.
63.9(g)	Yes	Except § 63.9(g)(2) pertaining to COMS does not apply.
63.9(h)	Yes	Except § 63.1207(j) requiring you to submit the notification of compliance within 90 days of completing a performance test unless the Administrator grants a time extension applies instead of § 63.9(h)(2)(iii). Note: Even though area sources are subject to this subpart, the major source determination required by § 63.9(h)(2)(i)(E) is applicable to hazardous waste combustors for the reasons discussed above.
63.9(i) and (j)	Yes.	
63.10	Yes	Except reports of performance test results required under § 63.10(d)(2) may be submitted up to 90 days after completion of the test.
63.11	No.	
63.12–63.15	Yes.	

PART 266—STANDARDS FOR THE MANAGEMENT OF SPECIFIC HAZARDOUS WASTES AND SPECIFIC TYPES OF HAZARDOUS WASTE MANAGEMENT FACILITIES

1. The authority citation for part 266 continues to read as follows:

Authority: Secs. 1006, 2002(a), 3004, 6905, 6906, 6912, 6922, 6924, 6925, and 6937.

2. Section 266.100 is amended by:

a. Revising the first sentence of paragraph (a).

b. Revising the first sentence of paragraph (b)(1).

c. Revising paragraphs (d)(1)(i)(B), (d)(2)(i), (d)(2)(ii), (d)(3) introductory text, (d)(3)(i) introductory text, and (d)(3)(i)(D).

The revisions read as follows:

§ 266.100 Applicability.

(a) The regulations of this subpart apply to hazardous waste burned or processed in a boiler or industrial furnace (as defined in § 260.10 of this chapter) irrespective of the purpose of burning or processing, except as provided by paragraphs (b), (c), (d), (g), and (h) of this section.* * *

* * * * *

(b) * * * (1) Except as provided by paragraph (b)(2) of this section, the standards of this part no longer apply when an affected source demonstrates compliance with the maximum achievable control technology (MACT) requirements of part 63, subpart EEE, of this chapter by conducting a comprehensive performance test and submitting to the Administrator a Notification of Compliance under §§ 63.1207(j) and 63.1210(b) of this chapter documenting compliance with the requirements of part 63, subpart EEE, of this chapter.* * *

* * * * *

(d) * * *

(1) * * *

(i) * * *

(B) The hazardous waste is burned solely for metal recovery consistent with the provisions of paragraph (d)(2) of this section;

* * * * *

(2) * * *

(i) The hazardous waste has a total concentration of organic compounds listed in part 261, appendix VIII, of this chapter exceeding 500 ppm by weight, as-fired, and so is considered to be burned for destruction. The concentration of organic compounds in a waste as-generated may be reduced to the 500 ppm limit by *bona fide* treatment that removes or destroys organic constituents. Blending for dilution to meet the 500 ppm limit is prohibited and documentation that the waste has not been impermissibly diluted must be retained in the records required by paragraph (d)(1)(iii) of this section; or

(ii) The hazardous waste has a heating value of 5,000 Btu/lb or more, as-fired, and so is considered to be burned as fuel. The heating value of a waste as-generated may be reduced to below the 5,000 Btu/lb limit by *bona fide* treatment that removes or destroys organic constituents. Blending for dilution to meet the 5,000 Btu/lb limit is prohibited and documentation that the waste has not been impermissibly diluted must be retained in the records required by paragraph (d)(1)(iii) of this section.

(3) To be exempt from §§ 266.102 through 266.111, an owner or operator of a lead or nickel-chromium or mercury recovery furnace (except for owners or operators of lead recovery furnaces subject to regulation under the Secondary Lead Smelting NESHAP) or a metal recovery furnace that burns baghouse bags used to capture metallic dusts emitted by steel manufacturing, must provide a one-time written notice to the Director identifying each hazardous waste burned and specifying whether the owner or operator claims an exemption for each waste under this paragraph or paragraph (d)(1) of this section. The owners or operator must comply with the requirements of paragraph (d)(1) of this section for those wastes claimed to be exempt under that paragraph and must comply with the requirements below for those wastes claimed to be exempt under this paragraph (d)(3).

(i) The hazardous wastes listed in appendices XI, XII, and XIII, part 266, and baghouse bags used to capture metallic dusts emitted by steel manufacturing are exempt from the requirements of paragraph (d)(1) of this section, provided that:

* * * * *

(D) The owner or operator certifies in the one-time notice that hazardous waste is burned under the provisions of paragraph (d)(3) of this section and that sampling and analysis will be conducted or other information will be obtained as necessary to ensure continued compliance with these requirements. Sampling and analysis shall be conducted according to paragraph (d)(1)(ii) of this section and records to document compliance with paragraph (d)(3) of this section shall be kept for at least three years.

* * * * *

PART 270—EPA ADMINISTERED PERMIT PROGRAMS: THE HAZARDOUS WASTE PERMIT PROGRAM

1. The authority citation for part 270 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912, 6924, 6925, 6927, 6939, and 6974.

2. Section 270.42 is amended by revising paragraph (j)(1) to read as follows:

§ 270.42 Permit modifications at the request of the permittee.

* * * * *

(j) * * *

(1) Facility owners or operators must have complied with the Notification of Intent to Comply (NIC) requirements of 40 CFR 63.1210 that were in effect prior to October 11, 2000, (See 40 CFR Part 63 Revised as of July 1, 2000) in order to request a permit modification under this section.

* * * * *

[FR Doc. 02–3373 Filed 2–13–02; 8:45 am]

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Federal Register

Thursday,
February 14, 2002

Part III

Department of Health and Human Services

42 CFR Part 36, et al.
Tribal Self-Governance Amendments of 2000; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 36, et al.

RIN 0917–AA05

Tribal Self-Governance Amendments of 2000

AGENCY: Indian Health Service, DHHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary of the Department of Health and Human Services (DHHS) proposes this rule to implement Title V of the Tribal Self-Governance Amendments of 2000 (the Act). The proposed rule has been negotiated among representatives of Self-Governance and non-Self-Governance Tribes and the DHHS. The proposed rule includes provisions governing how DHHS/Indian Health Service (IHS) carries out its responsibility to Indian Tribes under the Act and how Indian Tribes carry out their responsibilities under the Act. Any interested party is invited to comment on the proposed rule. As required by section 517 (b) of the Act, the Department has developed this proposed rule with active Tribal participation of Indian Tribes, inter-Tribal consortia, Tribal organizations and individual Tribal members, using the guidance of the Negotiated Rulemaking Act, 5 U.S.C. 561 *et seq.*

DATES: Comments must be received on or before April 15, 2002. We will send copies of this notice of proposed rulemaking (NPRM) to each Indian Tribe. We especially invite comments from individual Indian Tribes, Tribal members, and Tribal organizations.

ADDRESSES: Send your written comments to: Betty Gould, Regulations Officer, Division of Regulatory and Legal Affairs, IHS, 12300 Twinbrook Parkway, Suite 450, Rockville, MD 20857, Telephone 301–443–1116. (This is not a toll-free number.) Comments received will be available for inspection at the address above from 9 a.m. to 3 p.m., Monday through Friday, beginning approximately two weeks after publication.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed rule contact: Paula Williams, Director, Office of Tribal Self-Governance, IHS, 5600 Fishers Lane, Room 5A–55, Rockville, MD 20857, Telephone 301–443–7821. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: ''The Tribal Self-Governance Amendments of 2000'', Pub. L. 106–260, repeals Title III of the Indian Self-Determination Act, Pub. L. 93–638, as amended, (ISDA) and enacts a new Title V that establishes a permanent Self-Governance program within DHHS. Thus, Indian and Alaska Native Tribes are now able to compact for the operation, control, and redesign of various IHS activities on a permanent basis. Section 517 of Title V requires the Secretary, not later than 90 days after the date of the enactment of the Act, to initiate procedures under the Negotiated Rulemaking Act, 5 U.S.C. 561 *et seq*, to negotiate and promulgate the regulations necessary to carry out Title V. The Act calls for the establishment of a negotiated rulemaking committee pursuant to 5 U.S.C. 565, comprised only of Federal and Tribal representatives, with a majority of the Tribal government representatives representing Self-Governance Tribes. The Negotiated Rulemaking Committee on Joint Tribal and Federal Self-Governance (the Committee) conferred with and allowed representatives of Indian Tribes, inter-Tribal consortia, Tribal organizations, and individual Tribal members to actively participate in the rulemaking process.

Copies of the Committee's charter are on file with the appropriate committees of Congress and with the Library of Congress in accordance with section 9(c) of the Federal Advisory Committee Act, 5 U.S.C. Appendix.

Public Participation in Pre-Rulemaking Activity

A Notice of Intent to establish the Committee was published in the **Federal Register** at 65 FR 75906 on December 5, 2000. In the Notice of Intent, we proposed a rulemaking committee of representatives from 12 Self-Governance Tribes, 11 non-Self-Governance Tribes, and 7 Federal officials totaling 30 members. The Notice of Intent established a deadline of January 4, 2001, for submission of written comments. Twenty comments were received. The comments provided valuable input from Indian Tribes, organizations, and individuals. In order to change the composition of the Committee, as suggested by some comments, the Committee would have needed to be increased to more than 30 members. Carrying out the negotiated rulemaking process through a committee with more than 30 members would be cumbersome and challenging in reaching consensus under the time period required by section 517. Therefore, the size of the Committee was not changed. The members, representing 12 Self-Governance Tribes, 11 non-Self-Governance Tribes, and 7 Federal officials, meet the requirements of the Act. The Committee is co-chaired by one Tribal representative and one Federal representative.

The negotiated rulemaking meetings were open to the public. Individuals that were not voting members of the Committee had an opportunity to attend meetings and to give input to the 30 members of the Committee. The public was informed about the establishment of the Committee through a notice in the **Federal Register** at 66 FR 15063 on March 15, 2001.

The first meeting of the Negotiated Rulemaking Committee on Joint Tribal and Federal Self-Governance was held in San Diego, California on March 15–16, 2001. At that meeting, the Committee established three sub-committees, a meeting schedule, and a protocol for deliberations. The Committee agreed to operate based on consensus decision-making. The DHHS committed to publish all consensus decisions as the proposed rule. The Committee further agreed that any committee member and his/her constituents could comment on this proposed rule.

To complete the regulations within the statutory timeframe, the Committee divided the areas subject to regulation among three subcommittees, each co-chaired by one Federal and one Tribal representative. The sub-committees made recommendations to the Committee on whether regulations in a particular area were desirable. If the Committee agreed that regulations were desirable, the sub-committees developed options for draft regulations. The sub-committees presented their options to the full Committee, which discussed them and eventually approved the proposed regulations.

Between April 2001 and August 2001, the Committee met five times in different locations throughout the country. All meetings were announced in the **Federal Register** at 66 FR 10182, 66 FR 17657, and 66 FR 27620. Generally, the meetings lasted three days. Sub-committees also met and held teleconferences to develop draft material in support of the full Committee meetings.

In developing regulatory language, full Committee consensus was reached on the regulations that follow under subparts ''A'' through ''P.'' Where the full Committee could not reach consensus as defined in its protocol, this preamble includes a brief description of the issue, along with the Federal and Tribal positions when available. The public is invited to comment on these issues as well as on the proposed regulations.

Where the Tribal position is stated, it reflects dissatisfaction with proposed

resolution of the issues by the Federal representatives and preference for alternative language as put forth by the Indian Tribes. Where the Federal position is stated, it represents the official views of the DHHS, as expressed by the designated Federal officials.

There are only three issues where consensus was not reached. The three issues are: whether the provisions of Title V apply to statutorily mandated grants added to a funding agreement after award; application of Davis-Bacon prevailing wage rates to construction projects funded with both Federal and non-Federal funds; and Department of Justice representation under section 314 of Public Law 101–512, as amended, of Indian Tribes and Tribal certifying officers for environmental claims.

Key Areas of Disagreement

Whether Provisions of Title V Apply to Statutorily Mandated Grants Added to a Funding Agreement After Award

Tribal Position: The Tribal position is that section 505(b)(2) provides that Self-Governance Tribes have the alternative of including in funding agreements ''such programs, services, functions, or activities (or portions thereof) include all programs, services, functions, or activities (or portions thereof) *including grants (which may be added to a Funding Agreement after an award of such grant),* with respect to which Indian Tribes or Indians are primary or significant beneficiaries, administered by the DHHS through the IHS and all local, field, service unit, area, regional, and central headquarters and National Office functions so administered under the authority of * * * *'' (emphasis added).

The Tribal position is that the language in section 505(b)(2) makes clear Congress' intent that Self-Governance Tribes have the option of including grants that have been awarded in their funding agreement. Once these grants are incorporated in a funding agreement, they are subject to all of the terms and conditions set forth in the funding agreement as well as all of the provisions of Title V and applicable regulations. In contrast, the Federal position is that while grants may be included in a funding agreement at Tribal option, none of the provisions of Title V or regulations promulgated under section 517 apply. On the other hand, the Federal position is that the regulations, policies, and guidance generally applicable to grants apply to these grants included in funding agreements.

From the Tribal perspective, the thrust of self-governance is to remove excessive Federal control and return funding and decisions to local Tribal control. Whatever flexibility may exist within the grant system, placing grants in a funding agreement without providing the flexibility and benefits of Title V defeats the goal of this inclusion. Statutes are to be construed so as to produce a harmonious whole and so as to further the legislative scheme. In this instance, concluding that none of Title V's provisions or regulations promulgated under section 517 apply to these grants after they are included in a funding agreement is illogical and impedes Congress' intent when Title V was enacted. To the extent the language in section 505(b)(2) is ambiguous, Title V makes clear that any ambiguities are to be resolved in favor of the interpretation that facilitates the inclusion of programs, services, functions and activities (PSFAs) and related funds in a funding agreement. *See* section 512(a). In this instance IHS should interpret section 505(b)(2) making all provisions in Title V and regulations promulgated under section 517 applicable to statutorily mandated grants after they have been incorporated. Accordingly, the Tribal representatives propose that the following provision be included in the final Title V regulation and invite comments on the language set forth below:

Q: What provisions of Title V apply to statutorily mandated grants added to the funding agreement?

A: Once the grant is awarded and added to the funding agreement, unless provided otherwise in these regulations, all provisions of Title V and these regulations shall apply.

Federal Position: The Department firmly believes that statutorily mandated grants are, and must remain, subject to the terms and conditions of the statute mandating the grant, the grant award, and the Department's grant regulations.

The Federal position is that section 505(b)(1) distinguishes between two types of grants: ''discretionary IHS competitive grants'' and ''Congressionally earmarked competitive grants.'' Discretionary IHS competitive grants are defined in the proposed regulations as ''grants established by IHS pursuant to IHS' discretionary authority without any statutory directive.'' See § 137.10) Section 505(b)(1) specifically authorizes Self-Governance Tribes to negotiate their full Tribal share funding for such grants and receive that funding along with funding for other PSFAs as part of the negotiation and award of these funding agreements, rather than to compete for a grant award.

Section 505(b)(1) distinguishes the above discretionary grants from ''Congressionally earmarked competitive grants'' which are defined in the proposed regulations as ''statutorily mandated grants'' meaning ''a grant specifically designated in a statute for a defined purpose.'' *See* § 137.10 Statutorily mandated grants are specifically excluded from the provisions in section 505(b)(1). Rather, section 505(b)(2) authorizes statutorily mandated grants to be ''added to a funding agreement after an award of such grants.''

This distinction recognizes that statutorily mandated grants are not considered part of the PSFAs negotiated and awarded in the funding agreement. To the contrary, statutorily mandated grants have their own statutorily designated requirements for award. Statutorily mandated grants, pursuant to their authorizing statutes, are awarded through the Department's grants process which is governed by the Department's grant regulations and policies. These establish the terms and conditions of the grant.

While statutorily mandated grants may be added to funding agreements after award of the grant, such grants retain their separate character as grants and continue to be governed by the terms and conditions of the statute mandating the grant and the grant award—not the terms of the funding agreement or compact or the statutory provisions of Title V. Thus, as agreed to in these proposed regulations, statutorily mandated grant programs may not be redesigned, and the grant awards may not be reallocated for other purposes.

The Department, within the governing grants process, has agreed to lump sum funding for statutorily mandated grants and to the use of interest earned on such funding to enhance the grant program in order to accommodate Tribal programmatic concerns. However, the Department firmly believes that statutorily mandated grants are and must remain subject to the terms and conditions of the statute mandating the grant, the grant award, and the Department's grant regulations. Accordingly, the Federal representatives propose that the following provision be included in the final Title V regulation and invite comments on the language set forth below:

Q: What provisions of Title V apply to statutorily mandated grants added to the funding agreement?

A: None of the provisions of Title V apply.

Application of Davis-Bacon Prevailing Wage Rates to Construction Projects Funded With Both Federal and Non-Federal Funds

Tribal Position: The Committee reached consensus on two proposed regulations, which provide that Davis-Bacon wage rates do not apply to construction projects funded solely with non-Federal funds but do apply to covered employees working on construction projects funded solely by the Federal Government. A third funding possibility also occurs with frequency in the construction of IHS health facilities—a mixture of funds from both Federal and non-Federal sources. The Tribal position is that Davis-Bacon wage rates do not apply to those portions of a construction project funded from non-Federal sources. Accordingly, the Tribal representatives propose that the following provision be included in the final Title V regulation and invite comments on the language set forth below:

Q: Do Davis-Bacon wage rates apply to construction projects performed by Tribes using both Federal funds and non-Federal funds?

A: The Davis-Bacon wage rates only apply to the portion of the project that is funded with Federal funds. The Davis-Bacon Act and wage rates do not apply to portions of the project funded with non-Federal funds or when Tribes perform work with their own employees.

The Tribal representatives believe that this simple clarification gives Self-Governance Tribes performing Title V construction projects greater autonomy and thus advances Title V's goal of effectively ''implementing the Federal policy of government-to-government relations with Indian Tribes'' and of further ''strengthen[ing] the Federal policy of Indian self-determination.'' *See* 25 U.S.C.A. § 458aaa (Pub. L. 106–260, Sec. 2(6), Title V Congressional findings reproduced as note following section 458aaa).

In support of its position, the Tribal representatives note that by its own terms, the Davis-Bacon Act of March 3, 1931, ch. 411, §§ 1, 46 Stat. 1494, as amended, 40 U.S.C. §§ 276a(a), confers no rights directly on construction workers paid either with Federal or non-Federal funds. Rather, it imposes certain restrictions on the Federal Government when Federal funds are used to perform construction activities. *See generally Universities Research Ass'n, Inc.* v. *Coutu,* 450 U.S. 754, 772 (1981) (''The Davis-Bacon Act requires that certain stipulations be placed in Federal construction contracts for the benefit of mechanics and laborers, but it does not confer rights directly on those individuals.''). Section 509(g) of the Act merely extends Davis-Bacon prevailing wage requirements to ''laborers and mechanics employed by contractors and subcontractors (excluding Tribes and Tribal organizations) in the construction, alteration, or repair * * * of a building or other facilities in connection with the construction projects funded by the United States under [the Indian Self-Determination and Education Assistance] Act.'' 25 U.S.C. 458aaa–8(g) (emphasis added).

The Tribal representatives disagree with the Federal position that section 509(g) ''unambiguously states'' that Davis-Bacon wage rates ''do apply'' to portions of a Title V construction project that are not ''funded by the United States under [the Indian Self-Determination and Education Assistance] Act.'' 25 U.S.C. 458aaa–8(g). The Tribal position is that the Title V language clearly provides for just the opposite result: that Davis-Bacon wage rates only apply to those portions of the project that are actually funded by the United States, precisely as stated in the Tribal proposed regulation.

The Tribal representatives further point out that even if the language of section 509(g) is subject to the broader reading advanced by the Federal representatives, that fact simply makes this provision ambiguous. Section 509(g) certainly does not provide that Davis-Bacon wage rates apply to construction projects ''funded in whole or in part'' by the United States. If it did, the Federal position would have greater merit. However, given its actual language, section 509(g) is at best unclear. And if the language of Title V is unclear or is open to more than one reasonable interpretation, rules of statutory construction for Indian legislation require that the Title V Negotiated Rulemaking Committee reject interpretations which work against the interests of Self-Governance Tribes. *South Dakota* v. *Bourland,* 508 U.S. 679, 687 (1993); *Montana* v. *Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985) (''Statutes are to be construed liberally in favor of the Indians; ambiguous provisions are to be interpreted to the Indians' benefit.''). Federal courts have relied on this rule to interpret ambiguous provisions of the ISDA to the benefit of Indian Tribes. See *Ramah Navajo Chapter* v. *Lujan,* 112 F.3d 1455, 1462–63 (10th Cir. 1997); *Shoshone-Bannock Tribes of the Fort Hall Reservation* v. *Shalala (Shoshone-Bannock I*), 988 F. Supp. 1306, 1317 (D. Ore. 1997). In Ramah, the Tenth Circuit held that ''the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes.'' Ramah, 112 F.3d at 1462. Thus, '' 'if the [ISDA] can reasonably be construed as the Tribe would have it construed, it must be construed that way.' '' Id. at 1462 (quoting *Muscogee (Creek) Nation* v. *Hodel,* 851 F.2d 1439, 1445 (D.C. Cir. 1988)). *See also* section 512(a) of the Act.

Federal position: The Federal position is that no regulation is necessary for projects funded with a mixture of Federal and non-Federal funds because the language of section 509(g) unambiguously states that the Davis-Bacon wage rates do apply. Section 509(g) defines the employees that are covered, namely ''[a]ll laborers and mechanics employed by contractors or subcontractors (excluding Indian Tribes and Tribal organizations).'' Section 509(g) also sets forth the activities it covers: ''construction, alteration, or repair, including painting or decorating of a building or other facilities.'' Finally, section 509(g) provides that all covered employees who perform covered activities shall receive Davis-Bacon wages if they perform those activities ''in connection with construction projects funded by the United States under this Act.'' The Federal representatives believe the terms of the statute are clear: if a project receives Federal funding, then any covered employees carrying out covered activities ''in connection with'' the project must be paid Davis-Bacon wages.

Department of Justice Representation of Tribes and Tribal Certifying Officers for Environmental Claims.

Tribal position: The Committee reached consensus on all but one of the proposed regulations related to enforcement of the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA). The Tribal representatives and Federal representatives disagree on whether the Federal Government, specifically the Department of Justice, must defend Indian Tribes and Tribal certifying officers if they are sued as a result of carrying out these Federal environmental responsibilities. For the reasons provided below, the Tribal representatives propose that the following regulation be included in the final Title V regulations and invites comments on the language set forth below:

Q: Are Indian Tribes and Tribal certifying officers entitled to the benefit of a Federal defense if they are sued as

a result of carrying out their Federal environmental responsibilities?

A: Yes. Indian Tribes and Tribal Certifying Officers are performing Federal functions when carrying out these Federal environmental responsibilities, and they are deemed to be Federal agencies and Federal officials for this limited purpose. Under section 314 of Public Law 101–512, as amended, the Department of Justice is authorized and directed to defend Indian Tribes and Tribal employees who are sued with respect to claims resulting from the performance of these Federal functions.

The Tribal representatives believe that the potential for Self-Governance Tribes to assume Federal responsibilities for NEPA and NHPA compliance under Title V removes a substantial burden from IHS construction program managers and places that burden on Tribal officials. In transferring this burden, it is important to treat Tribal and Federal certifying officials equally. The Tribal representatives believe this can best be achieved by assuring Tribal certifying officials the benefit of a Federal defense under section 314 of Pub. L. 101–512 for NEPA enforcement actions brought against them. This protection is essential, and fundamentally fair, given that little or no Federal funding is likely to be available to Self-Governance Tribes to cover the expense of such litigation, and that private insurance is almost certainly unavailable for such claims.

The Tribal representatives believe their position is fully consistent with the language of the statute and greatly furthers the Title V Congressional policy of providing Self-Governance Tribes with all the resources, benefits and protections that IHS officials would have in carrying out this core governmental function.

Specifically, section 314 of Pub. L. 101–512 requires the United States to defend ''any civil action or proceeding'' involving ''claims'' resulting from the performance of a self-governance compact. It provides as follows:

> *With respect to claims resulting from the performance of functions * * * under a contract, grant agreement, or any other agreement or compact authorized by the Indian Self-Determination and Education Assistance Act * * *,* an Indian Tribe, Tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior or the IHS in the DHHS while carrying out any such contract or agreement and its employees are deemed to be employees of the Bureau or Service while acting within the scope of their employment in carrying out the contract or agreement: Provided, That after September 30, 1990, *any civil action or proceeding involving such claims* brought hereafter against any Indian Tribe, Tribal organization, or Indian contractor or Tribal employee covered by this provision *shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act * * ** Provided further, That beginning with the fiscal year ending September 30, 1991, and thereafter, the appropriate Secretary shall request through annual appropriations funds sufficient to reimburse the Treasury for any claims paid in the prior fiscal year pursuant to the foregoing provisions. * * * (emphasis added.)

Pub. L. 101–512, Title III, § 314, Pub. L. 103–138, Title III, § 308 (reprinted in 25 U.S.C.A. § 450f, Historical and Statutory Notes.

Under ordinary rules of English grammar, the phrase ''such claims'' includes all claims resulting from the performance of a compact because ''such claims'' refers back to ''claims resulting from the performance of functions under a * * * compact,'' the antecedent immediately preceding the reference. Nothing in the provision suggests that ''such claims'' are limited to tort claims. In interpreting this statutory requirement, the Title V Negotiated Rulemaking Committee should first look to the plain language of the Act. *Good Samaritan Hospital* v. *Shalala,* 508 U.S. 402, 409 (1993) (''The starting point in interpreting a statute is its language for, if the intent of Congress is clear, that is the end of the matter''). Indeed, some courts have interpreted section 314 to cover ''statutory claims'' and have assumed that it covers contract claims resulting from the performance of a compact or self-determination contract. See *Waters* v. *United States,* 812 F.Supp. 166 (N.D. Cal. 1993) (intentional torts and statutory claims within § 314's reach); *Carlow* v. *United States,* 40 Fed. Cl. 773 (1998) (§ 314 demonstrates that upon retrocession, the United States is liable for legitimate contract claims incurred by Tribal contractors administering ISDA programs). See also *Brown* v. *United States,* 43 Fed. Cl. 538 (1998) (Tribal compactor not indispensable party to action for mismanagement of lease because action against Indian Tribe is deemed to be an action against the United States).

Section 314's legislative history also supports this plain language interpretation. Earlier laws extending the so-called tort claims coverage to Tribal organizations explicitly limited the coverage to specific types of torts by including the language ''claims * * * for personal injury, including death.'' An early draft of Pub. L. 101–512 contained identical limiting language. The absence of that language in the final draft indicates that Congress intended there to be no limitation; all claims are included. The presence of new language, extending the coverage to ''any civil action or proceeding'' indicates that Congress intended the coverage to include, at a minimum, some class of actions broader than torts and, presumably, all civil actions and proceedings that result from the performance of compacts. Congress knew how to limit this coverage to tort claims, indeed to only certain specified tort claims, in 1988 and 1989, but declined to do so in 1990 and thereafter.

This plain language interpretation does not create any unforeseen burdens for the United States. Congress initially extended the so-called tort claim coverage to ISDA contractors and compactors on a limited basis, following the failure of the Federal Government to procure liability insurance on behalf of Indian Tribes, and pending the Secretary's investigation of the feasibility of procuring such insurance or providing alternative protection. When the Secretary failed to investigate the cost and availability of liability insurance, Congress made the coverage permanent in the course of extending and refining the scope of that coverage in a variety of settings. The legislative history indicates that Congress understood that Pub. L. 101–512 and its predecessors simply restored the status quo by making the Federal Government responsible for any legal liability associated with the performance of Federal functions. It does not expand the United States' liability. It simply precludes the United States from reducing its own liability and shifting that liability to Self-Governance Tribes via the ISDA without providing an equal level of protection.

A plain language interpretation also does not render the ''full protection and coverage'' clause null or void. Moreover, reading the provision as a whole, it is clear that section 314 provides several benefits to Self-Governance Tribes and that those benefits are cumulative. Self-Governance Tribes performing Federal functions are entitled to assert Federal defenses under the FTCA and to have the United States assume its position as a defendant and to be represented by the Attorney General and to have any resulting liability covered by the Treasury and to have the IHS request appropriations to reimburse the Treasury. While the FTCA protection does not have any application in the context of a NEPA enforcement lawsuit, that does not relieve the Federal Government of its obligation to provide Tribes with the other benefits conferred

by section 314, namely the benefit of a Federal defense. This also responds to the Federal representatives' argument that the application of section 314 to NEPA enforcement actions ''would result in a mismatch of processes, remedies, and defenses.'' As set forth in the proposed regulations, a NEPA enforcement action under Section 509(a)(2) of the Act will presumably be handled under the same Administrative Procedures Act (APA) process as currently occurs when the Secretary performs these Federal environmental responsibilities. No confusion or complication need result simply because Justice Department attorneys are handling the defense, instead of members of the private bar.

A narrow interpretation of the coverage of section 314 would shift the burden from the Department of Justice to the IHS or worse still to American Indian and Alaskan Native beneficiaries of IHS health programs. A narrow interpretation would require Self-Governance Tribes to incur substantial expense for liability insurance and/or legal representation. The IHS would then, in the Tribal representatives' view, be legally obliged to provide adequate contract support funds to cover these expenses. If it failed to do so, as a result of shortfalls or for some other reason, funds that should be used to provide direct services would be diverted and the beneficiaries would suffer from diminished health care services, again contrary to Congress' intent. An unduly narrow interpretation would thus conflict with Congressional intent in Title V and impair the Federal trust responsibility to deliver health care to Indian people. See S. Rep. 100–274, Dec. 21, 1987 at 2646 (''The United States has assumed a trust responsibility to provide health care to Native Americans. The intent of the Committee is to prevent the Federal Government from divesting itself, through the self-determination process, of the obligation it has to properly carry out that responsibility.'').

Congress clearly intended to confer on Self-Governance Tribes the same benefits that Federal officials enjoy when performing these Federal functions. It is clear that Self-Governance Tribes are carrying out Federal responsibilities. The nature of the legal liability associated with such responsibilities does not change because a Tribal government is performing a Federal function. The unique nature of the legal trust relationship between the Federal Government and Tribal governments requires that the Federal Government provide liability insurance coverage in the same manner as such coverage is provided when the Federal Government performs the function.

S. Rep. 100–274, Dec. 21, 1987 at 2645. Similarly, transferring the obligation to perform NEPA compliance determinations from Federal to Tribal officials, with virtually no additional funding and without providing these officials with a Federal defense, would create a windfall for the Federal Government, at the expense of Indian health care, contrary to Congressional intent. Department of Justice attorneys are well-experienced in APA litigation and would be in a better position to defend Tribal government officials in NEPA enforcement actions than would members of the private bar. The rare cases likely to be brought under this law will create no undue hardship or expense for the Department of Justice.

Federal position: The Federal position is that section 314 of Pub. L. 101–512 read as whole applies solely to claims within the ambit of the FTCA. There is no indication in the legislative history of section 314 that it was intended to do anything other than extend FTCA coverage for tort claims. See, e.g., H.R. Rep. No. 101–789, 101st Cong., 2d Sess. 72 (1990). The Tribal position would draw support from a Congressional rejection of an earlier version of this provision that would cover only claims for personal injury and death. However, this legislative history reflects Congressional concern that property damage claims would be excluded under the earlier version, see 135 Cong. Rec. S8767, S8834 (July 26, 1989) (remarks of Senator Inouye), and not an intent to broaden this provision beyond tort claims. Furthermore, section 314 only extends the ''protection and coverage of the [FTCA].'' Waivers of the sovereign immunity of the United States are construed narrowly, and in favor of the sovereign. Reading section 314 to imply that any other statutory waiver of Federal sovereign immunity extends to Indian Tribes would violate this principle and invade the province of the legislative branch.

If FTCA coverage did apply to private suits brought to enforce Tribal implementation of Federal environmental responsibilities, it would result in a mismatch of processes, remedies, and defenses. Private suits to enforce the NEPA generally involve court review of an administrative record under the APA for injunctive or declaratory relief. The APA does not authorize the award of damages. 5 U.S.C. § 702. The FTCA, by contrast, allows for trial *de novo* in the district courts, and waives the sovereign immunity of the United States for damages. 28 U.S.C. § 1346(b)(1). Moreover, the FTCA imposes liability only for negligent acts in the same manner and to the same extent that a private person would be liable, 28 U.S.C. § 2674, and provides a defense for the discretionary activities of Federal officials. 28 U.S.C. § 2680(a). Private suits to enforce Federal environmental responsibilities seek to enforce laws applicable to Federal agencies, not private persons, and squarely challenge the exercise of agency discretion under Federal law.

Finally, even if section 314 did apply to actions other than torts, section 509(a)(2) itself makes clear that the Tribal certifying officer is the proper defendant for claims arising from the performance of Federal environmental responsibilities, not the United States. For this reason, the Federal position is that no regulation is required.

During final Departmental review of the NPRM, § 137.401 was deleted because it would have provided Self-Governance Tribes with the opportunity to participate in the final stages of the budget request process. Tribal participation in the initial stages of the request process is already provided by the Department Policy on Indian/Alaska Native Tribes and Indian Organizations dated August 7, 1997. In June of 2001, the Department held its third annual tribal budget consultation meeting as part of the development of the FY 2003 budget. Participation in the final stages of the budget request process cannot be provided without violating the Executive Branch's longstanding policy on the need to preserve the confidentiality of pre-decisional budget information as outlined in Section 36 of OMB Circular A–11, ''COMMUNICATIONS WITH CONGRESS AND THE PUBLIC AND CLEARANCE REQUIREMENTS.''

Section 513 of Title V addressed the President's responsibilities regarding the budget, which are outside the scope of this rulemaking. Regulatory provisions have not been included to implement this section.

Miscellaneous Issue: Labor

The Committee considered but decided not to address the effect of the ISDA, and particularly Title V, on the application of other Federal private sector labor laws. Although this matter is not addressed in the proposed regulation, the IHS recognizes that the United States and Self-Governance Tribes have a unique government-to-government relationship, and that activities in furtherance of that relationship that are authorized by Title V are not ordinary government procurement activities. The IHS also

recognizes that when Indian Tribes undertake self-governance activities, they step into the shoes of the IHS in carrying out the Federal Government's unique responsibility to provide health care for Native Americans. This is a trust responsibility that Congress carries out under the Indian Commerce Clause. The provision of health care to Native Americans is a unique Federal responsibility that Congress has delegated to the IHS, and which in turn has been delegated to Indian Tribes as specified in their self-governance compacts and funding agreements. Under these unique circumstances, and given that Tribes, Tribal organizations and Indian patients are not to be penalized by the transfer of Federal health programs to Tribal operation under Title V, the IHS believes that it is contrary to the intent of the ISDA to apply to Self-Governance Tribes carrying out Title V compacts and funding agreements general Federal laws such as the National Labor Relations Act that would not apply to the IHS if the IHS were carrying out the compacted PSFA.

Summary of Regulations

The narrative below is keyed to specific subparts of the proposed rule.

Subpart A—General Provisions

This subpart contains provisions describing the authority, purpose and scope of these regulations. This subpart contains Congressional policies set forth in Title V. This subpart also contains provisions regarding the effect of these regulations on existing Tribal rights, whether Title V may be construed to reduce funding for programs serving a Indian Tribe under this Title or other laws, and the effect of these regulations on Federal policy directives.

Subpart B—Definitions

This subpart sets forth definitions for key terms used in the balance of the regulations. Most of the definitions come from definitions set forth in Title I or Title V. Throughout this proposed rule, the terms ''Indian Tribe'' and ''Self-Governance Tribe'' are used. These terms are included in the definition section. When a provision applies to all Federally-recognized Tribes (including Self-Governance Tribes), the term ''Indian Tribe'' is used; the term ''Self-Governance Tribe'' is used when referring to an Indian Tribe participating in self-governance under Title V. Each term includes inter-Tribal consortia and Tribal organizations under conditions set forth in the definition of ''Indian Tribe.'' Terms unique to Subpart N—Construction are defined in that subpart and not in subpart B.

Subpart C—Selection of Indian Tribes for Participation in Self-Governance

This subpart describes the eligibility criteria an Indian Tribe must satisfy to participate in self-governance. This subpart explains that Self-Governance Tribes currently participating under Title III of the ISDA and up to 50 additional Indian Tribes per year are eligible to participate in self-governance. This subpart also provides that more than one Indian Tribe can participate in the same compact and/or funding agreement under conditions set forth in this subpart. This subpart explains that in order to be eligible to participate in self-governance an Indian Tribe must successfully complete a planning phase, must request participation in the program through a resolution or official action of the governing body of each Indian Tribe to be served, and must demonstrate financial stability and financial management capability. This subpart describes how an Indian Tribe demonstrates financial stability and financial management capacity and what information is considered in making this determination. Finally, this subpart describes that planning and negotiation grants may be available, but not required, for participation.

Subpart D—Self-Governance Compact

This subpart describes the authority for Self-Governance Tribes to negotiate compacts and identifies what is included in a compact. This subpart explains that a compact is a separate document from a funding agreement and that the compact must be executed before or at the same time as A funding agreement.

Subpart E—Funding Agreement

This subpart describes the authority for Self-Governance Tribes to negotiate funding agreements and identifies what is included in a funding agreement. This subpart describes what terms are required to be included in a funding agreement and what terms are included at the Self-Governance Tribe's option.

Subpart F—Statutorily Mandated Grants

This subpart describes to what extent statutorily mandated grants may be added to a funding agreement after award. Although there were extensive discussions between the Tribal and Federal representatives as to whether the provisions of Title V applied to statutorily mandated grants once added to the funding agreement, consensus was not reached. The Tribal position is that once the grant is awarded and added to the funding agreement, all of the provisions of Title V apply. The Federal position is that none of the provisions of Title V apply to statutorily mandated grants. A more detailed explanation of the basis for this disagreement is contained in the Key Areas of Disagreement section of these proposed rules.

Notwithstanding this disagreement, Tribal and Federal representatives reached consensus on several important issues concerning statutorily mandated grant funds. Tribal and Federal representatives agreed that a statutorily mandated grant may be added to a funding agreement as an annual lump sum advance payment after the grant is awarded. They also agreed that a Self-Governance Tribe may keep the interest earned on these grant funds and may use such interest earned to enhance the grant program, including allowable administrative costs. In addition, consensus was reached as to the extent such grant funds may be reallocated or redesigned and that FTCA coverage applies. Finally, the Tribal and Federal representatives reached agreement on reporting requirements that apply to statutorily mandated grants.

Subpart G—Funding

This subpart describes what funds must be transferred to a Self-Governance Tribe in a funding agreement and when those funds must be transferred. This subpart describes those circumstances where the Secretary is prohibited from reducing or failing to transfer funds and where the Secretary is permitted to increase funds. This subpart describes miscellaneous provisions pertaining to funding provided under a funding agreement. This subpart describes that a funding agreement may provide for a stable base budget and describes what funds are included in the stable base budget.

Subpart H—Final Offer

This subpart describes the final offer and rejection process. The final offer begins the process for resolving, within a specific time frame, disputes that may develop in negotiations of compacts or funding agreements. This subpart describes the process for an Indian Tribe to present a final offer and the procedures the Secretary must follow to reject a final offer.

Subpart I—Operational Provisions

This subpart contains provisions that address most of the operational aspects of self-governance. This subpart explains that Self-Governance Tribes must ensure that internal measures are

in place to address conflicts of interest and also addresses the audit requirements that Self-Governance Tribes must comply with, together with the accounting standards that govern the expenditure of self-governance funds. It also includes provisions regarding records and record-keeping requirements.

This subpart explains that Self-Governance Tribes may redesign or consolidate PSFAs and may reallocate or redirect funds paid under a funding agreement. It includes a provision barring a Self-Governance Tribe from simultaneously compacting a program under Title V and contracting the same program under Title I. It also includes provisions regarding health status reporting requirements. This subpart addresses the disposition of savings generated by self-governance activities and explains that such savings will be identified in the annual report required under the Act. It explains the process by which Tribes may access both government-furnished real property and government-furnished personal property for use in the performance of a self-governance compact or funding agreement. It includes a provision authorizing funds paid under Title V compacts and grants to be treated as non-Federal funds for matching or cost participation requirements.

This subpart also includes a provision explaining that section 102(d) of the Act, 25 U.S.C. 450f(d) and section 314 of Public Law 101–512, which in part relates to the FTCA, apply to self-governance compacts and funding agreements. It also incorporates by reference the FTCA procedures set forth in the Title I regulations at 25 CFR Part 900, subpart M.

During the negotiations, Tribal representatives raised several issues concerning the relationship between coverage under the FTCA and supplemental liability insurance coverage, and they proposed specific regulations to address these concerns. The Committee ultimately decided that additional regulations were unnecessary because these concerns may be addressed under the existing statutes and regulations, as discussed below.

The first issue Tribal representatives raised was whether supplemental liability insurance purchased by Indian Tribes may be viewed as protecting the Federal Government. Since 1988, there has been no provision in the ISDA or other law that requires Indian Tribes to purchase liability insurance to protect or indemnify the Federal Government. At that time, Congress in 1988 amended the ISDA to: (1) delete a requirement that the Indian Tribes purchase liability insurance to protect the government, and (2) include FTCA coverage for Indian Tribes carrying out self-determination contracts. The Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. 100–472, repealed the first sentence of then section 103(c) of the Act requiring Indian Tribes to purchase liability insurance and substituted a provision extending FTCA coverage to medical malpractice now at section 102(d) of the Act. Instead of Indian Tribes insuring the United States, the United States extended its self-insurance to the Tribes. *See* S. Rep. No. 100–274 at 26–27, reprinted in 1988 U.S.C.C.A.N. 2620, 2645–46. FTCA coverage was extended to general tort liability claims by section 314 of Public Law 101–512.

Tribal representatives have requested clarification as to FTCA coverage of Tribal council members and Tribal organization's governing boards. The FTCA generally covers any activities of the Indian Tribe and its Tribal council members and Tribal organizations and their governing boards in carrying out a compact or funding agreement including activities necessary for assumption of IHS programs (including, but not limited to, adoption of financial management and personnel systems) and oversight and other activities by such councils and boards to assure effective implementation in carrying out such agreements.

Whether the FTCA applies in any particular case is decided on an individual case-by-case basis, first by the Department of Justice and subsequently by the Federal courts. Thus, Indian Tribes may wish to purchase liability insurance supplemental to FTCA coverage, and this is an allowable cost under the compact and funding agreement.

Subpart J—Waivers

This subpart contains procedures authorizing the Secretary to waive regulations promulgated to implement Title V or regulations promulgated under the authority specified in section 505(b) of the Act. This subpart explains how an Indian Tribe applies for a waiver, how the waiver request is processed, the applicable time frames for approval of waiver requests and that a denial of a waiver request is appealable in Federal court.

Subpart K—Withdrawal

This subpart addresses the procedures that apply when a Self-Governance Tribe withdraws from a Tribal organization or inter-Tribal consortium. Matters addressed include the effective date of the withdrawal, disposition of funds upon a withdrawal, and the future administration of the withdrawn programs.

Subpart L—Retrocession

This subpart addresses the procedures that apply when a Self-Governance Tribe retrocedes a program to the Secretary, and includes provisions pertaining to the contents of the retrocession notice, the effective date of the retrocession, the effect of retrocession on other or future contracts or compacts, and the disposition of government furnished property associated with the retroceded program.

Subpart M—Reassumption

This subpart addresses procedures by which the Secretary, without the consent of the Self-Governance Tribe, may reassume the operation of a program and associated funding in a compact or funding agreement, including the circumstances under which reassumption may occur, the steps which must be followed in any reassumption, the procedural and appeal rights, the effective date of any reassumption, and the return of government-furnished property. This subpart also addresses the additional processes that must be followed in the event of an immediate reassumption.

Subpart N—Construction.

This subpart addresses the process by which participating Self-Governance Tribes may agree to undertake construction projects and programs under section 509 of the Act. In its scope, this subpart distinguishes between construction projects, and ongoing programs that support construction projects. This subpart sets forth the process for Self-Governance Tribes to enter into and administer self-governance construction project agreements for construction projects, which may include Tribal shares of related construction programs. Alternatively, Self-Governance Tribes may assume construction programs (but not projects) using the compact and funding agreement process set forth in Subparts D and E.

Definitions are provided that are unique to this subpart. The definitions of construction project and construction project agreement are found in section 501 of the Act. For other terms which are common to this subpart and the Title I construction regulations set forth at 25 C.F.R. 900, subpart J, the Title I definitions have been adapted with minor changes. *See* 25 CFR 900.113.

NEPA Process

Self-Governance Tribes performing construction under section 509 are required to assume the Secretary's responsibilities for the completion of the construction project under the NEPA, the NHPA, and related Federal environmental laws. Sections 137.285 through 137.306 describes these Federal environmental responsibilities and provides Tribal options to carry out these responsibilities by adopting Federal agency environmental review policies and procedures or by developing their own. Sections 137.292, 137.293 and 137.310 through 137.312 describes how Self-Governance Tribes assume Federal environmental responsibilities by resolution, as well as the minimum criteria for the limited waiver of Tribal sovereign immunity required by section 509(a)(2) to allow judicial review of a Tribal certifying officer's actions under this subpart.

Notification and Project Assumption

Sections 137.320 through 137.344 describe the Secretary's responsibility to notify and consult with Indian Tribes concerning the development of construction budgets and new funding allocation methodologies, as well as when funds are available for the planning, design and construction of IHS construction projects. This subpart further describes the process that Self-Governance Tribes and the Secretary use to develop, negotiate and approve (or reject) construction project agreements under Title V. These sections explain the content and budget requirements for construction project agreements, the Secretary's funding and payment obligations to Self-Governance Tribes, the different types of construction project agreements and the process for resolving disputes when Self-Governance Tribes and the Secretary cannot agree on the content of a construction project agreement. These sections also describe the Self-Governance Tribes' authority to reallocate project funds and to use excess funds remaining at the completion of a construction project agreement.

Role of the Self-Governance Tribe in Carrying Out Construction Project Agreements

Sections 137.350 through 137.353 describe the Self-Governance Tribes' responsibility to complete construction project agreements and provide day-to-day management and administration for construction projects, within available funding. These sections also describe the Self-Governance Tribes' options if unforeseen circumstances increase project costs. These sections also describe the Self-Governance Tribes' responsibility to submit semiannual construction progress and financial reports to the Secretary.

Role of the Secretary in Carrying Out Construction Project Agreements

Section 137.341 sets forth how Self-Governance Tribes will receive payments for construction project agreements under section 509(e). Section 137.341 clarifies that when Self-Governance Tribes enter lump sum fixed price contracts, Self-Governance Tribes may opt to receive payment for a performance period measured either as one year, or as one project phase. Sections 137.360 through 137.365 sets forth the process for Secretarial review and approval of project planning and design documents, as well as Secretarial review and approval of any proposed amendments to the construction project agreement under section 509(f). Section 137.362 clarifies when Secretarial approval of proposed amendments is required, and when Self-Governance Tribes may make unilateral changes. Section 137.366 discusses the timing and purpose of site visits by the Secretary. Section 137.367 provides that the Secretary does not have the authority to issue stop orders, nor any other role in the day-to-day management of the construction project. Section 137.368 clarifies that the Secretary has no responsibility for overseeing health and safety code compliance during a Self-Governance Tribe's administration of a construction project agreement.

Other Provisions

Sections 137.370 describe the relationship between the construction subpart and other Title V subparts. Sections 137.371 through 137.374 describe the Self-Governance Tribes' authority and options for acquiring real property with funds provided under a construction project agreement, as well as the eligibility of Tribally-owned facilities for replacement, maintenance and improvement on the same basis as Federally-owned facilities. Sections 137.376 through 137.377 explain the application of metric standards, Federal procurement laws, and regulations to construction project agreements. Finally, Sections 137.378 through 137.379 explain when and how Davis-Bacon wage rates apply to construction project agreements. The issue of whether Davis-Bacon wage rates apply to construction projects funded from both Federal and non-Federal sources is discussed in the Key Areas of Disagreement section of the proposed regulation.

Subpart O—Secretarial Responsibilities

This subpart addresses (1) consultation with Self-Governance Tribes in the budget formulation process, and (2) the Secretary's annual report to Congress on the administration of Title V and on Tribal funding requirements (including guidelines to be used in the formulation of the report).

Subpart P—Appeals

This subpart addresses post-award appeals, pre-award appeals (including informal conferences), appeals of immediate reassumptions, and attorneys fees and costs under the Equal Access to Justice Act. As a general matter, this subpart states that all of the remedial provisions available to Tribes under section 110 of the Act are available to Self-Governance Tribes under Title V. For post-award disputes, the proposed regulation incorporates the regulations applicable to Title I contracts.

For pre-award appeals, the proposed regulation builds upon the procedures employed under Title I. Of special note are: (1) The provision authorizing the Interior Board of Indian Appeals to employ its existing procedures as a guide when considering appeals under this subpart; (2) the authority of the Interior Board of Indian Appeals (IBIA) in handling appeals; (3) the duty of the Administrative Law Judge (ALJ) to hold a hearing within 90 days of the date of the order referring the appeal to the ALJ; and (4) the duty of the Secretary to modify, adopt or reverse a recommended decision within 45 days.

Immediate reassumption appeals closely follow the similar appeal process available under the Title I regulations for emergency reassumptions.

The proposed regulation on claims for attorneys' fees and costs under the Equal Access to Justice Act employs the same procedures available to Indian Tribes under the Title I regulations.

Regulatory Impact Statement

We have examined the impacts of this rule as required by Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612) as amended by subtitle D of the Small Business Regulatory Fairness Act of 1996 (Public Law 104–121) and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). 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). Unless it is certified that the proposed rule is not expected to have a significant economic impact on a substantial number of small entities, the Regulatory Flexibility Act requires analysis of regulatory options that minimize any significant economic impact of a rule on small entities. Section 202 of the Unfunded Mandates Reform Act (Public Law 104–4) requires an assessment of anticipated costs and benefits before proposing any rule that may result in expenditure by State, local, and tribal governments, in aggregate, or by the private sector, of $100 million in any one year (adjusted annually for inflation). We have determined that this rule is consistent with the principles set forth in the Executive Order and in these statutes and find that this rule will not have an effect on the economy that exceeds $100 million in any one year (adjusted for inflation). Therefore, no further analysis is required under the Unfunded Mandates Reform Act. Because this rule does not impose any new costs on small entities, it will not result in a significant economic impact on a substantial number of small entities. Thus, a Regulatory Flexibility Analysis is not required. In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

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 requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. We have reviewed this proposed rule under the threshold criteria of Executive Order 13132, Federalism, and have determined that this proposed rule would not have substantial direct effect on the States, on the relationship between the National Government and States, or on the distribution of power and responsibilities among the various levels of government. As this rule has no Federalism implications, a Federalism summary impact statement is not required.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with the Act, this proposed rule was developed by a negotiated rulemaking committee comprised only of Federal and Tribal representatives, with a majority of the Tribal government representatives representing Self-Governance Tribes. The committee agreed to operate based on consensus decisionmaking. The proposed regulations have been agreed on by consensus. Where consensus was not reached, both the Tribal and Federal positions are discussed in the preamble.

National Environmental Policy Act (NEPA) Statement

The DHHS has determined that this proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to NEPA.

Paperwork Reduction Act (PRA) of 1995

This proposed regulation contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Management Reduction Act of 1995 (44 U.S.C. 3501–3520). The information collection requirements in this proposed regulation have been negotiated between the Department and Tribal representatives through the negotiated rulemaking process and have been agreed to by the parties in the negotiation. Health status reporting requirements will be negotiated on an individual Tribal basis and included in individual compacts or funding agreements. Self-governance Tribes will also have the option of participating in a voluntary national uniform data collection effort with the IHS. The subparts summarized below more specifically describe the information collection requirements. As required by the PRA of 1995 (44 U.S.C. 3507(d)), the Department has submitted a copy of these sections to the OMB for its review:

Subpart C—Selection of Tribes for Participation in Self-Governance

The provisions in this subpart require collection of information that indicates successful completion of the planning phase, a Tribal resolution requesting participation in self-governance, and information that demonstrates financial stability and financial capacity for participation in self-governance. The Department needs and uses this information to determine the qualified applicant pool for the self-governance project. The information is collected at the time the Indian Tribe requests participation in self-governance. The annual reporting and record keeping burden for this collection of information is estimated to average 10 hours for each new request for 50 respondents. The total annual reporting and record keeping burden for this collection is estimated to be 500 hours.

Subparts D and E—Compact and Funding Agreement

The compact sets forth the general terms of the government-to-government relationship between the Self-Governance Tribe and the Secretary and any terms the parties intend to control year after year. A funding agreement is required for each Self-Governance Tribe participating in self-governance and it provides the information that authorizes the Self-Governance Tribe to plan, conduct, consolidate, administer, and receive funding. The funding agreement identifies the PSFAs to be performed or administered; the budget category; the funds to be provided; the time and method of transfer of the funds; and, information regarding any other negotiated provisions or Tribal requests for stable base funding.

The provisions in this subpart require collection of information or record-keeping requirements that may be contained in either the compact or the funding agreement, such as the information provided in health status reports or the information needed when requesting multi-year funding. The Department needs and uses this information to determine eligibility of the applicant; to evaluate applicant capabilities; and to protect the service population and safeguard Federal funds and other resources. The information serves as the official record of the compact or funding agreement terms agreed to by the negotiating parties. The information is collected at the time the Self-Governance Tribe makes an initial request to compact or when the Self-Governance Tribe decides to take specific action to retrocede. The annual reporting and record keeping burden for this collection of information is estimated to average 34 hours for each response for 50 respondents. The total annual reporting and record keeping burden for this collection is estimated to be 1700 hours.

Subpart N—Construction Projects

The provisions in this subpart require collection of information regarding the Self-Governance Tribes' assumption of Federal responsibilities with respect to construction, including building codes and architectural and engineering standards (including health and safety), the successful completion of the construction project, and carrying out the negotiated construction project agreement. The information needed includes the semi-annual construction project progress and financial reports.

The Department needs and uses this information to determine eligibility of the applicant and to protect the service population and safeguard Federal funds and other resources. The information serves as the official record of the compact or funding agreement terms agreed to by the negotiating parties.

The information is collected at the time the Self-Governance Tribe negotiates the construction project agreement and through semi-annual reports. The annual reporting and record keeping burden for this collection of information is estimated to average 40 hours for each response for 30 respondents. The total annual burden for the collection is estimated to be 1200 hours.

Subpart P—Appeals

This subpart provides the appeals procedures available to Indian Tribes. It explains how to file a notice of appeal and what the notice should contain as well as instructions for submitting a written statement of objections. The Department uses this information to evaluate and grant or deny an appeal. The information is collected and reported once an Indian Tribe files an appeal. The annual reporting and record keeping burden for this collection of information is estimated to average 40 hours for each response for 8 respondents. The total annual reporting and record keeping burden for this collection is estimated to be 320 hours.

In order 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 by the effected public on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of the IHS;
- The accuracy of our estimate of the information collection burden (the time it takes respondents to read complete and submit the requested information);
- The quality, utility, and clarity of the information we are collecting; and
- Recommendations to minimize the information collection burden on the affected public, including use of automated collection techniques.

Under the PRA, DHHS must obtain OMB approval of all information and record keeping requirements. No person is required to respond to an information collection request unless the form or regulation requesting the information has a currently valid OMB control number. This number will appear in 42 CFR part 137 upon approval. To obtain a copy of the information collection clearance requests, explanatory information, and related form, contact Lance Hodahkwen, Reports Clearance Officer, 12300 Twinbrook Parkway, Suite 450, Rockville, MD 20852 at (301) 443–5938.

By law, the OMB must submit comments to the DHHS within 60 days of publication of this proposed rule, but may respond as soon as 30 days after publication. Therefore, to ensure consideration by the OMB, please send comments regarding these reporting burden estimates or any other aspect of these information collection requirements to the Office of Information and Regulatory Affairs, OMB, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: IHS Desk Officer, Allison Eydt.

This rule imposes no unfunded mandates on any governmental or private entity and is in compliance with the provisions of the Unfunded Mandates Act of 1995.

List of Subjects

42 CFR Parts 36 and 136

Employment, Government procurement, Health care, Health facilities, Indians, Penalties, Reporting and recordkeeping requirements.

42 CFR Parts 36a and 136a

Grant programs-education, Grant programs-health, Grant programs-Indians, Health care, Health professions, Indians, Penalties, Reporting and recordkeeping requirements, Scholarships and fellowships, Student aid.

42 CFR Part 137

Grant programs-Indians, Health care.

Dated: August 13, 2001.

Michael H. Trujillo,

Assistant Surgeon General, Director.

Dated: January 25, 2002.

Tommy G. Thompson,

Secretary.

For the reasons set out in the preamble, we are amending chapter I of title 42 of the Code of Federal Regulations as follows:

PART 36—[REDESIGNATED AS PART 136]

1. The authority for part 36 continues to read as follows:

Authority: 25 U.S.C. 13; sec. 3, 68 Stat. 674 (42 U.S.C. 2001, 2003); Sec. 1, 42 Stat. 208 (25 U.S.C. 13); 42 U.S.C. 2001, unless otherwise noted.

2. Part 36—Indian Health is redesignated as part 136 and transferred to a new Subchapter M—Indian Health Service, Department of Health and Human Services.

3. In redesignated part 136, in the section listed in the first column, the references listed in the second column are revised to read as shown in the third column:

In redesignated part 136	References to §	Are revised to read §
136.14	36.12	136.12
136.21	36.61(c)	136.61
136.23	36.12	136.12
136.23	36.61	136.61
136.42	36.41	136.41
136.43	36.41	136.41
136.53	36.51	136.51
136.53	36.54	136.54
136.56	36.54	136.54
136.106	36.105	136.105
136.116	36.114	136.114
136.303	36.302	136.302
136.321	36.320	136.320
136.322	36.332	136.332
136.351(b)(4)	36.350(a)	136.350(a)
136.351(b)(5)	36.350(a)	136.350(a)
136.351(b)(7)	36.350(a)	136.350(a)
136.351(b)(10)	36.350(a)	136.350(a)
136.353	36.350(a)(7) and (8)	136.350(a)(7) and (8)

In redesignated part 136	References to §	Are revised to read §
136.371	36.370	136.370
136.372	36.332	136.332

PART 36a—[REDESIGNATED AS PART 136a]

4. The authority for part 36a continues to read as follows:

Authority: Sec. 3, 68 Stat. 674; 42 U.S.C 2003; 42 Stat. 208, sec. 1, 68 Stat. 674; 25 U.S.C. 13, 42 U.S.C. 2001, unless otherwise noted.

5. Part 36a—Indian Health is redesignated as Part 136a and transferred to new Subchapter—Indian Health Service, Department of Health and Human Services.

6. Add a new part 137 to new subchapter M to read as follows:

SUBCHAPTER M—INDIAN HEALTH SERVICE, DEPARTMENT OF HEALTH AND HUMAN SERVICES

PART 137—TRIBAL SELF-GOVERNANCE

Subpart A—General Provisions

Sec.

137.1 Authority, purpose and scope.
137.2 Congressional policy.
137.3 Effect on existing Tribal rights.
137.4 May Title V be construed to limit or reduce in any way the funding for any program, project, or activity serving an Indian Tribe under this or other applicable Federal Law?
137.5 Effect of these regulations on Federal program guidelines, manual, or policy directives.

Subpart B—Definitions

137.10 Definitions.

Subpart C—Selection of Indian Tribes for Participation in Self-Governance

137.15 Who may participate in Tribal Self-Governance?
137.16 What if more than 50 Indian Tribes apply to participate in self-governance?
137.17 May more than one Indian Tribe participate in the same compact and/or funding agreement?
137.18 What criteria must an Indian Tribe satisfy to be eligible to participate in self-governance?

Planning Phase

137.20 What is required during the planning phase?
137.21 How does an Indian Tribe demonstrate financial stability and financial management capacity?
137.22 May the Secretary consider uncorrected significant and material audit exceptions identified regarding centralized financial and administrative functions?
137.23 For purposes of determining eligibility for participation in self-governance, may the Secretary consider any other information regarding the Indian Tribe's financial stability and financial management capacity?
137.24 Are there grants available to assist the Indian Tribe to meet the requirements to participate in self-governance?
137.25 Are planning and negotiation grants available?
137.26 Must an Indian tribe receive a planning or negotiation grant to be eligible to participate in self-governance?

Subpart D—Self-Governance Compact

137.30 What is a self-governance compact?
137.31 What is included in a compact?
137.32 Is a compact required to participate in self-governance?
137.33 May an Indian Tribe negotiate a funding agreement at the same time it is negotiating a compact?
137.34 May a funding agreement be executed without negotiating a compact?
137.35 What is the term of a self-governance compact?

Subpart E—Funding Agreements

137.40 What is a funding agreement?
137.41 What PSFAs must be included in a funding agreement?
137.42 What Tribal shares may be included in a funding agreement?
137.43 Are all funds identified as Tribal shares always paid to the Self-Governance Tribe under a funding agreement?

Terms in a Funding Agreement

137.45 What terms must be included in a funding agreement?
137.46 May additional terms be included in a funding agreement?
137.47 Do any provisions of Title I apply to compacts, funding agreements, and construction project agreements negotiated under Title V of the Act?
137.48 What is the effect of incorporating a Title I provision into a compact or funding agreement?
137.49 What if a Self-Governance Tribe requests such incorporation at the negotiation stage of a compact or funding agreement?

Term of a Funding Agreement

137.55 What is the term of a funding agreement?
137.56 Does a funding agreement remain in effect after the end of its term?
137.57 How is a funding agreement amended during the effective period of the funding agreement?

Subpart F—Statutorily Mandated Grants

137.60 May a statutorily mandated grant be added to a funding agreement?
137.65 May a Self-Governance Tribe receive statutorily mandated grant funding in an annual lump sum advance payment?
137.66 May a Self-Governance Tribe keep interest earned on statutorily mandated grant funds?
137.67 How may a Self-Governance Tribe use interest earned on statutorily mandated grant funds?
137.68 May funds from a statutorily mandated grant be added to a funding agreement be reallocated?
137.69 May a statutorily mandated grant program added to a funding agreement be redesigned?
137.70 Are the reporting requirements different for a statutorily mandated grant program added to a funding agreement?
137.71 May the Secretary and the Self-Governance Tribe develop separate programmatic reporting requirements for statutorily mandated grants?
137.72 Are Self-Governance Tribes and their employees carrying out statutorily mandated grant programs added to a funding agreement covered by the Federal Tort Claims Act (FTCA)?

Subpart G—Funding

General

137.75 What funds must the Secretary transfer to a Self-Governance Tribe in a funding agreement?
137.76 When must the Secretary transfer to a Self-Governance Tribe funds identified in a funding agreement?
137.77 When must the Secretary transfer funds identified in a funding agreement which does not correspond to the Federal fiscal year, e.g., calendar year?
137.78 When must the Secretary transfer funds that were not paid as part of the initial lump sum payment?
137.79 May a Self-Governance Tribe negotiate a funding agreement for a term longer or shorter than one year?
137.80 What funds must the Secretary include in a funding agreement?

Prohibitions

137.85 Is the Secretary prohibited from failing or refusing to transfer funds that are due to a Self-Governance Tribe under Title V?
137.86 Is the Secretary prohibited from reducing the amount of funds required under Title V to make funding available for self-governance monitoring or administration by the Secretary?
137.87 May the Secretary reduce the amount of funds due under Title V in subsequent years?
137.88 May the Secretary reduce the amount of funds required under Title V to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under the Act?
137.89 May the Secretary reduce the amount of funds required under Title V to pay for costs of Federal personnel

displaced by contracts under Title I or self-governance under Title V?
137.90 May the Secretary increase the funds required under the funding agreement?

Acquisition of Goods and Services from the IHS

137.95 May a Self-Governance Tribe purchase goods and services from the IHS on a reimbursable basis?

Prompt Payment Act

137.98 Does the Prompt Payment Act apply to funds transferred to a Self-Governance Tribe in a compact or funding agreement?

Interest or Other Income on Transfers

137.100 May a Self-Governance Tribe retain and spend interest earned on any funds paid under a compact or funding agreement?
137.101 What standard applies to a Self-Governance Tribe's management of funds paid under a compact or funding agreement?

Carryover of Funds

137.105 May a Self-Governance Tribe carryover from one year to the next any funds that remain at the end of the funding agreement?

Program Income

137.110 May a Self-Governance Tribe retain and expend any program income earned pursuant to a compact and funding agreement?

Limitation of Costs

137.115 Is a Self-Governance Tribe obligated to continue performance under a compact or funding agreement if the Secretary does not transfer sufficient funds?

Stable Base Budget

137.120 May a Self-Governance Tribe's funding agreement provide for a stable base budget?
137.121 What funds may be included in a stable base budget amount?
137.122 May a Self-Governance Tribe with a stable base budget receive other funding under its funding agreement?
137.123 Once stable base funding is negotiated, do funding amounts change from year to year?
137.124 Does the effective period of a stable base budget have to be the same as the term of the funding agreement?

Subpart H—Final Offer

137.130 What is covered by this subpart?
137.131 When should a final offer be submitted?
137.132 How does the Indian Tribe submit a final offer?
137.133 What does a final offer contain?
137.134 When does the 45 day review period begin?
137.135 May the Secretary request and obtain an extension of time of the 45 day review period?
137.136 What happens if the agency takes no action within the 45 day review period (or any extensions thereof)?
137.137 If the 45 day review period or extension thereto, has expired, and the Tribe's offer is deemed accepted by operation of law, are there any exceptions to this rule?
137.138 Once the Indian Tribe's final offer has been accepted or deemed accepted by operation of law, what is the next step?

Rejection of Final Offers

137.140 On what basis may the Secretary reject an Indian Tribe's final offer?
137.141 How does the Secretary reject a final offer?
137.142 What is a ''significant danger'' or ''risk'' to the public health?
137.143 How is the funding level to which the Indian Tribe is entitled determined?
137.144 Is technical assistance available to an Indian Tribe to avoid rejection of a final offer?
137.145 If the Secretary rejects a final offer, is the Secretary required to provide the Indian Tribe with technical assistance?
137.146 If the Secretary rejects all or part of a final offer, is the Indian Tribe entitled to an appeal?
137.147 Do those portions of the compact, funding agreement, or amendment not in dispute go into effect?
137.148 Does appealing the decision of the Secretary prevent entering into the compact, funding agreement or amendment?

Burden of Proof

137.150 What is the burden of proof in an appeal from rejection of a final offer?

Decision Maker

137.155 What constitutes a final agency action?

Subpart I—Operational Provisions

Conflicts of Interest

137.160 Are Self-Governance Tribes required to address potential conflicts of interest?

Audits and Cost Principles

137.165 Are Self-Governance Tribes required to undertake annual audits?
137.166 Are there exceptions to the annual audit requirements?
137.167 What cost principles must a Self-Governance Tribe follow when participating in self-governance under Title V?
137.168 May the Secretary require audit or accounting standards other than those specified in § 137.167?
137.169 How much time does the Federal Government have to make a claim against a Self-Governance Tribe relating to any disallowance of costs, based on an audit conducted under § 137.165?
137.170 When does the 365 day period commence?
137.171 Where do Self-Governance Tribes send their audit reports?
137.172 Should the audit report be sent anywhere else to ensure receipt by the Secretary?
137.173 Does a Self-Governance Tribe have a right of appeal from a disallowance?

Records

137.175 Is a Self-Governance Tribe required to maintain a recordkeeping system?
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137.179 May a Self-Governance Tribe make agreements with the Federal Records Centers regarding disclosure and release of the patient records stored pursuant to § 137.178?
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137.185 May a Self-Governance Tribe redesign or consolidate the PSFAs that are included in a funding agreement and reallocate or redirect funds for such PSFAs?

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137.205 Will this voluntary uniform data set reporting activity be required of all Self-Governance Tribes entering into a compact with the IHS under Title V?
137.206 Why does the IHS need this information?
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137.211 How does a Self-Governance Tribe learn whether self-governance activities have resulted in savings as described in § 137.210.

Access to Government Furnished Property

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agreement, or grant agreement pursuant to section 512(c) of the Act [25 U.S.C. 458aaa-11(c)]?

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137.217 May funds provided under compacts, funding agreements, or grants made pursuant to Title V be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program?

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137.262 If the Secretary reassumes a PSFA immediately, when must the Secretary provide the Self-Governance Tribe with a hearing?
137.263 May the Secretary provide a grant to a Self-Governance Tribe for technical assistance to overcome conditions identified under § 137.257.
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137.280 Construction definitions.

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137.287 What is the National Environmental Policy Act (NEPA)?
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137.292 How do Self-Governance Tribes assume environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa-8]?
137.293 Are Self-Governance Tribes required to adopt a separate resolution or take equivalent Tribal action to assume environmental responsibilities for each construction project agreement?
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137.295 May Self-Governance Tribes elect to develop their own environmental review process?
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137.298 Are Self-Governance Tribes required to comply with Executive Orders to fulfill their environmental responsibilities under section 509 of the Act [25 U.S.C. 458aaa-8]?
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137.300 Since Federal environmental responsibilities are new responsibilities which may be assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa-8], are there additional funds available to Self-Governance Tribes to carry out these formerly inherently Federal responsibilities?
137.301 How are project and program environmental review costs identified?
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137.304 May Self-Governance Tribes buy back environmental services from the IHS?
137.305 May Self-Governance Tribes act as lead, cooperating, or joint lead agencies for environmental review purposes?
137.306 How are Self-Governance Tribes recognized as having lead, cooperating, or joint lead agency status?
137.307 What Federal environmental responsibilities remain with the Secretary when a Self-Governance Tribe assumes Federal environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa-8]?
137.308 Does the Secretary have any enforcement authority for Federal environmental responsibilities assumed by Tribes under Section 509 of the Act?
137.309 How are NEPA and NHPA obligations typically enforced?
137.310 Are Self-Governance Tribes required to grant a limited waiver of their sovereign immunity to assume Federal environmental responsibilities under Section 509 of the Act [25 U.S.C. 458aaa-8]?
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137.312 Who is the proper defendant in a civil enforcement action under section 509(a)(2) of the Act [25 U.S.C. 458aaa-8(a)(2)]?

Notification (Prioritization Process, Planning, Development and Construction)

137.320 Is the Secretary required to consult with affected Indian Tribes concerning construction projects and programs?
137.321 How do Indian Tribes and the Secretary identify and request funds for needed construction projects?
137.322 Is the Secretary required to notify an Indian Tribe that funds are available for a construction project or a phase of a project?

Project Assumption Process

137.325 What does a Self-Governance Tribe do if it wants to perform a construction project under section 509 of the Act [25 U.S.C. 458aaa-8]?
137.326 What must a Tribal proposal for a construction project agreement contain?
137.327 May multiple projects be included in a single construction project agreement?
137.328 Must a construction project proposal incorporate provisions of Federal construction guidelines and manuals?
137.329 What environmental considerations must be included in the construction project agreement?
137.330 What happens if the Self-Governance Tribe and the Secretary cannot develop a mutually agreeable construction project agreement?
137.331 May the Secretary reject a final construction project proposal based on a determination of Tribal capacity or capability?
137.332 On what bases may the Secretary reject a final construction project proposal?
137.333 What procedures must the Secretary follow if the Secretary rejects a final construction project proposal, in whole or in part?
137.334 What happens if the Secretary fails to notify the Self-Governance Tribe of a decision to approve or reject a final construction project proposal within the time period allowed?
137.335 What costs may be included in the budget for a construction agreement?
137.336 What is the difference between fixed-price and cost-reimbursement agreements?
137.337 What funding must the Secretary provide in a construction project agreement?
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137.339 May the Self-Governance Tribe use project funds for matching or cost participation requirements under other Federal and non-Federal programs?
137.340 May a Self-Governance Tribe contribute funding to a project?
137.341 How will a Self-Governance Tribe receive payment under a construction project agreement?
137.342 What happens to funds remaining at the conclusion of a cost reimbursement construction project?
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137.344 May a Self-Governance Tribe reallocate funds among construction project agreements?

Roles of Self-Governance Tribe in Establishing and Implementing Construction Project Agreements

137.350 Is a Self-Governance Tribe responsible for completing a construction project in accordance with the negotiated construction project agreement?
137.351 Is a Self-Governance Tribe required to submit construction project progress and financial reports for construction project agreements?
137.352 What is contained in a construction project progress report?
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Roles of the Secretary in Establishing and Implementing Construction Project Agreements

137.360 Does the Secretary approve project planning and design documents prepared by the Self-Governance Tribe?
137.361 Does the Secretary have any other opportunities to approve planning or design documents prepared by the Self-Governance Tribe?
137.362 May construction project agreements be amended?
137.363 What is the procedure for the Secretary's review and approval of amendments?
137.364 What constitutes a significant change in the original scope of work?
137.365 What is the procedure for the Secretary's review and approval of project planning and design documents submitted by the Self-Governance Tribe?
137.366 May the Secretary conduct onsite project oversight visits?
137.367 May the Secretary issue a stop work order under a construction project agreement?
137.368 Is the Secretary responsible for oversight and compliance of health and safety codes during construction projects being performed by a Self-Governance Tribe under section 509 of the Act [25 U.S.C. 488aaa-8]?

Other

137.370 Do all provisions of this part apply to construction project agreements under this subpart?
137.371 Who takes title to real property purchased with funds provided under a construction project agreement?
137.372 What should the Self-Governance Tribe do if it wants real property purchased with construction project agreement funds to be taken into trust?
137.373 Do Federal real property laws, regulations and procedures that apply to the Secretary also apply to Self-Governance Tribes that purchase real property with funds provided under a construction project agreement?
137.374 Does the Secretary have a role in reviewing or monitoring a Self-Governance Tribe's actions in acquiring real property with funds provided under a construction project agreement?
137.375 Are Tribally-owned facilities constructed under section 509 of the Act [25 U.S.C. 458aaa-8] eligible for replacement, maintenance, and improvement funds on the same basis as if title to such property were vested in the United States?
137.376 Are design and construction projects performed by Self-Governance Tribes under section 509 of the Act [25 U.S.C. 458aaa-8] subject to Federal metric requirements?
137.377 Do Federal procurement law and regulations apply to construction project agreements performed under section 509 of the Act [25 U.S.C. 458aaa-8]?
137.378 Does the Federal Davis-Bacon Act and wage rates apply to construction projects performed by Self-Governance Tribes using their own funds or other non-Federal funds?
137.379 Do Davis-Bacon wage rates apply to construction projects performed by Self-Governance Tribes using Federal funds?

Subpart O—Secretarial Responsibilities Budget Request

137.400—137.404 [Reserved].

Reports

137.405 Is the Secretary required to report to Congress on administration of Title V and the funding requirements presently funded or unfunded?
137.406 In compiling reports pursuant to this section, may the Secretary impose any reporting requirements on Self-Governance Tribes, not otherwise provided in Title V?

137.407 What guidelines will be used by the Secretary to compile information required for the report?

Subpart P—Appeals

137.410 For the purposes of section 110 of the Act [25 U.S.C. 450m-1] does the term Acontract include compacts, funding agreements, and construction project agreements entered into under Title V?

Post-Award Disputes

137.412 Do the regulations at 25 CFR Part 900, Subpart N apply to compacts, funding agreements, and construction project agreements entered into under Title V?

Pre-Award Disputes

137.415 What decisions may an Indian Tribe appeal under §§ 137.415 through 137.436?
137.416 Do §§ 137.415 through 137.436 apply to any other disputes?
137.417 What procedures apply to Interior Board of Indian Appeals (IBIA) proceedings?
137.418 How does an Indian Tribe know where and when to file its appeal from decisions made by IHS?
137.419 What authority does the IBIA have under §§ 137.415 through 137.436?
137.420 Does an Indian Tribe have any options besides an appeal?
137.421 How does an Indian Tribe request an informal conference?
137.422 How is an informal conference held?
137.423 What happens after the informal conference?
137.424 Is the recommended decision from the informal conference final for the Secretary?
137.425 How does an Indian Tribe appeal the initial decision if it does not request an informal conference or if it does not agree with the recommended decision resulting from the informal conference?
137.426 May an Indian Tribe get an extension of time to file a notice of appeal?
137.427 What happens after an Indian Tribe files an appeal?
137.428 How is a hearing arranged?
137.429 What happens when a hearing is necessary?
137.430 What is the Secretary's burden of proof for appeals covered by § 137.145?
137.431 What rights do Indian Tribes and the Secretary have during the appeal process?
137.432 What happens after the hearing?
137.433 Is the recommended decision always final?
137.434 If an Indian Tribe objects to the recommended decision, what will the Secretary do?
137.435 Will an appeal adversely affect the Indian Tribe's rights in other compact, funding negotiations, or construction project agreements?
137.436 Will the decisions on appeal be available for the public to review?

Appeals of an Immediate Reassumption of a Self-Governance Program

137.440 What happens in the case of an immediate reassumption under section 507(a)(2)(C) of the Act [25 U.S.C. 458aaa-6(a)(2)(C)]?
137.441 Will there be a hearing?
137.442 What happens after the hearing?
137.443 Is the recommended decision always final?
137.444 If a Self-Governance Tribe objects to the recommended decision, what action will the Secretary take?
137.445 Will an immediate reassumption appeal adversely affect the Self-Governance Tribe's rights in other self-governance negotiations?

Equal Access to Justice Act Fees

137.450 Does the Equal Access to Justice Act (EAJA) apply to appeals under this subpart?

Authority: 25 U.S.C. 458 *et seq.*

Subpart A B General Provisions

§ 137.1 Authority, purpose and scope.

(a) *Authority.* These regulations are prepared, issued and maintained with the active participation and representation of Indian Tribes, Tribal organizations and inter-Tribal consortia pursuant to the guidance of the negotiated rulemaking procedures required by section 517 of the Act [25 U.S.C. 458aaa-16].

(b) *Purpose.* These regulations codify rules for self-governance compacts, funding agreements, and construction project agreements between the Department of Health and Human Services (DHHS) and Self-Governance Tribes to implement sections 2, 3, and 4 of Pub. L. 106–260.

(c) *Scope.* These regulations are binding on the Secretary and on Indian Tribes carrying out programs, services, functions, and activities (or portions thereof) (PSFAs) under Title V except as otherwise specifically authorized by a waiver under section 512(b) of the Act [25 U.S.C. 458aaa-11(b)].

(d) *Information Collection.* The information collection requirements contained in these rules have been approved by the Office of Management and Budget (OMB) and assigned the following approval numbers: [Approval numbers will appear in this location in the final rule.]

§ 137.2 Congressional policy.

(a) According to section 2 of Public Law 106–260, Congress has declared that:

(1) The Tribal right of self-government flows from the inherent sovereignty of Indian Tribes and nations;

(2) The United States recognizes a special government-to-government relationship with Indian Tribes, including the right of the Indian Tribes to self-governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian Tribes;

(3) Although progress has been made, the Federal bureaucracy, with its centralized rules and regulations, has eroded Tribal Self-Governance and dominates Tribal affairs.

(4) The Tribal Self-Governance Demonstration Project, established under title III of the Indian Self-Determination Act (ISDA) [25 U.S.C. 450f note] was designed to improve and perpetuate the government-to-government relationship between Indian Tribes and the United States and to strengthen Tribal control over Federal funding and program management;

(5) Although the Federal Government has made considerable strides in improving Indian health care, it has failed to fully meet its trust responsibilities and to satisfy its obligations to the Indian Tribes under treaties and other laws; and

(6) Congress has reviewed the results of the Tribal Self-Governance Demonstration Project and finds that transferring full control and funding to Tribal governments, upon Tribal request, over decision making for Federal PSFAs

(i) Is an appropriate and effective means of implementing the Federal policy of government-to-government relations with Indian Tribes; and

(ii) Strengthens the Federal policy of Indian self-determination.

(b) According to section 3 of Pub. L. 106–260, Congress has declared its policy to:

(1) Permanently establish and implement Tribal Self-Governance within the DHHS;

(2) Call for full cooperation from the DHHS and its constituent agencies in the implementation of Tribal Self-Governance—

(i) Enable the United States to maintain and improve its unique and continuing relationship with, and responsibility to, Indian Tribes;

(ii) Permit each Indian Tribe to choose the extent of its participation in self-governance in accordance with the provisions of the ISDA relating to the provision of Federal services to Indian Tribes;

(iii) Ensure the continuation of the trust responsibility of the United States to Indian Tribes and Indians;

(iv) Affirm and enable the United States to fulfill its obligations to the Indian Tribes under treaties and other laws;

(v) Strengthen the government-to-government relationship between the United States and Indian Tribes through direct and meaningful consultation with all Tribes;

(vi) Permit an orderly transition from Federal domination of programs and services to provide Indian Tribes with meaningful authority, control, funding, and discretion to plan, conduct, redesign, and administer PSFAs that meet the needs of the individual Tribal communities;

(vii) Provide for a measurable parallel reduction in the Federal bureaucracy as programs, services, functions, and activities (or portion thereof) are assumed by Indian Tribes; (viii) Encourage the Secretary to identify all PSFAs of the DHHS that may be managed by an Indian Tribe under this Act and to assist Indian Tribes in assuming responsibility for such PSFAs; and

(ix) Provide Indian Tribes with the earliest opportunity to administer PSFAs from throughout the Department.

(c) According to section 512(a) of the Act [25 U.S.C. 458aaa-11(a)], Congress has declared, except as otherwise provided by law, the Secretary shall interpret all Federal laws, Executive Orders, and regulations in a manner that will facilitate:

(1) The inclusion of PSFAs and funds associated therewith, in the agreements entered into under this section;

(2) The implementation of compacts and funding agreements entered into under this title; and

(3) The achievement of Tribal health goals and objectives.

(d) According to section 512(f) of the Act [25 U.S.C. 458aaa-11(f)], Congress has declared that each provision of Title V and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian Tribe participating in and any ambiguity shall be resolved in favor of the Indian Tribe.

(e) According to section 515(b) of the Act [25 U.S.C. 458aaa-14(b)], Congress has declared that nothing in the Act shall be construed to diminish in any way the trust responsibility of the United States to Indian Tribes and individual Indians that exists under treaties, Executive orders, or other laws and court decisions.

(f) According to section 507(g) of the Act [25 U.S.C. 458aaa-6(g)], Congress has declared that the Secretary is prohibited from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian Tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions.

(g) According to section 515(c) of the Act [25 U.S.C. 458aaa-14(c)], Congress has declared that the Indian Health Service (IHS) under this Act shall neither bill nor charge those Indians who may have the economic means to pay for services, nor require any Tribe to do so. Nothing in this section shall impair the right of the IHS or an Indian Tribe to seek recovery from third parties section 206 of the Indian Health Care Improvement Act [25 U.S.C. 1621e], under section 1 of the Federal Medical Care Recovery Act [42 U.S.C. 2651], and any other applicable Federal, State or Tribal law.

(h) According to section 507(e) of the Act [25 U.S.C. 458aaa-6(e)], Congress has declared that in the negotiation of compacts and funding agreements the Secretary shall at all times negotiate in good faith to maximize implementation of the self-governance policy. The Secretary shall carry out Title V in a manner that maximizes the policy of Tribal Self-Governance, and in a manner consistent with the purposes specified in section 3 of the Act.

§ 137.3 Effect on existing Tribal rights.

Nothing in this part shall be construed as:

(a) Affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by Indian Tribes;

(b) Terminating, waiving, modifying, or reducing the trust responsibility of the United States to the Indian Tribe(s) or individual Indians. The Secretary must act in good faith in upholding this trust responsibility;

(c) Mandating an Indian Tribe to apply for a compact(s) or grant(s) as described in the Act; or

(d) Impeding awards by other Departments and agencies of the United States to Indian Tribes to administer Indian programs under any other applicable law.

§ 137.4 May Title V be construed to limit or reduce in any way the funding for any program, project, or activity serving an Indian Tribe under this or other applicable Federal Law?

No, if an Indian Tribe alleges that a compact or funding agreement violates section 515(a) of the Act [25 U.S.C. 458aaa-14(a)], the Indian Tribe may apply the provisions of section 110 of the Act [25 U.S.C. 450m-1].

§ 137.5 Effect of these regulations on Federal program guidelines, manual, or policy directives.

Unless expressly agreed to by the Self-Governance Tribe in the compact or funding agreement, the Self-Governance Tribe shall not be subject to any agency circular, policy, manual, guidance, or rule adopted by the IHS, except for the eligibility provisions of section 105(g) of the Act [25 U.S.C. 450j(g)] and regulations promulgated under section 517 of the Act [25 U.S.C. 458aaa-16(e)].

Subpart B—Definitions.

§ 137.10 Definitions.

Unless otherwise provided in this part:

Act means sections 1 through 9 and Titles I and V of the Indian Self-Determination and Education Assistance Act of 1975, Public Law 93–638, as amended.

Appeal means a request by an Indian Tribe for an administrative review of an adverse decision by the Secretary.

Compact means a legally binding and mutually enforceable written agreement that affirms the government-to-government relationship between a Self-Governance Tribe and the United States.

Congressionally earmarked competitive grants as used in section 505(b)(1) of the Act [25 U.S.C. 458aaa-4(b)(1)] means statutorily mandated grants as defined in this section and used in subpart H of this part.

Contract means a self-determination contract as defined in section 4(j) of the Act [25 U.S.C. 450b].

Days means calendar days; except where the last day of any time period specified in these regulations falls on a Saturday, Sunday, or a Federal holiday, the period shall carry over to the next business day unless otherwise prohibited by law.

Department means the Department of Health and Human Services.

Director means the Director of the Indian Health Service.

Funding agreement means a legally binding and mutually enforceable written agreement that identifies the PSFAs that the Self-Governance Tribe will carry out, the funds being transferred from the Service Unit, Area, and Headquarter's levels in support of those PSFAs and such other terms as are required, or may be agreed upon, pursuant to Title V.

Gross mismanagement means a significant, clear, and convincing violation of a compact, funding agreement, or regulatory, or statutory requirements applicable to Federal funds transferred to an Indian Tribe by a compact or funding agreement that results in a significant reduction of funds available for the PSFAs assumed by a Self-Governance Tribe.

IHS means Indian Health Service.

IHS discretionary grant means a grant established by IHS pursuant to the IHS'

discretionary authority without any specific statutory directive.

Indian means a person who is a member of an Indian Tribe.

Indian Tribe means any Indian Tribe, band, nation, or other organized group, or community, including pueblos, rancherias, colonies, and any Alaska Native Village, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; provided that in any case in which an Indian Tribe has authorized another Indian Tribe, an inter-Tribal consortium, or a Tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under Title V, the authorized Indian Tribe, inter-Tribal consortium or Tribal organization shall have the rights and responsibilities of the authorizing Indian Tribe (except as otherwise provided in the authorizing resolution or in this part). In such event, the term 'Indian Tribe' as used in this part includes such other authorized Indian Tribe, inter-Tribal consortium, or Tribal organization.

Indirect costs shall have the same meaning as it has in 25 CFR 900.6 as applied to compacts, funding agreements and construction project agreements entered into under this part.

Inherent Federal functions means those Federal functions which cannot legally be delegated to Indian Tribes.

Inter-Tribal consortium means a coalition of two or more separate Indian Tribes that join together for the purpose of participating in self-governance, including Tribal organizations.

OMB means the Office of Management and Budget.

PSFA means programs, services, functions, and activities (or portions thereof).

Real property means any interest in land together with the improvements, structures, and fixtures and appurtenances thereto.

Reassumption means rescission, in whole or part, of a funding agreement and assuming or resuming control or operation of the PSFAs by the Secretary without consent of the Self-Governance Tribe.

Retained Tribal share means those funds that are available as a Tribal share but which the Self-Governance Tribe elects to leave with the IHS to administer.

Retrocession means the voluntary return to the Secretary of a self-governance program, service, function or activity (or portion thereof) for any reason, before or on the expiration of the term of the funding agreement.

Secretary means the Secretary of Health and Human Services (and his or her respective delegates.)

Self-Governance means the program of self-governance established under section 502 of the Act [25 U.S.C. 458aaa-1].

Self-Governance Tribe means an Indian Tribe participating in the program of self-governance pursuant to section 503(a) of the Act [25 U.S.C. 458aaa-2(a)] or selected and participating in self-governance pursuant to section 503(b) of the Act [25 U.S.C. 458aaa-2(b)].

Statutorily mandated grant as used in this section and subpart F of this part means a grant specifically designated in a statute for a defined purpose.

Title I means sections 1 through 9 and Title I of the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93–638, as amended.

Title V means Title V of the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93–638, as amended.

Tribal organization means the recognized governing body of any Indian Tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities; provided, that in any case where a contract or compact is entered into, or a grant is made, to an organization to perform services benefitting more than one Indian Tribe, the approval of each such Indian Tribe shall be a prerequisite to the entering into or making of such contract, compact, or grant.

Tribal share means an Indian Tribe's portion of all funds and resources that support secretarial PSFAs that are not required by the Secretary for the performance of inherent Federal functions.

Subpart C—Selection of Indian Tribes for Participation in Self-Governance

§ 137.15 Who may participate in Tribal Self-Governance?

Those Self-Governance Tribes described in 503(a) of the Act [25 U.S.C. 458aaa–2(a)] participating in the Title III Tribal Self-Governance Demonstration Project and up to 50 additional Indian Tribes per year that meet the criteria in § 137.18 may participate in self-governance.

§ 137.16 What if more than 50 Indian Tribes apply to participate in self-governance?

The first 50 Indian Tribes who apply and are determined to be eligible shall have the option to participate in self-governance. Any Indian Tribe denied participation due to the limitation in number of Indian Tribes that may take part is entitled to participate in the next fiscal year, provided the Indian Tribe continues to meet the financial stability and financial management capacity requirements.

§ 137.17 May more than one Indian Tribe participate in the same compact and/or funding agreement?

Yes, Indian Tribes may either:

(a) Each sign the same compact and/or funding agreement, provided that each one meets the criteria to participate in self-governance and accepts legal responsibility for all financial and administrative decisions made under the compact or funding agreement, or

(b) Authorize another Indian Tribe to participate in self-governance on their behalf.

§ 137.18 What criteria must an Indian Tribe satisfy to be eligible to participate in self-governance?

To be eligible to participate in self-governance, an Indian Tribe must have:

(a) Successfully completed the planning phase described in § 137.20;

(b) Requested participation in self-governance by resolution or other official action by the governing body of each Indian Tribe to be served; and

(c) Demonstrated, for three fiscal years, financial stability and financial management capability.

Planning Phase

§ 137.20 What is required during the planning phase?

The planning phase must be conducted to the satisfaction of the Indian Tribe and must include:

(a) Legal and budgetary research; and

(b) Internal Tribal government planning and organizational preparation relating to the administration of health programs.

§ 137.21 How does an Indian Tribe demonstrate financial stability and financial management capacity?

The Indian Tribe provides evidence that, for the three years prior to participation in self-governance, the Indian Tribe has had no uncorrected significant and material audit exceptions in the required annual audit of the Indian Tribe's self-determination contracts or self-governance funding agreements with any Federal agency.

§ 137.22 May the Secretary consider uncorrected significant and material audit exceptions identified regarding centralized financial and administrative functions?

Yes, if the Indian Tribe chooses to centralize its self-determination or self-governance financial and administrative functions with non-self-determination or non-self-governance financial and administrative functions, such as personnel, payroll, property management, etc., the Secretary may consider uncorrected significant and material audit exceptions related to the integrity of a cross-cutting centralized function in determining the Indian Tribe's eligibility for participation in the self-governance program.

§ 137.23 For purposes of determining eligibility for participation in self-governance, may the Secretary consider any other information regarding the Indian Tribe's financial stability and financial management capacity?

No, meeting the criteria set forth in §§ 137.21 and 137.22, shall be conclusive evidence of the required stability and capability to participate in self-governance.

§ 137.24 Are there grants available to assist the Indian Tribe to meet the requirements to participate in self-governance?

Yes, any Indian Tribe may apply, as provided in § 137.25, for a grant to assist it to:

(a) Plan to participate in self-governance; and

(b) Negotiate the terms of the compact and funding agreement between the Indian Tribe and Secretary.

§ 137.25 Are planning and negotiation grants available?

Subject to the availability of funds, IHS will annually publish a notice of the number of planning and negotiation grants available, an explanation of the application process for such grants, and the criteria for award. Questions may be directed to the Office of Tribal Self-Governance.

§ 137.26 Must an Indian tribe receive a planning or negotiation grant to be eligible to participate in self-governance?

No, an Indian Tribe may use other resources to meet the planning requirement.

Subpart D—Self-Governance Compact

§ 137.30 What is a self-governance compact?

A self-governance compact is a legally binding and mutually enforceable written agreement that affirms the government-to-government relationship between a Self-Governance Tribe and the United States.

§ 137.31 What is included in a compact?

A compact shall include general terms setting forth the government-to-government relationship consistent with the Federal Government's trust responsibility and statutory and treaty obligations to Indian Tribes and such other terms as the parties intend to control from year to year.

§ 137.32 Is a compact required to participate in self-governance?

Yes, Tribes must have a compact in order to participate in self-governance.

§ 137.33 May an Indian Tribe negotiate a funding agreement at the same time it is negotiating a compact?

Yes, at an Indian Tribe's option, a funding agreement may be negotiated prior to or at the same time as the negotiation of a compact.

§ 137.34 May a funding agreement be executed without negotiating a compact?

No, a compact is a separate document from a funding agreement, and the compact must be executed before or at the same time as a funding agreement.

§ 137.35 What is the term of a self-governance compact?

Upon approval and execution of a self-governance compact, the compact remains in effect for so long as permitted by Federal law or until terminated by mutual written agreement or retrocession or reassumption of all PSFAs.

Subpart E—Funding Agreements

§ 137.40 What is a funding agreement?

A funding agreement is a legally binding and mutually enforceable written agreement that identifies the PSFAs that the Self-Governance Tribe will carry out, the funds being transferred from service unit, area and headquarters levels in support of those PSFAs and such other terms as are required or may be agreed upon pursuant to Title V.

§ 137.41 What PSFAs must be included in a funding agreement?

At the Self-Governance Tribe's option, all PSFAs identified in and in accordance with section 505(b) of the Act must be included in a funding agreement, subject to section 507(c) of the Act [25 U.S.C. 458aaa–6(c)].

§ 137.42 What Tribal shares may be included in a funding agreement?

All Tribal shares identified in sections 505(b)(1) [25 U.S.C. 458aaa–4(b)(1)] and 508(c) of the Act [25 U.S.C. 458aaa–7(c)] may be included in a funding agreement, including Tribal shares of IHS discretionary grants.

§ 137.43 Are all funds identified as Tribal shares always paid to the Self-Governance Tribe under a funding agreement?

No, at the discretion of the Self-Governance Tribe, Tribal shares may be left, in whole or in part, with IHS for certain PSFAs. These shares are referred to as a ''retained Tribal shares.''

Terms in a Funding Agreement

§ 137.45 What terms must be included in a funding agreement?

A funding agreement must include terms required under section 505(d) of the Act [25 U.S.C. 458aaa–4(d)] and provisions regarding mandatory reporting and reassumption pursuant to section 507(a) of the Act [25 U.S.C. 458aaa–6(a)], unless those provisions have been included in a compact.

§ 137.46 May additional terms be included in a funding agreement?

Yes, at the Self-Governance Tribe's option, additional terms may be included as set forth in sections 506 [25 U.S.C. 458aaa–5] and 516(b) of the Act [25 U.S.C. 458aaa–15(b)]. In addition, any other terms to which the Self-Governance Tribe and the Secretary agree may be included.

§ 137.47 Do any provisions of Title I apply to compacts, funding agreements, and construction project agreements negotiated under Title V of the Act?

(a) Yes, the provisions of Title I listed in section 516(a) of the Act [25 U.S.C. 458aaa–15(a)] and section 314 of Pub. L. 101–512, as amended, [25 U.S.C. 450f note] mandatorily apply to a compact, funding agreement and construction project agreement to the extent they are not in conflict with Title V. In addition, at the option of a Self-Governance Tribe, under section 516(b) of the Act [25 U.S.C. 458aaa–15(b)] any provisions of Title I may be included in the compact or funding agreement.

(b) The provisions of Title I referenced in section 516(a) of the Act [25 U.S.C. 458aaa–15(a)] are sections 5 [25 U.S.C. 450c], 6 [25 U.S.C. 450d], 7 [25 U.S.C. 450e], 102(c) and (d) [25 U.S.C. 450f(c) and (d)], 104 [25 U.S.C. 450i], 105(k) and (l) [25 U.S.C. 450j(k) and (l)], 106(a) through (k) [25 U.S.C. 450j–1(a) through (k)], and 111 [25 U.S.C. 450n] of the Act.

§ 137.48 What is the effect of incorporating a Title I provision into a compact or funding agreement?

The incorporated Title I provision shall have the same force and effect as if it were set out in full in Title V.

§ 137.49 What if a Self-Governance Tribe requests such incorporation at the negotiation stage of a compact or funding agreement?

In that event, such incorporation shall be deemed effective immediately and shall control the negotiation and resulting compact and funding agreement.

Term of a Funding Agreement

§ 137.55 What is the term of a funding agreement?

A funding agreement shall have the term mutually agreed to by the parties. Absent notification from an Indian Tribe that it is withdrawing or retroceding the operation of one or more PSFAs identified in the funding agreement, the funding agreement shall remain in full force and effect until a subsequent funding agreement is executed.

§ 137.56 Does a funding agreement remain in effect after the end of its term?

Yes, the provisions of a funding agreement remain in full force and effect until a subsequent funding agreement is executed. Upon execution of a subsequent funding agreement, the provisions of such a funding agreement are retroactive to the end of the term of the preceding funding agreement.

§ 137.57 How is a funding agreement amended during the effective period of the funding agreement?

A funding agreement may be amended by the parties as provided for in the funding agreement, Title V, or this part.

Subpart F—Statutorily Mandated Grants

§ 137.60 May a statutorily mandated grant be added to a funding agreement?

Yes, in accordance with section 505(b)(2) of the Act [25 U.S.C. 458aaa–4(b)(2)], a statutorily mandated grant may be added to the funding agreement after award.

§ 137.65 May a Self-Governance Tribe receive statutorily mandated grant funding in an annual lump sum advance payment?

Yes, grant funds shall be added to the funding agreement as an annual lump sum advance payment after the grant is awarded.

§ 137.66 May a Self-Governance Tribe keep interest earned on statutorily mandated grant funds?

Yes, a Self-Governance Tribe may keep interest earned on statutorily mandated grant funds.

§ 137.67 How may a Self-Governance Tribe use interest earned on statutorily mandated grant funds?

Interest earned on such funds must be used to enhance the grant program including allowable administrative costs.

§ 137.68 May funds from a statutorily mandated grant added to a funding agreement be reallocated?

No, unless it is permitted under the statute authorizing the grant or under the terms and conditions of the grant award, funds from a statutorily mandated grant may not be reallocated.

§ 137.69 May a statutorily mandated grant program added to a funding agreement be redesigned?

No, unless it is permitted under the statute authorizing the grant or under the terms and conditions of the grant award, a program added to a funding agreement under a statutorily mandated grant may not be redesigned.

§ 137.70 Are the reporting requirements different for a statutorily mandated grant program added to a funding agreement?

Yes, the reporting requirements for a statutorily mandated grant program added to a funding agreement are subject to the terms and conditions of the grant award.

§ 137.71 May the Secretary and the Self-Governance Tribe develop separate programmatic reporting requirements for statutorily mandated grants?

Yes, the Secretary and the Self-Governance Tribe may develop separate programmatic reporting requirements for statutorily mandated grants.

§ 137.72 Are Self-Governance Tribes and their employees carrying out statutorily mandated grant programs added to a funding agreement covered by the Federal Tort Claims Act (FTCA)?

Yes, Self-Governance Tribes and their employees carrying out statutorily mandated grant programs added to a funding agreement are covered by the FTCA. Regulations governing coverage under the FTCA are published at 25 CFR Part 900, Subpart M.

Subpart G—Funding

General

§ 137.75 What funds must the Secretary transfer to a Self-Governance Tribe in a funding agreement?

Subject to the terms of any compact or funding agreement, the Secretary must transfer to a Tribe all funds provided for in the funding agreement, pursuant to section 508(c) of the Act [25 U.S.C. 458aaa–7(c)] and '137.80. The Secretary shall provide funding for periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

§ 137.76 When must the Secretary transfer to a Self-Governance Tribe funds identified in a funding agreement?

When a funding agreement requires an annual transfer of funding to be made at the beginning of a fiscal year, or requires semiannual or other periodic transfers of funding to be made commencing at the beginning of a fiscal year, the first such transfer shall be made not later than 10 days after the apportionment of such funds by the OMB to the Department, unless the funding agreement provides otherwise.

§ 137.77 When must the Secretary transfer funds identified in a funding agreement which does not correspond to the Federal fiscal year, e.g., calendar year?

When the period covered by a funding agreement crosses Federal fiscal years and unless 100 percent of the funding is available and agreed to in the funding agreement, funding for the funding agreement will be apportioned between the two fiscal years and payments due under the funding agreement associated with each respective fiscal year will be made on the later of:

(a) The effective date of the funding agreement, or

(b) Ten days after apportionment from OMB.

§ 137.78 When must the Secretary transfer funds that were not paid as part of the initial lump sum payment?

The Secretary must transfer any funds that were not paid in the initial lump sum payment within 10 days after distribution methodologies and other decisions regarding payment of those funds have been made by the IHS.

§ 137.79 May a Self-Governance Tribe negotiate a funding agreement for a term longer or shorter than one year?

Yes, upon Tribal request, the Secretary must negotiate a funding agreement for a term longer or shorter than a year. All references in these regulations to funding agreements shall also include funding agreements for a term longer or shorter than one year.

§ 137.80 What funds must the Secretary include in a funding agreement?

The Secretary must include funds in a funding agreement in an amount equal to the amount that the Self-Governance Tribe would have been entitled to receive in a contract under Title I, including amounts for direct program costs specified under section 106(a)(1) of the Act and amounts for contract support costs specified under section

106(a) (2), (3), (5), and (6) of the Act [25 U.S.C. 450j–1(a)(2), (3), (5) and (6)]. In addition, the Secretary shall include any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Self-Governance Tribe or its members, all without regard to the organizational level within the Department where such functions are carried out.

Prohibitions

§ 137.85 Is the Secretary prohibited from failing or refusing to transfer funds that are due to a Self-Governance Tribe under Title V?

Yes, sections 508(d)(1)(A) and (B) of the Act [25 U.S.C. 458aaa–7(d)(1)(A) and (B)] expressly prohibit the Secretary from:

(a) Failing or refusing to transfer to a Self-Governance Tribe its full share of any central, headquarters, regional, area, or service unit office or other funds due under Title V, except as required by Federal law, and

(b) From withholding portions of such funds for transfer over a period of years.

§ 137.86 Is the Secretary prohibited from reducing the amount of funds required under Title V to make funding available for self-governance monitoring or administration by the Secretary?

Yes, the Secretary is prohibited from reducing the amount of funds required under Title V to make funding available for self-governance monitoring or administration.

§ 137.87 May the Secretary reduce the amount of funds due under Title V in subsequent years?

No, in accordance with section 508(d)(1)(C)(ii) of the Act [[25 U.S.C. 458aaa–7(d)(1)(C)(ii)], the Secretary is prohibited from reducing the amount of funds required under Title V in subsequent years, except pursuant to:

(a) A reduction in appropriations from the previous fiscal year for the program or function to be included in a compact or funding agreement;

(b) A Congressional directive in legislation or accompanying report;

(c) A Tribal authorization;

(d) A change in the amount of pass-through funds subject to the terms of the funding agreement; or

(e) Completion of a project, activity, or program for which such funds were provided.

§ 137.88 May the Secretary reduce the amount of funds required under Title V to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under the Act?

No, the Secretary may not reduce the amount of funds required under Title V to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under the Act.

§ 137.89 May the Secretary reduce the amount of funds required under Title V to pay for costs of Federal personnel displaced by contracts under Title I or Self-Governance under Title V?

No, the Secretary may not reduce the amount of funds required under Title V to pay for costs of Federal personnel displaced by contracts under Title I or Self-Governance under Title V.

§ 137.90 May the Secretary increase the funds required under the funding agreement?

Yes, the Secretary may increase the funds required under the funding agreement. However, the Self-Governance Tribe and the Secretary must agree to any transfer of funds to the Self-Governance Tribe unless otherwise provided for in the funding agreement.

Acquisition of Goods and Services from the IHS

§ 137.95 May a Self-Governance Tribe purchase goods and services from the IHS on a reimbursable basis?

Yes, a Self-Governance Tribe may choose to purchase from the IHS any goods and services transferred by the IHS to a Self-Governance Tribe in a compact or funding agreement. The IHS shall provide any such goods and services to the Self-Governance Tribe, on a reimbursable basis, including payment in advance with subsequent adjustment.

Prompt Payment Act

§ 137.96 Does the Prompt Payment Act apply to funds transferred to a Self-Governance Tribe in a compact or funding agreement?

Yes, the Prompt Payment Act, 39 U.S.C. section 3901 *et seq.*, applies to the transfer of all funds due under a compact or funding agreement authorized pursuant to Title V. See also ''137.76 through 137.78 and 137.341(f).

Interest or Other Income on Transfers

§ 137.100 May a Self-Governance Tribe retain and spend interest earned on any funds paid under a compact or funding agreement?

Yes, pursuant to section 508(h) of the Act [25 U.S.C. 458aaa–7(h)], a Self-Governance Tribe may retain and spend interest earned on any funds paid under a compact or funding agreement.

§ 137.101 What standard applies to a Self-Governance Tribe's management of funds paid under a compact or funding agreement?

A Self-Governance Tribe is under a duty to invest and manage the funds as a prudent investor would, in light of the purpose, terms, distribution requirements, and provisions in the compact or funding agreement and Title V. This duty requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the investment portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the Self-Governance Tribe. In making and implementing investment decisions, the Self-Governance Tribe has a duty to diversify the investments unless, under the circumstances, it is prudent not to do so. In addition, the Self-Governance Tribe must:

(a) Conform to fundamental fiduciary duties of loyalty and impartiality;

(b) Act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents; and

(c) Incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the Self-Governance Tribe.

Carryover of Funds

§ 137.105 May a Self-Governance Tribe carryover from one year to the next any funds that remain at the end of the funding agreement?

Yes, pursuant to section 508(i) of the Act, a Self-Governance Tribe may carryover from one year to the next any funds that remain at the end of the funding agreement.

Program Income

§ 137.110 May a Self-Governance Tribe retain and expend any program income earned pursuant to a compact and funding agreement?

All Medicare, Medicaid, or other program income earned by a Self-Governance Tribe shall be treated as supplemental funding to that negotiated in the funding agreement. The Self-Governance Tribe may retain all such

income and expend such funds in the current year or in future years except to the extent that the Indian Health Care Improvement Act (25 U.S.C. 1601 *et seq.*) provides otherwise for Medicare and Medicaid receipts. Such funds shall not result in any offset or reduction in the amount of funds the Self-Governance Tribe is authorized to receive under its funding agreement in the year the program income is received or for any subsequent fiscal year.

Limitation of Costs

§ 137.115 Is a Self-Governance Tribe obligated to continue performance under a compact or funding agreement if the Secretary does not transfer sufficient funds?

No, if a Self-Governance Tribe believes that the total amount of funds provided for a specific PSFA in a compact or funding agreement is insufficient, the Self-Governance Tribe must provide reasonable written notice of such insufficiency to the Secretary. If the Secretary does not increase the amount of funds transferred under the funding agreement in a quantity sufficient for the Self-Governance Tribe to complete the PSFA, as jointly determined by the Self-Governance Tribe and the Secretary, the Self-Governance Tribe may suspend performance of the PSFA until such time as additional funds are transferred.

Stable Base Budget

§ 137.120 May a Self-Governance Tribe's funding agreement provide for a stable base budget?

Yes, at the option of a Self-Governance Tribe, a funding agreement may provide for a stable base budget, specifying the recurring funds to be transferred to a Self-Governance Tribe for a period specified in the funding agreement.

§ 137.121 What funds may be included in a stable base budget amount?

The stable base budget amount may include, at the option of the Self-Governance Tribe,

(a) Recurring funds available under section 106(a) of the Act [25 U.S.C. 450j–1];

(b) Recurring Tribal shares; and

(c) Any recurring funds for new or expanded PSFAs not previously assumed by the Self-Governance Tribe.

§ 137.122 May a Self-Governance Tribe with a stable base budget receive other funding under its funding agreement?

Yes, the funding agreement may include non-recurring funds, other recurring funds, and other funds the Self-Governance Tribe is entitled to include in a funding agreement that are not included in the stable base budget amount.

§ 137.123 Once stable base funding is negotiated, do funding amounts change from year to year?

Stable base funding amounts are subject to adjustment:

(a) Annually only to reflect changes in Congressional appropriations by sub-sub activity excluding earmarks;

(b) By mutual agreement of the Self-Governance Tribe and the Secretary; or

(c) As a result of full or partial retrocession or reassumption.

§ 137.124 Does the effective period of a stable base budget have to be the same as the term of the funding agreement?

No, the Self-Governance Tribe may provide in its funding agreement that the effective period of the stable base budget will be either longer or shorter than the term of the funding agreement.

Subpart H—Final Offer

§ 137.130 What is covered by this subpart?

This subpart explains the final offer process provided by the statute for resolving, within a specific timeframe, disputes that may develop in negotiation of compacts, funding agreements, or amendments thereof.

§ 137.131 When should a final offer be submitted?

A final offer should be submitted when the Secretary and an Indian Tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels).

§ 137.132 How does the Indian Tribe submit a final offer?

(a) A written final offer should be submitted:

(1) During negotiations to the agency lead negotiator;

(2) Thereafter to the Director.

(b) The document should be separate from the compact, funding agreement, or amendment and clearly identified as a ''Final Offer.''

§ 137.133 What does a final offer contain?

A final offer contains a description of the disagreement between the Secretary and the Indian Tribe and the Indian Tribe's final proposal to resolve the disagreement.

§ 137.134 When does the 45 day review period begin?

The 45 day review period begins from the date the IHS receives the final offer. Proof of receipt may include a date stamp, or postal return receipt, or hand delivery.

§ 137.135 May the Secretary request and obtain an extension of time of the 45 day review period?

Yes, the Secretary may request an extension of time before the expiration of the 45 day review period. The Indian Tribe may either grant or deny the Secretary's request for an extension. To be effective, any grant of extension of time must be in writing and be signed by the person authorized by the Indian Tribe to grant the extension before the expiration of the 45 day review period.

§ 137.136 What happens if the agency takes no action within the 45 day review period (or any extensions thereof)?

The final offer is accepted automatically by operation of law.

§ 137.137 If the 45 day review period or extension thereto, has expired, and the Tribe's offer is deemed accepted by operation of law, are there any exceptions to this rule?

No, there are no exceptions to this rule if the 45 day review period or extension thereto, has expired, and the Tribe's offer is deemed accepted by operation of law.

§ 137.138 Once the Indian Tribe's final offer has been accepted or deemed accepted by operation of law, what is the next step?

After the Indian Tribe's final offer is accepted or deemed accepted, the terms of the Indian Tribe's final offer and any funds included therein, shall be added to the funding agreement or compact within 10 days of the acceptance or the deemed acceptance.

Rejection of Final Offers

§ 137.140 On what basis may the Secretary reject an Indian Tribe's final offer?

The Secretary may reject an Indian Tribe's final offer for one of the following reasons:

(a) The amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian Tribe is entitled under the Act;

(b) The PSFA that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian Tribe;

(c) The Indian Tribe cannot carry out the PSFA in a manner that would not result in significant danger or risk to the public health; or

(d) The Indian Tribe is not eligible to participate in self-governance under section 503 of the Act [25 U.S.C. 458aaa–2].

§ 137.141 How does the Secretary reject a final offer?

The Secretary must reject a final offer by providing written notice to the

Indian Tribe based on the criteria in § 137.140 not more than 45 days after receipt of a final offer, or within a longer time period as agreed by the Self-Governance Tribe consistent with this subpart.

§ 137.142 What is a ''significant danger'' or ''risk'' to the public health?

A significant danger or risk is determined on a case-by-case basis in accordance with section 507(c) of the Act [25 U.S.C. 458aaa–6(c)].

§ 137.143 How is the funding level to which the Indian Tribe is entitled determined?

The Secretary must provide funds under a funding agreement in an amount equal to the amount that the Indian Tribe would have been entitled to receive under self-determination contracts under this Act, including amounts for direct program costs specified under section 106(a)(1) of the Act [25 U.S.C. 450j–1(a)(1)] and amounts for contract support costs specified under section 106(a)(2), (3), (5), and (6) of the Act [25 U.S.C. 450j–1(a)(2), (3), (5) and (6)], including any tribal shares.

§ 137.144 Is technical assistance available to an Indian Tribe to avoid rejection of a final offer?

Yes, upon receiving a final offer, the Secretary must offer any necessary technical assistance, and must share all relevant information with the Indian Tribe in order to avoid rejection of a final offer.

§ 137.145 If the Secretary rejects a final offer, is the Secretary required to provide the Indian Tribe with technical assistance?

Yes, the Secretary must offer and, if requested by the Indian Tribe, provide additional technical assistance to overcome the stated grounds for rejection.

§ 137.146 If the Secretary rejects all or part of a final offer, is the Indian Tribe entitled to an appeal?

Yes, the Indian Tribe is entitled to appeal the decision of the Secretary, with an agency hearing on the record, and the right to engage in full discovery relevant to any issue raised in the matter. The procedures for appeals are found in subpart P of this part. Alternatively, at its option, the Indian Tribe has the right to sue pursuant to section 110 of the Act [25 U.S.C. 450m–1] in Federal district court to challenge the Secretary's decision.

§ 137.147 Do those portions of the compact, funding agreement, or amendment not in dispute go into effect?

Yes, subject to section 507(c)(1)(D) of the Act [25 U.S.C. 458aaa–6(c)(1)(D)].

§ 137.148 Does appealing the decision of the Secretary prevent entering into the compact, funding agreement, or amendment?

No, appealing the decision of the Secretary does not prevent entering into the compact, funding agreement, or amendment.

Burden of Proof

§ 137.150 What is the burden of proof in an appeal from rejection of a final offer?

With respect to any appeal, hearing or civil action, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the final offer.

Decision Maker

§ 137.155 What constitutes a final agency action?

A final agency action shall consist of a written decision from the Department to the Indian Tribe either:

(a) By an official of the Department who holds a position at a higher organizational level within the Department than the level of the departmental agency in which the decision that is the subject of the appeal was made; or

(b) By an administrative judge.

Subpart I—Operational Provisions

Conflicts of Interest

§ 137.160 Are Self-Governance Tribes required to address potential conflicts of interest?

Yes, self-Governance Tribes participating in self-governance under Title V must ensure that internal measures are in place to address conflicts of interest in the administration of self-governance PSFAs.

Audits and Cost Principles

§ 137.165 Are Self-Governance Tribes required to undertake annual audits?

Yes, under the provisions of section 506(c) of the Act [25 U.S.C. 458aaa–5(c)], Self-Governance Tribes must undertake annual audits pursuant to the Single Audit Act, 31 U.S.C. 7501 *et seq.*

§ 137.166 Are there exceptions to the annual audit requirements?

Yes, the exceptions are described in 31 U.S.C. 7502 of the Single Audit Act.

§ 137.167 What cost principles must a Self-Governance Tribe follow when participating in self-governance under Title V?

A Self-Governance Tribe must apply the cost principles of the applicable OMB circular, except as modified by:

(a) Section 106 (k) of the Act [25 U.S.C. 450j–1],

(b) Other provisions of law, or

(c) Any exemptions to applicable OMB circulars subsequently granted by the OMB.

§ 137.168 May the Secretary require audit or accounting standards other than those specified in § 137.167?

No, no other audit or accounting standards shall be required by the Secretary.

§ 137.169 How much time does the Federal Government have to make a claim against a Self-Governance Tribe relating to any disallowance of costs, based on an audit conducted under § 137.165?

Any right of action or other remedy (other than those relating to a criminal offence) relating to any disallowance of costs is barred unless the Secretary provides notice of such a disallowance within 365 days from receiving any required annual agency single audit report or, for any period covered by law or regulation in force prior to enactment of the Single Agency Audit Act of 1984, any other required final audit report.

§ 137.170 When does the 365 day period commence?

For the purpose of determining the 365 day period, an audit report is deemed received on the date of actual receipt by the Secretary, at the address specified in § 137.172, if, within 60 days after receiving the audit report, the Secretary does not give notice of a determination by the Secretary to reject the single-agency audit report as insufficient due to non-compliance with chapter 75 of title 31, United States Code or noncompliance with any other applicable law.

§ 137.171 Where do Self-Governance Tribes send their audit reports?

(a) For fiscal years ending on or before June 30, 1996, the audit report must be sent to: National External Audit Review Center, Lucas Place Room 514, 323 W. 8th St., Kansas City, MO 64105.

(b) For fiscal years, beginning after June 30, 1996, the audit report must be sent to: Single Audit Clearinghouse, 1201 E. 10th St., Jeffersonville, IN 47132.

§ 137.172 Should the audit report be sent anywhere else to ensure receipt by the Secretary?

Yes, the Self-Governance Tribe should also send the audit report to: National External Audit Review Center, Lucas Place Room 514, 323 W. 8th St., Kansas City, MO 64105.

§ 137.173 Does a Self-Governance Tribe have a right of appeal from a disallowance?

Yes, the notice must set forth the right of appeal and hearing to the Interior Board of Contract Appeals, pursuant to section 110 of the Act [25 U.S.C. 450m–1].

Records

§ 137.175 Is a Self-Governance Tribe required to maintain a recordkeeping system?

Yes. Tribes are required to maintain records and provide Federal agency access to those records as provided in § 137.177.

§ 137.176 Are Tribal records subject to the Freedom of Information Act and Federal Privacy Act?

No, except to the extent that a Self-Governance Tribe specifies otherwise in its compact or funding agreement, the records of the Self-Governance Tribe shall not be considered Federal records for purposes of chapter 5 of title 5, United States Code.

§ 137.177 Is the Self-Governance Tribe required to make its records available to the Secretary?

Yes, after 30 days advance written notice from the Secretary, the Self-Governance Tribe must provide the Secretary with reasonable access to such records to enable the Department to meet its minimum legal recordkeeping system requirements under sections 3101 through 3106 of title 44 United States Code.

§ 137.178 May Self-Governance Tribes store patient records at the Federal Records Centers?

Yes, at the option of a Self-Governance Tribe, patient records may be stored at Federal Records Centers to the same extent and in the same manner as other Department patient records in accordance with section 105(o) of the Act [25 U.S.C. 450j(o)].

§ 137.179 May a Self-Governance Tribe make agreements with the Federal Records Centers regarding disclosure and release of the patient records stored pursuant to § 137.178?

Yes, a Self-Governance Tribe may make agreements with the Federal Records Centers regarding disclosure and release of the patient records stored pursuant to § 137.178.

§ 137.180 Are there other laws that govern access to patient records?

Yes, a Tribe must consider the potential application of Tribal, Federal and state law and regulations that may apply to requests for access to Tribal patient records, such as the provisions 42 CFR 2.1–2.67 pertaining to records regarding drug and/or alcohol treatment.

Redesign

§ 137.185 May a Self-Governance Tribe redesign or consolidate the PSFAs that are included in a funding agreement and reallocate or redirect funds for such PSFAs?

Yes, a Self-Governance Tribe may redesign or consolidate PSFAs included in a funding agreement and reallocate or redirect funds for such PSFAs in any manner which the Self-Governance Tribe deems to be in the best interest of the health and welfare of the Indian community being served, only if the redesign or consolidation does not have the effect of denying eligibility for services to population groups otherwise eligible to be served under applicable Federal law.

Non-Duplication

§ 137.190 Is a Self-Governance Tribe that receives funds under Title V also entitled to contract under section 102 of the Act [25 U.S.C. 450(f)] for such funds?

For the period for which, and to the extent to which, funding is provided under the compact or funding agreement, the Self-Governance Tribe is not entitled to contract with the Secretary for such funds under section 102 of the Act [25 U.S.C. 450f], except that such Self-Governance Tribe is eligible for new programs on the same basis as other Indian Tribes.

Health Status Reports

§ 137.200 Are there reporting requirements for Self-Governance Tribes under Title V?

Yes, compacts or funding agreements negotiated between the Secretary and a Self-Governance Tribe must include a provision that requires the Self-Governance Tribe to report on health status and services delivery. These reports may only impose minimal burdens on the Self-Governance Tribes.

§ 137.201 What are the purposes of the Tribal reporting requirements?

Tribal reports enable the Secretary to prepare reports required under Title V and to develop the budget request. The reporting requirements are not intended as a quality assessment or monitoring tool, although such provision may be included at the option of the Self-Governance Tribe. Under no circumstances will the reporting requirement include any confidential, proprietary or commercial information. For example, while staffing levels may be a part of a report, pay levels for the staff are considered confidential between the Self-Governance Tribe and the employee.

§ 137.202 What types of information will Self-Governance Tribes be expected to include in the reports?

Reports will be derived from existing minimal data elements currently collected by Self-Governance Tribes, and may include patient demographic and workload data. Not less than 60 days prior to the start of negotiations or a mutually agreed upon timeframe, the IHS will propose a list of recommended minimal data elements, along with justification for their inclusion, to be used as a basis for negotiating these requirements into the Self-Governance Tribe's compact or funding agreement.

§ 137.203 May a Self-Governance Tribe participate in a voluntary national uniform data collection effort with the IHS?

Yes, in order to advance Indian health advocacy efforts, each Self-Governance Tribe will be encouraged to participate, at its option, in national IHS data reporting activities such as Government Performance Results Act, epidemiologic and surveillance reporting.

§ 137.204 How will this voluntary national uniform data set be developed?

IHS will work with representatives of Self-Governance Tribes, in coordination with the Tribal Self Governance Advisory Committee (TSGAC), to develop a mutually-defined annual voluntary uniform subset of data that is consistent with Congressional intent, minimizes reporting burdens, and responds to the needs of the Self-Governance Tribe.

§ 137.205 Will this voluntary uniform data set reporting activity be required of all Self-Governance Tribes entering into a compact with the IHS under Title V?

No, to the extent that specific resources are available or have not otherwise been provided to the Self-Governance Tribe for this purpose, and if the Self-Governance Tribes choose to participate, the IHS will provide resources, hardware, software, and technical assistance to the Self-Governance Tribes to facilitate data gathering to ensure data consistency and integrity under this voluntary effort.

§ 137.206 Why does the IHS need this information?

This information will be used to comply with sections 513 [25 U.S.C. 458aaa–12] and 514 [25 U.S.C. 458aaa–13] of the Act as well as to assist IHS

in advocating for the Indian health system, budget formulation, and other reporting required by statute, development of partnerships with other organizations that benefit the health status of Indian Tribes, and sharing of best practices.

§ 137.207 Will funding be provided to the Self-Governance Tribe to compensate for the costs of reporting?

Yes, reporting requirements are subject to the Secretary providing specific funds for this purpose in the funding agreement.

Savings

§ 137.210 What happens if self-governance activities under Title V reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings?

To the extent that PSFAs carried out by Self-Governance Tribes under Title V reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of Tribal shares and other funds determined under section 508(c) of the Act [25 U.S.C. 458aaa–7(c)], the Secretary must make such savings available to the Self-Governance Tribes, for the provision of additional services to program beneficiaries in a manner equitable to directly served, contracted, and compacted programs.

§ 137.211 How does a Self-Governance Tribe learn whether self-governance activities have resulted in savings as described in § 137.210.

The annual report prepared pursuant to section 514(b)(2) [25 U.S.C. 458aaa–13(b)(2)] of the Act must specifically identify any such savings.

Access to Government Furnished Property

§ 137.215 How does a Self-Governance Tribe obtain title to real and personal property furnished by the Federal Government for use in the performance of a compact, funding agreement, construction project agreement, or grant agreement pursuant to section 512(c) of the Act [25 U.S.C. 458aaa–11(c)]?

(a) For government-furnished real and personal property made available to a Self-Governance Tribe, the Self-Governance Tribe must take title to all real or personal property unless the Self-Governance Tribe requests that the United States retain the title.

(b) For government-furnished personal property made available to a Self-Governance Tribe:

(1) The Secretary, in consultation with each Self-Governance Tribe, must develop a list of the property used in a compact, funding agreement, or construction project agreement.

(2) The Self-Governance Tribe must indicate any items on the list to which the Self-Governance Tribe wants the Secretary to retain title.

(3) The Secretary must provide the Self-Governance Tribe with any documentation needed to transfer title to the remaining listed property to the Self-Governance Tribe.

(c) For government-furnished real property made available to a Self-Governance Tribe:

(1) The Secretary, in consultation with the Self-Governance Tribe, must develop a list of the property furnished for use in a compact, funding agreement, or construction project agreement.

(2) The Secretary must inspect any real property on the list to determine the presence of any hazardous substance activity, as defined in 41 CFR 101–47.202.2(b)(10).

(3) The Self-Governance Tribe must indicate on the list to the Secretary any items of real property to which the Self-Governance Tribe wants the Secretary to retain title and those items of property to which the Self-Governance Tribe wishes to obtain title. The Secretary must take such steps as necessary to transfer title to the Self-Governance Tribe those items of real property which the Self-Governance Tribe wishes to acquire.

Matching and Cost Participation Requirements

§ 137.217 May funds provided under compacts, funding agreements, or grants made pursuant to Title V be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program?

Yes, funds provided under compacts, funding agreements, or grants made pursuant to Title V may be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program.

FTCA

§ 137.220 Do section 314 of Public Law 101–512 [25 U.S.C. 450f note] and section 102(d) of the Act [25 U.S.C. 450f(d)] (regarding, in part, FTCA coverage) apply to compacts, funding agreements and construction project agreements?

Yes, regulations governing FTCA coverage are set out at 25 CFR Part 900, Subpart M.

Subpart J—Regulation Waiver

§ 137.225 What regulations may be waived under Title V?

A Self-Governance Tribe may request a waiver of regulation(s) promulgated under section 517 of the Act [25 U.S.C. 458aaa–16] or under the authorities specified in section 505(b) of the Act [25 U.S.C. 458aaa–4(b)] for a compact or funding agreement entered into with the IHS under Title V.

§ 137.226 How does a Self-Governance Tribe request a waiver?

A Self-Governance Tribe may request a waiver by submitting a written request to the Secretary identifying the applicable Federal regulation(s) sought to be waived and the basis for the request.

§ 137.227 How much time does the Secretary have to act on a waiver request?

The Secretary must either approve or deny the requested waiver in writing within 90 days after receipt by the Secretary.

§ 137.228 Upon what basis may the waiver request be denied?

A denial may be made only upon a specific finding by the Secretary that identified language in the regulation may not be waived because such waiver is prohibited by Federal law.

§ 137.229 What happens if the Secretary neither approves or denies a waiver request within the time specified in § 137.227?

The waiver request is deemed approved.

§ 137.230 Is the Secretary's decision on a waiver request final for the Department?

Yes, the Secretary's decision on a waiver request is final for the Department.

§ 137.231 May a Self-Governance Tribe appeal the Secretary's decision to deny its request for a waiver of a regulation promulgated under section 517 of the Act [25 U.S.C. 458aaa–16]?

The decision may not be appealed under these regulations but may be appealed by the Self-Governance Tribe in Federal Court under applicable law.

Subpart K—Withdrawal

§ 137.235 May an Indian Tribe withdraw from a participating inter-Tribal consortium or Tribal organization?

Yes, an Indian Tribe may fully or partially withdraw from a participating inter-Tribal consortium or Tribal organization its share of any PSFAs included in a compact or funding agreement.

§ 137.236 When does a withdrawal become effective?

A withdrawal becomes effective within the time frame specified in the resolution that authorizes withdrawal from the participating Tribal organization or inter-Tribal consortium. In the absence of a specific time frame set forth in the resolution, such withdrawal becomes effective on

(a) The earlier of 1 year after the date of submission of such request, or the date on which the funding agreement expires; or

(b) Such date as may be mutually agreed upon by the Secretary, the withdrawing Indian Tribe, and the participating Tribal organization or inter-Tribal consortium that has signed the compact or funding agreement on behalf of the withdrawing Indian Tribe, inter-Tribal consortium, or Tribal organization.

§ 137.237 How are funds redistributed when a Indian Tribe fully or partially withdraws from a compact or funding agreement and elects to enter a contract or compact?

When an Indian Tribe eligible to enter into a contract under Title I or a compact or funding agreement under Title V fully or partially withdraws from a participating inter-Tribal consortium or Tribal organization, and has proposed to enter into a contract or compact and funding agreement covering the withdrawn funds:

(a) the withdrawing Indian Tribe is entitled to its Tribal share of funds supporting those PSFAs that the Indian Tribe will be carrying out under its own contract or compact and funding agreement (calculated on the same basis as the funds were initially allocated in the funding agreement of the inter-Tribal consortium or Tribal organization); and

(b) the funds referred to in paragraph (a) of this section must be transferred from the funding agreement of the inter-Tribal consortium or Tribal organization, on the condition that the provisions of sections 102 [25 U.S.C. 450f] and 105(i) of the Act [25 U.S.C. 450j], as appropriate, apply to the withdrawing Indian Tribe.

§ 137.238 How are funds distributed when an Indian Tribe fully or partially withdraws from a compact or funding agreement administered by an inter-Tribal consortium or Tribal organization serving more than one Indian Tribe and the withdrawing Indian Tribe elects not to enter a contract or compact?

All funds not obligated by the inter-Tribal consortium or Tribal organization associated with the withdrawing Indian Tribe's returned PSFAs, less close out costs, shall be returned by the inter-Tribal consortium or Tribal organization to the IHS for operation of the PSFAs included in the withdrawal.

§ 137.239 If the withdrawing Indian Tribe elects to operate PSFAs carried out under a compact or funding agreement under Title V through a contract under Title I, is the resulting contract considered a mature contract under section 4(h) of the Act [25 U.S.C. 450b(h)]?

Yes, if the withdrawing Indian Tribe elects to operate PSFAs carried out under a compact or funding agreement under Title V through a contract under Title I, the resulting contract is considered a mature contract under section 4(h) of the Act [25 U.S.C. 450b(h)] at the option of the Indian Tribe.

Subpart L—Retrocession

§ 137.245 What is retrocession?

Retrocession means the return by a Self-Governance Tribe to the Secretary of PSFAs, that are included in a compact or funding agreement, for any reason, before the expiration of the term of the compact or funding agreement.

§ 137.246 How does a Self-Governance Tribe retrocede a PSFA?

The Self-Governance Tribe submits a written notice to the Director of its intent to retrocede. The notice must specifically identify those PSFAs being retroceded. The notice may also include a proposed effective date of the retrocession.

§ 137.247 What is the effective date of a retrocession?

Unless the request for retrocession is rescinded, the retrocession becomes effective within the timeframe specified by the parties in the compact or funding agreement. In the absence of a specification, the retrocession becomes effective on:

(a) The earlier of 1 year after:

(1) The date of submission of the request, or

(2) The date on which the funding agreement expires; or

(b) Whatever date is mutually agreed upon by the Secretary and the retroceding Self-Governance Tribe.

§ 137.248 What effect will a retrocession have on a retroceding Self-Governance Tribe's rights to contract or compact under the Act?

A retrocession request shall not negatively affect:

(a) Any other contract or compact to which the retroceding Self-Governance Tribe is a party;

(b) Any other contracts or compacts the retroceding Self-Governance Tribe may request; and

(c) Any future request by such Self-Governance Tribe or an Indian Tribe to compact or contract for the same program.

§ 137.249 Will retrocession adversely affect funding available for the retroceded program?

No, the Secretary shall provide no less than the same level of funding that would have been available if there had been no retrocession.

§ 137.250 How are funds distributed when a Self-Governance Tribe fully or partially retrocedes from its compact or funding agreement?

Any funds not obligated by the Self-Governance Tribe and associated with the Self-Governance Tribe's returned PSFAs, less close out costs, must be returned by the Self-Governance Tribe to IHS for operation of the PSFA's associated with the compact or funding agreement from which the Self-Governance Tribe retroceded in whole or in part.

§ 137.251 What obligation does the retroceding Self-Governance Tribe have with respect to returning property that was provided by the Secretary under the compact or funding agreement and that was used in the operation of the retroceded program?

On the effective date of any retrocession, the retroceding Self-Governance Tribe, shall, at the option of the Secretary, deliver to the Secretary all requested property and equipment provided by the Secretary under the compact or funding agreement, to the extent used to carry out the retroceded PSFAs, which at the time of retrocession has a per item current fair market value, less the cost of improvements borne by the Self-Governance Tribe in excess of $5,000 at the time of the retrocession.

Subpart M—Reassumption

§ 137.255 What does reassumption mean?

Reassumption means rescission by the Secretary without consent of the Self-Governance Tribe of PSFAs and associated funding in a compact or funding agreement and resuming responsibility to provide such PSFAs.

§ 137.256 Under what circumstances may the Secretary reassume a program, service, function, or activity (or portion thereof)?

(a) Subject to the steps in § 137.257, the Secretary may reassume a program, service, function, or activity (or portion thereof) and associated funding if the Secretary makes a specific finding relative to that PSFA of :

(1) Imminent endangerment of the public health caused by an act or omission of the Self-Governance Tribe, and the imminent endangerment arises out of a failure to carry out the compact or funding agreement; or

(2) Gross mismanagement with respect to funds transferred to the Self-Governance Tribe by a compact or funding agreement, as determined by the Secretary, in consultation with the Inspector General, as appropriate.

(b) Immediate reassumption may occur under additional requirements set forth in § 137.261.

§ 137.257 What steps must the Secretary take prior to reassumption becoming effective?

Except as provided in §§ 137.261 for immediate reassumption, prior to a reassumption becoming effective, the Secretary must:

(a) Notify the Self-Governance Tribe in writing by certified mail of the details of findings required under §§ 137.256(a)(1) and (2);

(b) Request specified corrective action within a reasonable period of time, which in no case may be less than 45 days;

(c) Offer and provide, if requested, the necessary technical assistance and advice to assist the Self-Governance Tribe to overcome the conditions that led to the findings described under (a); and

(d) Provide the Self-Governance Tribe with a hearing on the record as provided under Subpart of this part.

§ 137.258 Does the Self-Governance Tribe have a right to a hearing prior to a non-immediate reassumption becoming effective?

Yes, at the Self-Governance Tribe's request, the Secretary must provide a hearing on the record prior to or in lieu of the corrective action period identified in § 137.257(b).

§ 137.259 What happens if the Secretary determines that the Self-Governance Tribe has not corrected the conditions that the Secretary identified in the notice?

(a) The Secretary shall provide a second written notice by certified mail to the Self-Governance Tribe served by the compact or funding agreement that the compact or funding agreement will be rescinded, in whole or in part.

(b) The second notice shall include:

(1) The intended effective date of the reassumption;

(2) The details and facts supporting the intended reassumption; and

(3) Instructions that explain the Indian Tribe's right to a formal hearing within 30 days of receipt of the notice.

§ 137.260 What is the earliest date on which a reassumption can be effective?

Except as provided in § 137.261, no PSFA may be reassumed by the Secretary until 30 days after the final resolution of the hearing and any subsequent appeals to provide the Self-Governance Tribe with an opportunity to take corrective action in response to any adverse final ruling.

§ 137.261 Does the Secretary have the authority to immediately reassume a PSFA?

Yes, the Secretary may immediately reassume operation of a program, service, function, or activity (or portion thereof) and associated funding upon providing to the Self-Governance Tribe written notice in which the Secretary makes a finding:

(a) Of imminent substantial and irreparable endangerment of the public health caused by an act or omission of the Indian Tribe; and

(b) The endangerment arises out of a failure to carry out the compact or funding agreement.

§ 137.262 If the Secretary reassumes a PSFA immediately, when must the Secretary provide the Self-Governance Tribe with a hearing?

If the Secretary immediately reassumes a PSFA, the Secretary must provide the Self-Governance Tribe with a hearing under Subpart P of this part not later than 10 days after such reassumption, unless the Self-Governance Tribe and the Secretary agree to an extension.

§ 137.263 May the Secretary provide a grant to a Self-Governance Tribe for technical assistance to overcome conditions identified under § 137.257?

Yes, the Secretary may make a grant for the purpose of obtaining technical assistance as provided in section 103 of the Act [25 U.S.C. 458aaa–h].

§ 137.264 To what extent may the Secretary require the Self-Governance Tribe to return property that was provided by the Secretary under the compact or funding agreement and used in the operation of the reassume program?

On the effective date of any reassumption, the Self-Governance Tribe, shall, at the option of the Secretary and only to the extent requested by the Secretary, deliver to the Secretary property and equipment provided by the Secretary under the compact or funding agreement, to the extent the property was used to directly carry out the reassume program, service, function, or activity (or portion thereof), provided that at the time of reassumption the property has a per item current fair market value, less the cost of improvements borne by the Self-Governance Tribe, in excess of $5,000 at the time of the reassumption.

§ 137.265 May a Tribe be reimbursed for actual and reasonable close out costs incurred after the effective date of reassumption?

Yes, a Tribe may be reimbursed for actual and reasonable close out costs incurred after the effective date of reassumption.

Subpart N—Construction

Purpose and Scope

§ 137.270 What is covered by this subpart?

This subpart covers IHS construction projects carried out under section 509 of the Act [25 U.S.C. 458aaa–8].

§ 137.271 Why is there a separate subpart in these regulations for construction project agreements?

Construction projects are separately defined in Title V and are subject to a separate proposal and review process. Provisions of a construction project agreement and this subpart shall be liberally construed in favor of the Self-Governance Tribe.

§ 137.272 What other alternatives are available for Self-Governance Tribes to perform construction projects?

Self-Governance Tribes also have the option of performing IHS construction projects under a variety of other legal authorities, including but not limited to Title I of the Act, the Indian Health Care Improvement Act, Public Law 94–437, and Public Law 86–121. This subpart does not cover projects constructed pursuant to agreements entered into under these authorities.

§ 137.273 What are IHS construction PSFAs?

IHS construction PSFAs are a combination of construction projects as defined in § 137.280 and construction programs.

§ 137.274 Does this subpart cover construction programs?

No, except as provided in § 137.275, this subpart does not cover construction programs such as the:

(a) Maintenance and Improvement Program;

(b) Construction program functions; and,

(c) Planning services and construction management services.

§ 137.275 May Self-Governance Tribes include IHS construction programs in a construction project agreement or in a funding agreement?

Yes, Self-Governance Tribes may choose to assume construction programs

in a construction project agreement, in a funding agreement, or in a combination of the two. These programs may include the following:

(a) Maintenance and improvement program;

(b) Construction program functions, and

(c) Planning services and construction management services.

Construction Definitions

§ 137.280 Construction definitions.

ALJ means administrative law judge.

APA means Administrative Procedures Act, 5 U.S.C. 701–706.

Budget means a statement of the funds required to complete the scope of work in a construction project agreement. For cost reimbursement agreements, budgets may be stated using broad categories such as planning, design, construction, project administration, and contingency. For fixed price agreements, budgets may be stated as lump sums, unit cost pricing, or a combination thereof.

Categorical exclusion means a category of actions that do not individually or cumulatively have a significant effect on the human environment and that have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

CEQ means Council on Environmental Quality in the Office of the President.

Construction management services (CMS) means activities limited to administrative support services; coordination; and monitoring oversight of the planning, design, and construction process. CMS activities typically include:

(1) Coordination and information exchange between the Self-Governance Tribe and the Federal Government;

(2) Preparation of a Self-Governance Tribe's project agreement; and

(3) A Self-Governance Tribe's subcontract scope of work identification and subcontract preparation, and competitive selection of construction contract subcontractors.

Construction phase is the phase of a construction project agreement during which the project is constructed, and includes labor, materials, equipment and services necessary to complete the work, in accordance with the construction project agreement.

Construction project means:

(1) An organized noncontinuous undertaking to complete a specific set of predetermined objectives for the planning, environmental determination, design, construction, repair, improvement, or expansion of buildings or facilities described in a project agreement, and

(2) Does not include construction program administration and activities described in sections 4(m)(1) through (3) of the Act [25 U.S.C. 4b(m)(1) through (3)], that may otherwise be included in a funding agreement under section 505 of the Act [25 U.S.C. 458aaa–4].

Construction project agreement means a negotiated agreement between the Secretary and a Self-Governance Tribe, that at a minimum:

(1) Establishes project phase start and completion dates;

(2) Defines a specific scope of work and standards by which it will be accomplished;

(3) Identifies the responsibilities of the Self-Governance Tribe and the Secretary;

(4) Addresses environmental considerations;

(5) Identifies the owner and operations and maintenance entity of the proposed work;

(6) Provides a budget;

(7) Provides a payment process; and

(8) Establishes the duration of the agreement based on the time necessary to complete the specified scope of work, which may be 1 or more years.

Design phase is the phase of a construction project agreement during which project plans, specifications, and other documents are prepared that are used to build the project. Site investigation, final site selection activities and environmental review and determination activities are completed in this phase if not conducted as a part of the planning phase.

Maintenance and improvement program:

(1) As used in this subpart means the program that provides funds for eligible facilities for the purpose of:

(i) Performing routine maintenance;

(ii) Achieving compliance with accreditation standards;

(iii) Improving and renovating facilities;

(iv) Ensuring that Indian health care facilities meet existing building codes and standards; and

(v) Ensuring compliance with public law building requirements.

(2) The maintenance and improvement program is comprised of routine maintenance and repair funding and project funding. Typical maintenance and improvement projects have historically been funded out of regional or national project pools and may include, but are not limited to, total replacement of a heating or cooling system, remodel of a medical laboratory, removal of lead based paint, abatement of asbestos and abatement of underground fuel storage tanks. Maintenance and repair program funding provided under a funding agreement is not covered under this subpart.

NEPA means the National Environmental Policy Act of 1969 [42 U.S.C. 4321 *et seq.*].

NHPA means the National Historic Preservation Act [16 U.S.C. 470 *et seq.*].

Planning phase is the phase of a construction project agreement during which planning services are provided.

Planning services may include performing a needs assessment, completing and/or verifying master plans, developing justification documents, conducting pre-design site investigations, developing budget cost estimates, conducting feasibility studies as needed, conducting environmental review activities and justifying the need for the project.

SHPO means State Historic Preservation Officer.

Scope of work means a brief description of the work to be accomplished under the construction project agreement, sufficient to confirm that the project is consistent with the purpose for which the Secretary has allocated funds.

THPO means Tribal Historic Preservation Officer.

NEPA Process

§ 137.285 Are Self-Governance Tribes required to accept Federal environmental responsibilities to enter into a construction project agreement?

Yes, under section 509 of the Act [25 U.S.C. 458aaa–8], Self-Governance Tribes must assume all Federal responsibilities under the NEPA of 1969 [42 U.S.C. 4321 *et seq.*] and the National Historic Preservation Act [16 U.S.C. 470 *et seq.*] and related provisions of law that would apply if the Secretary were to undertake a construction project, but only those responsibilities directly related to the completion of the construction project being assumed.

§ 137.286 Do Self-Governance Tribes become Federal agencies when they assume these Federal environmental responsibilities?

No, while Self-Governance Tribes are required to assume Federal environmental responsibilities for projects in place of the Secretary, Self-Governance Tribes do not thereby

become Federal agencies. However, because Self-Governance Tribes are assuming the responsibilities of the Secretary for the purposes of performing these Federal environmental responsibilities, Self-Governance Tribes will be considered the equivalent of Federal agencies for certain purposes as set forth in this subpart.

§ 137.287 What is the National Environmental Policy Act (NEPA)?

The NEPA is a procedural law that requires Federal agencies to follow established environmental review procedures, which include reviewing and documenting the environmental impact of their actions. NEPA establishes a comprehensive policy for protection and enhancement of the environment by the Federal Government; creates the Council on Environmental Quality in the Office of the President; and directs Federal agencies to carry out the policies and procedures of the Act. CEQ regulations (40 CFR 1500–1508) establish three levels of environmental review: categorical exclusions, environmental assessments, and environmental impact statements.

§ 137.288 What is the National Historic Preservation Act (NHPA)?

The National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings, such as construction projects, on properties covered by the NHPA, such as historic properties, properties eligible for listing on the National Register of Historic Places, or properties that an Indian Tribe regards as having religious and/or cultural importance. Section 106 of the NHPA [16 U.S.C. 70f] requires Federal agencies to afford the Advisory Council on Historic Preservation, acting through the State Historic Preservation Officer or the Tribal Historic Preservation Officer, a reasonable opportunity to comment on such undertakings.

§ 137.289 What is a Federal undertaking under NHPA?

The Advisory Council on Historic Preservation has defined a Federal undertaking in 36 CFR 800.16(y) as a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

§ 137.290 What additional provisions of law are related to NEPA and NHPA?

(a) Depending upon the nature and the location of the construction project, environmental laws related to NEPA and NHPA may include:

(1) Archaeological and Historical Preservation Act [16 U.S.C. 461];

(2) Archeological Resources Protection Act [16 U.S.C. 470];

(3) Clean Air Act [42 U.S.C. 7401];

(4) Clean Water Act [32 U.S.C. 1251];

(5) Coastal Barrier Improvement Act [42 U.S.C. 4028];

(6) Coastal Barrier Resources Act [16 U.S.C. 3501];

(7) Coastal Zone Management Act [16 U.S.C. 1451];

(8) Comprehensive Environmental Response, Compensation, and Liability Act [42 U.S.C. 9601];

(9) Endangered Species Act [16 U.S.C. 1531 et seq.];

(10) Farmland Protection Policy Act [7 U.S.C. 4201 et seq.];

(11) Marine Protection, Research, and Sanctuaries Act [33 U.S.C. 1401];

(12) National Historic Preservation Act [16 U.S.C. 470 et seq.];

(13) National Trails System Act [16 U.S.C. 1241];

(14) Native American Graves Protection and Repatriation Act [25 U.S.C. 3001];

(15) Noise Control Act [42 U.S.C. 7901];

(16) Resource Conservation and Recovery Act [42 U.S.C. 3251];

(17) Safe Drinking Water Act [42 U.S.C. 300];

(18) Toxic Substance Control Act [15 U.S.C. 2601];

(19) Wild and Scenic Rivers Act [16 U.S.C. 1271]; and

(20) Wilderness Act [16 U.S.C. 1131].

(b) This section provides a list of environmental laws for informational purposes only and does not create any legal rights or remedies, or imply private rights of action.

§ 137.291 May Self-Governance Tribes carry out construction projects without assuming these Federal environmental responsibilities?

Yes, but not under section 509 of the Act [25 U.S.C. 458aaa–8]. Self-Governance Tribes may otherwise elect to perform construction projects, or phases of construction projects, under other legal authorities (see § 137.272).

§ 137.292 How do Self-Governance Tribes assume environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa–8]?

Self-Governance Tribes assume environmental responsibilities by:

(a) Adopting a resolution or taking an equivalent Tribal action which:

(1) Designates a certifying officer to represent the Self-Governance Tribe and to assume the status of a responsible Federal official under NEPA, NHPA, and related provisions of law; and

(2) Accepts the jurisdiction of the Federal court, as provided in § 137.310 and § 137.311 for purposes of enforcement of the Federal environmental responsibilities assumed by the Self-Governance Tribe; and

(b) Entering into a construction project agreement under section 509 of the Act [25 U.S.C. 458aaa–8].

§ 137.293 Are Self-Governance Tribes required to adopt a separate resolution or take equivalent Tribal action to assume environmental responsibilities for each construction project agreement?

No, the Self-Governance Tribe may adopt a single resolution or take equivalent Tribal action to assume environmental responsibilities for a single project, multiple projects, a class of projects, or all projects performed under section 509 of the Act [25 U.S.C. 458aaa–8].

§ 137.294 What is the typical IHS environmental review process for construction projects?

(a) Most IHS construction projects normally do not have a significant impact on the environment, and therefore do not require environmental impact statements (EIS). Under current IHS procedures, an environmental review is performed on all construction projects. During the IHS environmental review process, the following activities may occur:

(1) Consult with Tribal, Federal, state, and local officials and interested parties on potential environmental effects;

(2) Document assessment of potential environmental effects; (IHS has developed a form to facilitate this process.)

(3) Perform necessary environmental surveys and inventories;

(4) Consult with the Advisory Council on Historic Preservation, acting through the SHPO or THPO, to ensure compliance with the NHPA;

(5) Determine if extraordinary or exceptional circumstances exist that would prevent the project from meeting the criteria for categorical exclusion from further environmental review under NEPA, or if an environmental assessment is required;

(6) Obtain environmental permits and approvals; and

(7) Identify methods to avoid or mitigate potential adverse effects;

(b) This section is for informational purposes only and does not create any legal rights or remedies, or imply private rights of action.

§ 137.295 May Self-Governance Tribes elect to develop their own environmental review process?

Yes, Self-Governance Tribes may develop their own environmental review process or adopt the procedures of the IHS or the procedures of another Federal agency.

§ 137.296 How does a Self-Governance Tribe comply with NEPA and NHPA?

Self-Governance Tribes comply with NEPA and the NHPA by adopting and following:

(a) Their own environmental review procedures;

(b) The procedures of the IHS; and/or

(c) The procedures of another Federal agency.

§ 137.297 If the environmental review procedures of a Federal agency are adopted by a Self-Governance Tribe, is the Self-Governance Tribe responsible for ensuring the agency's policies and procedures meet the requirements of NEPA, NHPA, and related environmental laws?

No, the Federal agency is responsible for ensuring its own policies and procedures meet the requirements of NEPA, NHPA, and related environmental laws, not the Self-Governance Tribe.

§ 137.298 Are Self-Governance Tribes required to comply with Executive Orders to fulfill their environmental responsibilities under section 509 of the Act [25 U.S.C. 458aaa–8]?

No, but Self-Governance Tribes may at their option, choose to voluntarily comply with Executive Orders. For facilities where ownership will vest with the Federal Government upon completion of the construction, Tribes and the Secretary may agree to include the goals and objectives of Executive Orders in the codes and standards of the construction project agreement.

§ 137.299 Are Federal funds available to cover the cost of Self-Governance Tribes carrying out environmental responsibilities?

Yes, funds are available:

(a) For project-specific environmental costs through the construction project agreement; and

(b) For environmental review program costs through a funding agreement and/or a construction project agreement.

§ 137.300 Since Federal environmental responsibilities are new responsibilities, which may be assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa–8], are there additional funds available to Self-Governance Tribes to carry out these formerly inherently Federal responsibilities?

Yes, the Secretary must transfer not less than the amount of funds that the Secretary would have otherwise used to carry out the Federal environmental responsibilities assumed by the Self-Governance Tribe.

§ 137.301 How are project and program environmental review costs identified?

(a) The Self-Governance Tribe and the Secretary should work together during the initial stages of project development to identify program and project related costs associated with carrying out environmental responsibilities for proposed projects. The goal in this process is to identify the costs associated with all foreseeable environmental review activities.

(b) If unforeseen environmental review and compliance costs are identified during the course of design and construction, the Self-Governance Tribe or the Self-Governance Tribe and the Secretary (with or without amendment as required by § 137.363) may do one or more of the following:

(1) Mitigate adverse environmental effects;

(2) Alter the project scope of work; and/or

(3) Add additional program and/or project funding, including seeking supplemental appropriations.

§ 137.302 Are Federal funds available to cover start-up costs associated with initial Tribal assumption of environmental responsibilities?

(a) Yes, start-up costs are available as provided in section 508(c) of the Act [25 U.S.C. 458aaa–7(c)]. During the initial year that these responsibilities are assumed, the amount required to be paid under section 106(a)(2) of the Act [25 U.S.C. 450j–1(a)(2)] must include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the agreement necessary:

(1) To plan, prepare for, and assume operation of the environmental responsibilities; and

(2) To ensure compliance with the terms of the agreement and prudent management.

(b) Costs incurred before the initial year that the agreement is in effect may not be included in the amount required to be paid under section 106(a)(2) of the Act [25 U.S.C. 450j–1(a)(2)] if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

§ 137.303 Are Federal or other funds available for training associated with Tribal assumption of environmental responsibilities?

Yes, Self-Governance Tribes may use construction program and project funds for training and program development. Training and program development funds may also be available from other Federal agencies, such as the Environmental Protection Agency and the National Park Service, state and local governments, and private organizations.

§ 137.304 May Self-Governance Tribes buy back environmental services from the IHS?

Yes, Self-Governance Tribes may ''buy back'' project related services in their construction project agreement, including design and construction engineering, and environmental compliance services from the IHS in accordance with Section 508(f) of the Act [25 U.S.C. 458aaa–7(f)] and § 137.95, subject to the availability of the IHS's capacity to conduct the work.

§ 137.305 May Self-Governance Tribes act as lead, cooperating, or joint lead agencies for environmental review purposes?

Yes, Self-Governance Tribes assuming Federal environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa–8] are entitled to receive equal consideration, on the same basis as any Federal agency, for lead, cooperating, and joint lead agency status. For informational purposes, the terms ''lead,'' ''cooperating,'' and ''joint lead agency'' are defined in the CEQ regulations at 40 CFR 1508.16, 1508.5 and 1506.2 respectively.

§ 137.306 How are Self-Governance Tribes recognized as having lead, cooperating, or joint lead agency status?

Self-Governance Tribes may be recognized as having lead, cooperating, or joint lead agency status through funding or other agreements with other agencies. To the extent that resources are available, the Secretary will encourage and facilitate Federal, state, and local agencies to enter into agreements designating Tribes as lead, cooperating, or joint lead agencies for environmental review purposes.

§ 137.307 What Federal environmental responsibilities remain with the Secretary when a Self-Governance Tribe assumes Federal environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa–8]?

(a) All environmental responsibilities for Federal actions not directly related to construction projects assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa–8] remain with the Secretary. Federal agencies, including the IHS, retain responsibility for ensuring their environmental review procedures meet the requirements of

NEPA, NHPA and related provisions of law, as called for in § 137.297.

(b) The Secretary will provide information updating and changing IHS agency environmental review policy and procedures to all Self-Governance Tribes implementing a construction project agreement, and to other Indian Tribes upon request. If a Self-Governance Tribe participating under section 509 of the Act [25 U.S.C. 458aaa–8] does not wish to receive this information, it must notify the Secretary in writing. As resources permit, at the request of the Self-Governance Tribe, the Secretary will provide technical assistance with carrying out Federal environmental responsibilities.

§ 137.308 Does the Secretary have any enforcement authority for Federal environmental responsibilities assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa–8]?

No, the Secretary does not have any enforcement authority for Federal environmental responsibilities assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa–8].

§ 137.309 How are NEPA and NHPA obligations typically enforced?

NEPA and NHPA obligations are typically enforced by interested parties who may file lawsuits against Federal agencies alleging that the agencies have not complied with their legal obligations under NEPA and NHPA. These lawsuits may only be filed in Federal court under the provisions of the APA, 5 U.S.C. 701–706. Under the APA, a Federal judge reviews the Federal agency's actions based upon an administrative record prepared by the Federal agency. The judge gives appropriate deference to the agency's decisions and does not substitute the court's views for those of the agency. Jury trials and civil discovery are not permitted in APA proceedings. If a Federal agency has failed to comply with NEPA or NHPA, the judge may grant declaratory or injunctive relief to the interested party. No money damages or fines are permitted in APA proceedings.

§ 137.310 Are Self-Governance Tribes required to grant a limited waiver of their sovereign immunity to assume Federal environmental responsibilities under section 509 of the Act [25 U.S.C. 458aaa–8]?

Yes, but only as provided in this section. Unless Self-Governance Tribes consent to the jurisdiction of a court, Self-Governance Tribes are immune from civil lawsuits. Self-Governance Tribes electing to assume Federal environmental responsibilities under section 509 of the Act [25 U.S.C. 458aaa–8] must provide a limited waiver of sovereign immunity solely for the purpose of enforcing a Tribal certifying officer's environmental responsibilities, as set forth in this subpart. Self-Governance Tribes are not required to waive any other immunity.

§ 137.311 Are Self-Governance Tribes entitled to determine the nature and scope of the limited immunity waiver required under section 509(a)(2) of the Act [25 U.S.C. 458aaa–8(a)(2)]?

(a) Yes, Section 509(a)(2) of the Act [25 U.S.C. 458aaa–8(a)(2)] only requires that the waiver permit a civil enforcement action to be brought against the Tribal certifying officer in his or her official capacity in Federal district court for declaratory and injunctive relief in a procedure that is substantially equivalent to an APA enforcement action against a Federal agency. Self-Governance Tribes are not required to subject themselves to suit in their own name, to submit to trial by jury or civil discovery, or to waive immunity for money damages, attorneys fees, or fines.

(b) Self-Governance Tribes may base the grant of a limited waiver under this subpart on the understanding that:

(1) Judicial review of the Tribal certifying official's actions are based upon the administrative record prepared by the Tribal official in the course of performing the Federal environmental responsibilities; and

(2) Actions and decisions of the Tribal certifying officer will be granted deference on a similar basis as Federal officials performing similar functions.

§ 137.312 Who is the proper defendant in a civil enforcement action under section 509(a)(2) of the Act [25 U.S.C. 458aaa–8(a)(2)]?

Only the designated Tribal certifying officer acting in his or her official capacity may be sued. Self-Governance Tribes and other Tribal officials are not proper defendants in lawsuits brought under section 509(a)(2) of the Act [25 U.S.C. 458aaa–8(a)(2)].

Notification (Prioritization Process, Planning, Development and Construction)

§ 137.320 Is the Secretary required to consult with affected Indian Tribes concerning construction projects and programs?

Yes, before developing a new project resource allocation methodology and application process the Secretary must consult with all Indian Tribes. In addition, before spending any funds for planning, design, construction, or renovation project, whether subject to a competitive application and ranking process or not, the Secretary must consult with any Indian Tribe that would be significantly affected by the expenditure to determine Tribal preferences concerning the size, location, type, and other characteristics of the project.

§ 137.321 How do Indian Tribes and the Secretary identify and request funds for needed construction projects?

In addition to the requirements contained in section 513 of the Act [25 U.S.C. 458aaa–12], Indian Tribes and the Secretary are encouraged to jointly identify health facility and sanitation needs at the earliest possible date for IHS budget formulation. In developing budget justifications for specific projects to be proposed to Congress, the Secretary shall follow the preferences of the affected Indian Tribe(s) to the greatest extent feasible concerning the size, location, type, and other characteristics of the project.

§ 137.322 Is the Secretary required to notify an Indian Tribe that funds are available for a construction project or a phase of a project?

(a) Yes, within 30 days after the Secretary's allocation of funds for planning phase, design phase, or construction phase activities for a specific project, the Secretary shall notify, by registered mail with return receipt in order to document mailing, the Indian Tribe(s) to be benefitted by the availability of the funds for each phase of a project. The Secretarial notice of fund allocation shall offer technical assistance in the preparation of a construction project proposal.

(b) The Secretary shall, within 30 days after receiving a request from an Indian Tribe, furnish the Indian Tribe with all information available to the Secretary about the project including, but not limited to: construction drawings, maps, engineering reports, design reports, plans of requirements, cost estimates, environmental assessments, or environmental impact reports and archeological reports.

(c) An Indian Tribe is not required to request this information prior to either submitting a notification of intent or a construction project proposal.

(d) The Secretary shall have a continuing responsibility to furnish information to the Indian Tribes.

Project Assumption Process

§ 137.325 What does a Self-Governance Tribe do if it wants to perform a construction project under section 509 of the Act [25 U.S.C. 458aaa–8]?

(a) A Self-Governance Tribe may start the process of developing a construction project agreement by:

(1) Notifying the Secretary in writing that the Self-Governance Tribe wishes to enter into a pre-agreement negotiation phase as set forth in section 105(m)(3) of the Act [25 U.S.C. 450j(m)(3)]; or

(2) Submitting a proposed construction project agreement. This proposed agreement may be the final proposal, or it may be a draft for consideration and negotiation, or

(3) A combination of the actions described in paragraphs (a)(1) and (2) of this section.

(b) Upon receiving a Self-Governance Tribe's request to enter into a pre-negotiation phase the Secretary shall take the steps outlined in section 105(m)(3) of the Act [25 U.S.C. 450j(m)(3)].

§ 137.326 What must a Tribal proposal for a construction project agreement contain?

A construction project proposal must contain all of the required elements of a construction project agreement as defined in § 137.280. In addition to these minimum requirements, Self-Governance Tribes may propose additional items.

§ 137.327 May multiple projects be included in a single construction project agreement?

Yes, a Self-Governance Tribe may include multiple projects in a single construction project agreement proposal or may add additional approved projects by amendment(s) to an existing construction project agreement.

§ 137.328 Must a construction project proposal incorporate provisions of Federal construction guidelines and manuals?

(a) No, the Self-Governance Tribe and the Secretary must agree upon and specify appropriate building codes and architectural and engineering standards (including health and safety) which must be in conformity with nationally recognized standards for comparable projects.

(b) The Secretary may provide, or the Self-Governance Tribe may request, Federal construction guidelines and manuals for consideration by the Self-Governance Tribe in the preparation of its construction project proposal. If Tribal construction codes and standards (including national, regional, State, or Tribal building codes or construction industry standards) are consistent with or exceed otherwise applicable nationally recognized standards, the Secretary must accept the Tribally proposed standards.

§ 137.329 What environmental considerations must be included in the construction project agreement?

The construction project agreement must include:

(a) Identification of the Tribal certifying officer for environmental review purposes,

(b) Reference to the Tribal resolution or equivalent Tribal action appointing the Tribal certifying officer and accepting the jurisdiction of the Federal court for enforcement purposes as provided in § 137.310 and 137.311.

(c) Identification of the environmental review procedures adopted by the Self-Governance Tribe, and

(d) An assurance that no action will be taken on the construction phase of the project that would have an adverse environmental impact or limit the choice of reasonable alternatives prior to making an environmental determination in accordance with the Self-Governance Tribe's adopted procedures.

§ 137.330 What happens if the Self-Governance Tribe and the Secretary cannot develop a mutually agreeable construction project agreement?

The Self-Governance Tribe may submit a final construction project proposal to the Secretary. No later than 30 days after the Secretary receives the final construction project proposal, or within a longer time agreed to by the Self-Governance Tribe in writing, the Secretary shall review and make a determination to approve or reject the construction project proposal in whole or in part.

§ 137.331 May the Secretary reject a final construction project proposal based on a determination of Tribal capacity or capability?

No, the Secretary may not reject a final construction project proposal based on a determination of Tribal capacity or capability.

§ 137.332 On what basis may the Secretary reject a final construction project proposal?

(a) The only basis for rejection of project activities in a final construction project proposal are:

(1) The amount of funds proposed in the final construction project proposal exceeds the applicable funding level for the construction project as determined under sections 508(c) [25 U.S.C. 458aaa–7(c)] and 106 of the Act [25 U.S.C. 450j–1].

(2) The final construction project proposal does not meet the minimum content requirements for construction project agreements set forth in section 501(a)(2) of the Act [25 U.S.C. 458aaa(a)(2)]; and

(3) The final construction project proposal on its face clearly demonstrates that the construction project cannot be completed as proposed.

(b) For construction programs proposed to be included in a construction project agreement, the Secretary may also reject that portion of the proposal that proposes to assume an inherently Federal function that cannot legally be delegated to the Self-Governance Tribe.

§ 137.333 What procedures must the Secretary follow if the Secretary rejects a final construction project proposal, in whole or in part?

Whenever the Secretary rejects a final construction project proposal in whole or in part, the Secretary must:

(a) Send the Self-Governance Tribe a timely written notice of rejection that shall set forth specific finding(s) that clearly demonstrates, or that is supported by controlling legal authority supporting the rejection;

(b) Within 20 days, provide all documents relied on in making the rejection decision to the Self-Governance Tribe;

(c) Provide assistance to the Self-Governance Tribe to overcome any objections stated in the written notice of rejection;

(d) Provide the Self-Governance Tribe with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal of the decision to reject the final construction contract proposal, under the regulations set forth in subpart P of this part, except that the Self-Governance Tribe may, in lieu of filing an appeal, initiate an action in Federal district court and proceed directly under sections 511 [25 U.S.C. 458aaa–10] and 110(a) of the Act [25 U.S.C. 450m–1(a)]. With respect to any hearing or appeal or civil action conducted pursuant to this section, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the final construction project proposal (or portion thereof); and

(e) Provide the Self-Governance Tribe with the option of entering into the severable portions of a final proposed construction project agreement (including a lesser funding amount) that the Secretary did not reject, subject to any additional alterations necessary to conform the construction project agreement to the severed provisions. Exercising this option does not affect the Self-Governance Tribe's right to appeal the portion of the final construction project proposal that was rejected by the Secretary.

§ 137.334 What happens if the Secretary fails to notify the Self-Governance Tribe of a decision to approve or reject a final construction project proposal within the time period allowed?

If the Secretary fails to notify the Self-Governance Tribe of the decision to approve or reject within 30 days (or a longer period if agreed to by the Self-Governance Tribe in writing), then the proposal will be deemed approved by the Secretary.

§ 137.335 What costs may be included in the budget for a construction agreement?

(a) A Self-Governance Tribe may include costs allowed by applicable OMB Circulars, and costs allowed under sections 508(c) [25 U.S.C. 458aaa–7(c)], 106 [25 U.S.C. 450j–1] and 105 (m) of the Act [25 U.S.C. 450j(m)]. The costs incurred will vary depending on which phase of the construction process the Self-Governance Tribe is conducting and type of construction project agreement that will be used.

(b) Regardless of whether a construction project agreement is fixed price or cost-reimbursement, budgets may include costs or fees associated with the following:

(1) Construction project proposal preparation;

(2) Conducting community meetings to develop project documents;

(3) Architects, engineers, and other consultants to prepare project planning documents, to develop project plans and specifications, and to assist in oversight of the design during construction;

(4) Real property lease or acquisition;

(5) Development of project surveys including topographical surveys, site boundary descriptions, geotechnical surveys, archeological surveys, and NEPA compliance;

(6) Project management, superintendence, safety and inspection;

(7) Travel, including local travel incurred as a direct result of conducting the construction project agreement and remote travel in conjunction with the project;

(8) Consultants, such as demographic consultants, planning consultants, attorneys, accountants, and personnel who provide services, to include construction management services;

(9) Project site development;

(10) Project construction cost;

(11) General, administrative overhead, and indirect costs;

(12) Securing and installing moveable equipment, telecommunications and data processing equipment, furnishings, including works of art, and special purpose equipment when part of a construction contract;

(13) Other costs directly related to performing the construction project agreement;

(14) Project contingency:

(i) A cost-reimbursement project agreement budgets contingency as a broad category. Project contingency remaining at the end of the project is considered savings.

(ii) Fixed-price agreements budget project contingency in the lump sum price or unit price.

(c) In the case of a fixed-price project agreement, a reasonable profit determined by taking into consideration the relevant risks and local market conditions.

§ 137.336 What is the difference between fixed-price and cost-reimbursement agreements?

(a) Cost-reimbursement agreements generally have one or more of the following characteristics:

(1) Risk is shared between IHS and the Self-Governance Tribe;

(2) Self-Governance Tribes are not required to perform beyond the amount of funds provided under the agreement;

(3) Self-Governance Tribes establish budgets based upon the actual costs of the project and are not allowed to include profit;

(4) Budgets are stated using broad categories, such as planning, design, construction project administration, and contingency;

(5) The agreement funding amount is stated as a ''not to exceed'' amount;

(6) Self-Governance Tribes provide notice to the IHS if they expect to exceed the amount of the agreement and require more funds;

(7) Excess funds remaining at the end of the project are considered savings; and,

(8) Actual costs are subject to applicable OMB circulars and cost principles.

(b) Fixed Price agreements generally have one or more of the following characteristics:

(1) Self-Governance Tribes assume the risk for performance;

(2) Self-Governance Tribes are entitled to make a reasonable profit;

(3) Budgets may be stated as lump sums, unit cost pricing, or a combination thereof;

(4) For unit cost pricing, savings may occur if actual quantity is less than estimated; and, (5) Excess funds remaining at the end of a lump sum fixed price project are considered profit.

§ 137.337 What funding must the Secretary provide in a construction project agreement?

The Secretary must provide funding for a construction project agreement in accordance with sections 106 [25 U.S.C. 450j–1] and 508(c) of the Act [25 U.S.C. 458aaa–7(c)].

§ 137.338 May funds from other sources be incorporated into a construction project agreement?

Yes, at the request of the Self-Governance Tribe, the Secretary may include funds from other agencies as permitted by law, whether on an ongoing or a one-time basis.

§ 137.339 May a Self-Governance Tribe use project funds for matching or cost participation requirements under other Federal and non-Federal programs?

Yes, notwithstanding any other provision of law, all funds provided under a construction project agreement may be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program.

§ 137.340 May a Self-Governance Tribe contribute funding to a project?

Yes, the Self-Governance Tribe and the Secretary may jointly fund projects. The construction project agreement should identify the Secretarial amount and any Tribal contribution amount that is being incorporated into the construction project agreement. The Self-Governance Tribe does not have to deposit its contribution with the Secretary.

§ 137.341 How will a Self-Governance Tribe receive payment under a construction project agreement?

(a) For all construction project agreements, advance payments shall be made annually or semiannually, at the Self-Governance Tribe's option. The initial payment shall include all contingency funding for the project or phase of the project to the extent that there are funds appropriated for that purpose.

(b) The amount of subsequent payments is based on the mutually agreeable project schedule reflecting:

(1) Work to be accomplished within the advance payment period,

(2) Work already accomplished, and

(3) Total prior payments for each annual or semiannual advance payment period.

(c) For lump sum, fixed price agreements, at the request of the Self-Governance Tribe, payments shall be based on an advance payment period measured as follows:

(1) One year; or

(2) Project Phase (e.g., planning, design, construction). If project phase is chosen as the payment period, the full amount of funds necessary to perform the work for that phase of the

construction project agreement is payable in the initial advance payment. For multi-phase projects, the planning and design phases must be completed prior to the transfer of funds for the associated construction phase. The completion of the planning and design phases will include at least one opportunity for Secretarial approval in accordance with § 137.360.

(d) For the purposes of payment, Sanitation Facilities Construction Projects authorized pursuant to Pub. L. 86–121, are considered to be a single construction phase and are payable in a single lump sum advance payment in accordance with paragraph (c)(2) of this section.

(e) For all other construction project agreements, the amount of advance payments shall include the funds necessary to perform the work identified in the advance payment period of one year.

(f) Any agreement to advance funds under paragraphs (b), (c) or (d) of this section is subject to the availability of appropriations.

(g) (1) Initial advance payments are due within 10 days of the effective date of the construction project agreement; and

(2) Subsequent payments are due:

(i) Within 10 days of apportionment for annual payments or

(ii) Within 10 days of the start date of the project phase for phase payments.

§ 137.342 What happens to funds remaining at the conclusion of a cost reimbursement construction project?

All funds, including contingency funds, remaining at the conclusion of the project are considered savings and may be used by the Self-Governance Tribe to provide additional services for the purpose for which the funds were originally appropriated. No further approval or justifying documentation is required before the expenditure of the remaining funds.

§ 137.343 What happens to funds remaining at the conclusion of a fixed price construction project?

(a) For lump sum fixed price construction project agreements, all funds remaining at the conclusion of the project are considered profits and belong to the Self-Governance Tribe.

(b) For fixed price construction project agreements with unit price components, all funds remaining that are associated with overestimated unit price quantities are savings and may be used by the Self-Governance Tribe in accordance with § 137.342. All other funds remaining at the conclusion of the project are considered profit and belong to the Self-Governance Tribe.

§ 137.344 May a Self-Governance Tribe reallocate funds among construction project agreements?

Yes, a Self-Governance Tribe may reallocate funds among construction project agreements to the extent not prohibited by applicable appropriation law(s).

Roles of Self-Governance Tribe in Establishing and Implementing Construction Project Agreements

§ 137.350 Is a Self-Governance Tribe responsible for completing a construction project in accordance with the negotiated construction project agreement?

Yes, a Self-Governance Tribe assumes responsibility for completing a construction project, including day-to-day on-site management and administration of the project, in accordance with the negotiated construction project agreement. However, Self-Governance Tribes are not required to perform beyond the amount of funds provided. For example, a Self-Governance Tribe may encounter unforeseen circumstances during the term of a construction project agreement. If this occurs, options available to the Self-Governance Tribe include, but are not limited to:

(a) Reallocating existing funding;

(b) Reducing/revising the scope of work that does not require an amendment because it does not result in a significant change;

(c) Utilizing savings from other projects;

(d) Requesting additional funds or appropriations;

(e) Utilizing interest earnings;

(f) Seeking funds from other sources; and/or

(g) Redesigning or re-scoping that does result in a significant change by amendment as provided in §§ 137.363 and 137.364.

§ 137.351 Is a Self-Governance Tribe required to submit construction project progress and financial reports for construction project agreements?

Yes, a Self-Governance Tribe must provide the Secretary with construction project progress and financial reports semiannually or, at the option of the Self-Governance Tribe, on a more frequent basis. Self-Governance Tribes are only required to submit the reports, as negotiated in the Construction Project Agreement, after funds have been transferred to the Self-Governance Tribe for a construction project. Construction project progress reports and financial reports are only required for active construction projects.

§ 137.352 What is contained in a construction project progress report?

Construction project progress reports contain information about accomplishments during the reporting period and issues and concerns of the Self-Governance Tribe, if any.

§ 137.353 What is contained in a construction project financial report?

Construction project financial reports contain information regarding the amount of funds expended during the reporting period, and financial concerns of the Self-Governance Tribe, if any.

Roles of the Secretary in Establishing and Implementing Construction Project Agreements

§ 137.360 Does the Secretary approve project planning and design documents prepared by the Self-Governance Tribe?

The Secretary shall have at least one opportunity to approve project planning and design documents prepared by the Self-Governance Tribe in advance of construction if the Self-Governance Tribe is required to submit planning or design documents as a part of the scope of work under a construction project agreement.

§ 137.361 Does the Secretary have any other opportunities to approve planning or design documents prepared by the Self-Governance Tribe?

Yes, but only if there is an amendment to the construction project agreement that results in a significant change in the original scope of work.

§ 137.362 May construction project agreements be amended?

Yes, the Self-Governance Tribe, at its discretion, may request the Secretary to amend a construction project agreement to include additional projects. In addition, amendments are required if there is a significant change from the original scope of work or if funds are added by the Secretary. The Self-Governance Tribe may make immaterial changes to the performance period and make budget adjustments within available funding without an amendment to the construction project agreement.

§ 137.363 What is the procedure for the Secretary's review and approval of amendments?

(a) The Secretary shall promptly notify the Self-Governance Tribe in writing of any concerns or issues that may lead to disapproval. The Secretary shall share relevant information and documents, and make a good faith effort to resolve all issues and concerns of the Self-Governance Tribe. If, after consultation with the Self-Governance

Tribe, the Secretary intends to disapprove the proposed amendment, then the Secretary shall follow the procedures set forth in §§ 137.330 through 137.334.

(b) The time allowed for Secretarial review, comment, and approval of amendments is 30 days, or within a longer time if agreed to by the Self-Governance Tribe in writing. Absence of a written response by the Secretary within 30 days shall be deemed approved.

(c) The timeframe set forth in paragraph (b) of this section is intended to be the maximum time and may be reduced based on urgency and need, by agreement of the parties. If the Self-Governance Tribe requests reduced timeframes for action due to unusual or special conditions (such as limited construction periods), the Secretary shall make a good faith effort to accommodate the requested timeframes.

§ 137.364 What constitutes a significant change in the original scope of work?

A significant change in the original scope of work is:

(a) A change that would result in a cost that exceeds the total of the project funds available and the Self-Governance Tribe's contingency funds; or

(b) A material departure from the original scope of work, including substantial departure from timelines negotiated in the construction project agreement.

§ 137.365 What is the procedure for the Secretary's review and approval of project planning and design documents submitted by the Self-Governance Tribe?

(a) The Secretary shall review and approve planning documents to ensure compliance with planning standards identified in the construction project agreement. The Secretary shall review and approve design documents for general compliance with requirements of the construction project agreement.

(b) The Secretary shall promptly notify the Self-Governance Tribe in writing of any concerns or issues that may lead to disapproval. The Secretary shall share relevant information and documents, and make a good faith effort to resolve all issues and concerns of the Self-Governance Tribe. If, after consultation with the Self-Governance Tribe, the Secretary intends to disapprove the documents, then the Secretary shall follow the procedures set forth in § 137.333.

(c) The time allowed for Secretarial review, comment, and approval of planning and design documents is 21 days, unless otherwise agreed to by the Self-Governance Tribe in writing. Absence of a written response by the Secretary within 21 days shall be deemed approved.

§ 137.366 May the Secretary conduct onsite project oversight visits?

Yes, the Secretary may conduct onsite project oversight visits semiannually or on an alternate schedule negotiated in the construction project agreement. The Secretary must provide the Self-Governance Tribe with reasonable advance written notice to assist the Self-Governance Tribe in coordinating the visit. The purpose of the visit is review the progress under the construction project agreement. At the request of the Self-Governance Tribe, the Secretary must provide the Self-Governance Tribe a written site visit report.

§ 137.367 May the Secretary issue a stop work order under a construction project agreement?

No, the Secretary has no role in the day-to-day management of a construction project.

§ 137.368 Is the Secretary responsible for oversight and compliance of health and safety codes during construction projects being performed by a Self-Governance Tribe under section 509 of the Act [25 U.S.C. 488aaa–8]?

No, the Secretary is not responsible for oversight and compliance of health and safety codes during construction projects being performed by a Self-Governance Tribe under section 509 of the Act [25 U.S.C. 488aaa–8].

Other

§ 137.370 Do all provisions of this part apply to construction project agreements under this subpart?

Yes, to the extent the provisions are not inconsistent with the provisions in this subpart. Provisions that do not apply include: programmatic reports and data requirements; reassumption; compact and funding agreement review, approval, and final offer process; and compact and funding agreement contents.

§ 137.371 Who takes title to real property purchased with funds provided under a construction project agreement?

The Self-Governance Tribe takes title to the real property unless the Self-Governance Tribe requests that the Secretary take title to the property.

§ 137.372 What should the Self-Governance Tribe do if it wants real property purchased with construction project agreement funds to be taken into trust?

The Self-Governance Tribe must submit a resolution of support from the governing body of Self-Governance Tribes in which the beneficial ownership is to be registered. Upon receipt of the Self-Governance Tribes' resolution, the Secretary shall transfer the request to the Secretary of the Interior so that it may be expeditiously processed in accordance with applicable Federal laws and regulations. The Secretary may not require the Self-Governance Tribe to furnish any information in support of such a request other than that expressly required by applicable law or regulation.

§ 137.373 Do Federal real property laws, regulations and procedures that apply to the Secretary also apply to Self-Governance Tribes that purchase real property with funds provided under a construction project agreement?

No, unless the Self-Governance Tribe has requested the Secretary take title to the property.

§ 137.374 Does the Secretary have a role in reviewing or monitoring a Self-Governance Tribe's actions in acquiring real property with funds provided under a construction project agreement?

No, unless the Self-Governance Tribe has requested the Secretary take title to the property. The Self-Governance Tribe is responsible for acquiring all real property needed to perform a construction project under a construction project agreement, not the Secretary. The Secretary shall not withhold funds or refuse to enter into a construction project agreement because of a disagreement between the Self-Governance Tribe and the Secretary over the Self-Governance Tribe's decisions to purchase or lease real property.

§ 137.375 Are Tribally-owned facilities constructed under section 509 of the Act [25 U.S.C. 458aaa–8] eligible for replacement, maintenance, and improvement funds on the same basis as if title to such property were vested in the United States?

Yes, Tribally-owned facilities constructed under section 509 of the Act [25 U.S.C. 458aaa–8] are eligible for replacement, maintenance, and improvement funds on the same basis as if title to such property were vested in the United States.

§ 137.376 Are design and construction projects performed by Self-Governance Tribes under section 509 of the Act [25 U.S.C. 458aaa–8] subject to Federal metric requirements?

No, however, the Self-Governance Tribe and the Secretary may negotiate the use of Federal metric requirements in the construction project agreement when the Self-Governance Tribe will

design and/or construct an IHS facility that the Secretary will own and operate.

§ 137.377 Do Federal procurement laws and regulations apply to construction project agreements performed under section 509 of the Act [25 U.S.C. 458aaa–8]?

No, unless otherwise agreed to by the Tribe, no provision of the Office of Federal Procurement Policy Act, the Federal Acquisition Regulations issued pursuant thereto, or any other law or regulation pertaining to Federal procurement (including Executive Orders) shall apply to any construction project conducted under section 509 of the Act [25 U.S.C. 458aaa–8]. The Secretary and the Self-Governance Tribe may negotiate to apply specific provisions of the Office of Federal Procurement and Policy Act and Federal Acquisition Regulations to a construction project agreement or funding agreement. Absent a negotiated agreement, such provisions and regulatory requirements do not apply.

§ 137.378 Does the Federal Davis-Bacon Act and wage rates apply to construction projects performed by Self-Governance Tribes using their own funds or other non-Federal funds?

No, the Federal Davis-Bacon Act and wage rates do not apply to construction projects performed by Self-Governance Tribes using their own funds or other non-Federal funds.

§ 137.379 Do Davis-Bacon wage rates apply to construction projects performed by Self-Governance Tribes using Federal funds?

Davis-Bacon Act wage rates only apply to laborers and mechanics employed by the contractors and subcontractors (excluding Indian Tribes, inter-Tribal consortia, and Tribal organizations) retained by Self-Governance Tribes to perform construction. The Davis-Bacon Act and wage rates do not apply when Self-Governance Tribes perform work with their own employees.

Subpart O—Secretarial Responsibilities

Budget Request

§§ 137.400–137.404 [Reserved]

Reports

§ 137.405 Is the Secretary required to report to Congress on administration of Title V and the funding requirements presently funded or unfunded?

Yes, no later than January 1 of each year after the date of enactment of the Tribal Self-Governance Amendments of 2000, the Secretary shall submit to the Committee on Indian Affairs of the Senate and the Committee on Resources of the House of Representatives a written report regarding the administration of Title V. The report shall include a detailed analysis of the funding requirements presently funded or unfunded for each Indian Tribe or Tribal organization, either directly by the Secretary, under self-determination contracts under title I, or under compacts and funding agreements authorized under Title V.

§ 137.406 In compiling reports pursuant to this section, may the Secretary impose any reporting requirements on Self-Governance Tribes, not otherwise provided in Title V?

No, in compiling reports pursuant to this section, the Secretary may not impose any reporting requirements on Self-Governance Tribes, not otherwise provided in Title V.

§ 137.407 What guidelines will be used by the Secretary to compile information required for the report?

The report shall be compiled from information contained in funding agreements, annual audit reports, and data of the Secretary regarding the disposition of Federal funds. The report must identify:

(a) The relative costs and benefits of self-governance, including savings;

(b) With particularity, all funds that are specifically or functionally related to the provision by the Secretary of services and benefits to Self-Governance Tribes and their members;

(c) The funds transferred to each Self-Governance Tribe and the corresponding reduction in the Federal bureaucracy;

(d) The funding formula for individual Tribal shares of all headquarter's funds, together with the comments of affected Self-Governance Tribes, developed under §§ 137.405 of this subpart; and

(e) Amounts expended in the preceding fiscal year to carry out inherent Federal functions, including an identification of those functions by type and location.

Subpart P—Appeals

§ 137.410 For the purposes of section 110 of the Act [25 U.S.C. 450m–1] does the term ''contract'' include compacts, funding agreements, and construction project agreements entered into under Title V?

Yes, for the purposes of section 110 of the Act [25 U.S.C. 450m–1] the term ''contract'' includes compacts, funding agreements, and construction project agreements entered into under Title V.

Post-Award Disputes

§ 137.412 Do the regulations at 25 CFR Part 900, Subpart N apply to compacts, funding agreements, and construction project agreements entered into under Title V?

Yes, the regulations at 25 CFR Part 900, Subpart N apply to compacts, funding agreements, and construction project agreements entered into under Title V.

Pre-Award Disputes

§ 137.415 What decisions may an Indian Tribe appeal under §§ ;137.415 through 137.436?

An Indian Tribe may appeal:

(a) A decision to reject a final offer, or a portion thereof, under section 507(b) of the Act [25 U.S.C. 458aaa–6(b)];

(b) A decision to reject a proposed amendment to a compact or funding agreement, or a portion thereof, under section 507(b) of the Act [25 U.S.C. 458aaa–6(b)];

(c) A decision to rescind and reassume a compact or funding agreement, in whole or in part, under section 507(a)(2) of the Act [25 U.S.C. 458aaa–6(a)(2)], except for immediate reassumptions under section 507(a)(2)(C) of the Act [25 U.S.C. 458aaa–6(a)(2)(C)];

(d) A decision to reject a final construction project proposal, or a portion thereof, under section 509(b) of the Act [25 U.S.C. 458aaa–8(b)] and subpart N of this part; and

(e) For construction project agreements carried out under section 509 of the Act [25 U.S.C. 458aaa–8], a decision to reject project planning documents, design documents, or proposed amendments submitted by a Self-Governance Tribe under section 509(f) of the Act [25 U.S.C. 458aaa–8(f)] and subpart N of this part.

§ 137.416 Do §§ 137.415 through 137.436 apply to any other disputes?

No, §§ 137.415 through 137.436 only apply to decisions listed in § 137.415. Specifically, §§ 137.415 through 137.436 do not apply to any other dispute, including, but not limited to:

(a) Disputes arising under the terms of a compact, funding agreement, or construction project agreement that has been awarded;

(b) Disputes arising from immediate reassumptions under section 507(a)(2)(C) of the Act [25 U.S.C. 458aaa–6(a)(2)(C)] and §§ 137.261 and 137.262, which are covered under §§ 137.440 through 137.445.

(c) Other post-award contract disputes, which are covered under §§ 137.412.

(d) Denials under the Freedom of Information Act, 5 U.S.C. 552, which may be appealed under 45 CFR 5.

(e) Decisions relating to the award of grants under section 503(e) of the Act [25 U.S.C. 458aaa–2(e)], which may be appealed under 45 CFR 5.

§ 137.417 What procedures apply to Interior Board of Indian Appeals (IBIA) proceedings?

The IBIA may use the procedures set forth in 43 CFR 4.22–4.27 as a guide.

§ 137.418 How does an Indian Tribe know where and when to file its appeal from decisions made by IHS?

Every decision in any of the areas listed in § 137.415 must contain information which shall tell the Indian Tribe where and when to file the Indian Tribe's appeal. Each decision shall include the following statement:

Within 30 days of the receipt of this decision, you may request an informal conference under 42 CFR 137.421, or appeal this decision under 42 CFR 137.425 to the Interior Board of Indian Appeals (IBIA). Should you decide to appeal this decision, you may request a hearing on the record. An appeal to the IBIA under 42 CFR 137.425 shall be filed with the IBIA by certified mail or by hand delivery at the following address: Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203. You shall serve copies of your Notice of Appeal on the Secretary and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies.

§ 137.419 What authority does the IBIA have under §§ 137.415 through 137.436?

The IBIA has the authority:

(a) To conduct a hearing on the record;

(b) To permit the parties to engage in full discovery relevant to any issue raised in the matter; and

(c) To issue a recommended decision;

(d) To take such action as necessary to insure rights specified in § 137.430.

§ 137.420 Does an Indian Tribe have any options besides an appeal?

Yes, the Indian Tribe may request an informal conference. An informal conference is a way to resolve issues as quickly as possible, without the need for a formal hearing. Or, the Indian Tribe may, in lieu of filing an administrative appeal under this subpart or upon completion of an informal conference, file an action in Federal court pursuant to section 110 of the Act [25 U.S.C. 450m–1].

§ 137.421 How does an Indian Tribe request an informal conference?

The Indian Tribe must file its request for an informal conference with the office of the person whose decision it is appealing, within 30 days of the day it receives the decision. The Indian Tribe may either hand-deliver the request for an informal conference to that person's office, or mail it by certified mail, return receipt requested. If the Indian Tribe mails the request, it will be considered filed on the date the Indian Tribe mailed it by certified mail.

§ 137.422 How is an informal conference held?

(a) The informal conference must be held within 30 days of the date the request was received, unless the Indian Tribe and the authorized representative of the Secretary agree on another date.

(b) If possible, the informal conference will be held at the Indian Tribe's office. If the meeting cannot be held at the Indian Tribe's office and is held more than fifty miles from its office, the Secretary must arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Indian Tribe.

(c) The informal conference must be conducted by a designated representative of the Secretary.

(d) Only people who are the designated representatives of the Indian Tribe, or authorized by the Secretary are allowed to make presentations at the informal conference.

§ 137.423 What happens after the informal conference?

(a) Within 10 days of the informal conference, the person who conducted the informal conference must prepare and mail to the Indian Tribe a written report which summarizes what happened at the informal conference and a recommended decision.

(b) Every report of an informal conference must contain the following language:

Within 30 days of the receipt of the recommended decision from the informal conference, you may file an appeal of the initial decision of the DHHS agency with the Interior Board of Indian Appeals (IBIA) under 42 CFR 137.425. You may request a hearing on the record. An appeal to the IBIA under 42 CFR 137.425 shall be filed with the IBIA by certified mail or hand delivery at the following address: Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203. You shall serve copies of your Notice of Appeal on the Secretary and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies. Alternatively you may file an action in Federal court pursuant to section 110 of the Act. [25 U.S.C. 450m–1].

§ 137.424 Is the recommended decision from the informal conference final for the Secretary?

No, if the Indian Tribe is dissatisfied with the recommended decision from the informal conference, it may still appeal the initial decision within 30 days of receiving the recommended decision and the report of the informal conference. If the Indian Tribe does not file a notice of appeal within 30 days, or before the expiration of the extension it has received under § 137.426 , the recommended decision of the informal conference becomes final for the Secretary and may be appealed to Federal court pursuant to section 110 of the Act [25 U.S.C. 450m–1].

§ 137.425 How does an Indian Tribe appeal the initial decision if it does not request an informal conference or if it does not agree with the recommended decision resulting from the informal conference?

(a) If the Indian Tribe decides to appeal, it must file a notice of appeal with the IBIA within 30 days of receiving either the initial decision or the recommended decision from the informal conference.

(b) The Indian Tribe may either hand-deliver the notice of appeal to the IBIA, or mail it by certified mail, return receipt requested. If the Indian Tribe mails the Notice of Appeal, it will be considered filed on the date the Indian Tribe mailed it by certified mail. The Indian Tribe should mail the notice of appeal to: Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203.

(c) The Notice of Appeal must:

(1) Briefly state why the Indian Tribe thinks the initial decision is wrong;

(2) Briefly identify the issues involved in the appeal; and

(3) State whether the Indian Tribe wants a hearing on the record, or whether the Indian Tribe wants to waive its right to a hearing.

(d) The Indian Tribe must serve a copy of the notice of appeal upon the official whose decision it is appealing. The Indian Tribe must certify to the IBIA that it has done so.

(e) The authorized representative of the Secretary will be considered a party to all appeals filed with the IBIA under the Act.

(f) In lieu of filing an administrative appeal an Indian Tribe may proceed directly to Federal court pursuant to section 110 of the Act [25 U.S.C. 450m–1].

§ 137.426 May an Indian Tribe get an extension of time to file a notice of appeal?

Yes, if the Indian Tribe needs additional time, the Indian Tribe may request an extension of time to file its Notice of Appeal with the IBIA within 60 days of receiving either the initial decision or the recommended decision resulting from the informal conference. The request of the Indian Tribe must be in writing, and must give a reason for not filing its notice of appeal within the 30-day time period. If the Indian Tribe has a valid reason for not filing its notice of appeal on time, it may receive an extension.

§ 137.427 What happens after an Indian Tribe files an appeal?

(a) Within 5 days of receiving the Indian Tribe's notice of appeal, the IBIA will decide whether the appeal falls under § 137.415. If so, the Indian Tribe is entitled to a hearing.

(b) If the IBIA cannot make that decision based on the information included in the notice of appeal, the IBIA may ask for additional statements from the Indian Tribe, or from the appropriate Federal agency. If the IBIA asks for more statements, it will make its decision within 5 days of receiving those statements.

(c) If the IBIA decides that the Indian Tribe is not entitled to a hearing or if the Indian Tribe has waived its right to a hearing on the record, the IBIA will dismiss the appeal and inform the Indian Tribe that it is not entitled to a hearing or has waived its right to a hearing.

§ 137.428 How is a hearing arranged?

(a) If a hearing is to be held, the IBIA will refer the Indian Tribe's case to the Hearings Division of the Office of Hearings and Appeals of the U.S. Department of the Interior. The case will then be assigned to an Administrative Law Judge (ALJ), appointed under 5 U.S.C. 3105.

(b) Within 15 days of the date of the referral, the ALJ will hold a pre-hearing conference, by telephone or in person, to decide whether an evidentiary hearing is necessary, or whether it is possible to decide the appeal based on the written record. At the pre-hearing conference the ALJ will provide for:

(1) A briefing and discovery schedule;

(2) A schedule for the exchange of information, including, but not limited to witness and exhibit lists, if an evidentiary hearing is to be held;

(3) The simplification or clarification of issues;

(4) The limitation of the number of expert witnesses, or avoidance of similar cumulative evidence, if an evidentiary hearing is to be held;

(5) The possibility of agreement disposing of all or any of the issues in dispute; and

(6) Such other matters as may aid in the disposition of the appeal.

(c) The ALJ shall order a written record to be made of any conference results that are not reflected in a transcript.

§ 137.429 What happens when a hearing is necessary?

(a) The ALJ must hold a hearing within 90 days of the date of the order referring the appeal to the ALJ, unless the parties agree to have the hearing on a later date.

(b) At least 30 days before the hearing, the Secretary must file and serve the Indian Tribe with a response to the notice of appeal.

(c) If the hearing is held more than 50 miles from the Indian Tribe's office, the Secretary must arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Indian Tribe.

(d) The hearing shall be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. 556.

§ 137.430 What is the Secretary's burden of proof for appeals covered by § 137.415?

As required by section 518 of the Act [25 U.S.C. 458aaa–17], the Secretary must demonstrate by clear and convincing evidence the validity of the grounds for the decision made and that the decision is fully consistent with provisions and policies of the Act.

§ 137.431 What rights do Indian Tribes and the Secretary have during the appeal process?

Both the Indian Tribe and the Secretary have the same rights during the appeal process. These rights include the right to:

(a) Be represented by legal counsel;

(b) Have the parties provide witnesses who have knowledge of the relevant issues, including specific witnesses with that knowledge, who are requested by either party;

(c) Cross-examine witnesses;

(d) Introduce oral or documentary evidence, or both;

(e) Require that oral testimony be under oath;

(f) Receive a copy of the transcript of the hearing, and copies of all documentary evidence which is introduced at the hearing;

(g) Compel the presence of witnesses, or the production of documents, or both, by subpoena at hearings or at depositions;

(h) Take depositions, to request the production of documents, to serve interrogatories on other parties, and to request admissions; and

(i) Any other procedural rights under the Administrative Procedure Act, 5 U.S.C. 556.

§ 137.432 What happens after the hearing?

(a) Within 30 days of the end of the formal hearing or any post-hearing briefing schedule established by the ALJ, the ALJ shall send all the parties a recommended decision, by certified mail, return receipt requested. The recommended decision must contain the ALJ's findings of fact and conclusions of law on all the issues. The recommended decision shall also state that the Indian Tribe has the right to object to the recommended decision.

(b) The recommended decision shall contain the following statement: Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary under 42 CFR 137.43. An appeal to the Secretary under 42 CFR 137.43 shall be filed at the following address: Department of Health and Human Services, 200 Independence Ave. SW., Washington, DC 20201. You shall serve copies of your notice of appeal on the official whose decision is being appealed. You shall certify to the Secretary that you have served this copy. If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final.

§ 137.433 Is the recommended decision always final?

No, any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 30 days of receiving the recommended decision. Objections must be served on all other parties. The recommended decision shall become final for the Secretary 30 days after the Indian Tribe receives the ALJ's recommended decision, unless a written statement of objections is filed with the Secretary during the 30-day period. If no party files a written statement of objections within 30 days, the recommended decision shall become final for the Secretary.

§ 137.434 If an Indian Tribe objects to the recommended decision, what will the Secretary do?

(a) The Secretary has 45 days from the date it receives the final authorized submission in the appeal to modify, adopt, or reverse the recommended decision. The Secretary also may remand the case to the IBIA for further proceedings. If the Secretary does not modify or reverse the recommended decision or remand the case to the IBIA during that time, the recommended decision automatically becomes final.

(b) When reviewing the recommended decision, the Secretary may consider and decide all issues properly raised by any party to the appeal, based on the record.

(c) The decision of the Secretary must:

(1) Be in writing;

(2) Specify the findings of fact or conclusions of law that are modified or reversed;

(3) Give reasons for the decision, based on the record; and

(4) State that the decision is final for the Department.

§ 137.435 Will an appeal adversely affect the Indian Tribe's rights in other compact, funding negotiations, or construction project agreement?

No, a pending appeal will not adversely affect or prevent the negotiation or award of another compact, funding agreement, or construction project agreement.

§ 137.436 Will the decisions on appeal be available for the public to review?

Yes, all final decisions must be published for the Department under this subpart. Decisions can be found on the Department's website.

Appeals of an Immediate Reassumption of a Self-Governance Program

§ 137.440 What happens in the case of an immediate reassumption under section 507(a)(2)(C) of the Act [25 U.S.C. 458aaa–6(a)(2)(C)]?

(a) The Secretary may, upon written notification to the Self-Governance Tribe, immediately reassume operation of a program, service, function, or activity (or portion thereof) if:

(1) The Secretary makes a finding of imminent substantial and irreparable endangerment of the public health caused by an act or omission of the Self-Governance Tribe; and

(2) The endangerment arises out of a failure to carry out the compact or funding agreement.

(b) When the Secretary advises a Self-Governance Tribe that the Secretary intends to take an action referred to in paragraph (a) of this section, the Secretary must also notify the Deputy Director of the Office of Hearings and Appeals, Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203.

§ 137.441 Will there be a hearing?

Yes, unless the Self-Governance Tribe waives its right to a hearing in writing. The Deputy Director of the Office of Hearings and Appeals must appoint an Administrative Law Judge to hold a hearing,

(a) The hearing must be held within 10 days of the date of the notice referred to in § 137.440 unless the Self-Governance Tribe agrees to a later date.

(b) If possible, the hearing will be held at the office of the Self-Governance Tribe. If the hearing is held more than 50 miles from the office of the Self-Governance Tribe, the Secretary must arrange to pay transportation costs and per diem for incidental expenses. This will allow for adequate representation of the Self-Governance Tribe.

§ 137.442 What happens after the hearing?

(a) Within 30 days after the end of the hearing or any post-hearing briefing schedule established by the ALJ, the ALJ must send all parties a recommended decision by certified mail, return receipt requested. The recommended decision shall contain the ALJ's findings of fact and conclusions of law on all the issues. The recommended decision must also state that the Self-Governance Tribe has the right to object to the recommended decision.

(b) The recommended decision must contain the following statement: Within 15 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary under § 137.443. An appeal to the Secretary under 25 CFR 900.165(b) shall be filed at the following address: Department of Health and Human Services, 200 Independence Ave. SW., Washington, DC 20201. You shall serve copies of your notice of appeal on the official whose decision is being appealed. You shall certify to the Secretary that you have served this copy. If neither party files an objection to the recommended decision within 15 days, the recommended decision will become final.

§ 137.443 Is the recommended decision always final?

No, any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 15 days of receiving the recommended decision. The objecting party must serve a copy of its objections on the other party. The recommended decision will become final 15 days after the Self-Governance Tribe receives the ALJ's recommended decision, unless a written statement of objections is filed with the Secretary during the 15-day period. If no party files a written statement of objections within 15 days, the recommended decision will become final.

§ 137.444 If a Self-Governance Tribe objects to the recommended decision, what action will the Secretary take?

(a) The Secretary has 15 days from the date the Secretary receives timely written objections to modify, adopt, or reverse the recommended decision. If the Secretary does not modify or reverse the recommended decision during that time, the recommended decision automatically becomes final.

(b) When reviewing the recommended decision, the Secretary may consider and decide all issues properly raised by any party to the appeal, based on the record.

(c) The decision of the Secretary must:

(1) Be in writing;

(2) Specify the findings of fact or conclusions of law that are modified or reversed;

(3) Give reasons for the decision, based on the record; and

(4) State that the decision is final for the Secretary.

§ 137.445 Will an immediate reassumption appeal adversely affect the Self-Governance Tribe's rights in other self-governance negotiations?

No, a pending appeal will not adversely affect or prevent the negotiation or award of another compact, funding agreement, or construction project agreement.

Equal Access to Justice Act Fees

§ 137.450 Does the Equal Access to Justice Act (EAJA) apply to appeals under this subpart?

Yes, EAJA claims against the Department will be heard pursuant to 25 CFR 900.177.

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Part III

Department of Health and Human Services

42 CFR Part 36, et al.
Tribal Self-Governance Amendments of 2000; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 36, et al.

RIN 0917–AA05

Tribal Self-Governance Amendments of 2000

AGENCY: Indian Health Service, DHHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary of the Department of Health and Human Services (DHHS) proposes this rule to implement Title V of the Tribal Self-Governance Amendments of 2000 (the Act). The proposed rule has been negotiated among representatives of Self-Governance and non-Self-Governance Tribes and the DHHS. The proposed rule includes provisions governing how DHHS/Indian Health Service (IHS) carries out its responsibility to Indian Tribes under the Act and how Indian Tribes carry out their responsibilities under the Act. Any interested party is invited to comment on the proposed rule. As required by section 517 (b) of the Act, the Department has developed this proposed rule with active Tribal participation of Indian Tribes, inter-Tribal consortia, Tribal organizations and individual Tribal members, using the guidance of the Negotiated Rulemaking Act, 5 U.S.C. 561 *et seq.*

DATES: Comments must be received on or before April 15, 2002. We will send copies of this notice of proposed rulemaking (NPRM) to each Indian Tribe. We especially invite comments from individual Indian Tribes, Tribal members, and Tribal organizations.

ADDRESSES: Send your written comments to: Betty Gould, Regulations Officer, Division of Regulatory and Legal Affairs, IHS, 12300 Twinbrook Parkway, Suite 450, Rockville, MD 20857, Telephone 301–443–1116. (This is not a toll-free number.) Comments received will be available for inspection at the address above from 9 a.m. to 3 p.m., Monday through Friday, beginning approximately two weeks after publication.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed rule contact: Paula Williams, Director, Office of Tribal Self-Governance, IHS, 5600 Fishers Lane, Room 5A–55, Rockville, MD 20857, Telephone 301–443–7821. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: ''The Tribal Self-Governance Amendments of 2000'', Pub. L. 106–260, repeals Title III of the Indian Self-Determination Act, Pub. L. 93–638, as amended, (ISDA) and enacts a new Title V that establishes a permanent Self-Governance program within DHHS. Thus, Indian and Alaska Native Tribes are now able to compact for the operation, control, and redesign of various IHS activities on a permanent basis. Section 517 of Title V requires the Secretary, not later than 90 days after the date of the enactment of the Act, to initiate procedures under the Negotiated Rulemaking Act, 5 U.S.C. 561 *et seq*, to negotiate and promulgate the regulations necessary to carry out Title V. The Act calls for the establishment of a negotiated rulemaking committee pursuant to 5 U.S.C. 565, comprised only of Federal and Tribal representatives, with a majority of the Tribal government representatives representing Self-Governance Tribes. The Negotiated Rulemaking Committee on Joint Tribal and Federal Self-Governance (the Committee) conferred with and allowed representatives of Indian Tribes, inter-Tribal consortia, Tribal organizations, and individual Tribal members to actively participate in the rulemaking process.

Copies of the Committee's charter are on file with the appropriate committees of Congress and with the Library of Congress in accordance with section 9(c) of the Federal Advisory Committee Act, 5 U.S.C. Appendix.

Public Participation in Pre-Rulemaking Activity

A Notice of Intent to establish the Committee was published in the **Federal Register** at 65 FR 75906 on December 5, 2000. In the Notice of Intent, we proposed a rulemaking committee of representatives from 12 Self-Governance Tribes, 11 non-Self-Governance Tribes, and 7 Federal officials totaling 30 members. The Notice of Intent established a deadline of January 4, 2001, for submission of written comments. Twenty comments were received. The comments provided valuable input from Indian Tribes, organizations, and individuals. In order to change the composition of the Committee, as suggested by some comments, the Committee would have needed to be increased to more than 30 members. Carrying out the negotiated rulemaking process through a committee with more than 30 members would be cumbersome and challenging in reaching consensus under the time period required by section 517. Therefore, the size of the Committee was not changed. The members, representing 12 Self-Governance Tribes, 11 non-Self-Governance Tribes, and 7 Federal officials, meet the requirements of the Act. The Committee is co-chaired by one Tribal representative and one Federal representative.

The negotiated rulemaking meetings were open to the public. Individuals that were not voting members of the Committee had an opportunity to attend meetings and to give input to the 30 members of the Committee. The public was informed about the establishment of the Committee through a notice in the **Federal Register** at 66 FR 15063 on March 15, 2001.

The first meeting of the Negotiated Rulemaking Committee on Joint Tribal and Federal Self-Governance was held in San Diego, California on March 15–16, 2001. At that meeting, the Committee established three sub-committees, a meeting schedule, and a protocol for deliberations. The Committee agreed to operate based on consensus decision-making. The DHHS committed to publish all consensus decisions as the proposed rule. The Committee further agreed that any committee member and his/her constituents could comment on this proposed rule.

To complete the regulations within the statutory timeframe, the Committee divided the areas subject to regulation among three subcommittees, each co-chaired by one Federal and one Tribal representative. The sub-committees made recommendations to the Committee on whether regulations in a particular area were desirable. If the Committee agreed that regulations were desirable, the sub-committees developed options for draft regulations. The sub-committees presented their options to the full Committee, which discussed them and eventually approved the proposed regulations.

Between April 2001 and August 2001, the Committee met five times in different locations throughout the country. All meetings were announced in the **Federal Register** at 66 FR 10182, 66 FR 17657, and 66 FR 27620. Generally, the meetings lasted three days. Sub-committees also met and held teleconferences to develop draft material in support of the full Committee meetings.

In developing regulatory language, full Committee consensus was reached on the regulations that follow under subparts ''A'' through ''P.'' Where the full Committee could not reach consensus as defined in its protocol, this preamble includes a brief description of the issue, along with the Federal and Tribal positions when available. The public is invited to comment on these issues as well as on the proposed regulations.

Where the Tribal position is stated, it reflects dissatisfaction with proposed

resolution of the issues by the Federal representatives and preference for alternative language as put forth by the Indian Tribes. Where the Federal position is stated, it represents the official views of the DHHS, as expressed by the designated Federal officials.

There are only three issues where consensus was not reached. The three issues are: whether the provisions of Title V apply to statutorily mandated grants added to a funding agreement after award; application of Davis-Bacon prevailing wage rates to construction projects funded with both Federal and non-Federal funds; and Department of Justice representation under section 314 of Public Law 101–512, as amended, of Indian Tribes and Tribal certifying officers for environmental claims.

Key Areas of Disagreement

Whether Provisions of Title V Apply to Statutorily Mandated Grants Added to a Funding Agreement After Award

Tribal Position: The Tribal position is that section 505(b)(2) provides that Self-Governance Tribes have the alternative of including in funding agreements ''such programs, services, functions, or activities (or portions thereof) include all programs, services, functions, or activities (or portions thereof) *including grants (which may be added to a Funding Agreement after an award of such grant),* with respect to which Indian Tribes or Indians are primary or significant beneficiaries, administered by the DHHS through the IHS and all local, field, service unit, area, regional, and central headquarters and National Office functions so administered under the authority of * * * *'' (emphasis added).

The Tribal position is that the language in section 505(b)(2) makes clear Congress' intent that Self-Governance Tribes have the option of including grants that have been awarded in their funding agreement. Once these grants are incorporated in a funding agreement, they are subject to all of the terms and conditions set forth in the funding agreement as well as all of the provisions of Title V and applicable regulations. In contrast, the Federal position is that while grants may be included in a funding agreement at Tribal option, none of the provisions of Title V or regulations promulgated under section 517 apply. On the other hand, the Federal position is that the regulations, policies, and guidance generally applicable to grants apply to these grants included in funding agreements.

From the Tribal perspective, the thrust of self-governance is to remove excessive Federal control and return funding and decisions to local Tribal control. Whatever flexibility may exist within the grant system, placing grants in a funding agreement without providing the flexibility and benefits of Title V defeats the goal of this inclusion. Statutes are to be construed so as to produce a harmonious whole and so as to further the legislative scheme. In this instance, concluding that none of Title V's provisions or regulations promulgated under section 517 apply to these grants after they are included in a funding agreement is illogical and impedes Congress' intent when Title V was enacted. To the extent the language in section 505(b)(2) is ambiguous, Title V makes clear that any ambiguities are to be resolved in favor of the interpretation that facilitates the inclusion of programs, services, functions and activities (PSFAs) and related funds in a funding agreement. *See* section 512(a). In this instance IHS should interpret section 505(b)(2) making all provisions in Title V and regulations promulgated under section 517 applicable to statutorily mandated grants after they have been incorporated. Accordingly, the Tribal representatives propose that the following provision be included in the final Title V regulation and invite comments on the language set forth below:

Q: What provisions of Title V apply to statutorily mandated grants added to the funding agreement?

A: Once the grant is awarded and added to the funding agreement, unless provided otherwise in these regulations, all provisions of Title V and these regulations shall apply.

Federal Position: The Department firmly believes that statutorily mandated grants are, and must remain, subject to the terms and conditions of the statute mandating the grant, the grant award, and the Department's grant regulations.

The Federal position is that section 505(b)(1) distinguishes between two types of grants: ''discretionary IHS competitive grants'' and ''Congressionally earmarked competitive grants.'' Discretionary IHS competitive grants are defined in the proposed regulations as ''grants established by IHS pursuant to IHS' discretionary authority without any statutory directive.'' See § 137.10) Section 505(b)(1) specifically authorizes Self-Governance Tribes to negotiate their full Tribal share funding for such grants and receive that funding along with funding for other PSFAs as part of the negotiation and award of these funding agreements, rather than to compete for a grant award.

Section 505(b)(1) distinguishes the above discretionary grants from ''Congressionally earmarked competitive grants'' which are defined in the proposed regulations as ''statutorily mandated grants'' meaning ''a grant specifically designated in a statute for a defined purpose.'' *See* § 137.10 Statutorily mandated grants are specifically excluded from the provisions in section 505(b)(1). Rather, section 505(b)(2) authorizes statutorily mandated grants to be ''added to a funding agreement after an award of such grants.''

This distinction recognizes that statutorily mandated grants are not considered part of the PSFAs negotiated and awarded in the funding agreement. To the contrary, statutorily mandated grants have their own statutorily designated requirements for award. Statutorily mandated grants, pursuant to their authorizing statutes, are awarded through the Department's grants process which is governed by the Department's grant regulations and policies. These establish the terms and conditions of the grant.

While statutorily mandated grants may be added to funding agreements after award of the grant, such grants retain their separate character as grants and continue to be governed by the terms and conditions of the statute mandating the grant and the grant award—not the terms of the funding agreement or compact or the statutory provisions of Title V. Thus, as agreed to in these proposed regulations, statutorily mandated grant programs may not be redesigned, and the grant awards may not be reallocated for other purposes.

The Department, within the governing grants process, has agreed to lump sum funding for statutorily mandated grants and to the use of interest earned on such funding to enhance the grant program in order to accommodate Tribal programmatic concerns. However, the Department firmly believes that statutorily mandated grants are and must remain subject to the terms and conditions of the statute mandating the grant, the grant award, and the Department's grant regulations. Accordingly, the Federal representatives propose that the following provision be included in the final Title V regulation and invite comments on the language set forth below:

Q: What provisions of Title V apply to statutorily mandated grants added to the funding agreement?

A: None of the provisions of Title V apply.

Application of Davis-Bacon Prevailing Wage Rates to Construction Projects Funded With Both Federal and Non-Federal Funds

Tribal Position: The Committee reached consensus on two proposed regulations, which provide that Davis-Bacon wage rates do not apply to construction projects funded solely with non-Federal funds but do apply to covered employees working on construction projects funded solely by the Federal Government. A third funding possibility also occurs with frequency in the construction of IHS health facilities—a mixture of funds from both Federal and non-Federal sources. The Tribal position is that Davis-Bacon wage rates do not apply to those portions of a construction project funded from non-Federal sources. Accordingly, the Tribal representatives propose that the following provision be included in the final Title V regulation and invite comments on the language set forth below:

Q: Do Davis-Bacon wage rates apply to construction projects performed by Tribes using both Federal funds and non-Federal funds?

A: The Davis-Bacon wage rates only apply to the portion of the project that is funded with Federal funds. The Davis-Bacon Act and wage rates do not apply to portions of the project funded with non-Federal funds or when Tribes perform work with their own employees.

The Tribal representatives believe that this simple clarification gives Self-Governance Tribes performing Title V construction projects greater autonomy and thus advances Title V's goal of effectively ''implementing the Federal policy of government-to-government relations with Indian Tribes'' and of further ''strengthen[ing] the Federal policy of Indian self-determination.'' *See* 25 U.S.C.A. § 458aaa (Pub. L. 106–260, Sec. 2(6), Title V Congressional findings reproduced as note following section 458aaa).

In support of its position, the Tribal representatives note that by its own terms, the Davis-Bacon Act of March 3, 1931, ch. 411, §§ 1, 46 Stat. 1494, as amended, 40 U.S.C. §§ 276a(a), confers no rights directly on construction workers paid either with Federal or non-Federal funds. Rather, it imposes certain restrictions on the Federal Government when Federal funds are used to perform construction activities. *See generally Universities Research Ass'n, Inc.* v. *Coutu,* 450 U.S. 754, 772 (1981) (''The Davis-Bacon Act requires that certain stipulations be placed in Federal construction contracts for the benefit of mechanics and laborers, but it does not confer rights directly on those individuals.''). Section 509(g) of the Act merely extends Davis-Bacon prevailing wage requirements to ''laborers and mechanics employed by contractors and subcontractors (excluding Tribes and Tribal organizations) in the construction, alteration, or repair * * * of a building or other facilities in connection with the construction projects funded by the United States under [the Indian Self-Determination and Education Assistance] Act.'' 25 U.S.C. 458aaa–8(g) (emphasis added).

The Tribal representatives disagree with the Federal position that section 509(g) ''unambiguously states'' that Davis-Bacon wage rates ''do apply'' to portions of a Title V construction project that are not ''funded by the United States under [the Indian Self-Determination and Education Assistance] Act.'' 25 U.S.C. 458aaa–8(g). The Tribal position is that the Title V language clearly provides for just the opposite result: that Davis-Bacon wage rates only apply to those portions of the project that are actually funded by the United States, precisely as stated in the Tribal proposed regulation.

The Tribal representatives further point out that even if the language of section 509(g) is subject to the broader reading advanced by the Federal representatives, that fact simply makes this provision ambiguous. Section 509(g) certainly does not provide that Davis-Bacon wage rates apply to construction projects ''funded in whole or in part'' by the United States. If it did, the Federal position would have greater merit. However, given its actual language, section 509(g) is at best unclear. And if the language of Title V is unclear or is open to more than one reasonable interpretation, rules of statutory construction for Indian legislation require that the Title V Negotiated Rulemaking Committee reject interpretations which work against the interests of Self-Governance Tribes. *South Dakota* v. *Bourland,* 508 U.S. 679, 687 (1993); *Montana* v. *Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985) (''Statutes are to be construed liberally in favor of the Indians; ambiguous provisions are to be interpreted to the Indians' benefit.''). Federal courts have relied on this rule to interpret ambiguous provisions of the ISDA to the benefit of Indian Tribes. See *Ramah Navajo Chapter* v. *Lujan,* 112 F.3d 1455, 1462–63 (10th Cir. 1997); *Shoshone-Bannock Tribes of the Fort Hall Reservation* v. *Shalala (Shoshone-Bannock I*), 988 F. Supp. 1306, 1317 (D. Ore. 1997). In Ramah, the Tenth Circuit held that ''the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes.'' Ramah, 112 F.3d at 1462. Thus, '' 'if the [ISDA] can reasonably be construed as the Tribe would have it construed, it must be construed that way.' '' Id. at 1462 (quoting *Muscogee (Creek) Nation* v. *Hodel,* 851 F.2d 1439, 1445 (D.C. Cir. 1988)). *See also* section 512(a) of the Act.

Federal position: The Federal position is that no regulation is necessary for projects funded with a mixture of Federal and non-Federal funds because the language of section 509(g) unambiguously states that the Davis-Bacon wage rates do apply. Section 509(g) defines the employees that are covered, namely ''[a]ll laborers and mechanics employed by contractors or subcontractors (excluding Indian Tribes and Tribal organizations).'' Section 509(g) also sets forth the activities it covers: ''construction, alteration, or repair, including painting or decorating of a building or other facilities.'' Finally, section 509(g) provides that all covered employees who perform covered activities shall receive Davis-Bacon wages if they perform those activities ''in connection with construction projects funded by the United States under this Act.'' The Federal representatives believe the terms of the statute are clear: if a project receives Federal funding, then any covered employees carrying out covered activities ''in connection with'' the project must be paid Davis-Bacon wages.

Department of Justice Representation of Tribes and Tribal Certifying Officers for Environmental Claims.

Tribal position: The Committee reached consensus on all but one of the proposed regulations related to enforcement of the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA). The Tribal representatives and Federal representatives disagree on whether the Federal Government, specifically the Department of Justice, must defend Indian Tribes and Tribal certifying officers if they are sued as a result of carrying out these Federal environmental responsibilities. For the reasons provided below, the Tribal representatives propose that the following regulation be included in the final Title V regulations and invites comments on the language set forth below:

Q: Are Indian Tribes and Tribal certifying officers entitled to the benefit of a Federal defense if they are sued as

a result of carrying out their Federal environmental responsibilities?

A: Yes. Indian Tribes and Tribal Certifying Officers are performing Federal functions when carrying out these Federal environmental responsibilities, and they are deemed to be Federal agencies and Federal officials for this limited purpose. Under section 314 of Public Law 101–512, as amended, the Department of Justice is authorized and directed to defend Indian Tribes and Tribal employees who are sued with respect to claims resulting from the performance of these Federal functions.

The Tribal representatives believe that the potential for Self-Governance Tribes to assume Federal responsibilities for NEPA and NHPA compliance under Title V removes a substantial burden from IHS construction program managers and places that burden on Tribal officials. In transferring this burden, it is important to treat Tribal and Federal certifying officials equally. The Tribal representatives believe this can best be achieved by assuring Tribal certifying officials the benefit of a Federal defense under section 314 of Pub. L. 101–512 for NEPA enforcement actions brought against them. This protection is essential, and fundamentally fair, given that little or no Federal funding is likely to be available to Self-Governance Tribes to cover the expense of such litigation, and that private insurance is almost certainly unavailable for such claims.

The Tribal representatives believe their position is fully consistent with the language of the statute and greatly furthers the Title V Congressional policy of providing Self-Governance Tribes with all the resources, benefits and protections that IHS officials would have in carrying out this core governmental function.

Specifically, section 314 of Pub. L. 101–512 requires the United States to defend ''any civil action or proceeding'' involving ''claims'' resulting from the performance of a self-governance compact. It provides as follows:

> *With respect to claims resulting from the performance of functions * * * under a contract, grant agreement, or any other agreement or compact authorized by the Indian Self-Determination and Education Assistance Act * * *,* an Indian Tribe, Tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior or the IHS in the DHHS while carrying out any such contract or agreement and its employees are deemed to be employees of the Bureau or Service while acting within the scope of their employment in carrying out the contract or agreement: Provided, That after September 30, 1990, *any civil action or proceeding involving such claims* brought hereafter against any Indian Tribe, Tribal organization, or Indian contractor or Tribal employee covered by this provision *shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act * * ** Provided further, That beginning with the fiscal year ending September 30, 1991, and thereafter, the appropriate Secretary shall request through annual appropriations funds sufficient to reimburse the Treasury for any claims paid in the prior fiscal year pursuant to the foregoing provisions. * * * (emphasis added.)

Pub. L. 101–512, Title III, § 314, Pub. L. 103–138, Title III, § 308 (reprinted in 25 U.S.C.A. § 450f, Historical and Statutory Notes.

Under ordinary rules of English grammar, the phrase ''such claims'' includes all claims resulting from the performance of a compact because ''such claims'' refers back to ''claims resulting from the performance of functions under a * * * compact,'' the antecedent immediately preceding the reference. Nothing in the provision suggests that ''such claims'' are limited to tort claims. In interpreting this statutory requirement, the Title V Negotiated Rulemaking Committee should first look to the plain language of the Act. *Good Samaritan Hospital* v. *Shalala,* 508 U.S. 402, 409 (1993) (''The starting point in interpreting a statute is its language for, if the intent of Congress is clear, that is the end of the matter''). Indeed, some courts have interpreted section 314 to cover ''statutory claims'' and have assumed that it covers contract claims resulting from the performance of a compact or self-determination contract. See *Waters* v. *United States,* 812 F.Supp. 166 (N.D. Cal. 1993) (intentional torts and statutory claims within § 314's reach); *Carlow* v. *United States,* 40 Fed. Cl. 773 (1998) (§ 314 demonstrates that upon retrocession, the United States is liable for legitimate contract claims incurred by Tribal contractors administering ISDA programs). See also *Brown* v. *United States,* 43 Fed. Cl. 538 (1998) (Tribal compactor not indispensable party to action for mismanagement of lease because action against Indian Tribe is deemed to be an action against the United States).

Section 314's legislative history also supports this plain language interpretation. Earlier laws extending the so-called tort claims coverage to Tribal organizations explicitly limited the coverage to specific types of torts by including the language ''claims * * * for personal injury, including death.'' An early draft of Pub. L. 101–512 contained identical limiting language. The absence of that language in the final draft indicates that Congress intended there to be no limitation; all claims are included. The presence of new language, extending the coverage to ''any civil action or proceeding'' indicates that Congress intended the coverage to include, at a minimum, some class of actions broader than torts and, presumably, all civil actions and proceedings that result from the performance of compacts. Congress knew how to limit this coverage to tort claims, indeed to only certain specified tort claims, in 1988 and 1989, but declined to do so in 1990 and thereafter.

This plain language interpretation does not create any unforeseen burdens for the United States. Congress initially extended the so-called tort claim coverage to ISDA contractors and compactors on a limited basis, following the failure of the Federal Government to procure liability insurance on behalf of Indian Tribes, and pending the Secretary's investigation of the feasibility of procuring such insurance or providing alternative protection. When the Secretary failed to investigate the cost and availability of liability insurance, Congress made the coverage permanent in the course of extending and refining the scope of that coverage in a variety of settings. The legislative history indicates that Congress understood that Pub. L. 101–512 and its predecessors simply restored the status quo by making the Federal Government responsible for any legal liability associated with the performance of Federal functions. It does not expand the United States' liability. It simply precludes the United States from reducing its own liability and shifting that liability to Self-Governance Tribes via the ISDA without providing an equal level of protection.

A plain language interpretation also does not render the ''full protection and coverage'' clause null or void. Moreover, reading the provision as a whole, it is clear that section 314 provides several benefits to Self-Governance Tribes and that those benefits are cumulative. Self-Governance Tribes performing Federal functions are entitled to assert Federal defenses under the FTCA and to have the United States assume its position as a defendant and to be represented by the Attorney General and to have any resulting liability covered by the Treasury and to have the IHS request appropriations to reimburse the Treasury. While the FTCA protection does not have any application in the context of a NEPA enforcement lawsuit, that does not relieve the Federal Government of its obligation to provide Tribes with the other benefits conferred

by section 314, namely the benefit of a Federal defense. This also responds to the Federal representatives' argument that the application of section 314 to NEPA enforcement actions ''would result in a mismatch of processes, remedies, and defenses.'' As set forth in the proposed regulations, a NEPA enforcement action under Section 509(a)(2) of the Act will presumably be handled under the same Administrative Procedures Act (APA) process as currently occurs when the Secretary performs these Federal environmental responsibilities. No confusion or complication need result simply because Justice Department attorneys are handling the defense, instead of members of the private bar.

A narrow interpretation of the coverage of section 314 would shift the burden from the Department of Justice to the IHS or worse still to American Indian and Alaskan Native beneficiaries of IHS health programs. A narrow interpretation would require Self-Governance Tribes to incur substantial expense for liability insurance and/or legal representation. The IHS would then, in the Tribal representatives' view, be legally obliged to provide adequate contract support funds to cover these expenses. If it failed to do so, as a result of shortfalls or for some other reason, funds that should be used to provide direct services would be diverted and the beneficiaries would suffer from diminished health care services, again contrary to Congress' intent. An unduly narrow interpretation would thus conflict with Congressional intent in Title V and impair the Federal trust responsibility to deliver health care to Indian people. See S. Rep. 100–274, Dec. 21, 1987 at 2646 (''The United States has assumed a trust responsibility to provide health care to Native Americans. The intent of the Committee is to prevent the Federal Government from divesting itself, through the self-determination process, of the obligation it has to properly carry out that responsibility.'').

Congress clearly intended to confer on Self-Governance Tribes the same benefits that Federal officials enjoy when performing these Federal functions. It is clear that Self-Governance Tribes are carrying out Federal responsibilities. The nature of the legal liability associated with such responsibilities does not change because a Tribal government is performing a Federal function. The unique nature of the legal trust relationship between the Federal Government and Tribal governments requires that the Federal Government provide liability insurance coverage in the same manner as such coverage is provided when the Federal Government performs the function.

S. Rep. 100–274, Dec. 21, 1987 at 2645. Similarly, transferring the obligation to perform NEPA compliance determinations from Federal to Tribal officials, with virtually no additional funding and without providing these officials with a Federal defense, would create a windfall for the Federal Government, at the expense of Indian health care, contrary to Congressional intent. Department of Justice attorneys are well-experienced in APA litigation and would be in a better position to defend Tribal government officials in NEPA enforcement actions than would members of the private bar. The rare cases likely to be brought under this law will create no undue hardship or expense for the Department of Justice.

Federal position: The Federal position is that section 314 of Pub. L. 101–512 read as whole applies solely to claims within the ambit of the FTCA. There is no indication in the legislative history of section 314 that it was intended to do anything other than extend FTCA coverage for tort claims. See, e.g., H.R. Rep. No. 101–789, 101st Cong., 2d Sess. 72 (1990). The Tribal position would draw support from a Congressional rejection of an earlier version of this provision that would cover only claims for personal injury and death. However, this legislative history reflects Congressional concern that property damage claims would be excluded under the earlier version, see 135 Cong. Rec. S8767, S8834 (July 26, 1989) (remarks of Senator Inouye), and not an intent to broaden this provision beyond tort claims. Furthermore, section 314 only extends the ''protection and coverage of the [FTCA].'' Waivers of the sovereign immunity of the United States are construed narrowly, and in favor of the sovereign. Reading section 314 to imply that any other statutory waiver of Federal sovereign immunity extends to Indian Tribes would violate this principle and invade the province of the legislative branch.

If FTCA coverage did apply to private suits brought to enforce Tribal implementation of Federal environmental responsibilities, it would result in a mismatch of processes, remedies, and defenses. Private suits to enforce the NEPA generally involve court review of an administrative record under the APA for injunctive or declaratory relief. The APA does not authorize the award of damages. 5 U.S.C. § 702. The FTCA, by contrast, allows for trial *de novo* in the district courts, and waives the sovereign immunity of the United States for damages. 28 U.S.C. § 1346(b)(1). Moreover, the FTCA imposes liability only for negligent acts in the same manner and to the same extent that a private person would be liable, 28 U.S.C. § 2674, and provides a defense for the discretionary activities of Federal officials. 28 U.S.C. § 2680(a). Private suits to enforce Federal environmental responsibilities seek to enforce laws applicable to Federal agencies, not private persons, and squarely challenge the exercise of agency discretion under Federal law.

Finally, even if section 314 did apply to actions other than torts, section 509(a)(2) itself makes clear that the Tribal certifying officer is the proper defendant for claims arising from the performance of Federal environmental responsibilities, not the United States. For this reason, the Federal position is that no regulation is required.

During final Departmental review of the NPRM, § 137.401 was deleted because it would have provided Self-Governance Tribes with the opportunity to participate in the final stages of the budget request process. Tribal participation in the initial stages of the request process is already provided by the Department Policy on Indian/Alaska Native Tribes and Indian Organizations dated August 7, 1997. In June of 2001, the Department held its third annual tribal budget consultation meeting as part of the development of the FY 2003 budget. Participation in the final stages of the budget request process cannot be provided without violating the Executive Branch's longstanding policy on the need to preserve the confidentiality of pre-decisional budget information as outlined in Section 36 of OMB Circular A–11, ''COMMUNICATIONS WITH CONGRESS AND THE PUBLIC AND CLEARANCE REQUIREMENTS.''

Section 513 of Title V addressed the President's responsibilities regarding the budget, which are outside the scope of this rulemaking. Regulatory provisions have not been included to implement this section.

Miscellaneous Issue: Labor

The Committee considered but decided not to address the effect of the ISDA, and particularly Title V, on the application of other Federal private sector labor laws. Although this matter is not addressed in the proposed regulation, the IHS recognizes that the United States and Self-Governance Tribes have a unique government-to-government relationship, and that activities in furtherance of that relationship that are authorized by Title V are not ordinary government procurement activities. The IHS also

recognizes that when Indian Tribes undertake self-governance activities, they step into the shoes of the IHS in carrying out the Federal Government's unique responsibility to provide health care for Native Americans. This is a trust responsibility that Congress carries out under the Indian Commerce Clause. The provision of health care to Native Americans is a unique Federal responsibility that Congress has delegated to the IHS, and which in turn has been delegated to Indian Tribes as specified in their self-governance compacts and funding agreements. Under these unique circumstances, and given that Tribes, Tribal organizations and Indian patients are not to be penalized by the transfer of Federal health programs to Tribal operation under Title V, the IHS believes that it is contrary to the intent of the ISDA to apply to Self-Governance Tribes carrying out Title V compacts and funding agreements general Federal laws such as the National Labor Relations Act that would not apply to the IHS if the IHS were carrying out the compacted PSFA.

Summary of Regulations

The narrative below is keyed to specific subparts of the proposed rule.

Subpart A—General Provisions

This subpart contains provisions describing the authority, purpose and scope of these regulations. This subpart contains Congressional policies set forth in Title V. This subpart also contains provisions regarding the effect of these regulations on existing Tribal rights, whether Title V may be construed to reduce funding for programs serving a Indian Tribe under this Title or other laws, and the effect of these regulations on Federal policy directives.

Subpart B—Definitions

This subpart sets forth definitions for key terms used in the balance of the regulations. Most of the definitions come from definitions set forth in Title I or Title V. Throughout this proposed rule, the terms ''Indian Tribe'' and ''Self-Governance Tribe'' are used. These terms are included in the definition section. When a provision applies to all Federally-recognized Tribes (including Self-Governance Tribes), the term ''Indian Tribe'' is used; the term ''Self-Governance Tribe'' is used when referring to an Indian Tribe participating in self-governance under Title V. Each term includes inter-Tribal consortia and Tribal organizations under conditions set forth in the definition of ''Indian Tribe.'' Terms unique to Subpart N—Construction are defined in that subpart and not in subpart B.

Subpart C—Selection of Indian Tribes for Participation in Self-Governance

This subpart describes the eligibility criteria an Indian Tribe must satisfy to participate in self-governance. This subpart explains that Self-Governance Tribes currently participating under Title III of the ISDA and up to 50 additional Indian Tribes per year are eligible to participate in self-governance. This subpart also provides that more than one Indian Tribe can participate in the same compact and/or funding agreement under conditions set forth in this subpart. This subpart explains that in order to be eligible to participate in self-governance an Indian Tribe must successfully complete a planning phase, must request participation in the program through a resolution or official action of the governing body of each Indian Tribe to be served, and must demonstrate financial stability and financial management capability. This subpart describes how an Indian Tribe demonstrates financial stability and financial management capacity and what information is considered in making this determination. Finally, this subpart describes that planning and negotiation grants may be available, but not required, for participation.

Subpart D—Self-Governance Compact

This subpart describes the authority for Self-Governance Tribes to negotiate compacts and identifies what is included in a compact. This subpart explains that a compact is a separate document from a funding agreement and that the compact must be executed before or at the same time as A funding agreement.

Subpart E—Funding Agreement

This subpart describes the authority for Self-Governance Tribes to negotiate funding agreements and identifies what is included in a funding agreement. This subpart describes what terms are required to be included in a funding agreement and what terms are included at the Self-Governance Tribe's option.

Subpart F—Statutorily Mandated Grants

This subpart describes to what extent statutorily mandated grants may be added to a funding agreement after award. Although there were extensive discussions between the Tribal and Federal representatives as to whether the provisions of Title V applied to statutorily mandated grants once added to the funding agreement, consensus was not reached. The Tribal position is that once the grant is awarded and added to the funding agreement, all of the provisions of Title V apply. The Federal position is that none of the provisions of Title V apply to statutorily mandated grants. A more detailed explanation of the basis for this disagreement is contained in the Key Areas of Disagreement section of these proposed rules.

Notwithstanding this disagreement, Tribal and Federal representatives reached consensus on several important issues concerning statutorily mandated grant funds. Tribal and Federal representatives agreed that a statutorily mandated grant may be added to a funding agreement as an annual lump sum advance payment after the grant is awarded. They also agreed that a Self-Governance Tribe may keep the interest earned on these grant funds and may use such interest earned to enhance the grant program, including allowable administrative costs. In addition, consensus was reached as to the extent such grant funds may be reallocated or redesigned and that FTCA coverage applies. Finally, the Tribal and Federal representatives reached agreement on reporting requirements that apply to statutorily mandated grants.

Subpart G—Funding

This subpart describes what funds must be transferred to a Self-Governance Tribe in a funding agreement and when those funds must be transferred. This subpart describes those circumstances where the Secretary is prohibited from reducing or failing to transfer funds and where the Secretary is permitted to increase funds. This subpart describes miscellaneous provisions pertaining to funding provided under a funding agreement. This subpart describes that a funding agreement may provide for a stable base budget and describes what funds are included in the stable base budget.

Subpart H—Final Offer

This subpart describes the final offer and rejection process. The final offer begins the process for resolving, within a specific time frame, disputes that may develop in negotiations of compacts or funding agreements. This subpart describes the process for an Indian Tribe to present a final offer and the procedures the Secretary must follow to reject a final offer.

Subpart I—Operational Provisions

This subpart contains provisions that address most of the operational aspects of self-governance. This subpart explains that Self-Governance Tribes must ensure that internal measures are

in place to address conflicts of interest and also addresses the audit requirements that Self-Governance Tribes must comply with, together with the accounting standards that govern the expenditure of self-governance funds. It also includes provisions regarding records and record-keeping requirements.

This subpart explains that Self-Governance Tribes may redesign or consolidate PSFAs and may reallocate or redirect funds paid under a funding agreement. It includes a provision barring a Self-Governance Tribe from simultaneously compacting a program under Title V and contracting the same program under Title I. It also includes provisions regarding health status reporting requirements. This subpart addresses the disposition of savings generated by self-governance activities and explains that such savings will be identified in the annual report required under the Act. It explains the process by which Tribes may access both government-furnished real property and government-furnished personal property for use in the performance of a self-governance compact or funding agreement. It includes a provision authorizing funds paid under Title V compacts and grants to be treated as non-Federal funds for matching or cost participation requirements.

This subpart also includes a provision explaining that section 102(d) of the Act, 25 U.S.C. 450f(d) and section 314 of Public Law 101–512, which in part relates to the FTCA, apply to self-governance compacts and funding agreements. It also incorporates by reference the FTCA procedures set forth in the Title I regulations at 25 CFR Part 900, subpart M.

During the negotiations, Tribal representatives raised several issues concerning the relationship between coverage under the FTCA and supplemental liability insurance coverage, and they proposed specific regulations to address these concerns. The Committee ultimately decided that additional regulations were unnecessary because these concerns may be addressed under the existing statutes and regulations, as discussed below.

The first issue Tribal representatives raised was whether supplemental liability insurance purchased by Indian Tribes may be viewed as protecting the Federal Government. Since 1988, there has been no provision in the ISDA or other law that requires Indian Tribes to purchase liability insurance to protect or indemnify the Federal Government. At that time, Congress in 1988 amended the ISDA to: (1) delete a requirement that the Indian Tribes purchase liability insurance to protect the government, and (2) include FTCA coverage for Indian Tribes carrying out self-determination contracts. The Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. 100–472, repealed the first sentence of then section 103(c) of the Act requiring Indian Tribes to purchase liability insurance and substituted a provision extending FTCA coverage to medical malpractice now at section 102(d) of the Act. Instead of Indian Tribes insuring the United States, the United States extended its self-insurance to the Tribes. *See* S. Rep. No. 100–274 at 26–27, reprinted in 1988 U.S.C.C.A.N. 2620, 2645–46. FTCA coverage was extended to general tort liability claims by section 314 of Public Law 101–512.

Tribal representatives have requested clarification as to FTCA coverage of Tribal council members and Tribal organization's governing boards. The FTCA generally covers any activities of the Indian Tribe and its Tribal council members and Tribal organizations and their governing boards in carrying out a compact or funding agreement including activities necessary for assumption of IHS programs (including, but not limited to, adoption of financial management and personnel systems) and oversight and other activities by such councils and boards to assure effective implementation in carrying out such agreements.

Whether the FTCA applies in any particular case is decided on an individual case-by-case basis, first by the Department of Justice and subsequently by the Federal courts. Thus, Indian Tribes may wish to purchase liability insurance supplemental to FTCA coverage, and this is an allowable cost under the compact and funding agreement.

Subpart J—Waivers

This subpart contains procedures authorizing the Secretary to waive regulations promulgated to implement Title V or regulations promulgated under the authority specified in section 505(b) of the Act. This subpart explains how an Indian Tribe applies for a waiver, how the waiver request is processed, the applicable time frames for approval of waiver requests and that a denial of a waiver request is appealable in Federal court.

Subpart K—Withdrawal

This subpart addresses the procedures that apply when a Self-Governance Tribe withdraws from a Tribal organization or inter-Tribal consortium. Matters addressed include the effective date of the withdrawal, disposition of funds upon a withdrawal, and the future administration of the withdrawn programs.

Subpart L—Retrocession

This subpart addresses the procedures that apply when a Self-Governance Tribe retrocedes a program to the Secretary, and includes provisions pertaining to the contents of the retrocession notice, the effective date of the retrocession, the effect of retrocession on other or future contracts or compacts, and the disposition of government furnished property associated with the retroceded program.

Subpart M—Reassumption

This subpart addresses procedures by which the Secretary, without the consent of the Self-Governance Tribe, may reassume the operation of a program and associated funding in a compact or funding agreement, including the circumstances under which reassumption may occur, the steps which must be followed in any reassumption, the procedural and appeal rights, the effective date of any reassumption, and the return of government-furnished property. This subpart also addresses the additional processes that must be followed in the event of an immediate reassumption.

Subpart N—Construction.

This subpart addresses the process by which participating Self-Governance Tribes may agree to undertake construction projects and programs under section 509 of the Act. In its scope, this subpart distinguishes between construction projects, and ongoing programs that support construction projects. This subpart sets forth the process for Self-Governance Tribes to enter into and administer self-governance construction project agreements for construction projects, which may include Tribal shares of related construction programs. Alternatively, Self-Governance Tribes may assume construction programs (but not projects) using the compact and funding agreement process set forth in Subparts D and E.

Definitions are provided that are unique to this subpart. The definitions of construction project and construction project agreement are found in section 501 of the Act. For other terms which are common to this subpart and the Title I construction regulations set forth at 25 C.F.R. 900, subpart J, the Title I definitions have been adapted with minor changes. *See* 25 CFR 900.113.

NEPA Process

Self-Governance Tribes performing construction under section 509 are required to assume the Secretary's responsibilities for the completion of the construction project under the NEPA, the NHPA, and related Federal environmental laws. Sections 137.285 through 137.306 describes these Federal environmental responsibilities and provides Tribal options to carry out these responsibilities by adopting Federal agency environmental review policies and procedures or by developing their own. Sections 137.292, 137.293 and 137.310 through 137.312 describes how Self-Governance Tribes assume Federal environmental responsibilities by resolution, as well as the minimum criteria for the limited waiver of Tribal sovereign immunity required by section 509(a)(2) to allow judicial review of a Tribal certifying officer's actions under this subpart.

Notification and Project Assumption

Sections 137.320 through 137.344 describe the Secretary's responsibility to notify and consult with Indian Tribes concerning the development of construction budgets and new funding allocation methodologies, as well as when funds are available for the planning, design and construction of IHS construction projects. This subpart further describes the process that Self-Governance Tribes and the Secretary use to develop, negotiate and approve (or reject) construction project agreements under Title V. These sections explain the content and budget requirements for construction project agreements, the Secretary's funding and payment obligations to Self-Governance Tribes, the different types of construction project agreements and the process for resolving disputes when Self-Governance Tribes and the Secretary cannot agree on the content of a construction project agreement. These sections also describe the Self-Governance Tribes' authority to reallocate project funds and to use excess funds remaining at the completion of a construction project agreement.

Role of the Self-Governance Tribe in Carrying Out Construction Project Agreements

Sections 137.350 through 137.353 describe the Self-Governance Tribes' responsibility to complete construction project agreements and provide day-to-day management and administration for construction projects, within available funding. These sections also describe the Self-Governance Tribes' options if unforeseen circumstances increase project costs. These sections also describe the Self-Governance Tribes' responsibility to submit semiannual construction progress and financial reports to the Secretary.

Role of the Secretary in Carrying Out Construction Project Agreements

Section 137.341 sets forth how Self-Governance Tribes will receive payments for construction project agreements under section 509(e). Section 137.341 clarifies that when Self-Governance Tribes enter lump sum fixed price contracts, Self-Governance Tribes may opt to receive payment for a performance period measured either as one year, or as one project phase. Sections 137.360 through 137.365 sets forth the process for Secretarial review and approval of project planning and design documents, as well as Secretarial review and approval of any proposed amendments to the construction project agreement under section 509(f). Section 137.362 clarifies when Secretarial approval of proposed amendments is required, and when Self-Governance Tribes may make unilateral changes. Section 137.366 discusses the timing and purpose of site visits by the Secretary. Section 137.367 provides that the Secretary does not have the authority to issue stop orders, nor any other role in the day-to-day management of the construction project. Section 137.368 clarifies that the Secretary has no responsibility for overseeing health and safety code compliance during a Self-Governance Tribe's administration of a construction project agreement.

Other Provisions

Sections 137.370 describe the relationship between the construction subpart and other Title V subparts. Sections 137.371 through 137.374 describe the Self-Governance Tribes' authority and options for acquiring real property with funds provided under a construction project agreement, as well as the eligibility of Tribally-owned facilities for replacement, maintenance and improvement on the same basis as Federally-owned facilities. Sections 137.376 through 137.377 explain the application of metric standards, Federal procurement laws, and regulations to construction project agreements. Finally, Sections 137.378 through 137.379 explain when and how Davis-Bacon wage rates apply to construction project agreements. The issue of whether Davis-Bacon wage rates apply to construction projects funded from both Federal and non-Federal sources is discussed in the Key Areas of Disagreement section of the proposed regulation.

Subpart O—Secretarial Responsibilities

This subpart addresses (1) consultation with Self-Governance Tribes in the budget formulation process, and (2) the Secretary's annual report to Congress on the administration of Title V and on Tribal funding requirements (including guidelines to be used in the formulation of the report).

Subpart P—Appeals

This subpart addresses post-award appeals, pre-award appeals (including informal conferences), appeals of immediate reassumptions, and attorneys fees and costs under the Equal Access to Justice Act. As a general matter, this subpart states that all of the remedial provisions available to Tribes under section 110 of the Act are available to Self-Governance Tribes under Title V. For post-award disputes, the proposed regulation incorporates the regulations applicable to Title I contracts.

For pre-award appeals, the proposed regulation builds upon the procedures employed under Title I. Of special note are: (1) The provision authorizing the Interior Board of Indian Appeals to employ its existing procedures as a guide when considering appeals under this subpart; (2) the authority of the Interior Board of Indian Appeals (IBIA) in handling appeals; (3) the duty of the Administrative Law Judge (ALJ) to hold a hearing within 90 days of the date of the order referring the appeal to the ALJ; and (4) the duty of the Secretary to modify, adopt or reverse a recommended decision within 45 days.

Immediate reassumption appeals closely follow the similar appeal process available under the Title I regulations for emergency reassumptions.

The proposed regulation on claims for attorneys' fees and costs under the Equal Access to Justice Act employs the same procedures available to Indian Tribes under the Title I regulations.

Regulatory Impact Statement

We have examined the impacts of this rule as required by Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612) as amended by subtitle D of the Small Business Regulatory Fairness Act of 1996 (Public Law 104–121) and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). 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). Unless it is certified that the proposed rule is not expected to have a significant economic impact on a substantial number of small entities, the Regulatory Flexibility Act requires analysis of regulatory options that minimize any significant economic impact of a rule on small entities. Section 202 of the Unfunded Mandates Reform Act (Public Law 104–4) requires an assessment of anticipated costs and benefits before proposing any rule that may result in expenditure by State, local, and tribal governments, in aggregate, or by the private sector, of $100 million in any one year (adjusted annually for inflation). We have determined that this rule is consistent with the principles set forth in the Executive Order and in these statutes and find that this rule will not have an effect on the economy that exceeds $100 million in any one year (adjusted for inflation). Therefore, no further analysis is required under the Unfunded Mandates Reform Act. Because this rule does not impose any new costs on small entities, it will not result in a significant economic impact on a substantial number of small entities. Thus, a Regulatory Flexibility Analysis is not required. In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

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 requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. We have reviewed this proposed rule under the threshold criteria of Executive Order 13132, Federalism, and have determined that this proposed rule would not have substantial direct effect on the States, on the relationship between the National Government and States, or on the distribution of power and responsibilities among the various levels of government. As this rule has no Federalism implications, a Federalism summary impact statement is not required.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with the Act, this proposed rule was developed by a negotiated rulemaking committee comprised only of Federal and Tribal representatives, with a majority of the Tribal government representatives representing Self-Governance Tribes. The committee agreed to operate based on consensus decisionmaking. The proposed regulations have been agreed on by consensus. Where consensus was not reached, both the Tribal and Federal positions are discussed in the preamble.

National Environmental Policy Act (NEPA) Statement

The DHHS has determined that this proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to NEPA.

Paperwork Reduction Act (PRA) of 1995

This proposed regulation contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Management Reduction Act of 1995 (44 U.S.C. 3501–3520). The information collection requirements in this proposed regulation have been negotiated between the Department and Tribal representatives through the negotiated rulemaking process and have been agreed to by the parties in the negotiation. Health status reporting requirements will be negotiated on an individual Tribal basis and included in individual compacts or funding agreements. Self-governance Tribes will also have the option of participating in a voluntary national uniform data collection effort with the IHS. The subparts summarized below more specifically describe the information collection requirements. As required by the PRA of 1995 (44 U.S.C. 3507(d)), the Department has submitted a copy of these sections to the OMB for its review:

Subpart C—Selection of Tribes for Participation in Self-Governance

The provisions in this subpart require collection of information that indicates successful completion of the planning phase, a Tribal resolution requesting participation in self-governance, and information that demonstrates financial stability and financial capacity for participation in self-governance. The Department needs and uses this information to determine the qualified applicant pool for the self-governance project. The information is collected at the time the Indian Tribe requests participation in self-governance. The annual reporting and record keeping burden for this collection of information is estimated to average 10 hours for each new request for 50 respondents. The total annual reporting and record keeping burden for this collection is estimated to be 500 hours.

Subparts D and E—Compact and Funding Agreement

The compact sets forth the general terms of the government-to-government relationship between the Self-Governance Tribe and the Secretary and any terms the parties intend to control year after year. A funding agreement is required for each Self-Governance Tribe participating in self-governance and it provides the information that authorizes the Self-Governance Tribe to plan, conduct, consolidate, administer, and receive funding. The funding agreement identifies the PSFAs to be performed or administered; the budget category; the funds to be provided; the time and method of transfer of the funds; and, information regarding any other negotiated provisions or Tribal requests for stable base funding.

The provisions in this subpart require collection of information or record-keeping requirements that may be contained in either the compact or the funding agreement, such as the information provided in health status reports or the information needed when requesting multi-year funding. The Department needs and uses this information to determine eligibility of the applicant; to evaluate applicant capabilities; and to protect the service population and safeguard Federal funds and other resources. The information serves as the official record of the compact or funding agreement terms agreed to by the negotiating parties. The information is collected at the time the Self-Governance Tribe makes an initial request to compact or when the Self-Governance Tribe decides to take specific action to retrocede. The annual reporting and record keeping burden for this collection of information is estimated to average 34 hours for each response for 50 respondents. The total annual reporting and record keeping burden for this collection is estimated to be 1700 hours.

Subpart N—Construction Projects

The provisions in this subpart require collection of information regarding the Self-Governance Tribes' assumption of Federal responsibilities with respect to construction, including building codes and architectural and engineering standards (including health and safety), the successful completion of the construction project, and carrying out the negotiated construction project agreement. The information needed includes the semi-annual construction project progress and financial reports.

The Department needs and uses this information to determine eligibility of the applicant and to protect the service population and safeguard Federal funds and other resources. The information serves as the official record of the compact or funding agreement terms agreed to by the negotiating parties.

The information is collected at the time the Self-Governance Tribe negotiates the construction project agreement and through semi-annual reports. The annual reporting and record keeping burden for this collection of information is estimated to average 40 hours for each response for 30 respondents. The total annual burden for the collection is estimated to be 1200 hours.

Subpart P—Appeals

This subpart provides the appeals procedures available to Indian Tribes. It explains how to file a notice of appeal and what the notice should contain as well as instructions for submitting a written statement of objections. The Department uses this information to evaluate and grant or deny an appeal. The information is collected and reported once an Indian Tribe files an appeal. The annual reporting and record keeping burden for this collection of information is estimated to average 40 hours for each response for 8 respondents. The total annual reporting and record keeping burden for this collection is estimated to be 320 hours.

In order 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 by the effected public on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of the IHS;
- The accuracy of our estimate of the information collection burden (the time it takes respondents to read complete and submit the requested information);
- The quality, utility, and clarity of the information we are collecting; and
- Recommendations to minimize the information collection burden on the affected public, including use of automated collection techniques.

Under the PRA, DHHS must obtain OMB approval of all information and record keeping requirements. No person is required to respond to an information collection request unless the form or regulation requesting the information has a currently valid OMB control number. This number will appear in 42 CFR part 137 upon approval. To obtain a copy of the information collection clearance requests, explanatory information, and related form, contact Lance Hodahkwen, Reports Clearance Officer, 12300 Twinbrook Parkway, Suite 450, Rockville, MD 20852 at (301) 443–5938.

By law, the OMB must submit comments to the DHHS within 60 days of publication of this proposed rule, but may respond as soon as 30 days after publication. Therefore, to ensure consideration by the OMB, please send comments regarding these reporting burden estimates or any other aspect of these information collection requirements to the Office of Information and Regulatory Affairs, OMB, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: IHS Desk Officer, Allison Eydt.

This rule imposes no unfunded mandates on any governmental or private entity and is in compliance with the provisions of the Unfunded Mandates Act of 1995.

List of Subjects

42 CFR Parts 36 and 136

Employment, Government procurement, Health care, Health facilities, Indians, Penalties, Reporting and recordkeeping requirements.

42 CFR Parts 36a and 136a

Grant programs-education, Grant programs-health, Grant programs-Indians, Health care, Health professions, Indians, Penalties, Reporting and recordkeeping requirements, Scholarships and fellowships, Student aid.

42 CFR Part 137

Grant programs-Indians, Health care.

Dated: August 13, 2001.

Michael H. Trujillo,

Assistant Surgeon General, Director.

Dated: January 25, 2002.

Tommy G. Thompson,

Secretary.

For the reasons set out in the preamble, we are amending chapter I of title 42 of the Code of Federal Regulations as follows:

PART 36—[REDESIGNATED AS PART 136]

1. The authority for part 36 continues to read as follows:

Authority: 25 U.S.C. 13; sec. 3, 68 Stat. 674 (42 U.S.C. 2001, 2003); Sec. 1, 42 Stat. 208 (25 U.S.C. 13); 42 U.S.C. 2001, unless otherwise noted.

2. Part 36—Indian Health is redesignated as part 136 and transferred to a new Subchapter M—Indian Health Service, Department of Health and Human Services.

3. In redesignated part 136, in the section listed in the first column, the references listed in the second column are revised to read as shown in the third column:

In redesignated part 136	References to §	Are revised to read §
136.14	36.12	136.12
136.21	36.61(c)	136.61
136.23	36.12	136.12
136.23	36.61	136.61
136.42	36.41	136.41
136.43	36.41	136.41
136.53	36.51	136.51
136.53	36.54	136.54
136.56	36.54	136.54
136.106	36.105	136.105
136.116	36.114	136.114
136.303	36.302	136.302
136.321	36.320	136.320
136.322	36.332	136.332
136.351(b)(4)	36.350(a)	136.350(a)
136.351(b)(5)	36.350(a)	136.350(a)
136.351(b)(7)	36.350(a)	136.350(a)
136.351(b)(10)	36.350(a)	136.350(a)
136.353	36.350(a)(7) and (8)	136.350(a)(7) and (8)

In redesignated part 136	References to §	Are revised to read §
136.371	36.370	136.370
136.372	36.332	136.332

PART 36a—[REDESIGNATED AS PART 136a]

4. The authority for part 36a continues to read as follows:

Authority: Sec. 3, 68 Stat. 674; 42 U.S.C 2003; 42 Stat. 208, sec. 1, 68 Stat. 674; 25 U.S.C. 13, 42 U.S.C. 2001, unless otherwise noted.

5. Part 36a—Indian Health is redesignated as Part 136a and transferred to new Subchapter—Indian Health Service, Department of Health and Human Services.

6. Add a new part 137 to new subchapter M to read as follows:

SUBCHAPTER M—INDIAN HEALTH SERVICE, DEPARTMENT OF HEALTH AND HUMAN SERVICES

PART 137—TRIBAL SELF-GOVERNANCE

Subpart A—General Provisions

Sec.

137.1 Authority, purpose and scope.
137.2 Congressional policy.
137.3 Effect on existing Tribal rights.
137.4 May Title V be construed to limit or reduce in any way the funding for any program, project, or activity serving an Indian Tribe under this or other applicable Federal Law?
137.5 Effect of these regulations on Federal program guidelines, manual, or policy directives.

Subpart B—Definitions

137.10 Definitions.

Subpart C—Selection of Indian Tribes for Participation in Self-Governance

137.15 Who may participate in Tribal Self-Governance?
137.16 What if more than 50 Indian Tribes apply to participate in self-governance?
137.17 May more than one Indian Tribe participate in the same compact and/or funding agreement?
137.18 What criteria must an Indian Tribe satisfy to be eligible to participate in self-governance?

Planning Phase

137.20 What is required during the planning phase?
137.21 How does an Indian Tribe demonstrate financial stability and financial management capacity?
137.22 May the Secretary consider uncorrected significant and material audit exceptions identified regarding centralized financial and administrative functions?
137.23 For purposes of determining eligibility for participation in self-governance, may the Secretary consider any other information regarding the Indian Tribe's financial stability and financial management capacity?
137.24 Are there grants available to assist the Indian Tribe to meet the requirements to participate in self-governance?
137.25 Are planning and negotiation grants available?
137.26 Must an Indian tribe receive a planning or negotiation grant to be eligible to participate in self-governance?

Subpart D—Self-Governance Compact

137.30 What is a self-governance compact?
137.31 What is included in a compact?
137.32 Is a compact required to participate in self-governance?
137.33 May an Indian Tribe negotiate a funding agreement at the same time it is negotiating a compact?
137.34 May a funding agreement be executed without negotiating a compact?
137.35 What is the term of a self-governance compact?

Subpart E—Funding Agreements

137.40 What is a funding agreement?
137.41 What PSFAs must be included in a funding agreement?
137.42 What Tribal shares may be included in a funding agreement?
137.43 Are all funds identified as Tribal shares always paid to the Self-Governance Tribe under a funding agreement?

Terms in a Funding Agreement

137.45 What terms must be included in a funding agreement?
137.46 May additional terms be included in a funding agreement?
137.47 Do any provisions of Title I apply to compacts, funding agreements, and construction project agreements negotiated under Title V of the Act?
137.48 What is the effect of incorporating a Title I provision into a compact or funding agreement?
137.49 What if a Self-Governance Tribe requests such incorporation at the negotiation stage of a compact or funding agreement?

Term of a Funding Agreement

137.55 What is the term of a funding agreement?
137.56 Does a funding agreement remain in effect after the end of its term?
137.57 How is a funding agreement amended during the effective period of the funding agreement?

Subpart F—Statutorily Mandated Grants

137.60 May a statutorily mandated grant be added to a funding agreement?
137.65 May a Self-Governance Tribe receive statutorily mandated grant funding in an annual lump sum advance payment?
137.66 May a Self-Governance Tribe keep interest earned on statutorily mandated grant funds?
137.67 How may a Self-Governance Tribe use interest earned on statutorily mandated grant funds?
137.68 May funds from a statutorily mandated grant be added to a funding agreement be reallocated?
137.69 May a statutorily mandated grant program added to a funding agreement be redesigned?
137.70 Are the reporting requirements different for a statutorily mandated grant program added to a funding agreement?
137.71 May the Secretary and the Self-Governance Tribe develop separate programmatic reporting requirements for statutorily mandated grants?
137.72 Are Self-Governance Tribes and their employees carrying out statutorily mandated grant programs added to a funding agreement covered by the Federal Tort Claims Act (FTCA)?

Subpart G—Funding

General

137.75 What funds must the Secretary transfer to a Self-Governance Tribe in a funding agreement?
137.76 When must the Secretary transfer to a Self-Governance Tribe funds identified in a funding agreement?
137.77 When must the Secretary transfer funds identified in a funding agreement which does not correspond to the Federal fiscal year, e.g., calendar year?
137.78 When must the Secretary transfer funds that were not paid as part of the initial lump sum payment?
137.79 May a Self-Governance Tribe negotiate a funding agreement for a term longer or shorter than one year?
137.80 What funds must the Secretary include in a funding agreement?

Prohibitions

137.85 Is the Secretary prohibited from failing or refusing to transfer funds that are due to a Self-Governance Tribe under Title V?
137.86 Is the Secretary prohibited from reducing the amount of funds required under Title V to make funding available for self-governance monitoring or administration by the Secretary?
137.87 May the Secretary reduce the amount of funds due under Title V in subsequent years?
137.88 May the Secretary reduce the amount of funds required under Title V to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under the Act?
137.89 May the Secretary reduce the amount of funds required under Title V to pay for costs of Federal personnel

displaced by contracts under Title I or self-governance under Title V?
137.90 May the Secretary increase the funds required under the funding agreement?

Acquisition of Goods and Services from the IHS

137.95 May a Self-Governance Tribe purchase goods and services from the IHS on a reimbursable basis?

Prompt Payment Act

137.98 Does the Prompt Payment Act apply to funds transferred to a Self-Governance Tribe in a compact or funding agreement?

Interest or Other Income on Transfers

137.100 May a Self-Governance Tribe retain and spend interest earned on any funds paid under a compact or funding agreement?
137.101 What standard applies to a Self-Governance Tribe's management of funds paid under a compact or funding agreement?

Carryover of Funds

137.105 May a Self-Governance Tribe carryover from one year to the next any funds that remain at the end of the funding agreement?

Program Income

137.110 May a Self-Governance Tribe retain and expend any program income earned pursuant to a compact and funding agreement?

Limitation of Costs

137.115 Is a Self-Governance Tribe obligated to continue performance under a compact or funding agreement if the Secretary does not transfer sufficient funds?

Stable Base Budget

137.120 May a Self-Governance Tribe's funding agreement provide for a stable base budget?
137.121 What funds may be included in a stable base budget amount?
137.122 May a Self-Governance Tribe with a stable base budget receive other funding under its funding agreement?
137.123 Once stable base funding is negotiated, do funding amounts change from year to year?
137.124 Does the effective period of a stable base budget have to be the same as the term of the funding agreement?

Subpart H—Final Offer

137.130 What is covered by this subpart?
137.131 When should a final offer be submitted?
137.132 How does the Indian Tribe submit a final offer?
137.133 What does a final offer contain?
137.134 When does the 45 day review period begin?
137.135 May the Secretary request and obtain an extension of time of the 45 day review period?
137.136 What happens if the agency takes no action within the 45 day review period (or any extensions thereof)?
137.137 If the 45 day review period or extension thereto, has expired, and the Tribe's offer is deemed accepted by operation of law, are there any exceptions to this rule?
137.138 Once the Indian Tribe's final offer has been accepted or deemed accepted by operation of law, what is the next step?

Rejection of Final Offers

137.140 On what basis may the Secretary reject an Indian Tribe's final offer?
137.141 How does the Secretary reject a final offer?
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137.211 How does a Self-Governance Tribe learn whether self-governance activities have resulted in savings as described in § 137.210.

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agreement, or grant agreement pursuant to section 512(c) of the Act [25 U.S.C. 458aaa-11(c)]?

Matching and Cost Participation Requirements

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137.226 How does a Self-Governance Tribe request a waiver?
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137.231 May a Self-Governance Tribe appeal the Secretary's decision to deny its request for a waiver of a regulation promulgated under section 517 of the Act [25 U.S.C. 458aaa-16]?

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137.236 When does a withdrawal become effective?
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137.239 If the withdrawing Indian Tribe elects to operate PSFAs carried out under a compact or funding agreement under Title V through a contract under Title I, is the resulting contract considered a mature contract under section 4(h) of the Act [25 U.S.C. 450b(h)]?

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137.259 What happens if the Secretary determines that the Self-Governance Tribe has not corrected the conditions that the Secretary identified in the notice?
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137.262 If the Secretary reassumes a PSFA immediately, when must the Secretary provide the Self-Governance Tribe with a hearing?
137.263 May the Secretary provide a grant to a Self-Governance Tribe for technical assistance to overcome conditions identified under § 137.257.
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137.272 What other alternatives are available for Self-Governance Tribes to perform construction projects?
137.273 What are IHS construction PSFAs?
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Construction Definitions

137.280 Construction definitions.

NEPA Process

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137.286 Do Self-Governance Tribes become Federal agencies when they assume these Federal environmental responsibilities?
137.287 What is the National Environmental Policy Act (NEPA)?
137.288 What is the National Historic Preservation Act (NHPA)?
137.289 What is a Federal undertaking under NHPA?
137.290 What additional provisions of law are related to NEPA and NHPA?
137.291 May Self-Governance Tribes carry out construction projects without assuming these Federal environmental responsibilities?
137.292 How do Self-Governance Tribes assume environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa-8]?
137.293 Are Self-Governance Tribes required to adopt a separate resolution or take equivalent Tribal action to assume environmental responsibilities for each construction project agreement?
137.294 What is the typical IHS environmental review process for construction projects?
137.295 May Self-Governance Tribes elect to develop their own environmental review process?
137.296 How does a Self-Governance Tribe comply with NEPA and NHPA?
137.297 If the environmental review procedures of a Federal agency are adopted by a Self-Governance Tribe, is the Self-Governance Tribe responsible for ensuring the agency's policies and procedures meet the requirements of NEPA, NHPA, and related environmental laws?
137.298 Are Self-Governance Tribes required to comply with Executive Orders to fulfill their environmental responsibilities under section 509 of the Act [25 U.S.C. 458aaa-8]?
137.299 Are Federal funds available to cover the cost of Self-Governance Tribes carrying out environmental responsibilities?
137.300 Since Federal environmental responsibilities are new responsibilities which may be assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa-8], are there additional funds available to Self-Governance Tribes to carry out these formerly inherently Federal responsibilities?
137.301 How are project and program environmental review costs identified?
137.302 Are Federal funds available to cover start-up costs associated with initial Tribal assumption of environmental responsibilities?
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137.304 May Self-Governance Tribes buy back environmental services from the IHS?
137.305 May Self-Governance Tribes act as lead, cooperating, or joint lead agencies for environmental review purposes?
137.306 How are Self-Governance Tribes recognized as having lead, cooperating, or joint lead agency status?
137.307 What Federal environmental responsibilities remain with the Secretary when a Self-Governance Tribe assumes Federal environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa-8]?
137.308 Does the Secretary have any enforcement authority for Federal environmental responsibilities assumed by Tribes under Section 509 of the Act?
137.309 How are NEPA and NHPA obligations typically enforced?
137.310 Are Self-Governance Tribes required to grant a limited waiver of their sovereign immunity to assume Federal environmental responsibilities under Section 509 of the Act [25 U.S.C. 458aaa-8]?
137.311 Are Self-Governance Tribes entitled to determine the nature and scope of the limited immunity waiver required under section 509(a)(2) of the Act?
137.312 Who is the proper defendant in a civil enforcement action under section 509(a)(2) of the Act [25 U.S.C. 458aaa-8(a)(2)]?

Notification (Prioritization Process, Planning, Development and Construction)

137.320 Is the Secretary required to consult with affected Indian Tribes concerning construction projects and programs?
137.321 How do Indian Tribes and the Secretary identify and request funds for needed construction projects?
137.322 Is the Secretary required to notify an Indian Tribe that funds are available for a construction project or a phase of a project?

Project Assumption Process

137.325 What does a Self-Governance Tribe do if it wants to perform a construction project under section 509 of the Act [25 U.S.C. 458aaa-8]?
137.326 What must a Tribal proposal for a construction project agreement contain?
137.327 May multiple projects be included in a single construction project agreement?
137.328 Must a construction project proposal incorporate provisions of Federal construction guidelines and manuals?
137.329 What environmental considerations must be included in the construction project agreement?
137.330 What happens if the Self-Governance Tribe and the Secretary cannot develop a mutually agreeable construction project agreement?
137.331 May the Secretary reject a final construction project proposal based on a determination of Tribal capacity or capability?
137.332 On what bases may the Secretary reject a final construction project proposal?
137.333 What procedures must the Secretary follow if the Secretary rejects a final construction project proposal, in whole or in part?
137.334 What happens if the Secretary fails to notify the Self-Governance Tribe of a decision to approve or reject a final construction project proposal within the time period allowed?
137.335 What costs may be included in the budget for a construction agreement?
137.336 What is the difference between fixed-price and cost-reimbursement agreements?
137.337 What funding must the Secretary provide in a construction project agreement?
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137.339 May the Self-Governance Tribe use project funds for matching or cost participation requirements under other Federal and non-Federal programs?
137.340 May a Self-Governance Tribe contribute funding to a project?
137.341 How will a Self-Governance Tribe receive payment under a construction project agreement?
137.342 What happens to funds remaining at the conclusion of a cost reimbursement construction project?
137.343 What happens to funds remaining at the conclusion of a fixed price construction project?
137.344 May a Self-Governance Tribe reallocate funds among construction project agreements?

Roles of Self-Governance Tribe in Establishing and Implementing Construction Project Agreements

137.350 Is a Self-Governance Tribe responsible for completing a construction project in accordance with the negotiated construction project agreement?
137.351 Is a Self-Governance Tribe required to submit construction project progress and financial reports for construction project agreements?
137.352 What is contained in a construction project progress report?
137.353 What is contained in a construction project financial report?

Roles of the Secretary in Establishing and Implementing Construction Project Agreements

137.360 Does the Secretary approve project planning and design documents prepared by the Self-Governance Tribe?
137.361 Does the Secretary have any other opportunities to approve planning or design documents prepared by the Self-Governance Tribe?
137.362 May construction project agreements be amended?
137.363 What is the procedure for the Secretary's review and approval of amendments?
137.364 What constitutes a significant change in the original scope of work?
137.365 What is the procedure for the Secretary's review and approval of project planning and design documents submitted by the Self-Governance Tribe?
137.366 May the Secretary conduct onsite project oversight visits?
137.367 May the Secretary issue a stop work order under a construction project agreement?
137.368 Is the Secretary responsible for oversight and compliance of health and safety codes during construction projects being performed by a Self-Governance Tribe under section 509 of the Act [25 U.S.C. 488aaa-8]?

Other

137.370 Do all provisions of this part apply to construction project agreements under this subpart?
137.371 Who takes title to real property purchased with funds provided under a construction project agreement?
137.372 What should the Self-Governance Tribe do if it wants real property purchased with construction project agreement funds to be taken into trust?
137.373 Do Federal real property laws, regulations and procedures that apply to the Secretary also apply to Self-Governance Tribes that purchase real property with funds provided under a construction project agreement?
137.374 Does the Secretary have a role in reviewing or monitoring a Self-Governance Tribe's actions in acquiring real property with funds provided under a construction project agreement?
137.375 Are Tribally-owned facilities constructed under section 509 of the Act [25 U.S.C. 458aaa-8] eligible for replacement, maintenance, and improvement funds on the same basis as if title to such property were vested in the United States?
137.376 Are design and construction projects performed by Self-Governance Tribes under section 509 of the Act [25 U.S.C. 458aaa-8] subject to Federal metric requirements?
137.377 Do Federal procurement law and regulations apply to construction project agreements performed under section 509 of the Act [25 U.S.C. 458aaa-8]?
137.378 Does the Federal Davis-Bacon Act and wage rates apply to construction projects performed by Self-Governance Tribes using their own funds or other non-Federal funds?
137.379 Do Davis-Bacon wage rates apply to construction projects performed by Self-Governance Tribes using Federal funds?

Subpart O—Secretarial Responsibilities Budget Request

137.400—137.404 [Reserved].

Reports

137.405 Is the Secretary required to report to Congress on administration of Title V and the funding requirements presently funded or unfunded?
137.406 In compiling reports pursuant to this section, may the Secretary impose any reporting requirements on Self-Governance Tribes, not otherwise provided in Title V?

137.407 What guidelines will be used by the Secretary to compile information required for the report?

Subpart P—Appeals

137.410 For the purposes of section 110 of the Act [25 U.S.C. 450m-1] does the term Acontract include compacts, funding agreements, and construction project agreements entered into under Title V?

Post-Award Disputes

137.412 Do the regulations at 25 CFR Part 900, Subpart N apply to compacts, funding agreements, and construction project agreements entered into under Title V?

Pre-Award Disputes

137.415 What decisions may an Indian Tribe appeal under §§ 137.415 through 137.436?
137.416 Do §§ 137.415 through 137.436 apply to any other disputes?
137.417 What procedures apply to Interior Board of Indian Appeals (IBIA) proceedings?
137.418 How does an Indian Tribe know where and when to file its appeal from decisions made by IHS?
137.419 What authority does the IBIA have under §§ 137.415 through 137.436?
137.420 Does an Indian Tribe have any options besides an appeal?
137.421 How does an Indian Tribe request an informal conference?
137.422 How is an informal conference held?
137.423 What happens after the informal conference?
137.424 Is the recommended decision from the informal conference final for the Secretary?
137.425 How does an Indian Tribe appeal the initial decision if it does not request an informal conference or if it does not agree with the recommended decision resulting from the informal conference?
137.426 May an Indian Tribe get an extension of time to file a notice of appeal?
137.427 What happens after an Indian Tribe files an appeal?
137.428 How is a hearing arranged?
137.429 What happens when a hearing is necessary?
137.430 What is the Secretary's burden of proof for appeals covered by § 137.145?
137.431 What rights do Indian Tribes and the Secretary have during the appeal process?
137.432 What happens after the hearing?
137.433 Is the recommended decision always final?
137.434 If an Indian Tribe objects to the recommended decision, what will the Secretary do?
137.435 Will an appeal adversely affect the Indian Tribe's rights in other compact, funding negotiations, or construction project agreements?
137.436 Will the decisions on appeal be available for the public to review?

Appeals of an Immediate Reassumption of a Self-Governance Program

137.440 What happens in the case of an immediate reassumption under section 507(a)(2)(C) of the Act [25 U.S.C. 458aaa-6(a)(2)(C)]?
137.441 Will there be a hearing?
137.442 What happens after the hearing?
137.443 Is the recommended decision always final?
137.444 If a Self-Governance Tribe objects to the recommended decision, what action will the Secretary take?
137.445 Will an immediate reassumption appeal adversely affect the Self-Governance Tribe's rights in other self-governance negotiations?

Equal Access to Justice Act Fees

137.450 Does the Equal Access to Justice Act (EAJA) apply to appeals under this subpart?

Authority: 25 U.S.C. 458 *et seq.*

Subpart A B General Provisions

§ 137.1 Authority, purpose and scope.

(a) *Authority.* These regulations are prepared, issued and maintained with the active participation and representation of Indian Tribes, Tribal organizations and inter-Tribal consortia pursuant to the guidance of the negotiated rulemaking procedures required by section 517 of the Act [25 U.S.C. 458aaa-16].

(b) *Purpose.* These regulations codify rules for self-governance compacts, funding agreements, and construction project agreements between the Department of Health and Human Services (DHHS) and Self-Governance Tribes to implement sections 2, 3, and 4 of Pub. L. 106–260.

(c) *Scope.* These regulations are binding on the Secretary and on Indian Tribes carrying out programs, services, functions, and activities (or portions thereof) (PSFAs) under Title V except as otherwise specifically authorized by a waiver under section 512(b) of the Act [25 U.S.C. 458aaa-11(b)].

(d) *Information Collection.* The information collection requirements contained in these rules have been approved by the Office of Management and Budget (OMB) and assigned the following approval numbers: [Approval numbers will appear in this location in the final rule.]

§ 137.2 Congressional policy.

(a) According to section 2 of Public Law 106–260, Congress has declared that:

(1) The Tribal right of self-government flows from the inherent sovereignty of Indian Tribes and nations;

(2) The United States recognizes a special government-to-government relationship with Indian Tribes, including the right of the Indian Tribes to self-governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian Tribes;

(3) Although progress has been made, the Federal bureaucracy, with its centralized rules and regulations, has eroded Tribal Self-Governance and dominates Tribal affairs.

(4) The Tribal Self-Governance Demonstration Project, established under title III of the Indian Self-Determination Act (ISDA) [25 U.S.C. 450f note] was designed to improve and perpetuate the government-to-government relationship between Indian Tribes and the United States and to strengthen Tribal control over Federal funding and program management;

(5) Although the Federal Government has made considerable strides in improving Indian health care, it has failed to fully meet its trust responsibilities and to satisfy its obligations to the Indian Tribes under treaties and other laws; and

(6) Congress has reviewed the results of the Tribal Self-Governance Demonstration Project and finds that transferring full control and funding to Tribal governments, upon Tribal request, over decision making for Federal PSFAs

(i) Is an appropriate and effective means of implementing the Federal policy of government-to-government relations with Indian Tribes; and

(ii) Strengthens the Federal policy of Indian self-determination.

(b) According to section 3 of Pub. L. 106–260, Congress has declared its policy to:

(1) Permanently establish and implement Tribal Self-Governance within the DHHS;

(2) Call for full cooperation from the DHHS and its constituent agencies in the implementation of Tribal Self-Governance—

(i) Enable the United States to maintain and improve its unique and continuing relationship with, and responsibility to, Indian Tribes;

(ii) Permit each Indian Tribe to choose the extent of its participation in self-governance in accordance with the provisions of the ISDA relating to the provision of Federal services to Indian Tribes;

(iii) Ensure the continuation of the trust responsibility of the United States to Indian Tribes and Indians;

(iv) Affirm and enable the United States to fulfill its obligations to the Indian Tribes under treaties and other laws;

(v) Strengthen the government-to-government relationship between the United States and Indian Tribes through direct and meaningful consultation with all Tribes;

(vi) Permit an orderly transition from Federal domination of programs and services to provide Indian Tribes with meaningful authority, control, funding, and discretion to plan, conduct, redesign, and administer PSFAs that meet the needs of the individual Tribal communities;

(vii) Provide for a measurable parallel reduction in the Federal bureaucracy as programs, services, functions, and activities (or portion thereof) are assumed by Indian Tribes; (viii) Encourage the Secretary to identify all PSFAs of the DHHS that may be managed by an Indian Tribe under this Act and to assist Indian Tribes in assuming responsibility for such PSFAs; and

(ix) Provide Indian Tribes with the earliest opportunity to administer PSFAs from throughout the Department.

(c) According to section 512(a) of the Act [25 U.S.C. 458aaa-11(a)], Congress has declared, except as otherwise provided by law, the Secretary shall interpret all Federal laws, Executive Orders, and regulations in a manner that will facilitate:

(1) The inclusion of PSFAs and funds associated therewith, in the agreements entered into under this section;

(2) The implementation of compacts and funding agreements entered into under this title; and

(3) The achievement of Tribal health goals and objectives.

(d) According to section 512(f) of the Act [25 U.S.C. 458aaa-11(f)], Congress has declared that each provision of Title V and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian Tribe participating in and any ambiguity shall be resolved in favor of the Indian Tribe.

(e) According to section 515(b) of the Act [25 U.S.C. 458aaa-14(b)], Congress has declared that nothing in the Act shall be construed to diminish in any way the trust responsibility of the United States to Indian Tribes and individual Indians that exists under treaties, Executive orders, or other laws and court decisions.

(f) According to section 507(g) of the Act [25 U.S.C. 458aaa-6(g)], Congress has declared that the Secretary is prohibited from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian Tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions.

(g) According to section 515(c) of the Act [25 U.S.C. 458aaa-14(c)], Congress has declared that the Indian Health Service (IHS) under this Act shall neither bill nor charge those Indians who may have the economic means to pay for services, nor require any Tribe to do so. Nothing in this section shall impair the right of the IHS or an Indian Tribe to seek recovery from third parties section 206 of the Indian Health Care Improvement Act [25 U.S.C. 1621e], under section 1 of the Federal Medical Care Recovery Act [42 U.S.C. 2651], and any other applicable Federal, State or Tribal law.

(h) According to section 507(e) of the Act [25 U.S.C. 458aaa-6(e)], Congress has declared that in the negotiation of compacts and funding agreements the Secretary shall at all times negotiate in good faith to maximize implementation of the self-governance policy. The Secretary shall carry out Title V in a manner that maximizes the policy of Tribal Self-Governance, and in a manner consistent with the purposes specified in section 3 of the Act.

§ 137.3 Effect on existing Tribal rights.

Nothing in this part shall be construed as:

(a) Affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by Indian Tribes;

(b) Terminating, waiving, modifying, or reducing the trust responsibility of the United States to the Indian Tribe(s) or individual Indians. The Secretary must act in good faith in upholding this trust responsibility;

(c) Mandating an Indian Tribe to apply for a compact(s) or grant(s) as described in the Act; or

(d) Impeding awards by other Departments and agencies of the United States to Indian Tribes to administer Indian programs under any other applicable law.

§ 137.4 May Title V be construed to limit or reduce in any way the funding for any program, project, or activity serving an Indian Tribe under this or other applicable Federal Law?

No, if an Indian Tribe alleges that a compact or funding agreement violates section 515(a) of the Act [25 U.S.C. 458aaa-14(a)], the Indian Tribe may apply the provisions of section 110 of the Act [25 U.S.C. 450m-1].

§ 137.5 Effect of these regulations on Federal program guidelines, manual, or policy directives.

Unless expressly agreed to by the Self-Governance Tribe in the compact or funding agreement, the Self-Governance Tribe shall not be subject to any agency circular, policy, manual, guidance, or rule adopted by the IHS, except for the eligibility provisions of section 105(g) of the Act [25 U.S.C. 450j(g)] and regulations promulgated under section 517 of the Act [25 U.S.C. 458aaa-16(e)].

Subpart B—Definitions.

§ 137.10 Definitions.

Unless otherwise provided in this part:

Act means sections 1 through 9 and Titles I and V of the Indian Self-Determination and Education Assistance Act of 1975, Public Law 93–638, as amended.

Appeal means a request by an Indian Tribe for an administrative review of an adverse decision by the Secretary.

Compact means a legally binding and mutually enforceable written agreement that affirms the government-to-government relationship between a Self-Governance Tribe and the United States.

Congressionally earmarked competitive grants as used in section 505(b)(1) of the Act [25 U.S.C. 458aaa-4(b)(1)] means statutorily mandated grants as defined in this section and used in subpart H of this part.

Contract means a self-determination contract as defined in section 4(j) of the Act [25 U.S.C. 450b].

Days means calendar days; except where the last day of any time period specified in these regulations falls on a Saturday, Sunday, or a Federal holiday, the period shall carry over to the next business day unless otherwise prohibited by law.

Department means the Department of Health and Human Services.

Director means the Director of the Indian Health Service.

Funding agreement means a legally binding and mutually enforceable written agreement that identifies the PSFAs that the Self-Governance Tribe will carry out, the funds being transferred from the Service Unit, Area, and Headquarter's levels in support of those PSFAs and such other terms as are required, or may be agreed upon, pursuant to Title V.

Gross mismanagement means a significant, clear, and convincing violation of a compact, funding agreement, or regulatory, or statutory requirements applicable to Federal funds transferred to an Indian Tribe by a compact or funding agreement that results in a significant reduction of funds available for the PSFAs assumed by a Self-Governance Tribe.

IHS means Indian Health Service.

IHS discretionary grant means a grant established by IHS pursuant to the IHS'

discretionary authority without any specific statutory directive.

Indian means a person who is a member of an Indian Tribe.

Indian Tribe means any Indian Tribe, band, nation, or other organized group, or community, including pueblos, rancherias, colonies, and any Alaska Native Village, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; provided that in any case in which an Indian Tribe has authorized another Indian Tribe, an inter-Tribal consortium, or a Tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under Title V, the authorized Indian Tribe, inter-Tribal consortium or Tribal organization shall have the rights and responsibilities of the authorizing Indian Tribe (except as otherwise provided in the authorizing resolution or in this part). In such event, the term 'Indian Tribe' as used in this part includes such other authorized Indian Tribe, inter-Tribal consortium, or Tribal organization.

Indirect costs shall have the same meaning as it has in 25 CFR 900.6 as applied to compacts, funding agreements and construction project agreements entered into under this part.

Inherent Federal functions means those Federal functions which cannot legally be delegated to Indian Tribes.

Inter-Tribal consortium means a coalition of two or more separate Indian Tribes that join together for the purpose of participating in self-governance, including Tribal organizations.

OMB means the Office of Management and Budget.

PSFA means programs, services, functions, and activities (or portions thereof).

Real property means any interest in land together with the improvements, structures, and fixtures and appurtenances thereto.

Reassumption means rescission, in whole or part, of a funding agreement and assuming or resuming control or operation of the PSFAs by the Secretary without consent of the Self-Governance Tribe.

Retained Tribal share means those funds that are available as a Tribal share but which the Self-Governance Tribe elects to leave with the IHS to administer.

Retrocession means the voluntary return to the Secretary of a self-governance program, service, function or activity (or portion thereof) for any reason, before or on the expiration of the term of the funding agreement.

Secretary means the Secretary of Health and Human Services (and his or her respective delegates.)

Self-Governance means the program of self-governance established under section 502 of the Act [25 U.S.C. 458aaa-1].

Self-Governance Tribe means an Indian Tribe participating in the program of self-governance pursuant to section 503(a) of the Act [25 U.S.C. 458aaa-2(a)] or selected and participating in self-governance pursuant to section 503(b) of the Act [25 U.S.C. 458aaa-2(b)].

Statutorily mandated grant as used in this section and subpart F of this part means a grant specifically designated in a statute for a defined purpose.

Title I means sections 1 through 9 and Title I of the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93–638, as amended.

Title V means Title V of the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93–638, as amended.

Tribal organization means the recognized governing body of any Indian Tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities; provided, that in any case where a contract or compact is entered into, or a grant is made, to an organization to perform services benefitting more than one Indian Tribe, the approval of each such Indian Tribe shall be a prerequisite to the entering into or making of such contract, compact, or grant.

Tribal share means an Indian Tribe's portion of all funds and resources that support secretarial PSFAs that are not required by the Secretary for the performance of inherent Federal functions.

Subpart C—Selection of Indian Tribes for Participation in Self-Governance

§ 137.15 Who may participate in Tribal Self-Governance?

Those Self-Governance Tribes described in 503(a) of the Act [25 U.S.C. 458aaa–2(a)] participating in the Title III Tribal Self-Governance Demonstration Project and up to 50 additional Indian Tribes per year that meet the criteria in § 137.18 may participate in self-governance.

§ 137.16 What if more than 50 Indian Tribes apply to participate in self-governance?

The first 50 Indian Tribes who apply and are determined to be eligible shall have the option to participate in self-governance. Any Indian Tribe denied participation due to the limitation in number of Indian Tribes that may take part is entitled to participate in the next fiscal year, provided the Indian Tribe continues to meet the financial stability and financial management capacity requirements.

§ 137.17 May more than one Indian Tribe participate in the same compact and/or funding agreement?

Yes, Indian Tribes may either:

(a) Each sign the same compact and/or funding agreement, provided that each one meets the criteria to participate in self-governance and accepts legal responsibility for all financial and administrative decisions made under the compact or funding agreement, or

(b) Authorize another Indian Tribe to participate in self-governance on their behalf.

§ 137.18 What criteria must an Indian Tribe satisfy to be eligible to participate in self-governance?

To be eligible to participate in self-governance, an Indian Tribe must have:

(a) Successfully completed the planning phase described in § 137.20;

(b) Requested participation in self-governance by resolution or other official action by the governing body of each Indian Tribe to be served; and

(c) Demonstrated, for three fiscal years, financial stability and financial management capability.

Planning Phase

§ 137.20 What is required during the planning phase?

The planning phase must be conducted to the satisfaction of the Indian Tribe and must include:

(a) Legal and budgetary research; and

(b) Internal Tribal government planning and organizational preparation relating to the administration of health programs.

§ 137.21 How does an Indian Tribe demonstrate financial stability and financial management capacity?

The Indian Tribe provides evidence that, for the three years prior to participation in self-governance, the Indian Tribe has had no uncorrected significant and material audit exceptions in the required annual audit of the Indian Tribe's self-determination contracts or self-governance funding agreements with any Federal agency.

§ 137.22 May the Secretary consider uncorrected significant and material audit exceptions identified regarding centralized financial and administrative functions?

Yes, if the Indian Tribe chooses to centralize its self-determination or self-governance financial and administrative functions with non-self-determination or non-self-governance financial and administrative functions, such as personnel, payroll, property management, etc., the Secretary may consider uncorrected significant and material audit exceptions related to the integrity of a cross-cutting centralized function in determining the Indian Tribe's eligibility for participation in the self-governance program.

§ 137.23 For purposes of determining eligibility for participation in self-governance, may the Secretary consider any other information regarding the Indian Tribe's financial stability and financial management capacity?

No, meeting the criteria set forth in §§ 137.21 and 137.22, shall be conclusive evidence of the required stability and capability to participate in self-governance.

§ 137.24 Are there grants available to assist the Indian Tribe to meet the requirements to participate in self-governance?

Yes, any Indian Tribe may apply, as provided in § 137.25, for a grant to assist it to:

(a) Plan to participate in self-governance; and

(b) Negotiate the terms of the compact and funding agreement between the Indian Tribe and Secretary.

§ 137.25 Are planning and negotiation grants available?

Subject to the availability of funds, IHS will annually publish a notice of the number of planning and negotiation grants available, an explanation of the application process for such grants, and the criteria for award. Questions may be directed to the Office of Tribal Self-Governance.

§ 137.26 Must an Indian tribe receive a planning or negotiation grant to be eligible to participate in self-governance?

No, an Indian Tribe may use other resources to meet the planning requirement.

Subpart D—Self-Governance Compact

§ 137.30 What is a self-governance compact?

A self-governance compact is a legally binding and mutually enforceable written agreement that affirms the government-to-government relationship between a Self-Governance Tribe and the United States.

§ 137.31 What is included in a compact?

A compact shall include general terms setting forth the government-to-government relationship consistent with the Federal Government's trust responsibility and statutory and treaty obligations to Indian Tribes and such other terms as the parties intend to control from year to year.

§ 137.32 Is a compact required to participate in self-governance?

Yes, Tribes must have a compact in order to participate in self-governance.

§ 137.33 May an Indian Tribe negotiate a funding agreement at the same time it is negotiating a compact?

Yes, at an Indian Tribe's option, a funding agreement may be negotiated prior to or at the same time as the negotiation of a compact.

§ 137.34 May a funding agreement be executed without negotiating a compact?

No, a compact is a separate document from a funding agreement, and the compact must be executed before or at the same time as a funding agreement.

§ 137.35 What is the term of a self-governance compact?

Upon approval and execution of a self-governance compact, the compact remains in effect for so long as permitted by Federal law or until terminated by mutual written agreement or retrocession or reassumption of all PSFAs.

Subpart E—Funding Agreements

§ 137.40 What is a funding agreement?

A funding agreement is a legally binding and mutually enforceable written agreement that identifies the PSFAs that the Self-Governance Tribe will carry out, the funds being transferred from service unit, area and headquarters levels in support of those PSFAs and such other terms as are required or may be agreed upon pursuant to Title V.

§ 137.41 What PSFAs must be included in a funding agreement?

At the Self-Governance Tribe's option, all PSFAs identified in and in accordance with section 505(b) of the Act must be included in a funding agreement, subject to section 507(c) of the Act [25 U.S.C. 458aaa–6(c)].

§ 137.42 What Tribal shares may be included in a funding agreement?

All Tribal shares identified in sections 505(b)(1) [25 U.S.C. 458aaa–4(b)(1)] and 508(c) of the Act [25 U.S.C. 458aaa–7(c)] may be included in a funding agreement, including Tribal shares of IHS discretionary grants.

§ 137.43 Are all funds identified as Tribal shares always paid to the Self-Governance Tribe under a funding agreement?

No, at the discretion of the Self-Governance Tribe, Tribal shares may be left, in whole or in part, with IHS for certain PSFAs. These shares are referred to as a ''retained Tribal shares.''

Terms in a Funding Agreement

§ 137.45 What terms must be included in a funding agreement?

A funding agreement must include terms required under section 505(d) of the Act [25 U.S.C. 458aaa–4(d)] and provisions regarding mandatory reporting and reassumption pursuant to section 507(a) of the Act [25 U.S.C. 458aaa–6(a)], unless those provisions have been included in a compact.

§ 137.46 May additional terms be included in a funding agreement?

Yes, at the Self-Governance Tribe's option, additional terms may be included as set forth in sections 506 [25 U.S.C. 458aaa–5] and 516(b) of the Act [25 U.S.C. 458aaa–15(b)]. In addition, any other terms to which the Self-Governance Tribe and the Secretary agree may be included.

§ 137.47 Do any provisions of Title I apply to compacts, funding agreements, and construction project agreements negotiated under Title V of the Act?

(a) Yes, the provisions of Title I listed in section 516(a) of the Act [25 U.S.C. 458aaa–15(a)] and section 314 of Pub. L. 101–512, as amended, [25 U.S.C. 450f note] mandatorily apply to a compact, funding agreement and construction project agreement to the extent they are not in conflict with Title V. In addition, at the option of a Self-Governance Tribe, under section 516(b) of the Act [25 U.S.C. 458aaa–15(b)] any provisions of Title I may be included in the compact or funding agreement.

(b) The provisions of Title I referenced in section 516(a) of the Act [25 U.S.C. 458aaa–15(a)] are sections 5 [25 U.S.C. 450c], 6 [25 U.S.C. 450d], 7 [25 U.S.C. 450e], 102(c) and (d) [25 U.S.C. 450f(c) and (d)], 104 [25 U.S.C. 450i], 105(k) and (l) [25 U.S.C. 450j(k) and (l)], 106(a) through (k) [25 U.S.C. 450j–1(a) through (k)], and 111 [25 U.S.C. 450n] of the Act.

§ 137.48 What is the effect of incorporating a Title I provision into a compact or funding agreement?

The incorporated Title I provision shall have the same force and effect as if it were set out in full in Title V.

§ 137.49 What if a Self-Governance Tribe requests such incorporation at the negotiation stage of a compact or funding agreement?

In that event, such incorporation shall be deemed effective immediately and shall control the negotiation and resulting compact and funding agreement.

Term of a Funding Agreement

§ 137.55 What is the term of a funding agreement?

A funding agreement shall have the term mutually agreed to by the parties. Absent notification from an Indian Tribe that it is withdrawing or retroceding the operation of one or more PSFAs identified in the funding agreement, the funding agreement shall remain in full force and effect until a subsequent funding agreement is executed.

§ 137.56 Does a funding agreement remain in effect after the end of its term?

Yes, the provisions of a funding agreement remain in full force and effect until a subsequent funding agreement is executed. Upon execution of a subsequent funding agreement, the provisions of such a funding agreement are retroactive to the end of the term of the preceding funding agreement.

§ 137.57 How is a funding agreement amended during the effective period of the funding agreement?

A funding agreement may be amended by the parties as provided for in the funding agreement, Title V, or this part.

Subpart F—Statutorily Mandated Grants

§ 137.60 May a statutorily mandated grant be added to a funding agreement?

Yes, in accordance with section 505(b)(2) of the Act [25 U.S.C. 458aaa–4(b)(2)], a statutorily mandated grant may be added to the funding agreement after award.

§ 137.65 May a Self-Governance Tribe receive statutorily mandated grant funding in an annual lump sum advance payment?

Yes, grant funds shall be added to the funding agreement as an annual lump sum advance payment after the grant is awarded.

§ 137.66 May a Self-Governance Tribe keep interest earned on statutorily mandated grant funds?

Yes, a Self-Governance Tribe may keep interest earned on statutorily mandated grant funds.

§ 137.67 How may a Self-Governance Tribe use interest earned on statutorily mandated grant funds?

Interest earned on such funds must be used to enhance the grant program including allowable administrative costs.

§ 137.68 May funds from a statutorily mandated grant added to a funding agreement be reallocated?

No, unless it is permitted under the statute authorizing the grant or under the terms and conditions of the grant award, funds from a statutorily mandated grant may not be reallocated.

§ 137.69 May a statutorily mandated grant program added to a funding agreement be redesigned?

No, unless it is permitted under the statute authorizing the grant or under the terms and conditions of the grant award, a program added to a funding agreement under a statutorily mandated grant may not be redesigned.

§ 137.70 Are the reporting requirements different for a statutorily mandated grant program added to a funding agreement?

Yes, the reporting requirements for a statutorily mandated grant program added to a funding agreement are subject to the terms and conditions of the grant award.

§ 137.71 May the Secretary and the Self-Governance Tribe develop separate programmatic reporting requirements for statutorily mandated grants?

Yes, the Secretary and the Self-Governance Tribe may develop separate programmatic reporting requirements for statutorily mandated grants.

§ 137.72 Are Self-Governance Tribes and their employees carrying out statutorily mandated grant programs added to a funding agreement covered by the Federal Tort Claims Act (FTCA)?

Yes, Self-Governance Tribes and their employees carrying out statutorily mandated grant programs added to a funding agreement are covered by the FTCA. Regulations governing coverage under the FTCA are published at 25 CFR Part 900, Subpart M.

Subpart G—Funding

General

§ 137.75 What funds must the Secretary transfer to a Self-Governance Tribe in a funding agreement?

Subject to the terms of any compact or funding agreement, the Secretary must transfer to a Tribe all funds provided for in the funding agreement, pursuant to section 508(c) of the Act [25 U.S.C. 458aaa–7(c)] and '137.80. The Secretary shall provide funding for periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

§ 137.76 When must the Secretary transfer to a Self-Governance Tribe funds identified in a funding agreement?

When a funding agreement requires an annual transfer of funding to be made at the beginning of a fiscal year, or requires semiannual or other periodic transfers of funding to be made commencing at the beginning of a fiscal year, the first such transfer shall be made not later than 10 days after the apportionment of such funds by the OMB to the Department, unless the funding agreement provides otherwise.

§ 137.77 When must the Secretary transfer funds identified in a funding agreement which does not correspond to the Federal fiscal year, e.g., calendar year?

When the period covered by a funding agreement crosses Federal fiscal years and unless 100 percent of the funding is available and agreed to in the funding agreement, funding for the funding agreement will be apportioned between the two fiscal years and payments due under the funding agreement associated with each respective fiscal year will be made on the later of:

(a) The effective date of the funding agreement, or

(b) Ten days after apportionment from OMB.

§ 137.78 When must the Secretary transfer funds that were not paid as part of the initial lump sum payment?

The Secretary must transfer any funds that were not paid in the initial lump sum payment within 10 days after distribution methodologies and other decisions regarding payment of those funds have been made by the IHS.

§ 137.79 May a Self-Governance Tribe negotiate a funding agreement for a term longer or shorter than one year?

Yes, upon Tribal request, the Secretary must negotiate a funding agreement for a term longer or shorter than a year. All references in these regulations to funding agreements shall also include funding agreements for a term longer or shorter than one year.

§ 137.80 What funds must the Secretary include in a funding agreement?

The Secretary must include funds in a funding agreement in an amount equal to the amount that the Self-Governance Tribe would have been entitled to receive in a contract under Title I, including amounts for direct program costs specified under section 106(a)(1) of the Act and amounts for contract support costs specified under section

106(a) (2), (3), (5), and (6) of the Act [25 U.S.C. 450j–1(a)(2), (3), (5) and (6)]. In addition, the Secretary shall include any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Self-Governance Tribe or its members, all without regard to the organizational level within the Department where such functions are carried out.

Prohibitions

§ 137.85 Is the Secretary prohibited from failing or refusing to transfer funds that are due to a Self-Governance Tribe under Title V?

Yes, sections 508(d)(1)(A) and (B) of the Act [25 U.S.C. 458aaa–7(d)(1)(A) and (B)] expressly prohibit the Secretary from:

(a) Failing or refusing to transfer to a Self-Governance Tribe its full share of any central, headquarters, regional, area, or service unit office or other funds due under Title V, except as required by Federal law, and

(b) From withholding portions of such funds for transfer over a period of years.

§ 137.86 Is the Secretary prohibited from reducing the amount of funds required under Title V to make funding available for self-governance monitoring or administration by the Secretary?

Yes, the Secretary is prohibited from reducing the amount of funds required under Title V to make funding available for self-governance monitoring or administration.

§ 137.87 May the Secretary reduce the amount of funds due under Title V in subsequent years?

No, in accordance with section 508(d)(1)(C)(ii) of the Act [[25 U.S.C. 458aaa–7(d)(1)(C)(ii)], the Secretary is prohibited from reducing the amount of funds required under Title V in subsequent years, except pursuant to:

(a) A reduction in appropriations from the previous fiscal year for the program or function to be included in a compact or funding agreement;

(b) A Congressional directive in legislation or accompanying report;

(c) A Tribal authorization;

(d) A change in the amount of pass-through funds subject to the terms of the funding agreement; or

(e) Completion of a project, activity, or program for which such funds were provided.

§ 137.88 May the Secretary reduce the amount of funds required under Title V to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under the Act?

No, the Secretary may not reduce the amount of funds required under Title V to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under the Act.

§ 137.89 May the Secretary reduce the amount of funds required under Title V to pay for costs of Federal personnel displaced by contracts under Title I or Self-Governance under Title V?

No, the Secretary may not reduce the amount of funds required under Title V to pay for costs of Federal personnel displaced by contracts under Title I or Self-Governance under Title V.

§ 137.90 May the Secretary increase the funds required under the funding agreement?

Yes, the Secretary may increase the funds required under the funding agreement. However, the Self-Governance Tribe and the Secretary must agree to any transfer of funds to the Self-Governance Tribe unless otherwise provided for in the funding agreement.

Acquisition of Goods and Services from the IHS

§ 137.95 May a Self-Governance Tribe purchase goods and services from the IHS on a reimbursable basis?

Yes, a Self-Governance Tribe may choose to purchase from the IHS any goods and services transferred by the IHS to a Self-Governance Tribe in a compact or funding agreement. The IHS shall provide any such goods and services to the Self-Governance Tribe, on a reimbursable basis, including payment in advance with subsequent adjustment.

Prompt Payment Act

§ 137.96 Does the Prompt Payment Act apply to funds transferred to a Self-Governance Tribe in a compact or funding agreement?

Yes, the Prompt Payment Act, 39 U.S.C. section 3901 *et seq.*, applies to the transfer of all funds due under a compact or funding agreement authorized pursuant to Title V. See also ''137.76 through 137.78 and 137.341(f).

Interest or Other Income on Transfers

§ 137.100 May a Self-Governance Tribe retain and spend interest earned on any funds paid under a compact or funding agreement?

Yes, pursuant to section 508(h) of the Act [25 U.S.C. 458aaa–7(h)], a Self-Governance Tribe may retain and spend interest earned on any funds paid under a compact or funding agreement.

§ 137.101 What standard applies to a Self-Governance Tribe's management of funds paid under a compact or funding agreement?

A Self-Governance Tribe is under a duty to invest and manage the funds as a prudent investor would, in light of the purpose, terms, distribution requirements, and provisions in the compact or funding agreement and Title V. This duty requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the investment portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the Self-Governance Tribe. In making and implementing investment decisions, the Self-Governance Tribe has a duty to diversify the investments unless, under the circumstances, it is prudent not to do so. In addition, the Self-Governance Tribe must:

(a) Conform to fundamental fiduciary duties of loyalty and impartiality;

(b) Act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents; and

(c) Incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the Self-Governance Tribe.

Carryover of Funds

§ 137.105 May a Self-Governance Tribe carryover from one year to the next any funds that remain at the end of the funding agreement?

Yes, pursuant to section 508(i) of the Act, a Self-Governance Tribe may carryover from one year to the next any funds that remain at the end of the funding agreement.

Program Income

§ 137.110 May a Self-Governance Tribe retain and expend any program income earned pursuant to a compact and funding agreement?

All Medicare, Medicaid, or other program income earned by a Self-Governance Tribe shall be treated as supplemental funding to that negotiated in the funding agreement. The Self-Governance Tribe may retain all such

income and expend such funds in the current year or in future years except to the extent that the Indian Health Care Improvement Act (25 U.S.C. 1601 *et seq.*) provides otherwise for Medicare and Medicaid receipts. Such funds shall not result in any offset or reduction in the amount of funds the Self-Governance Tribe is authorized to receive under its funding agreement in the year the program income is received or for any subsequent fiscal year.

Limitation of Costs

§ 137.115 Is a Self-Governance Tribe obligated to continue performance under a compact or funding agreement if the Secretary does not transfer sufficient funds?

No, if a Self-Governance Tribe believes that the total amount of funds provided for a specific PSFA in a compact or funding agreement is insufficient, the Self-Governance Tribe must provide reasonable written notice of such insufficiency to the Secretary. If the Secretary does not increase the amount of funds transferred under the funding agreement in a quantity sufficient for the Self-Governance Tribe to complete the PSFA, as jointly determined by the Self-Governance Tribe and the Secretary, the Self-Governance Tribe may suspend performance of the PSFA until such time as additional funds are transferred.

Stable Base Budget

§ 137.120 May a Self-Governance Tribe's funding agreement provide for a stable base budget?

Yes, at the option of a Self-Governance Tribe, a funding agreement may provide for a stable base budget, specifying the recurring funds to be transferred to a Self-Governance Tribe for a period specified in the funding agreement.

§ 137.121 What funds may be included in a stable base budget amount?

The stable base budget amount may include, at the option of the Self-Governance Tribe,

(a) Recurring funds available under section 106(a) of the Act [25 U.S.C. 450j–1];

(b) Recurring Tribal shares; and

(c) Any recurring funds for new or expanded PSFAs not previously assumed by the Self-Governance Tribe.

§ 137.122 May a Self-Governance Tribe with a stable base budget receive other funding under its funding agreement?

Yes, the funding agreement may include non-recurring funds, other recurring funds, and other funds the Self-Governance Tribe is entitled to include in a funding agreement that are not included in the stable base budget amount.

§ 137.123 Once stable base funding is negotiated, do funding amounts change from year to year?

Stable base funding amounts are subject to adjustment:

(a) Annually only to reflect changes in Congressional appropriations by sub-sub activity excluding earmarks;

(b) By mutual agreement of the Self-Governance Tribe and the Secretary; or

(c) As a result of full or partial retrocession or reassumption.

§ 137.124 Does the effective period of a stable base budget have to be the same as the term of the funding agreement?

No, the Self-Governance Tribe may provide in its funding agreement that the effective period of the stable base budget will be either longer or shorter than the term of the funding agreement.

Subpart H—Final Offer

§ 137.130 What is covered by this subpart?

This subpart explains the final offer process provided by the statute for resolving, within a specific timeframe, disputes that may develop in negotiation of compacts, funding agreements, or amendments thereof.

§ 137.131 When should a final offer be submitted?

A final offer should be submitted when the Secretary and an Indian Tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels).

§ 137.132 How does the Indian Tribe submit a final offer?

(a) A written final offer should be submitted:

(1) During negotiations to the agency lead negotiator;

(2) Thereafter to the Director.

(b) The document should be separate from the compact, funding agreement, or amendment and clearly identified as a ''Final Offer.''

§ 137.133 What does a final offer contain?

A final offer contains a description of the disagreement between the Secretary and the Indian Tribe and the Indian Tribe's final proposal to resolve the disagreement.

§ 137.134 When does the 45 day review period begin?

The 45 day review period begins from the date the IHS receives the final offer. Proof of receipt may include a date stamp, or postal return receipt, or hand delivery.

§ 137.135 May the Secretary request and obtain an extension of time of the 45 day review period?

Yes, the Secretary may request an extension of time before the expiration of the 45 day review period. The Indian Tribe may either grant or deny the Secretary's request for an extension. To be effective, any grant of extension of time must be in writing and be signed by the person authorized by the Indian Tribe to grant the extension before the expiration of the 45 day review period.

§ 137.136 What happens if the agency takes no action within the 45 day review period (or any extensions thereof)?

The final offer is accepted automatically by operation of law.

§ 137.137 If the 45 day review period or extension thereto, has expired, and the Tribe's offer is deemed accepted by operation of law, are there any exceptions to this rule?

No, there are no exceptions to this rule if the 45 day review period or extension thereto, has expired, and the Tribe's offer is deemed accepted by operation of law.

§ 137.138 Once the Indian Tribe's final offer has been accepted or deemed accepted by operation of law, what is the next step?

After the Indian Tribe's final offer is accepted or deemed accepted, the terms of the Indian Tribe's final offer and any funds included therein, shall be added to the funding agreement or compact within 10 days of the acceptance or the deemed acceptance.

Rejection of Final Offers

§ 137.140 On what basis may the Secretary reject an Indian Tribe's final offer?

The Secretary may reject an Indian Tribe's final offer for one of the following reasons:

(a) The amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian Tribe is entitled under the Act;

(b) The PSFA that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian Tribe;

(c) The Indian Tribe cannot carry out the PSFA in a manner that would not result in significant danger or risk to the public health; or

(d) The Indian Tribe is not eligible to participate in self-governance under section 503 of the Act [25 U.S.C. 458aaa–2].

§ 137.141 How does the Secretary reject a final offer?

The Secretary must reject a final offer by providing written notice to the

Indian Tribe based on the criteria in § 137.140 not more than 45 days after receipt of a final offer, or within a longer time period as agreed by the Self-Governance Tribe consistent with this subpart.

§ 137.142 What is a ''significant danger'' or ''risk'' to the public health?

A significant danger or risk is determined on a case-by-case basis in accordance with section 507(c) of the Act [25 U.S.C. 458aaa–6(c)].

§ 137.143 How is the funding level to which the Indian Tribe is entitled determined?

The Secretary must provide funds under a funding agreement in an amount equal to the amount that the Indian Tribe would have been entitled to receive under self-determination contracts under this Act, including amounts for direct program costs specified under section 106(a)(1) of the Act [25 U.S.C. 450j–1(a)(1)] and amounts for contract support costs specified under section 106(a)(2), (3), (5), and (6) of the Act [25 U.S.C. 450j–1(a)(2), (3), (5) and (6)], including any tribal shares.

§ 137.144 Is technical assistance available to an Indian Tribe to avoid rejection of a final offer?

Yes, upon receiving a final offer, the Secretary must offer any necessary technical assistance, and must share all relevant information with the Indian Tribe in order to avoid rejection of a final offer.

§ 137.145 If the Secretary rejects a final offer, is the Secretary required to provide the Indian Tribe with technical assistance?

Yes, the Secretary must offer and, if requested by the Indian Tribe, provide additional technical assistance to overcome the stated grounds for rejection.

§ 137.146 If the Secretary rejects all or part of a final offer, is the Indian Tribe entitled to an appeal?

Yes, the Indian Tribe is entitled to appeal the decision of the Secretary, with an agency hearing on the record, and the right to engage in full discovery relevant to any issue raised in the matter. The procedures for appeals are found in subpart P of this part. Alternatively, at its option, the Indian Tribe has the right to sue pursuant to section 110 of the Act [25 U.S.C. 450m–1] in Federal district court to challenge the Secretary's decision.

§ 137.147 Do those portions of the compact, funding agreement, or amendment not in dispute go into effect?

Yes, subject to section 507(c)(1)(D) of the Act [25 U.S.C. 458aaa–6(c)(1)(D)].

§ 137.148 Does appealing the decision of the Secretary prevent entering into the compact, funding agreement, or amendment?

No, appealing the decision of the Secretary does not prevent entering into the compact, funding agreement, or amendment.

Burden of Proof

§ 137.150 What is the burden of proof in an appeal from rejection of a final offer?

With respect to any appeal, hearing or civil action, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the final offer.

Decision Maker

§ 137.155 What constitutes a final agency action?

A final agency action shall consist of a written decision from the Department to the Indian Tribe either:

(a) By an official of the Department who holds a position at a higher organizational level within the Department than the level of the departmental agency in which the decision that is the subject of the appeal was made; or

(b) By an administrative judge.

Subpart I—Operational Provisions

Conflicts of Interest

§ 137.160 Are Self-Governance Tribes required to address potential conflicts of interest?

Yes, self-Governance Tribes participating in self-governance under Title V must ensure that internal measures are in place to address conflicts of interest in the administration of self-governance PSFAs.

Audits and Cost Principles

§ 137.165 Are Self-Governance Tribes required to undertake annual audits?

Yes, under the provisions of section 506(c) of the Act [25 U.S.C. 458aaa–5(c)], Self-Governance Tribes must undertake annual audits pursuant to the Single Audit Act, 31 U.S.C. 7501 *et seq.*

§ 137.166 Are there exceptions to the annual audit requirements?

Yes, the exceptions are described in 31 U.S.C. 7502 of the Single Audit Act.

§ 137.167 What cost principles must a Self-Governance Tribe follow when participating in self-governance under Title V?

A Self-Governance Tribe must apply the cost principles of the applicable OMB circular, except as modified by:

(a) Section 106 (k) of the Act [25 U.S.C. 450j–1],

(b) Other provisions of law, or

(c) Any exemptions to applicable OMB circulars subsequently granted by the OMB.

§ 137.168 May the Secretary require audit or accounting standards other than those specified in § 137.167?

No, no other audit or accounting standards shall be required by the Secretary.

§ 137.169 How much time does the Federal Government have to make a claim against a Self-Governance Tribe relating to any disallowance of costs, based on an audit conducted under § 137.165?

Any right of action or other remedy (other than those relating to a criminal offence) relating to any disallowance of costs is barred unless the Secretary provides notice of such a disallowance within 365 days from receiving any required annual agency single audit report or, for any period covered by law or regulation in force prior to enactment of the Single Agency Audit Act of 1984, any other required final audit report.

§ 137.170 When does the 365 day period commence?

For the purpose of determining the 365 day period, an audit report is deemed received on the date of actual receipt by the Secretary, at the address specified in § 137.172, if, within 60 days after receiving the audit report, the Secretary does not give notice of a determination by the Secretary to reject the single-agency audit report as insufficient due to non-compliance with chapter 75 of title 31, United States Code or noncompliance with any other applicable law.

§ 137.171 Where do Self-Governance Tribes send their audit reports?

(a) For fiscal years ending on or before June 30, 1996, the audit report must be sent to: National External Audit Review Center, Lucas Place Room 514, 323 W. 8th St., Kansas City, MO 64105.

(b) For fiscal years, beginning after June 30, 1996, the audit report must be sent to: Single Audit Clearinghouse, 1201 E. 10th St., Jeffersonville, IN 47132.

§ 137.172 Should the audit report be sent anywhere else to ensure receipt by the Secretary?

Yes, the Self-Governance Tribe should also send the audit report to: National External Audit Review Center, Lucas Place Room 514, 323 W. 8th St., Kansas City, MO 64105.

§ 137.173 Does a Self-Governance Tribe have a right of appeal from a disallowance?

Yes, the notice must set forth the right of appeal and hearing to the Interior Board of Contract Appeals, pursuant to section 110 of the Act [25 U.S.C. 450m–1].

Records

§ 137.175 Is a Self-Governance Tribe required to maintain a recordkeeping system?

Yes. Tribes are required to maintain records and provide Federal agency access to those records as provided in § 137.177.

§ 137.176 Are Tribal records subject to the Freedom of Information Act and Federal Privacy Act?

No, except to the extent that a Self-Governance Tribe specifies otherwise in its compact or funding agreement, the records of the Self-Governance Tribe shall not be considered Federal records for purposes of chapter 5 of title 5, United States Code.

§ 137.177 Is the Self-Governance Tribe required to make its records available to the Secretary?

Yes, after 30 days advance written notice from the Secretary, the Self-Governance Tribe must provide the Secretary with reasonable access to such records to enable the Department to meet its minimum legal recordkeeping system requirements under sections 3101 through 3106 of title 44 United States Code.

§ 137.178 May Self-Governance Tribes store patient records at the Federal Records Centers?

Yes, at the option of a Self-Governance Tribe, patient records may be stored at Federal Records Centers to the same extent and in the same manner as other Department patient records in accordance with section 105(o) of the Act [25 U.S.C. 450j(o)].

§ 137.179 May a Self-Governance Tribe make agreements with the Federal Records Centers regarding disclosure and release of the patient records stored pursuant to § 137.178?

Yes, a Self-Governance Tribe may make agreements with the Federal Records Centers regarding disclosure and release of the patient records stored pursuant to § 137.178.

§ 137.180 Are there other laws that govern access to patient records?

Yes, a Tribe must consider the potential application of Tribal, Federal and state law and regulations that may apply to requests for access to Tribal patient records, such as the provisions 42 CFR 2.1–2.67 pertaining to records regarding drug and/or alcohol treatment.

Redesign

§ 137.185 May a Self-Governance Tribe redesign or consolidate the PSFAs that are included in a funding agreement and reallocate or redirect funds for such PSFAs?

Yes, a Self-Governance Tribe may redesign or consolidate PSFAs included in a funding agreement and reallocate or redirect funds for such PSFAs in any manner which the Self-Governance Tribe deems to be in the best interest of the health and welfare of the Indian community being served, only if the redesign or consolidation does not have the effect of denying eligibility for services to population groups otherwise eligible to be served under applicable Federal law.

Non-Duplication

§ 137.190 Is a Self-Governance Tribe that receives funds under Title V also entitled to contract under section 102 of the Act [25 U.S.C. 450(f)] for such funds?

For the period for which, and to the extent to which, funding is provided under the compact or funding agreement, the Self-Governance Tribe is not entitled to contract with the Secretary for such funds under section 102 of the Act [25 U.S.C. 450f], except that such Self-Governance Tribe is eligible for new programs on the same basis as other Indian Tribes.

Health Status Reports

§ 137.200 Are there reporting requirements for Self-Governance Tribes under Title V?

Yes, compacts or funding agreements negotiated between the Secretary and a Self-Governance Tribe must include a provision that requires the Self-Governance Tribe to report on health status and services delivery. These reports may only impose minimal burdens on the Self-Governance Tribes.

§ 137.201 What are the purposes of the Tribal reporting requirements?

Tribal reports enable the Secretary to prepare reports required under Title V and to develop the budget request. The reporting requirements are not intended as a quality assessment or monitoring tool, although such provision may be included at the option of the Self-Governance Tribe. Under no circumstances will the reporting requirement include any confidential, proprietary or commercial information. For example, while staffing levels may be a part of a report, pay levels for the staff are considered confidential between the Self-Governance Tribe and the employee.

§ 137.202 What types of information will Self-Governance Tribes be expected to include in the reports?

Reports will be derived from existing minimal data elements currently collected by Self-Governance Tribes, and may include patient demographic and workload data. Not less than 60 days prior to the start of negotiations or a mutually agreed upon timeframe, the IHS will propose a list of recommended minimal data elements, along with justification for their inclusion, to be used as a basis for negotiating these requirements into the Self-Governance Tribe's compact or funding agreement.

§ 137.203 May a Self-Governance Tribe participate in a voluntary national uniform data collection effort with the IHS?

Yes, in order to advance Indian health advocacy efforts, each Self-Governance Tribe will be encouraged to participate, at its option, in national IHS data reporting activities such as Government Performance Results Act, epidemiologic and surveillance reporting.

§ 137.204 How will this voluntary national uniform data set be developed?

IHS will work with representatives of Self-Governance Tribes, in coordination with the Tribal Self Governance Advisory Committee (TSGAC), to develop a mutually-defined annual voluntary uniform subset of data that is consistent with Congressional intent, minimizes reporting burdens, and responds to the needs of the Self-Governance Tribe.

§ 137.205 Will this voluntary uniform data set reporting activity be required of all Self-Governance Tribes entering into a compact with the IHS under Title V?

No, to the extent that specific resources are available or have not otherwise been provided to the Self-Governance Tribe for this purpose, and if the Self-Governance Tribes choose to participate, the IHS will provide resources, hardware, software, and technical assistance to the Self-Governance Tribes to facilitate data gathering to ensure data consistency and integrity under this voluntary effort.

§ 137.206 Why does the IHS need this information?

This information will be used to comply with sections 513 [25 U.S.C. 458aaa–12] and 514 [25 U.S.C. 458aaa–13] of the Act as well as to assist IHS

in advocating for the Indian health system, budget formulation, and other reporting required by statute, development of partnerships with other organizations that benefit the health status of Indian Tribes, and sharing of best practices.

§ 137.207 Will funding be provided to the Self-Governance Tribe to compensate for the costs of reporting?

Yes, reporting requirements are subject to the Secretary providing specific funds for this purpose in the funding agreement.

Savings

§ 137.210 What happens if self-governance activities under Title V reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings?

To the extent that PSFAs carried out by Self-Governance Tribes under Title V reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of Tribal shares and other funds determined under section 508(c) of the Act [25 U.S.C. 458aaa–7(c)], the Secretary must make such savings available to the Self-Governance Tribes, for the provision of additional services to program beneficiaries in a manner equitable to directly served, contracted, and compacted programs.

§ 137.211 How does a Self-Governance Tribe learn whether self-governance activities have resulted in savings as described in § 137.210.

The annual report prepared pursuant to section 514(b)(2) [25 U.S.C. 458aaa–13(b)(2)] of the Act must specifically identify any such savings.

Access to Government Furnished Property

§ 137.215 How does a Self-Governance Tribe obtain title to real and personal property furnished by the Federal Government for use in the performance of a compact, funding agreement, construction project agreement, or grant agreement pursuant to section 512(c) of the Act [25 U.S.C. 458aaa–11(c)]?

(a) For government-furnished real and personal property made available to a Self-Governance Tribe, the Self-Governance Tribe must take title to all real or personal property unless the Self-Governance Tribe requests that the United States retain the title.

(b) For government-furnished personal property made available to a Self-Governance Tribe:

(1) The Secretary, in consultation with each Self-Governance Tribe, must develop a list of the property used in a compact, funding agreement, or construction project agreement.

(2) The Self-Governance Tribe must indicate any items on the list to which the Self-Governance Tribe wants the Secretary to retain title.

(3) The Secretary must provide the Self-Governance Tribe with any documentation needed to transfer title to the remaining listed property to the Self-Governance Tribe.

(c) For government-furnished real property made available to a Self-Governance Tribe:

(1) The Secretary, in consultation with the Self-Governance Tribe, must develop a list of the property furnished for use in a compact, funding agreement, or construction project agreement.

(2) The Secretary must inspect any real property on the list to determine the presence of any hazardous substance activity, as defined in 41 CFR 101–47.202.2(b)(10).

(3) The Self-Governance Tribe must indicate on the list to the Secretary any items of real property to which the Self-Governance Tribe wants the Secretary to retain title and those items of property to which the Self-Governance Tribe wishes to obtain title. The Secretary must take such steps as necessary to transfer title to the Self-Governance Tribe those items of real property which the Self-Governance Tribe wishes to acquire.

Matching and Cost Participation Requirements

§ 137.217 May funds provided under compacts, funding agreements, or grants made pursuant to Title V be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program?

Yes, funds provided under compacts, funding agreements, or grants made pursuant to Title V may be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program.

FTCA

§ 137.220 Do section 314 of Public Law 101–512 [25 U.S.C. 450f note] and section 102(d) of the Act [25 U.S.C. 450f(d)] (regarding, in part, FTCA coverage) apply to compacts, funding agreements and construction project agreements?

Yes, regulations governing FTCA coverage are set out at 25 CFR Part 900, Subpart M.

Subpart J—Regulation Waiver

§ 137.225 What regulations may be waived under Title V?

A Self-Governance Tribe may request a waiver of regulation(s) promulgated under section 517 of the Act [25 U.S.C. 458aaa–16] or under the authorities specified in section 505(b) of the Act [25 U.S.C. 458aaa–4(b)] for a compact or funding agreement entered into with the IHS under Title V.

§ 137.226 How does a Self-Governance Tribe request a waiver?

A Self-Governance Tribe may request a waiver by submitting a written request to the Secretary identifying the applicable Federal regulation(s) sought to be waived and the basis for the request.

§ 137.227 How much time does the Secretary have to act on a waiver request?

The Secretary must either approve or deny the requested waiver in writing within 90 days after receipt by the Secretary.

§ 137.228 Upon what basis may the waiver request be denied?

A denial may be made only upon a specific finding by the Secretary that identified language in the regulation may not be waived because such waiver is prohibited by Federal law.

§ 137.229 What happens if the Secretary neither approves or denies a waiver request within the time specified in § 137.227?

The waiver request is deemed approved.

§ 137.230 Is the Secretary's decision on a waiver request final for the Department?

Yes, the Secretary's decision on a waiver request is final for the Department.

§ 137.231 May a Self-Governance Tribe appeal the Secretary's decision to deny its request for a waiver of a regulation promulgated under section 517 of the Act [25 U.S.C. 458aaa–16]?

The decision may not be appealed under these regulations but may be appealed by the Self-Governance Tribe in Federal Court under applicable law.

Subpart K—Withdrawal

§ 137.235 May an Indian Tribe withdraw from a participating inter-Tribal consortium or Tribal organization?

Yes, an Indian Tribe may fully or partially withdraw from a participating inter-Tribal consortium or Tribal organization its share of any PSFAs included in a compact or funding agreement.

§ 137.236 When does a withdrawal become effective?

A withdrawal becomes effective within the time frame specified in the resolution that authorizes withdrawal from the participating Tribal organization or inter-Tribal consortium. In the absence of a specific time frame set forth in the resolution, such withdrawal becomes effective on

(a) The earlier of 1 year after the date of submission of such request, or the date on which the funding agreement expires; or

(b) Such date as may be mutually agreed upon by the Secretary, the withdrawing Indian Tribe, and the participating Tribal organization or inter-Tribal consortium that has signed the compact or funding agreement on behalf of the withdrawing Indian Tribe, inter-Tribal consortium, or Tribal organization.

§ 137.237 How are funds redistributed when a Indian Tribe fully or partially withdraws from a compact or funding agreement and elects to enter a contract or compact?

When an Indian Tribe eligible to enter into a contract under Title I or a compact or funding agreement under Title V fully or partially withdraws from a participating inter-Tribal consortium or Tribal organization, and has proposed to enter into a contract or compact and funding agreement covering the withdrawn funds:

(a) the withdrawing Indian Tribe is entitled to its Tribal share of funds supporting those PSFAs that the Indian Tribe will be carrying out under its own contract or compact and funding agreement (calculated on the same basis as the funds were initially allocated in the funding agreement of the inter-Tribal consortium or Tribal organization); and

(b) the funds referred to in paragraph (a) of this section must be transferred from the funding agreement of the inter-Tribal consortium or Tribal organization, on the condition that the provisions of sections 102 [25 U.S.C. 450f] and 105(i) of the Act [25 U.S.C. 450j], as appropriate, apply to the withdrawing Indian Tribe.

§ 137.238 How are funds distributed when an Indian Tribe fully or partially withdraws from a compact or funding agreement administered by an inter-Tribal consortium or Tribal organization serving more than one Indian Tribe and the withdrawing Indian Tribe elects not to enter a contract or compact?

All funds not obligated by the inter-Tribal consortium or Tribal organization associated with the withdrawing Indian Tribe's returned PSFAs, less close out costs, shall be returned by the inter-Tribal consortium or Tribal organization to the IHS for operation of the PSFAs included in the withdrawal.

§ 137.239 If the withdrawing Indian Tribe elects to operate PSFAs carried out under a compact or funding agreement under Title V through a contract under Title I, is the resulting contract considered a mature contract under section 4(h) of the Act [25 U.S.C. 450b(h)]?

Yes, if the withdrawing Indian Tribe elects to operate PSFAs carried out under a compact or funding agreement under Title V through a contract under Title I, the resulting contract is considered a mature contract under section 4(h) of the Act [25 U.S.C. 450b(h)] at the option of the Indian Tribe.

Subpart L—Retrocession

§ 137.245 What is retrocession?

Retrocession means the return by a Self-Governance Tribe to the Secretary of PSFAs, that are included in a compact or funding agreement, for any reason, before the expiration of the term of the compact or funding agreement.

§ 137.246 How does a Self-Governance Tribe retrocede a PSFA?

The Self-Governance Tribe submits a written notice to the Director of its intent to retrocede. The notice must specifically identify those PSFAs being retroceded. The notice may also include a proposed effective date of the retrocession.

§ 137.247 What is the effective date of a retrocession?

Unless the request for retrocession is rescinded, the retrocession becomes effective within the timeframe specified by the parties in the compact or funding agreement. In the absence of a specification, the retrocession becomes effective on:

(a) The earlier of 1 year after:

(1) The date of submission of the request, or

(2) The date on which the funding agreement expires; or

(b) Whatever date is mutually agreed upon by the Secretary and the retroceding Self-Governance Tribe.

§ 137.248 What effect will a retrocession have on a retroceding Self-Governance Tribe's rights to contract or compact under the Act?

A retrocession request shall not negatively affect:

(a) Any other contract or compact to which the retroceding Self-Governance Tribe is a party;

(b) Any other contracts or compacts the retroceding Self-Governance Tribe may request; and

(c) Any future request by such Self-Governance Tribe or an Indian Tribe to compact or contract for the same program.

§ 137.249 Will retrocession adversely affect funding available for the retroceded program?

No, the Secretary shall provide no less than the same level of funding that would have been available if there had been no retrocession.

§ 137.250 How are funds distributed when a Self-Governance Tribe fully or partially retrocedes from its compact or funding agreement?

Any funds not obligated by the Self-Governance Tribe and associated with the Self-Governance Tribe's returned PSFAs, less close out costs, must be returned by the Self-Governance Tribe to IHS for operation of the PSFA's associated with the compact or funding agreement from which the Self-Governance Tribe retroceded in whole or in part.

§ 137.251 What obligation does the retroceding Self-Governance Tribe have with respect to returning property that was provided by the Secretary under the compact or funding agreement and that was used in the operation of the retroceded program?

On the effective date of any retrocession, the retroceding Self-Governance Tribe, shall, at the option of the Secretary, deliver to the Secretary all requested property and equipment provided by the Secretary under the compact or funding agreement, to the extent used to carry out the retroceded PSFAs, which at the time of retrocession has a per item current fair market value, less the cost of improvements borne by the Self-Governance Tribe in excess of $5,000 at the time of the retrocession.

Subpart M—Reassumption

§ 137.255 What does reassumption mean?

Reassumption means rescission by the Secretary without consent of the Self-Governance Tribe of PSFAs and associated funding in a compact or funding agreement and resuming responsibility to provide such PSFAs.

§ 137.256 Under what circumstances may the Secretary reassume a program, service, function, or activity (or portion thereof)?

(a) Subject to the steps in § 137.257, the Secretary may reassume a program, service, function, or activity (or portion thereof) and associated funding if the Secretary makes a specific finding relative to that PSFA of :

(1) Imminent endangerment of the public health caused by an act or omission of the Self-Governance Tribe, and the imminent endangerment arises out of a failure to carry out the compact or funding agreement; or

(2) Gross mismanagement with respect to funds transferred to the Self-Governance Tribe by a compact or funding agreement, as determined by the Secretary, in consultation with the Inspector General, as appropriate.

(b) Immediate reassumption may occur under additional requirements set forth in § 137.261.

§ 137.257 What steps must the Secretary take prior to reassumption becoming effective?

Except as provided in §§ 137.261 for immediate reassumption, prior to a reassumption becoming effective, the Secretary must:

(a) Notify the Self-Governance Tribe in writing by certified mail of the details of findings required under §§ 137.256(a)(1) and (2);

(b) Request specified corrective action within a reasonable period of time, which in no case may be less than 45 days;

(c) Offer and provide, if requested, the necessary technical assistance and advice to assist the Self-Governance Tribe to overcome the conditions that led to the findings described under (a); and

(d) Provide the Self-Governance Tribe with a hearing on the record as provided under Subpart of this part.

§ 137.258 Does the Self-Governance Tribe have a right to a hearing prior to a non-immediate reassumption becoming effective?

Yes, at the Self-Governance Tribe's request, the Secretary must provide a hearing on the record prior to or in lieu of the corrective action period identified in § 137.257(b).

§ 137.259 What happens if the Secretary determines that the Self-Governance Tribe has not corrected the conditions that the Secretary identified in the notice?

(a) The Secretary shall provide a second written notice by certified mail to the Self-Governance Tribe served by the compact or funding agreement that the compact or funding agreement will be rescinded, in whole or in part.

(b) The second notice shall include:

(1) The intended effective date of the reassumption;

(2) The details and facts supporting the intended reassumption; and

(3) Instructions that explain the Indian Tribe's right to a formal hearing within 30 days of receipt of the notice.

§ 137.260 What is the earliest date on which a reassumption can be effective?

Except as provided in § 137.261, no PSFA may be reassumed by the Secretary until 30 days after the final resolution of the hearing and any subsequent appeals to provide the Self-Governance Tribe with an opportunity to take corrective action in response to any adverse final ruling.

§ 137.261 Does the Secretary have the authority to immediately reassume a PSFA?

Yes, the Secretary may immediately reassume operation of a program, service, function, or activity (or portion thereof) and associated funding upon providing to the Self-Governance Tribe written notice in which the Secretary makes a finding:

(a) Of imminent substantial and irreparable endangerment of the public health caused by an act or omission of the Indian Tribe; and

(b) The endangerment arises out of a failure to carry out the compact or funding agreement.

§ 137.262 If the Secretary reassumes a PSFA immediately, when must the Secretary provide the Self-Governance Tribe with a hearing?

If the Secretary immediately reassumes a PSFA, the Secretary must provide the Self-Governance Tribe with a hearing under Subpart P of this part not later than 10 days after such reassumption, unless the Self-Governance Tribe and the Secretary agree to an extension.

§ 137.263 May the Secretary provide a grant to a Self-Governance Tribe for technical assistance to overcome conditions identified under § 137.257?

Yes, the Secretary may make a grant for the purpose of obtaining technical assistance as provided in section 103 of the Act [25 U.S.C. 458aaa–h].

§ 137.264 To what extent may the Secretary require the Self-Governance Tribe to return property that was provided by the Secretary under the compact or funding agreement and used in the operation of the reassume program?

On the effective date of any reassumption, the Self-Governance Tribe, shall, at the option of the Secretary and only to the extent requested by the Secretary, deliver to the Secretary property and equipment provided by the Secretary under the compact or funding agreement, to the extent the property was used to directly carry out the reassume program, service, function, or activity (or portion thereof), provided that at the time of reassumption the property has a per item current fair market value, less the cost of improvements borne by the Self-Governance Tribe, in excess of $5,000 at the time of the reassumption.

§ 137.265 May a Tribe be reimbursed for actual and reasonable close out costs incurred after the effective date of reassumption?

Yes, a Tribe may be reimbursed for actual and reasonable close out costs incurred after the effective date of reassumption.

Subpart N—Construction

Purpose and Scope

§ 137.270 What is covered by this subpart?

This subpart covers IHS construction projects carried out under section 509 of the Act [25 U.S.C. 458aaa–8].

§ 137.271 Why is there a separate subpart in these regulations for construction project agreements?

Construction projects are separately defined in Title V and are subject to a separate proposal and review process. Provisions of a construction project agreement and this subpart shall be liberally construed in favor of the Self-Governance Tribe.

§ 137.272 What other alternatives are available for Self-Governance Tribes to perform construction projects?

Self-Governance Tribes also have the option of performing IHS construction projects under a variety of other legal authorities, including but not limited to Title I of the Act, the Indian Health Care Improvement Act, Public Law 94–437, and Public Law 86–121. This subpart does not cover projects constructed pursuant to agreements entered into under these authorities.

§ 137.273 What are IHS construction PSFAs?

IHS construction PSFAs are a combination of construction projects as defined in § 137.280 and construction programs.

§ 137.274 Does this subpart cover construction programs?

No, except as provided in § 137.275, this subpart does not cover construction programs such as the:

(a) Maintenance and Improvement Program;

(b) Construction program functions; and,

(c) Planning services and construction management services.

§ 137.275 May Self-Governance Tribes include IHS construction programs in a construction project agreement or in a funding agreement?

Yes, Self-Governance Tribes may choose to assume construction programs

in a construction project agreement, in a funding agreement, or in a combination of the two. These programs may include the following:

(a) Maintenance and improvement program;

(b) Construction program functions, and

(c) Planning services and construction management services.

Construction Definitions

§ 137.280 Construction definitions.

ALJ means administrative law judge.

APA means Administrative Procedures Act, 5 U.S.C. 701–706.

Budget means a statement of the funds required to complete the scope of work in a construction project agreement. For cost reimbursement agreements, budgets may be stated using broad categories such as planning, design, construction, project administration, and contingency. For fixed price agreements, budgets may be stated as lump sums, unit cost pricing, or a combination thereof.

Categorical exclusion means a category of actions that do not individually or cumulatively have a significant effect on the human environment and that have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

CEQ means Council on Environmental Quality in the Office of the President.

Construction management services (CMS) means activities limited to administrative support services; coordination; and monitoring oversight of the planning, design, and construction process. CMS activities typically include:

(1) Coordination and information exchange between the Self-Governance Tribe and the Federal Government;

(2) Preparation of a Self-Governance Tribe's project agreement; and

(3) A Self-Governance Tribe's subcontract scope of work identification and subcontract preparation, and competitive selection of construction contract subcontractors.

Construction phase is the phase of a construction project agreement during which the project is constructed, and includes labor, materials, equipment and services necessary to complete the work, in accordance with the construction project agreement.

Construction project means:

(1) An organized noncontinuous undertaking to complete a specific set of predetermined objectives for the planning, environmental determination, design, construction, repair, improvement, or expansion of buildings or facilities described in a project agreement, and

(2) Does not include construction program administration and activities described in sections 4(m)(1) through (3) of the Act [25 U.S.C. 4b(m)(1) through (3)], that may otherwise be included in a funding agreement under section 505 of the Act [25 U.S.C. 458aaa–4].

Construction project agreement means a negotiated agreement between the Secretary and a Self-Governance Tribe, that at a minimum:

(1) Establishes project phase start and completion dates;

(2) Defines a specific scope of work and standards by which it will be accomplished;

(3) Identifies the responsibilities of the Self-Governance Tribe and the Secretary;

(4) Addresses environmental considerations;

(5) Identifies the owner and operations and maintenance entity of the proposed work;

(6) Provides a budget;

(7) Provides a payment process; and

(8) Establishes the duration of the agreement based on the time necessary to complete the specified scope of work, which may be 1 or more years.

Design phase is the phase of a construction project agreement during which project plans, specifications, and other documents are prepared that are used to build the project. Site investigation, final site selection activities and environmental review and determination activities are completed in this phase if not conducted as a part of the planning phase.

Maintenance and improvement program:

(1) As used in this subpart means the program that provides funds for eligible facilities for the purpose of:

(i) Performing routine maintenance;

(ii) Achieving compliance with accreditation standards;

(iii) Improving and renovating facilities;

(iv) Ensuring that Indian health care facilities meet existing building codes and standards; and

(v) Ensuring compliance with public law building requirements.

(2) The maintenance and improvement program is comprised of routine maintenance and repair funding and project funding. Typical maintenance and improvement projects have historically been funded out of regional or national project pools and may include, but are not limited to, total replacement of a heating or cooling system, remodel of a medical laboratory, removal of lead based paint, abatement of asbestos and abatement of underground fuel storage tanks. Maintenance and repair program funding provided under a funding agreement is not covered under this subpart.

NEPA means the National Environmental Policy Act of 1969 [42 U.S.C. 4321 *et seq.*].

NHPA means the National Historic Preservation Act [16 U.S.C. 470 *et seq.*].

Planning phase is the phase of a construction project agreement during which planning services are provided.

Planning services may include performing a needs assessment, completing and/or verifying master plans, developing justification documents, conducting pre-design site investigations, developing budget cost estimates, conducting feasibility studies as needed, conducting environmental review activities and justifying the need for the project.

SHPO means State Historic Preservation Officer.

Scope of work means a brief description of the work to be accomplished under the construction project agreement, sufficient to confirm that the project is consistent with the purpose for which the Secretary has allocated funds.

THPO means Tribal Historic Preservation Officer.

NEPA Process

§ 137.285 Are Self-Governance Tribes required to accept Federal environmental responsibilities to enter into a construction project agreement?

Yes, under section 509 of the Act [25 U.S.C. 458aaa–8], Self-Governance Tribes must assume all Federal responsibilities under the NEPA of 1969 [42 U.S.C. 4321 *et seq.*] and the National Historic Preservation Act [16 U.S.C. 470 *et seq.*] and related provisions of law that would apply if the Secretary were to undertake a construction project, but only those responsibilities directly related to the completion of the construction project being assumed.

§ 137.286 Do Self-Governance Tribes become Federal agencies when they assume these Federal environmental responsibilities?

No, while Self-Governance Tribes are required to assume Federal environmental responsibilities for projects in place of the Secretary, Self-Governance Tribes do not thereby

become Federal agencies. However, because Self-Governance Tribes are assuming the responsibilities of the Secretary for the purposes of performing these Federal environmental responsibilities, Self-Governance Tribes will be considered the equivalent of Federal agencies for certain purposes as set forth in this subpart.

§ 137.287 What is the National Environmental Policy Act (NEPA)?

The NEPA is a procedural law that requires Federal agencies to follow established environmental review procedures, which include reviewing and documenting the environmental impact of their actions. NEPA establishes a comprehensive policy for protection and enhancement of the environment by the Federal Government; creates the Council on Environmental Quality in the Office of the President; and directs Federal agencies to carry out the policies and procedures of the Act. CEQ regulations (40 CFR 1500–1508) establish three levels of environmental review: categorical exclusions, environmental assessments, and environmental impact statements.

§ 137.288 What is the National Historic Preservation Act (NHPA)?

The National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings, such as construction projects, on properties covered by the NHPA, such as historic properties, properties eligible for listing on the National Register of Historic Places, or properties that an Indian Tribe regards as having religious and/or cultural importance. Section 106 of the NHPA [16 U.S.C. 70f] requires Federal agencies to afford the Advisory Council on Historic Preservation, acting through the State Historic Preservation Officer or the Tribal Historic Preservation Officer, a reasonable opportunity to comment on such undertakings.

§ 137.289 What is a Federal undertaking under NHPA?

The Advisory Council on Historic Preservation has defined a Federal undertaking in 36 CFR 800.16(y) as a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

§ 137.290 What additional provisions of law are related to NEPA and NHPA?

(a) Depending upon the nature and the location of the construction project, environmental laws related to NEPA and NHPA may include:

(1) Archaeological and Historical Preservation Act [16 U.S.C. 461];

(2) Archeological Resources Protection Act [16 U.S.C. 470];

(3) Clean Air Act [42 U.S.C. 7401];

(4) Clean Water Act [32 U.S.C. 1251];

(5) Coastal Barrier Improvement Act [42 U.S.C. 4028];

(6) Coastal Barrier Resources Act [16 U.S.C. 3501];

(7) Coastal Zone Management Act [16 U.S.C. 1451];

(8) Comprehensive Environmental Response, Compensation, and Liability Act [42 U.S.C. 9601];

(9) Endangered Species Act [16 U.S.C. 1531 et seq.];

(10) Farmland Protection Policy Act [7 U.S.C. 4201 et seq.];

(11) Marine Protection, Research, and Sanctuaries Act [33 U.S.C. 1401];

(12) National Historic Preservation Act [16 U.S.C. 470 et seq.];

(13) National Trails System Act [16 U.S.C. 1241];

(14) Native American Graves Protection and Repatriation Act [25 U.S.C. 3001];

(15) Noise Control Act [42 U.S.C. 7901];

(16) Resource Conservation and Recovery Act [42 U.S.C. 3251];

(17) Safe Drinking Water Act [42 U.S.C. 300];

(18) Toxic Substance Control Act [15 U.S.C. 2601];

(19) Wild and Scenic Rivers Act [16 U.S.C. 1271]; and

(20) Wilderness Act [16 U.S.C. 1131].

(b) This section provides a list of environmental laws for informational purposes only and does not create any legal rights or remedies, or imply private rights of action.

§ 137.291 May Self-Governance Tribes carry out construction projects without assuming these Federal environmental responsibilities?

Yes, but not under section 509 of the Act [25 U.S.C. 458aaa–8]. Self-Governance Tribes may otherwise elect to perform construction projects, or phases of construction projects, under other legal authorities (see § 137.272).

§ 137.292 How do Self-Governance Tribes assume environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa–8]?

Self-Governance Tribes assume environmental responsibilities by:

(a) Adopting a resolution or taking an equivalent Tribal action which:

(1) Designates a certifying officer to represent the Self-Governance Tribe and to assume the status of a responsible Federal official under NEPA, NHPA, and related provisions of law; and

(2) Accepts the jurisdiction of the Federal court, as provided in § 137.310 and § 137.311 for purposes of enforcement of the Federal environmental responsibilities assumed by the Self-Governance Tribe; and

(b) Entering into a construction project agreement under section 509 of the Act [25 U.S.C. 458aaa–8].

§ 137.293 Are Self-Governance Tribes required to adopt a separate resolution or take equivalent Tribal action to assume environmental responsibilities for each construction project agreement?

No, the Self-Governance Tribe may adopt a single resolution or take equivalent Tribal action to assume environmental responsibilities for a single project, multiple projects, a class of projects, or all projects performed under section 509 of the Act [25 U.S.C. 458aaa–8].

§ 137.294 What is the typical IHS environmental review process for construction projects?

(a) Most IHS construction projects normally do not have a significant impact on the environment, and therefore do not require environmental impact statements (EIS). Under current IHS procedures, an environmental review is performed on all construction projects. During the IHS environmental review process, the following activities may occur:

(1) Consult with Tribal, Federal, state, and local officials and interested parties on potential environmental effects;

(2) Document assessment of potential environmental effects; (IHS has developed a form to facilitate this process.)

(3) Perform necessary environmental surveys and inventories;

(4) Consult with the Advisory Council on Historic Preservation, acting through the SHPO or THPO, to ensure compliance with the NHPA;

(5) Determine if extraordinary or exceptional circumstances exist that would prevent the project from meeting the criteria for categorical exclusion from further environmental review under NEPA, or if an environmental assessment is required;

(6) Obtain environmental permits and approvals; and

(7) Identify methods to avoid or mitigate potential adverse effects;

(b) This section is for informational purposes only and does not create any legal rights or remedies, or imply private rights of action.

§ 137.295 May Self-Governance Tribes elect to develop their own environmental review process?

Yes, Self-Governance Tribes may develop their own environmental review process or adopt the procedures of the IHS or the procedures of another Federal agency.

§ 137.296 How does a Self-Governance Tribe comply with NEPA and NHPA?

Self-Governance Tribes comply with NEPA and the NHPA by adopting and following:

(a) Their own environmental review procedures;

(b) The procedures of the IHS; and/or

(c) The procedures of another Federal agency.

§ 137.297 If the environmental review procedures of a Federal agency are adopted by a Self-Governance Tribe, is the Self-Governance Tribe responsible for ensuring the agency's policies and procedures meet the requirements of NEPA, NHPA, and related environmental laws?

No, the Federal agency is responsible for ensuring its own policies and procedures meet the requirements of NEPA, NHPA, and related environmental laws, not the Self-Governance Tribe.

§ 137.298 Are Self-Governance Tribes required to comply with Executive Orders to fulfill their environmental responsibilities under section 509 of the Act [25 U.S.C. 458aaa–8]?

No, but Self-Governance Tribes may at their option, choose to voluntarily comply with Executive Orders. For facilities where ownership will vest with the Federal Government upon completion of the construction, Tribes and the Secretary may agree to include the goals and objectives of Executive Orders in the codes and standards of the construction project agreement.

§ 137.299 Are Federal funds available to cover the cost of Self-Governance Tribes carrying out environmental responsibilities?

Yes, funds are available:

(a) For project-specific environmental costs through the construction project agreement; and

(b) For environmental review program costs through a funding agreement and/or a construction project agreement.

§ 137.300 Since Federal environmental responsibilities are new responsibilities, which may be assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa–8], are there additional funds available to Self-Governance Tribes to carry out these formerly inherently Federal responsibilities?

Yes, the Secretary must transfer not less than the amount of funds that the Secretary would have otherwise used to carry out the Federal environmental responsibilities assumed by the Self-Governance Tribe.

§ 137.301 How are project and program environmental review costs identified?

(a) The Self-Governance Tribe and the Secretary should work together during the initial stages of project development to identify program and project related costs associated with carrying out environmental responsibilities for proposed projects. The goal in this process is to identify the costs associated with all foreseeable environmental review activities.

(b) If unforeseen environmental review and compliance costs are identified during the course of design and construction, the Self-Governance Tribe or the Self-Governance Tribe and the Secretary (with or without amendment as required by § 137.363) may do one or more of the following:

(1) Mitigate adverse environmental effects;

(2) Alter the project scope of work; and/or

(3) Add additional program and/or project funding, including seeking supplemental appropriations.

§ 137.302 Are Federal funds available to cover start-up costs associated with initial Tribal assumption of environmental responsibilities?

(a) Yes, start-up costs are available as provided in section 508(c) of the Act [25 U.S.C. 458aaa–7(c)]. During the initial year that these responsibilities are assumed, the amount required to be paid under section 106(a)(2) of the Act [25 U.S.C. 450j–1(a)(2)] must include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the agreement necessary:

(1) To plan, prepare for, and assume operation of the environmental responsibilities; and

(2) To ensure compliance with the terms of the agreement and prudent management.

(b) Costs incurred before the initial year that the agreement is in effect may not be included in the amount required to be paid under section 106(a)(2) of the Act [25 U.S.C. 450j–1(a)(2)] if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

§ 137.303 Are Federal or other funds available for training associated with Tribal assumption of environmental responsibilities?

Yes, Self-Governance Tribes may use construction program and project funds for training and program development. Training and program development funds may also be available from other Federal agencies, such as the Environmental Protection Agency and the National Park Service, state and local governments, and private organizations.

§ 137.304 May Self-Governance Tribes buy back environmental services from the IHS?

Yes, Self-Governance Tribes may ''buy back'' project related services in their construction project agreement, including design and construction engineering, and environmental compliance services from the IHS in accordance with Section 508(f) of the Act [25 U.S.C. 458aaa–7(f)] and § 137.95, subject to the availability of the IHS's capacity to conduct the work.

§ 137.305 May Self-Governance Tribes act as lead, cooperating, or joint lead agencies for environmental review purposes?

Yes, Self-Governance Tribes assuming Federal environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa–8] are entitled to receive equal consideration, on the same basis as any Federal agency, for lead, cooperating, and joint lead agency status. For informational purposes, the terms ''lead,'' ''cooperating,'' and ''joint lead agency'' are defined in the CEQ regulations at 40 CFR 1508.16, 1508.5 and 1506.2 respectively.

§ 137.306 How are Self-Governance Tribes recognized as having lead, cooperating, or joint lead agency status?

Self-Governance Tribes may be recognized as having lead, cooperating, or joint lead agency status through funding or other agreements with other agencies. To the extent that resources are available, the Secretary will encourage and facilitate Federal, state, and local agencies to enter into agreements designating Tribes as lead, cooperating, or joint lead agencies for environmental review purposes.

§ 137.307 What Federal environmental responsibilities remain with the Secretary when a Self-Governance Tribe assumes Federal environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa–8]?

(a) All environmental responsibilities for Federal actions not directly related to construction projects assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa–8] remain with the Secretary. Federal agencies, including the IHS, retain responsibility for ensuring their environmental review procedures meet the requirements of

NEPA, NHPA and related provisions of law, as called for in § 137.297.

(b) The Secretary will provide information updating and changing IHS agency environmental review policy and procedures to all Self-Governance Tribes implementing a construction project agreement, and to other Indian Tribes upon request. If a Self-Governance Tribe participating under section 509 of the Act [25 U.S.C. 458aaa–8] does not wish to receive this information, it must notify the Secretary in writing. As resources permit, at the request of the Self-Governance Tribe, the Secretary will provide technical assistance with carrying out Federal environmental responsibilities.

§ 137.308 Does the Secretary have any enforcement authority for Federal environmental responsibilities assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa–8]?

No, the Secretary does not have any enforcement authority for Federal environmental responsibilities assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa–8].

§ 137.309 How are NEPA and NHPA obligations typically enforced?

NEPA and NHPA obligations are typically enforced by interested parties who may file lawsuits against Federal agencies alleging that the agencies have not complied with their legal obligations under NEPA and NHPA. These lawsuits may only be filed in Federal court under the provisions of the APA, 5 U.S.C. 701–706. Under the APA, a Federal judge reviews the Federal agency's actions based upon an administrative record prepared by the Federal agency. The judge gives appropriate deference to the agency's decisions and does not substitute the court's views for those of the agency. Jury trials and civil discovery are not permitted in APA proceedings. If a Federal agency has failed to comply with NEPA or NHPA, the judge may grant declaratory or injunctive relief to the interested party. No money damages or fines are permitted in APA proceedings.

§ 137.310 Are Self-Governance Tribes required to grant a limited waiver of their sovereign immunity to assume Federal environmental responsibilities under section 509 of the Act [25 U.S.C. 458aaa–8]?

Yes, but only as provided in this section. Unless Self-Governance Tribes consent to the jurisdiction of a court, Self-Governance Tribes are immune from civil lawsuits. Self-Governance Tribes electing to assume Federal environmental responsibilities under section 509 of the Act [25 U.S.C. 458aaa–8] must provide a limited waiver of sovereign immunity solely for the purpose of enforcing a Tribal certifying officer's environmental responsibilities, as set forth in this subpart. Self-Governance Tribes are not required to waive any other immunity.

§ 137.311 Are Self-Governance Tribes entitled to determine the nature and scope of the limited immunity waiver required under section 509(a)(2) of the Act [25 U.S.C. 458aaa–8(a)(2)]?

(a) Yes, Section 509(a)(2) of the Act [25 U.S.C. 458aaa–8(a)(2)] only requires that the waiver permit a civil enforcement action to be brought against the Tribal certifying officer in his or her official capacity in Federal district court for declaratory and injunctive relief in a procedure that is substantially equivalent to an APA enforcement action against a Federal agency. Self-Governance Tribes are not required to subject themselves to suit in their own name, to submit to trial by jury or civil discovery, or to waive immunity for money damages, attorneys fees, or fines.

(b) Self-Governance Tribes may base the grant of a limited waiver under this subpart on the understanding that:

(1) Judicial review of the Tribal certifying official's actions are based upon the administrative record prepared by the Tribal official in the course of performing the Federal environmental responsibilities; and

(2) Actions and decisions of the Tribal certifying officer will be granted deference on a similar basis as Federal officials performing similar functions.

§ 137.312 Who is the proper defendant in a civil enforcement action under section 509(a)(2) of the Act [25 U.S.C. 458aaa–8(a)(2)]?

Only the designated Tribal certifying officer acting in his or her official capacity may be sued. Self-Governance Tribes and other Tribal officials are not proper defendants in lawsuits brought under section 509(a)(2) of the Act [25 U.S.C. 458aaa–8(a)(2)].

Notification (Prioritization Process, Planning, Development and Construction)

§ 137.320 Is the Secretary required to consult with affected Indian Tribes concerning construction projects and programs?

Yes, before developing a new project resource allocation methodology and application process the Secretary must consult with all Indian Tribes. In addition, before spending any funds for planning, design, construction, or renovation project, whether subject to a competitive application and ranking process or not, the Secretary must consult with any Indian Tribe that would be significantly affected by the expenditure to determine Tribal preferences concerning the size, location, type, and other characteristics of the project.

§ 137.321 How do Indian Tribes and the Secretary identify and request funds for needed construction projects?

In addition to the requirements contained in section 513 of the Act [25 U.S.C. 458aaa–12], Indian Tribes and the Secretary are encouraged to jointly identify health facility and sanitation needs at the earliest possible date for IHS budget formulation. In developing budget justifications for specific projects to be proposed to Congress, the Secretary shall follow the preferences of the affected Indian Tribe(s) to the greatest extent feasible concerning the size, location, type, and other characteristics of the project.

§ 137.322 Is the Secretary required to notify an Indian Tribe that funds are available for a construction project or a phase of a project?

(a) Yes, within 30 days after the Secretary's allocation of funds for planning phase, design phase, or construction phase activities for a specific project, the Secretary shall notify, by registered mail with return receipt in order to document mailing, the Indian Tribe(s) to be benefitted by the availability of the funds for each phase of a project. The Secretarial notice of fund allocation shall offer technical assistance in the preparation of a construction project proposal.

(b) The Secretary shall, within 30 days after receiving a request from an Indian Tribe, furnish the Indian Tribe with all information available to the Secretary about the project including, but not limited to: construction drawings, maps, engineering reports, design reports, plans of requirements, cost estimates, environmental assessments, or environmental impact reports and archeological reports.

(c) An Indian Tribe is not required to request this information prior to either submitting a notification of intent or a construction project proposal.

(d) The Secretary shall have a continuing responsibility to furnish information to the Indian Tribes.

Project Assumption Process

§ 137.325 What does a Self-Governance Tribe do if it wants to perform a construction project under section 509 of the Act [25 U.S.C. 458aaa–8]?

(a) A Self-Governance Tribe may start the process of developing a construction project agreement by:

(1) Notifying the Secretary in writing that the Self-Governance Tribe wishes to enter into a pre-agreement negotiation phase as set forth in section 105(m)(3) of the Act [25 U.S.C. 450j(m)(3)]; or

(2) Submitting a proposed construction project agreement. This proposed agreement may be the final proposal, or it may be a draft for consideration and negotiation, or

(3) A combination of the actions described in paragraphs (a)(1) and (2) of this section.

(b) Upon receiving a Self-Governance Tribe's request to enter into a pre-negotiation phase the Secretary shall take the steps outlined in section 105(m)(3) of the Act [25 U.S.C. 450j(m)(3)].

§ 137.326 What must a Tribal proposal for a construction project agreement contain?

A construction project proposal must contain all of the required elements of a construction project agreement as defined in § 137.280. In addition to these minimum requirements, Self-Governance Tribes may propose additional items.

§ 137.327 May multiple projects be included in a single construction project agreement?

Yes, a Self-Governance Tribe may include multiple projects in a single construction project agreement proposal or may add additional approved projects by amendment(s) to an existing construction project agreement.

§ 137.328 Must a construction project proposal incorporate provisions of Federal construction guidelines and manuals?

(a) No, the Self-Governance Tribe and the Secretary must agree upon and specify appropriate building codes and architectural and engineering standards (including health and safety) which must be in conformity with nationally recognized standards for comparable projects.

(b) The Secretary may provide, or the Self-Governance Tribe may request, Federal construction guidelines and manuals for consideration by the Self-Governance Tribe in the preparation of its construction project proposal. If Tribal construction codes and standards (including national, regional, State, or Tribal building codes or construction industry standards) are consistent with or exceed otherwise applicable nationally recognized standards, the Secretary must accept the Tribally proposed standards.

§ 137.329 What environmental considerations must be included in the construction project agreement?

The construction project agreement must include:

(a) Identification of the Tribal certifying officer for environmental review purposes,

(b) Reference to the Tribal resolution or equivalent Tribal action appointing the Tribal certifying officer and accepting the jurisdiction of the Federal court for enforcement purposes as provided in § 137.310 and 137.311.

(c) Identification of the environmental review procedures adopted by the Self-Governance Tribe, and

(d) An assurance that no action will be taken on the construction phase of the project that would have an adverse environmental impact or limit the choice of reasonable alternatives prior to making an environmental determination in accordance with the Self-Governance Tribe's adopted procedures.

§ 137.330 What happens if the Self-Governance Tribe and the Secretary cannot develop a mutually agreeable construction project agreement?

The Self-Governance Tribe may submit a final construction project proposal to the Secretary. No later than 30 days after the Secretary receives the final construction project proposal, or within a longer time agreed to by the Self-Governance Tribe in writing, the Secretary shall review and make a determination to approve or reject the construction project proposal in whole or in part.

§ 137.331 May the Secretary reject a final construction project proposal based on a determination of Tribal capacity or capability?

No, the Secretary may not reject a final construction project proposal based on a determination of Tribal capacity or capability.

§ 137.332 On what basis may the Secretary reject a final construction project proposal?

(a) The only basis for rejection of project activities in a final construction project proposal are:

(1) The amount of funds proposed in the final construction project proposal exceeds the applicable funding level for the construction project as determined under sections 508(c) [25 U.S.C. 458aaa–7(c)] and 106 of the Act [25 U.S.C. 450j–1].

(2) The final construction project proposal does not meet the minimum content requirements for construction project agreements set forth in section 501(a)(2) of the Act [25 U.S.C. 458aaa(a)(2)]; and

(3) The final construction project proposal on its face clearly demonstrates that the construction project cannot be completed as proposed.

(b) For construction programs proposed to be included in a construction project agreement, the Secretary may also reject that portion of the proposal that proposes to assume an inherently Federal function that cannot legally be delegated to the Self-Governance Tribe.

§ 137.333 What procedures must the Secretary follow if the Secretary rejects a final construction project proposal, in whole or in part?

Whenever the Secretary rejects a final construction project proposal in whole or in part, the Secretary must:

(a) Send the Self-Governance Tribe a timely written notice of rejection that shall set forth specific finding(s) that clearly demonstrates, or that is supported by controlling legal authority supporting the rejection;

(b) Within 20 days, provide all documents relied on in making the rejection decision to the Self-Governance Tribe;

(c) Provide assistance to the Self-Governance Tribe to overcome any objections stated in the written notice of rejection;

(d) Provide the Self-Governance Tribe with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal of the decision to reject the final construction contract proposal, under the regulations set forth in subpart P of this part, except that the Self-Governance Tribe may, in lieu of filing an appeal, initiate an action in Federal district court and proceed directly under sections 511 [25 U.S.C. 458aaa–10] and 110(a) of the Act [25 U.S.C. 450m–1(a)]. With respect to any hearing or appeal or civil action conducted pursuant to this section, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the final construction project proposal (or portion thereof); and

(e) Provide the Self-Governance Tribe with the option of entering into the severable portions of a final proposed construction project agreement (including a lesser funding amount) that the Secretary did not reject, subject to any additional alterations necessary to conform the construction project agreement to the severed provisions. Exercising this option does not affect the Self-Governance Tribe's right to appeal the portion of the final construction project proposal that was rejected by the Secretary.

§ 137.334 What happens if the Secretary fails to notify the Self-Governance Tribe of a decision to approve or reject a final construction project proposal within the time period allowed?

If the Secretary fails to notify the Self-Governance Tribe of the decision to approve or reject within 30 days (or a longer period if agreed to by the Self-Governance Tribe in writing), then the proposal will be deemed approved by the Secretary.

§ 137.335 What costs may be included in the budget for a construction agreement?

(a) A Self-Governance Tribe may include costs allowed by applicable OMB Circulars, and costs allowed under sections 508(c) [25 U.S.C. 458aaa–7(c)], 106 [25 U.S.C. 450j–1] and 105 (m) of the Act [25 U.S.C. 450j(m)]. The costs incurred will vary depending on which phase of the construction process the Self-Governance Tribe is conducting and type of construction project agreement that will be used.

(b) Regardless of whether a construction project agreement is fixed price or cost-reimbursement, budgets may include costs or fees associated with the following:

(1) Construction project proposal preparation;

(2) Conducting community meetings to develop project documents;

(3) Architects, engineers, and other consultants to prepare project planning documents, to develop project plans and specifications, and to assist in oversight of the design during construction;

(4) Real property lease or acquisition;

(5) Development of project surveys including topographical surveys, site boundary descriptions, geotechnical surveys, archeological surveys, and NEPA compliance;

(6) Project management, superintendence, safety and inspection;

(7) Travel, including local travel incurred as a direct result of conducting the construction project agreement and remote travel in conjunction with the project;

(8) Consultants, such as demographic consultants, planning consultants, attorneys, accountants, and personnel who provide services, to include construction management services;

(9) Project site development;

(10) Project construction cost;

(11) General, administrative overhead, and indirect costs;

(12) Securing and installing moveable equipment, telecommunications and data processing equipment, furnishings, including works of art, and special purpose equipment when part of a construction contract;

(13) Other costs directly related to performing the construction project agreement;

(14) Project contingency:

(i) A cost-reimbursement project agreement budgets contingency as a broad category. Project contingency remaining at the end of the project is considered savings.

(ii) Fixed-price agreements budget project contingency in the lump sum price or unit price.

(c) In the case of a fixed-price project agreement, a reasonable profit determined by taking into consideration the relevant risks and local market conditions.

§ 137.336 What is the difference between fixed-price and cost-reimbursement agreements?

(a) Cost-reimbursement agreements generally have one or more of the following characteristics:

(1) Risk is shared between IHS and the Self-Governance Tribe;

(2) Self-Governance Tribes are not required to perform beyond the amount of funds provided under the agreement;

(3) Self-Governance Tribes establish budgets based upon the actual costs of the project and are not allowed to include profit;

(4) Budgets are stated using broad categories, such as planning, design, construction project administration, and contingency;

(5) The agreement funding amount is stated as a ''not to exceed'' amount;

(6) Self-Governance Tribes provide notice to the IHS if they expect to exceed the amount of the agreement and require more funds;

(7) Excess funds remaining at the end of the project are considered savings; and,

(8) Actual costs are subject to applicable OMB circulars and cost principles.

(b) Fixed Price agreements generally have one or more of the following characteristics:

(1) Self-Governance Tribes assume the risk for performance;

(2) Self-Governance Tribes are entitled to make a reasonable profit;

(3) Budgets may be stated as lump sums, unit cost pricing, or a combination thereof;

(4) For unit cost pricing, savings may occur if actual quantity is less than estimated; and, (5) Excess funds remaining at the end of a lump sum fixed price project are considered profit.

§ 137.337 What funding must the Secretary provide in a construction project agreement?

The Secretary must provide funding for a construction project agreement in accordance with sections 106 [25 U.S.C. 450j–1] and 508(c) of the Act [25 U.S.C. 458aaa–7(c)].

§ 137.338 May funds from other sources be incorporated into a construction project agreement?

Yes, at the request of the Self-Governance Tribe, the Secretary may include funds from other agencies as permitted by law, whether on an ongoing or a one-time basis.

§ 137.339 May a Self-Governance Tribe use project funds for matching or cost participation requirements under other Federal and non-Federal programs?

Yes, notwithstanding any other provision of law, all funds provided under a construction project agreement may be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program.

§ 137.340 May a Self-Governance Tribe contribute funding to a project?

Yes, the Self-Governance Tribe and the Secretary may jointly fund projects. The construction project agreement should identify the Secretarial amount and any Tribal contribution amount that is being incorporated into the construction project agreement. The Self-Governance Tribe does not have to deposit its contribution with the Secretary.

§ 137.341 How will a Self-Governance Tribe receive payment under a construction project agreement?

(a) For all construction project agreements, advance payments shall be made annually or semiannually, at the Self-Governance Tribe's option. The initial payment shall include all contingency funding for the project or phase of the project to the extent that there are funds appropriated for that purpose.

(b) The amount of subsequent payments is based on the mutually agreeable project schedule reflecting:

(1) Work to be accomplished within the advance payment period,

(2) Work already accomplished, and

(3) Total prior payments for each annual or semiannual advance payment period.

(c) For lump sum, fixed price agreements, at the request of the Self-Governance Tribe, payments shall be based on an advance payment period measured as follows:

(1) One year; or

(2) Project Phase (e.g., planning, design, construction). If project phase is chosen as the payment period, the full amount of funds necessary to perform the work for that phase of the

construction project agreement is payable in the initial advance payment. For multi-phase projects, the planning and design phases must be completed prior to the transfer of funds for the associated construction phase. The completion of the planning and design phases will include at least one opportunity for Secretarial approval in accordance with § 137.360.

(d) For the purposes of payment, Sanitation Facilities Construction Projects authorized pursuant to Pub. L. 86–121, are considered to be a single construction phase and are payable in a single lump sum advance payment in accordance with paragraph (c)(2) of this section.

(e) For all other construction project agreements, the amount of advance payments shall include the funds necessary to perform the work identified in the advance payment period of one year.

(f) Any agreement to advance funds under paragraphs (b), (c) or (d) of this section is subject to the availability of appropriations.

(g) (1) Initial advance payments are due within 10 days of the effective date of the construction project agreement; and

(2) Subsequent payments are due:

(i) Within 10 days of apportionment for annual payments or

(ii) Within 10 days of the start date of the project phase for phase payments.

§ 137.342 What happens to funds remaining at the conclusion of a cost reimbursement construction project?

All funds, including contingency funds, remaining at the conclusion of the project are considered savings and may be used by the Self-Governance Tribe to provide additional services for the purpose for which the funds were originally appropriated. No further approval or justifying documentation is required before the expenditure of the remaining funds.

§ 137.343 What happens to funds remaining at the conclusion of a fixed price construction project?

(a) For lump sum fixed price construction project agreements, all funds remaining at the conclusion of the project are considered profits and belong to the Self-Governance Tribe.

(b) For fixed price construction project agreements with unit price components, all funds remaining that are associated with overestimated unit price quantities are savings and may be used by the Self-Governance Tribe in accordance with § 137.342. All other funds remaining at the conclusion of the project are considered profit and belong to the Self-Governance Tribe.

§ 137.344 May a Self-Governance Tribe reallocate funds among construction project agreements?

Yes, a Self-Governance Tribe may reallocate funds among construction project agreements to the extent not prohibited by applicable appropriation law(s).

Roles of Self-Governance Tribe in Establishing and Implementing Construction Project Agreements

§ 137.350 Is a Self-Governance Tribe responsible for completing a construction project in accordance with the negotiated construction project agreement?

Yes, a Self-Governance Tribe assumes responsibility for completing a construction project, including day-to-day on-site management and administration of the project, in accordance with the negotiated construction project agreement. However, Self-Governance Tribes are not required to perform beyond the amount of funds provided. For example, a Self-Governance Tribe may encounter unforeseen circumstances during the term of a construction project agreement. If this occurs, options available to the Self-Governance Tribe include, but are not limited to:

(a) Reallocating existing funding;

(b) Reducing/revising the scope of work that does not require an amendment because it does not result in a significant change;

(c) Utilizing savings from other projects;

(d) Requesting additional funds or appropriations;

(e) Utilizing interest earnings;

(f) Seeking funds from other sources; and/or

(g) Redesigning or re-scoping that does result in a significant change by amendment as provided in §§ 137.363 and 137.364.

§ 137.351 Is a Self-Governance Tribe required to submit construction project progress and financial reports for construction project agreements?

Yes, a Self-Governance Tribe must provide the Secretary with construction project progress and financial reports semiannually or, at the option of the Self-Governance Tribe, on a more frequent basis. Self-Governance Tribes are only required to submit the reports, as negotiated in the Construction Project Agreement, after funds have been transferred to the Self-Governance Tribe for a construction project. Construction project progress reports and financial reports are only required for active construction projects.

§ 137.352 What is contained in a construction project progress report?

Construction project progress reports contain information about accomplishments during the reporting period and issues and concerns of the Self-Governance Tribe, if any.

§ 137.353 What is contained in a construction project financial report?

Construction project financial reports contain information regarding the amount of funds expended during the reporting period, and financial concerns of the Self-Governance Tribe, if any.

Roles of the Secretary in Establishing and Implementing Construction Project Agreements

§ 137.360 Does the Secretary approve project planning and design documents prepared by the Self-Governance Tribe?

The Secretary shall have at least one opportunity to approve project planning and design documents prepared by the Self-Governance Tribe in advance of construction if the Self-Governance Tribe is required to submit planning or design documents as a part of the scope of work under a construction project agreement.

§ 137.361 Does the Secretary have any other opportunities to approve planning or design documents prepared by the Self-Governance Tribe?

Yes, but only if there is an amendment to the construction project agreement that results in a significant change in the original scope of work.

§ 137.362 May construction project agreements be amended?

Yes, the Self-Governance Tribe, at its discretion, may request the Secretary to amend a construction project agreement to include additional projects. In addition, amendments are required if there is a significant change from the original scope of work or if funds are added by the Secretary. The Self-Governance Tribe may make immaterial changes to the performance period and make budget adjustments within available funding without an amendment to the construction project agreement.

§ 137.363 What is the procedure for the Secretary's review and approval of amendments?

(a) The Secretary shall promptly notify the Self-Governance Tribe in writing of any concerns or issues that may lead to disapproval. The Secretary shall share relevant information and documents, and make a good faith effort to resolve all issues and concerns of the Self-Governance Tribe. If, after consultation with the Self-Governance

Tribe, the Secretary intends to disapprove the proposed amendment, then the Secretary shall follow the procedures set forth in §§ 137.330 through 137.334.

(b) The time allowed for Secretarial review, comment, and approval of amendments is 30 days, or within a longer time if agreed to by the Self-Governance Tribe in writing. Absence of a written response by the Secretary within 30 days shall be deemed approved.

(c) The timeframe set forth in paragraph (b) of this section is intended to be the maximum time and may be reduced based on urgency and need, by agreement of the parties. If the Self-Governance Tribe requests reduced timeframes for action due to unusual or special conditions (such as limited construction periods), the Secretary shall make a good faith effort to accommodate the requested timeframes.

§ 137.364 What constitutes a significant change in the original scope of work?

A significant change in the original scope of work is:

(a) A change that would result in a cost that exceeds the total of the project funds available and the Self-Governance Tribe's contingency funds; or

(b) A material departure from the original scope of work, including substantial departure from timelines negotiated in the construction project agreement.

§ 137.365 What is the procedure for the Secretary's review and approval of project planning and design documents submitted by the Self-Governance Tribe?

(a) The Secretary shall review and approve planning documents to ensure compliance with planning standards identified in the construction project agreement. The Secretary shall review and approve design documents for general compliance with requirements of the construction project agreement.

(b) The Secretary shall promptly notify the Self-Governance Tribe in writing of any concerns or issues that may lead to disapproval. The Secretary shall share relevant information and documents, and make a good faith effort to resolve all issues and concerns of the Self-Governance Tribe. If, after consultation with the Self-Governance Tribe, the Secretary intends to disapprove the documents, then the Secretary shall follow the procedures set forth in § 137.333.

(c) The time allowed for Secretarial review, comment, and approval of planning and design documents is 21 days, unless otherwise agreed to by the Self-Governance Tribe in writing. Absence of a written response by the Secretary within 21 days shall be deemed approved.

§ 137.366 May the Secretary conduct onsite project oversight visits?

Yes, the Secretary may conduct onsite project oversight visits semiannually or on an alternate schedule negotiated in the construction project agreement. The Secretary must provide the Self-Governance Tribe with reasonable advance written notice to assist the Self-Governance Tribe in coordinating the visit. The purpose of the visit is review the progress under the construction project agreement. At the request of the Self-Governance Tribe, the Secretary must provide the Self-Governance Tribe a written site visit report.

§ 137.367 May the Secretary issue a stop work order under a construction project agreement?

No, the Secretary has no role in the day-to-day management of a construction project.

§ 137.368 Is the Secretary responsible for oversight and compliance of health and safety codes during construction projects being performed by a Self-Governance Tribe under section 509 of the Act [25 U.S.C. 488aaa–8]?

No, the Secretary is not responsible for oversight and compliance of health and safety codes during construction projects being performed by a Self-Governance Tribe under section 509 of the Act [25 U.S.C. 488aaa–8].

Other

§ 137.370 Do all provisions of this part apply to construction project agreements under this subpart?

Yes, to the extent the provisions are not inconsistent with the provisions in this subpart. Provisions that do not apply include: programmatic reports and data requirements; reassumption; compact and funding agreement review, approval, and final offer process; and compact and funding agreement contents.

§ 137.371 Who takes title to real property purchased with funds provided under a construction project agreement?

The Self-Governance Tribe takes title to the real property unless the Self-Governance Tribe requests that the Secretary take title to the property.

§ 137.372 What should the Self-Governance Tribe do if it wants real property purchased with construction project agreement funds to be taken into trust?

The Self-Governance Tribe must submit a resolution of support from the governing body of Self-Governance Tribes in which the beneficial ownership is to be registered. Upon receipt of the Self-Governance Tribes' resolution, the Secretary shall transfer the request to the Secretary of the Interior so that it may be expeditiously processed in accordance with applicable Federal laws and regulations. The Secretary may not require the Self-Governance Tribe to furnish any information in support of such a request other than that expressly required by applicable law or regulation.

§ 137.373 Do Federal real property laws, regulations and procedures that apply to the Secretary also apply to Self-Governance Tribes that purchase real property with funds provided under a construction project agreement?

No, unless the Self-Governance Tribe has requested the Secretary take title to the property.

§ 137.374 Does the Secretary have a role in reviewing or monitoring a Self-Governance Tribe's actions in acquiring real property with funds provided under a construction project agreement?

No, unless the Self-Governance Tribe has requested the Secretary take title to the property. The Self-Governance Tribe is responsible for acquiring all real property needed to perform a construction project under a construction project agreement, not the Secretary. The Secretary shall not withhold funds or refuse to enter into a construction project agreement because of a disagreement between the Self-Governance Tribe and the Secretary over the Self-Governance Tribe's decisions to purchase or lease real property.

§ 137.375 Are Tribally-owned facilities constructed under section 509 of the Act [25 U.S.C. 458aaa–8] eligible for replacement, maintenance, and improvement funds on the same basis as if title to such property were vested in the United States?

Yes, Tribally-owned facilities constructed under section 509 of the Act [25 U.S.C. 458aaa–8] are eligible for replacement, maintenance, and improvement funds on the same basis as if title to such property were vested in the United States.

§ 137.376 Are design and construction projects performed by Self-Governance Tribes under section 509 of the Act [25 U.S.C. 458aaa–8] subject to Federal metric requirements?

No, however, the Self-Governance Tribe and the Secretary may negotiate the use of Federal metric requirements in the construction project agreement when the Self-Governance Tribe will

design and/or construct an IHS facility that the Secretary will own and operate.

§ 137.377 Do Federal procurement laws and regulations apply to construction project agreements performed under section 509 of the Act [25 U.S.C. 458aaa–8]?

No, unless otherwise agreed to by the Tribe, no provision of the Office of Federal Procurement Policy Act, the Federal Acquisition Regulations issued pursuant thereto, or any other law or regulation pertaining to Federal procurement (including Executive Orders) shall apply to any construction project conducted under section 509 of the Act [25 U.S.C. 458aaa–8]. The Secretary and the Self-Governance Tribe may negotiate to apply specific provisions of the Office of Federal Procurement and Policy Act and Federal Acquisition Regulations to a construction project agreement or funding agreement. Absent a negotiated agreement, such provisions and regulatory requirements do not apply.

§ 137.378 Does the Federal Davis-Bacon Act and wage rates apply to construction projects performed by Self-Governance Tribes using their own funds or other non-Federal funds?

No, the Federal Davis-Bacon Act and wage rates do not apply to construction projects performed by Self-Governance Tribes using their own funds or other non-Federal funds.

§ 137.379 Do Davis-Bacon wage rates apply to construction projects performed by Self-Governance Tribes using Federal funds?

Davis-Bacon Act wage rates only apply to laborers and mechanics employed by the contractors and subcontractors (excluding Indian Tribes, inter-Tribal consortia, and Tribal organizations) retained by Self-Governance Tribes to perform construction. The Davis-Bacon Act and wage rates do not apply when Self-Governance Tribes perform work with their own employees.

Subpart O—Secretarial Responsibilities

Budget Request

§§ 137.400–137.404 [Reserved]

Reports

§ 137.405 Is the Secretary required to report to Congress on administration of Title V and the funding requirements presently funded or unfunded?

Yes, no later than January 1 of each year after the date of enactment of the Tribal Self-Governance Amendments of 2000, the Secretary shall submit to the Committee on Indian Affairs of the Senate and the Committee on Resources of the House of Representatives a written report regarding the administration of Title V. The report shall include a detailed analysis of the funding requirements presently funded or unfunded for each Indian Tribe or Tribal organization, either directly by the Secretary, under self-determination contracts under title I, or under compacts and funding agreements authorized under Title V.

§ 137.406 In compiling reports pursuant to this section, may the Secretary impose any reporting requirements on Self-Governance Tribes, not otherwise provided in Title V?

No, in compiling reports pursuant to this section, the Secretary may not impose any reporting requirements on Self-Governance Tribes, not otherwise provided in Title V.

§ 137.407 What guidelines will be used by the Secretary to compile information required for the report?

The report shall be compiled from information contained in funding agreements, annual audit reports, and data of the Secretary regarding the disposition of Federal funds. The report must identify:

(a) The relative costs and benefits of self-governance, including savings;

(b) With particularity, all funds that are specifically or functionally related to the provision by the Secretary of services and benefits to Self-Governance Tribes and their members;

(c) The funds transferred to each Self-Governance Tribe and the corresponding reduction in the Federal bureaucracy;

(d) The funding formula for individual Tribal shares of all headquarter's funds, together with the comments of affected Self-Governance Tribes, developed under §§ 137.405 of this subpart; and

(e) Amounts expended in the preceding fiscal year to carry out inherent Federal functions, including an identification of those functions by type and location.

Subpart P—Appeals

§ 137.410 For the purposes of section 110 of the Act [25 U.S.C. 450m–1] does the term ''contract'' include compacts, funding agreements, and construction project agreements entered into under Title V?

Yes, for the purposes of section 110 of the Act [25 U.S.C. 450m–1] the term ''contract'' includes compacts, funding agreements, and construction project agreements entered into under Title V.

Post-Award Disputes

§ 137.412 Do the regulations at 25 CFR Part 900, Subpart N apply to compacts, funding agreements, and construction project agreements entered into under Title V?

Yes, the regulations at 25 CFR Part 900, Subpart N apply to compacts, funding agreements, and construction project agreements entered into under Title V.

Pre-Award Disputes

§ 137.415 What decisions may an Indian Tribe appeal under §§ ;137.415 through 137.436?

An Indian Tribe may appeal:

(a) A decision to reject a final offer, or a portion thereof, under section 507(b) of the Act [25 U.S.C. 458aaa–6(b)];

(b) A decision to reject a proposed amendment to a compact or funding agreement, or a portion thereof, under section 507(b) of the Act [25 U.S.C. 458aaa–6(b)];

(c) A decision to rescind and reassume a compact or funding agreement, in whole or in part, under section 507(a)(2) of the Act [25 U.S.C. 458aaa–6(a)(2)], except for immediate reassumptions under section 507(a)(2)(C) of the Act [25 U.S.C. 458aaa–6(a)(2)(C)];

(d) A decision to reject a final construction project proposal, or a portion thereof, under section 509(b) of the Act [25 U.S.C. 458aaa–8(b)] and subpart N of this part; and

(e) For construction project agreements carried out under section 509 of the Act [25 U.S.C. 458aaa–8], a decision to reject project planning documents, design documents, or proposed amendments submitted by a Self-Governance Tribe under section 509(f) of the Act [25 U.S.C. 458aaa–8(f)] and subpart N of this part.

§ 137.416 Do §§ 137.415 through 137.436 apply to any other disputes?

No, §§ 137.415 through 137.436 only apply to decisions listed in § 137.415. Specifically, §§ 137.415 through 137.436 do not apply to any other dispute, including, but not limited to:

(a) Disputes arising under the terms of a compact, funding agreement, or construction project agreement that has been awarded;

(b) Disputes arising from immediate reassumptions under section 507(a)(2)(C) of the Act [25 U.S.C. 458aaa–6(a)(2)(C)] and §§ 137.261 and 137.262, which are covered under §§ 137.440 through 137.445.

(c) Other post-award contract disputes, which are covered under §§ 137.412.

(d) Denials under the Freedom of Information Act, 5 U.S.C. 552, which may be appealed under 45 CFR 5.

(e) Decisions relating to the award of grants under section 503(e) of the Act [25 U.S.C. 458aaa–2(e)], which may be appealed under 45 CFR 5.

§ 137.417 What procedures apply to Interior Board of Indian Appeals (IBIA) proceedings?

The IBIA may use the procedures set forth in 43 CFR 4.22–4.27 as a guide.

§ 137.418 How does an Indian Tribe know where and when to file its appeal from decisions made by IHS?

Every decision in any of the areas listed in § 137.415 must contain information which shall tell the Indian Tribe where and when to file the Indian Tribe's appeal. Each decision shall include the following statement:

Within 30 days of the receipt of this decision, you may request an informal conference under 42 CFR 137.421, or appeal this decision under 42 CFR 137.425 to the Interior Board of Indian Appeals (IBIA). Should you decide to appeal this decision, you may request a hearing on the record. An appeal to the IBIA under 42 CFR 137.425 shall be filed with the IBIA by certified mail or by hand delivery at the following address: Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203. You shall serve copies of your Notice of Appeal on the Secretary and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies.

§ 137.419 What authority does the IBIA have under §§ 137.415 through 137.436?

The IBIA has the authority:

(a) To conduct a hearing on the record;

(b) To permit the parties to engage in full discovery relevant to any issue raised in the matter; and

(c) To issue a recommended decision;

(d) To take such action as necessary to insure rights specified in § 137.430.

§ 137.420 Does an Indian Tribe have any options besides an appeal?

Yes, the Indian Tribe may request an informal conference. An informal conference is a way to resolve issues as quickly as possible, without the need for a formal hearing. Or, the Indian Tribe may, in lieu of filing an administrative appeal under this subpart or upon completion of an informal conference, file an action in Federal court pursuant to section 110 of the Act [25 U.S.C. 450m–1].

§ 137.421 How does an Indian Tribe request an informal conference?

The Indian Tribe must file its request for an informal conference with the office of the person whose decision it is appealing, within 30 days of the day it receives the decision. The Indian Tribe may either hand-deliver the request for an informal conference to that person's office, or mail it by certified mail, return receipt requested. If the Indian Tribe mails the request, it will be considered filed on the date the Indian Tribe mailed it by certified mail.

§ 137.422 How is an informal conference held?

(a) The informal conference must be held within 30 days of the date the request was received, unless the Indian Tribe and the authorized representative of the Secretary agree on another date.

(b) If possible, the informal conference will be held at the Indian Tribe's office. If the meeting cannot be held at the Indian Tribe's office and is held more than fifty miles from its office, the Secretary must arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Indian Tribe.

(c) The informal conference must be conducted by a designated representative of the Secretary.

(d) Only people who are the designated representatives of the Indian Tribe, or authorized by the Secretary are allowed to make presentations at the informal conference.

§ 137.423 What happens after the informal conference?

(a) Within 10 days of the informal conference, the person who conducted the informal conference must prepare and mail to the Indian Tribe a written report which summarizes what happened at the informal conference and a recommended decision.

(b) Every report of an informal conference must contain the following language:

Within 30 days of the receipt of the recommended decision from the informal conference, you may file an appeal of the initial decision of the DHHS agency with the Interior Board of Indian Appeals (IBIA) under 42 CFR 137.425. You may request a hearing on the record. An appeal to the IBIA under 42 CFR 137.425 shall be filed with the IBIA by certified mail or hand delivery at the following address: Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203. You shall serve copies of your Notice of Appeal on the Secretary and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies. Alternatively you may file an action in Federal court pursuant to section 110 of the Act. [25 U.S.C. 450m–1].

§ 137.424 Is the recommended decision from the informal conference final for the Secretary?

No, if the Indian Tribe is dissatisfied with the recommended decision from the informal conference, it may still appeal the initial decision within 30 days of receiving the recommended decision and the report of the informal conference. If the Indian Tribe does not file a notice of appeal within 30 days, or before the expiration of the extension it has received under § 137.426 , the recommended decision of the informal conference becomes final for the Secretary and may be appealed to Federal court pursuant to section 110 of the Act [25 U.S.C. 450m–1].

§ 137.425 How does an Indian Tribe appeal the initial decision if it does not request an informal conference or if it does not agree with the recommended decision resulting from the informal conference?

(a) If the Indian Tribe decides to appeal, it must file a notice of appeal with the IBIA within 30 days of receiving either the initial decision or the recommended decision from the informal conference.

(b) The Indian Tribe may either hand-deliver the notice of appeal to the IBIA, or mail it by certified mail, return receipt requested. If the Indian Tribe mails the Notice of Appeal, it will be considered filed on the date the Indian Tribe mailed it by certified mail. The Indian Tribe should mail the notice of appeal to: Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203.

(c) The Notice of Appeal must:

(1) Briefly state why the Indian Tribe thinks the initial decision is wrong;

(2) Briefly identify the issues involved in the appeal; and

(3) State whether the Indian Tribe wants a hearing on the record, or whether the Indian Tribe wants to waive its right to a hearing.

(d) The Indian Tribe must serve a copy of the notice of appeal upon the official whose decision it is appealing. The Indian Tribe must certify to the IBIA that it has done so.

(e) The authorized representative of the Secretary will be considered a party to all appeals filed with the IBIA under the Act.

(f) In lieu of filing an administrative appeal an Indian Tribe may proceed directly to Federal court pursuant to section 110 of the Act [25 U.S.C. 450m–1].

§ 137.426 May an Indian Tribe get an extension of time to file a notice of appeal?

Yes, if the Indian Tribe needs additional time, the Indian Tribe may request an extension of time to file its Notice of Appeal with the IBIA within 60 days of receiving either the initial decision or the recommended decision resulting from the informal conference. The request of the Indian Tribe must be in writing, and must give a reason for not filing its notice of appeal within the 30-day time period. If the Indian Tribe has a valid reason for not filing its notice of appeal on time, it may receive an extension.

§ 137.427 What happens after an Indian Tribe files an appeal?

(a) Within 5 days of receiving the Indian Tribe's notice of appeal, the IBIA will decide whether the appeal falls under § 137.415. If so, the Indian Tribe is entitled to a hearing.

(b) If the IBIA cannot make that decision based on the information included in the notice of appeal, the IBIA may ask for additional statements from the Indian Tribe, or from the appropriate Federal agency. If the IBIA asks for more statements, it will make its decision within 5 days of receiving those statements.

(c) If the IBIA decides that the Indian Tribe is not entitled to a hearing or if the Indian Tribe has waived its right to a hearing on the record, the IBIA will dismiss the appeal and inform the Indian Tribe that it is not entitled to a hearing or has waived its right to a hearing.

§ 137.428 How is a hearing arranged?

(a) If a hearing is to be held, the IBIA will refer the Indian Tribe's case to the Hearings Division of the Office of Hearings and Appeals of the U.S. Department of the Interior. The case will then be assigned to an Administrative Law Judge (ALJ), appointed under 5 U.S.C. 3105.

(b) Within 15 days of the date of the referral, the ALJ will hold a pre-hearing conference, by telephone or in person, to decide whether an evidentiary hearing is necessary, or whether it is possible to decide the appeal based on the written record. At the pre-hearing conference the ALJ will provide for:

(1) A briefing and discovery schedule;

(2) A schedule for the exchange of information, including, but not limited to witness and exhibit lists, if an evidentiary hearing is to be held;

(3) The simplification or clarification of issues;

(4) The limitation of the number of expert witnesses, or avoidance of similar cumulative evidence, if an evidentiary hearing is to be held;

(5) The possibility of agreement disposing of all or any of the issues in dispute; and

(6) Such other matters as may aid in the disposition of the appeal.

(c) The ALJ shall order a written record to be made of any conference results that are not reflected in a transcript.

§ 137.429 What happens when a hearing is necessary?

(a) The ALJ must hold a hearing within 90 days of the date of the order referring the appeal to the ALJ, unless the parties agree to have the hearing on a later date.

(b) At least 30 days before the hearing, the Secretary must file and serve the Indian Tribe with a response to the notice of appeal.

(c) If the hearing is held more than 50 miles from the Indian Tribe's office, the Secretary must arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Indian Tribe.

(d) The hearing shall be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. 556.

§ 137.430 What is the Secretary's burden of proof for appeals covered by § 137.415?

As required by section 518 of the Act [25 U.S.C. 458aaa–17], the Secretary must demonstrate by clear and convincing evidence the validity of the grounds for the decision made and that the decision is fully consistent with provisions and policies of the Act.

§ 137.431 What rights do Indian Tribes and the Secretary have during the appeal process?

Both the Indian Tribe and the Secretary have the same rights during the appeal process. These rights include the right to:

(a) Be represented by legal counsel;

(b) Have the parties provide witnesses who have knowledge of the relevant issues, including specific witnesses with that knowledge, who are requested by either party;

(c) Cross-examine witnesses;

(d) Introduce oral or documentary evidence, or both;

(e) Require that oral testimony be under oath;

(f) Receive a copy of the transcript of the hearing, and copies of all documentary evidence which is introduced at the hearing;

(g) Compel the presence of witnesses, or the production of documents, or both, by subpoena at hearings or at depositions;

(h) Take depositions, to request the production of documents, to serve interrogatories on other parties, and to request admissions; and

(i) Any other procedural rights under the Administrative Procedure Act, 5 U.S.C. 556.

§ 137.432 What happens after the hearing?

(a) Within 30 days of the end of the formal hearing or any post-hearing briefing schedule established by the ALJ, the ALJ shall send all the parties a recommended decision, by certified mail, return receipt requested. The recommended decision must contain the ALJ's findings of fact and conclusions of law on all the issues. The recommended decision shall also state that the Indian Tribe has the right to object to the recommended decision.

(b) The recommended decision shall contain the following statement: Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary under 42 CFR 137.43. An appeal to the Secretary under 42 CFR 137.43 shall be filed at the following address: Department of Health and Human Services, 200 Independence Ave. SW., Washington, DC 20201. You shall serve copies of your notice of appeal on the official whose decision is being appealed. You shall certify to the Secretary that you have served this copy. If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final.

§ 137.433 Is the recommended decision always final?

No, any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 30 days of receiving the recommended decision. Objections must be served on all other parties. The recommended decision shall become final for the Secretary 30 days after the Indian Tribe receives the ALJ's recommended decision, unless a written statement of objections is filed with the Secretary during the 30-day period. If no party files a written statement of objections within 30 days, the recommended decision shall become final for the Secretary.

§ 137.434 If an Indian Tribe objects to the recommended decision, what will the Secretary do?

(a) The Secretary has 45 days from the date it receives the final authorized submission in the appeal to modify, adopt, or reverse the recommended decision. The Secretary also may remand the case to the IBIA for further proceedings. If the Secretary does not modify or reverse the recommended decision or remand the case to the IBIA during that time, the recommended decision automatically becomes final.

(b) When reviewing the recommended decision, the Secretary may consider and decide all issues properly raised by any party to the appeal, based on the record.

(c) The decision of the Secretary must:

(1) Be in writing;

(2) Specify the findings of fact or conclusions of law that are modified or reversed;

(3) Give reasons for the decision, based on the record; and

(4) State that the decision is final for the Department.

§ 137.435 Will an appeal adversely affect the Indian Tribe's rights in other compact, funding negotiations, or construction project agreement?

No, a pending appeal will not adversely affect or prevent the negotiation or award of another compact, funding agreement, or construction project agreement.

§ 137.436 Will the decisions on appeal be available for the public to review?

Yes, all final decisions must be published for the Department under this subpart. Decisions can be found on the Department's website.

Appeals of an Immediate Reassumption of a Self-Governance Program

§ 137.440 What happens in the case of an immediate reassumption under section 507(a)(2)(C) of the Act [25 U.S.C. 458aaa–6(a)(2)(C)]?

(a) The Secretary may, upon written notification to the Self-Governance Tribe, immediately reassume operation of a program, service, function, or activity (or portion thereof) if:

(1) The Secretary makes a finding of imminent substantial and irreparable endangerment of the public health caused by an act or omission of the Self-Governance Tribe; and

(2) The endangerment arises out of a failure to carry out the compact or funding agreement.

(b) When the Secretary advises a Self-Governance Tribe that the Secretary intends to take an action referred to in paragraph (a) of this section, the Secretary must also notify the Deputy Director of the Office of Hearings and Appeals, Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203.

§ 137.441 Will there be a hearing?

Yes, unless the Self-Governance Tribe waives its right to a hearing in writing. The Deputy Director of the Office of Hearings and Appeals must appoint an Administrative Law Judge to hold a hearing,

(a) The hearing must be held within 10 days of the date of the notice referred to in § 137.440 unless the Self-Governance Tribe agrees to a later date.

(b) If possible, the hearing will be held at the office of the Self-Governance Tribe. If the hearing is held more than 50 miles from the office of the Self-Governance Tribe, the Secretary must arrange to pay transportation costs and per diem for incidental expenses. This will allow for adequate representation of the Self-Governance Tribe.

§ 137.442 What happens after the hearing?

(a) Within 30 days after the end of the hearing or any post-hearing briefing schedule established by the ALJ, the ALJ must send all parties a recommended decision by certified mail, return receipt requested. The recommended decision shall contain the ALJ's findings of fact and conclusions of law on all the issues. The recommended decision must also state that the Self-Governance Tribe has the right to object to the recommended decision.

(b) The recommended decision must contain the following statement: Within 15 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary under § 137.443. An appeal to the Secretary under 25 CFR 900.165(b) shall be filed at the following address: Department of Health and Human Services, 200 Independence Ave. SW., Washington, DC 20201. You shall serve copies of your notice of appeal on the official whose decision is being appealed. You shall certify to the Secretary that you have served this copy. If neither party files an objection to the recommended decision within 15 days, the recommended decision will become final.

§ 137.443 Is the recommended decision always final?

No, any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 15 days of receiving the recommended decision. The objecting party must serve a copy of its objections on the other party. The recommended decision will become final 15 days after the Self-Governance Tribe receives the ALJ's recommended decision, unless a written statement of objections is filed with the Secretary during the 15-day period. If no party files a written statement of objections within 15 days, the recommended decision will become final.

§ 137.444 If a Self-Governance Tribe objects to the recommended decision, what action will the Secretary take?

(a) The Secretary has 15 days from the date the Secretary receives timely written objections to modify, adopt, or reverse the recommended decision. If the Secretary does not modify or reverse the recommended decision during that time, the recommended decision automatically becomes final.

(b) When reviewing the recommended decision, the Secretary may consider and decide all issues properly raised by any party to the appeal, based on the record.

(c) The decision of the Secretary must:

(1) Be in writing;

(2) Specify the findings of fact or conclusions of law that are modified or reversed;

(3) Give reasons for the decision, based on the record; and

(4) State that the decision is final for the Secretary.

§ 137.445 Will an immediate reassumption appeal adversely affect the Self-Governance Tribe's rights in other self-governance negotiations?

No, a pending appeal will not adversely affect or prevent the negotiation or award of another compact, funding agreement, or construction project agreement.

Equal Access to Justice Act Fees

§ 137.450 Does the Equal Access to Justice Act (EAJA) apply to appeals under this subpart?

Yes, EAJA claims against the Department will be heard pursuant to 25 CFR 900.177.

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Part IV

Department of Education

National Institute on Disability and Rehabilitation; Notice

DEPARTMENT OF EDUCATION

[CDFA Nos.: 84.133A–18 and 84.133A–19]

National Institute on Disability and Rehabilitation Research

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice reopening application deadline date.

SUMMARY: On June 26, 2001, the Office of Special Education and Rehabilitative Services, National Institute on Disability and Rehabilitation Research published a notice in the **Federal Register** (66 FR 34034) inviting applications for new fiscal year (FY) 2001 grant awards for four Disability and Rehabilitation Research Projects and Centers Program (DRRP) priority areas. The intent of this notice is to reopen the competition for two of the priority areas: Resource Center for Community-based Research on Technology for Independence (CFDA 84.133A–18) and Community-based Research Projects on Technology for Independence (CFDA 84.133A–19).

Deadline for Transmittal of Applications: April 15, 2002.

Note to Applicants: The information provided in the Notice of Final Priorities published on June 26, 2001, (66 FR 34026) identifies the requirements for applications submitted in response to this notice. The information in this notice remains the same except for the CFDA numbers for the competition have been changed.

FOR FURTHER INFORMATION CONTACT: Donna Nangle, U.S. Department of Education, 400 Maryland Avenue, SW., room 3414, Switzer Building, Washington, DC 20202–2645. Telephone: (202) 205–5880 or via the Internet: *donna.nangle@ed.gov*.

If you use a telecommunications device for the deaf (TDD), you may call the TDD number at (202) 205–4475. 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.**

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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: 29 U.S.C. 762(g) and 764(b).

Dated: February 8, 2002.

Loretta L. Petty,

Acting Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 02–3674 Filed 2–13–02; 8:45 am]

BILLING CODE 4000–01–P

Federal Register

Thursday,
February 14, 2002

Part IV

Department of Education

National Institute on Disability and Rehabilitation; Notice

DEPARTMENT OF EDUCATION

[CDFA Nos.: 84.133A–18 and 84.133A–19]

National Institute on Disability and Rehabilitation Research

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice reopening application deadline date.

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Program Authority: 29 U.S.C. 762(g) and 764(b).

Dated: February 8, 2002.

Loretta L. Petty,

Acting Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 02–3674 Filed 2–13–02; 8:45 am]

BILLING CODE 4000–01–P

Federal Register

Thursday,
February 14, 2002

Part V

Department of Agriculture

Agricultural Marketing Service

7 CFR Part 1030

Milk in the Upper Midwest Marketing Area; Tentative Decision on Proposed Amendments and Opportunity To File Written Exceptions to Tentative Marketing Agreement and To Order; Proposed Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1030

[Docket No. AO–361–A35; DA–01–03]

Milk in the Upper Midwest Marketing Area; Tentative Decision on Proposed Amendments and Opportunity To File Written Exceptions to Tentative Marketing Agreement and To Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This tentative decision proposes to adopt, on an interim final and emergency basis, provisions that would eliminate the ability to simultaneously pool milk on the Upper Midwest Federal milk order and a State-operated milk order that has marketwide pooling. Additionally, the order would be amended by establishing a limit on the amount of milk that can be diverted to nonpool plants from pool distributing plants regulated under the order. Public comments on these actions and the other pooling and payment issues are requested. In addition, this decision requires determining if producers approve the issuance of the amended order on an interim basis.

DATES: Comments should be submitted on or before April 15, 2002.

ADDRESSES: Comments (6 copies) should be filed with the Hearing Clerk, Room 1083, South Building, United States Department of Agriculture, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Gino M. Tosi, Marketing Specialist, USDA/AMS/Dairy Programs, Order Formulation Branch, Room 2968, South Building, PO Box 96456, Washington, DC 20090–6456, (202) 690–1366, e-mail address: *gino.tosi@usda.gov.*

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

The amendments to the rules proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have a retroactive effect. If adopted, the proposed amendments would not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), 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 request modification or exemption from such order by filing 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 the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Department 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 its principal place of business, has jurisdiction in equity to review the Department's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Analysis Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a ''small business'' if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a ''small business'' if it has fewer than 500 employees. For the purposes of determining which dairy farms are ''small businesses,'' the $750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most ''small'' dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees. In June 2001, there were 12,748 producers pooled on, and 57 handlers regulated by the Upper Midwest order. Based on these criteria, the vast majority of the producers and handlers would be considered as small businesses. The adoption of the proposed pooling standards serve to revise established criteria that determine those producers, producer milk, and plants that have a reasonable association with, and, are consistently serving the fluid needs of, the Upper Midwest milk marketing area, and are not associated with other marketwide pools concerning the same milk. Criteria for pooling are established on the basis of performance levels that are considered adequate to meet the Class I fluid needs and, by doing so, determine those that are eligible to share in the revenue that arises from the classified pricing of milk. Criteria for pooling are established without regard to the size of any dairy industry organization or entity. The criteria established are applied in an identical fashion to both large and small businesses and do not have any different economic impact on a substantial number of small entities. The proposed amendments will engender a small change, relative to the total price paid to producers, and no substantial number of entities will change pool status as a result of the proposed amendments. Therefore, the proposed amendments will not have a significant economic impact on a substantial number of small entities.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). It was determined that these proposed amendments would have little or no impact on reporting, recordkeeping, or other compliance requirements because they would remain identical to the current requirements. No new forms are proposed and no additional reporting requirements would be necessary.

This notice does not require additional information collection that requires clearance by the Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the forms are routinely used in most business transactions. Forms require only a minimal amount of information which can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

No other burdens are expected to fall on the dairy industry as a result of overlapping Federal rules. This proposed rulemaking does not duplicate, overlap, or conflict with any existing Federal rules.

Interested parties are invited to submit comments on the probable regulatory and informational impact of this proposed rule on small entities. Also, parties may suggest modifications of this proposal for the purpose of tailoring their applicability to small businesses.

Prior documents in this proceeding

Notice of Hearing: Issued June 5, 2001; published June 11, 2001 (66 FR 31185).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this tentative final decision with respect to proposed amendments to the tentative marketing agreement and the order regulating the handling of milk in the Upper Midwest marketing area. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

Interested parties may file written exceptions to this decision with the Hearing Clerk, U.S. Department of Agriculture, Washington, DC 20250, by the 60th day after publication of this decision in the **Federal Register**. Six (6) copies of the exceptions should be filed. All written submissions made pursuant to this notice will be made available for public inspection at the office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)).

The Hearing notice specifically invited interested persons to present evidence concerning the probable regulatory and informational impact of the proposals on small businesses. While no evidence was received that specifically addressed these issues, some of the evidence encompassed entities of various sizes. The materials are addressed in the discussion below of the particular issues considered.

The proposed amendments set forth below are based on the record of a public hearing held at Bloomington, Minnesota, on June 26–27, 2001, pursuant to a notice of hearing issued June 5, 2001 and published June 11, 2001 (66 FR 31185).

The material issues on the record of hearing relate to:

1. Eliminating the simultaneous pooling of milk on the order when already pooled on a State-operated milk order that has marketwide pooling.

2. Allowing overbase milk from California to remain as eligible for pooling on the Upper Midwest Federal milk order.

3. Changing certain pooling provisions of the order regarding performance standards and diversion limits.

4. Changing the rate of partial payments to producers.

5. Determining whether emergency marketing conditions exist that would warrant the omission of a recommended decision and the opportunity to file written exceptions.

Findings and Conclusions

Preliminary Statement: Representatives from the California Department of Food and Agriculture, Dairy Marketing Branch, appeared at the hearing to provide information and to answer factual questions about the California State milk order program. Their appearance was at the request of the USDA and their participation was provided as a courtesy to the public. The participation of the California officials was neither in support of nor in opposition to any of the proposals or issues that were heard. The California officials provided publications that detailed and explained the history and operations of the California milk order program which included how milk is pooled and priced under that State order.

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. Simultaneous Pooling on a Federal and State-Operated Milk Order

A proposal, published in the hearing notice as Proposal 1, seeking to prevent the simultaneous pooling of milk on the Upper Midwest order and on a State-operated order with marketwide pooling, should be adopted immediately. The practice of pooling milk on a Federal milk order and simultaneously pooling the same milk on a State-operated milk order has also come to be referred to as ''double dipping.'' Currently, the Upper Midwest order (Order 30) only provides prohibitions for the simultaneous pooling of the same milk on more than one Federal order. The record provides evidence and support for eliminating the ability of milk already receiving the benefits of marketwide pooling through a State-operated milk order from simultaneously being pooled on Order 30.

Proposal 1, which sought to end the practice of double dipping, was proposed by Associated Milk Producers, Inc. et.al., First District Association, and Lakeshore Federated Cooperative. These entities are dairy farmer cooperatives who supply a significant portion of the milk needs of the Upper Midwest marketing area. Other entities who joined in support of this proposal included: Foremost Farms USA; Mid-West Dairymen's Company; Bongards' Creameries; Cady Cheese; Cass-Clay Creamery; Ellsworth Cooperative Creamery; Family Dairies USA; Hastings Cooperative Creamery; Kraft Foods; Lynn Dairy; Manitowoc Milk Producers Cooperative; Milwaukee Cooperative Milk Producers; Muller Pinehurst Dairy; Mullins Cheese; Plainview Milk Products; Swiss Valley Farms; Valley Queen; Weyauwega Milk Products; White Clover Dairy, Inc.; and Hilmar Cheese of Hilmar, California.

A witness appearing on behalf of Associated Milk Producers, Inc.(AMPI), a supporter for the direct elimination of double-dipping, provided evidence and testimony that showed an increasing amount of California milk being pooled on Order 30. For the time period of October 2000 through May 2001, said the AMPI witness, there was an estimated $11.4 million negative effect on the pool, the equivalent of about a ten-cent ($0.10) reduction for each hundredweight of milk pooled on the order, as a result of pooling California milk on Order 30. According to the AMPI witness, this estimate was calculated by factoring the amount of milk from California that had been pooled on the Upper Midwest pool from the Order's actual Producer Price Differential (PPD) and applying the difference to the volume of milk pooled on the order.

The AMPI witness indicated the reform of the Federal milk marketing order system, implemented in January 2000, provided economic incentives for California milk to pool on Order 30. Specifically, said AMPI, the use of the higher of either the Class III or Class IV milk price in setting and moving Class I milk prices had yielded generally higher PPDs than existed in the Upper Midwest region prior to reform.

The AMPI witness surmised that Order 30's pooling of California milk, already pooled under the State-operated milk order of California, resulted in obvious inequities. The witness provided estimates of extent and impact on Upper Midwest dairy farmers and was of the opinion that this situation is severe enough to conclude that the Department should move directly to a final decision and avoid the more lengthy procedure of first issuing a recommended decision and then issuing a final decision.

These views and conclusions by the AMPI witness were supported in testimony by a witness appearing on behalf of Foremost Farms USA (Foremost). The Foremost witness testified that California milk pooled on Order 30 grew from about 10 million pounds to an average of 260 million pounds during the 3-month period of March through May 2001. According to calculations by Foremost, an estimated $6 million reduction in value for all milk pooled on the order occurred due

to the pooling of California milk on Order 30. This revenue, said Foremost, comes from Upper Midwest dairy farmers who already have the lowest PPD in the Federal order system. Acknowledging that tighter pooling provisions may serve to eliminate the double dipping issue, Foremost was of the opinion that tightening pooling standards would not be the best way to accomplish that end.

A witness representing the Mid-West Dairymen's Company/Lakeshore Federated Dairy Cooperative (MDC), a dairy farmer cooperative located in northern Illinois and southern Wisconsin, testified in support of ending double dipping. This witness also spoke on behalf of Lakeshore Federated Dairy Cooperative, which represents over 4,000 dairy farmers located in Illinois, Iowa, and Wisconsin, and whose milk is pooled mostly on the Upper Midwest order and to a lesser extent on the Central and Mideast Federal milk orders. This witness indicated that Mid-West Dairymen's Company milk supplies the fluid market.

The MDC witness expressed concern about equity among producers and equity among handlers. In this regard, the witness maintained that this issue should be handled on an expedited basis. The MDC witness indicated that the Federal order program has a long history of promoting equity to both producers and handlers. According to MDC, classified pricing contributes to equity among handlers, and the marketwide pooling of revenue generated from classified pricing provides for equity among producers. Specifically noted by the MDC witness was the purposeful elimination of individual handler pooling as milk marketing orders have consolidated in larger geographic areas.

Federal orders prohibit the pooling of the same milk of a producer on more than one Federal order, noted the MDC witness. Drawing money from one Federal order pool equitably shares revenue with those producers who supply the market, but drawing additional revenue from a second Federal order pool destroys the goal of equity among producers, a reason why the Federal order program prohibits double pooling, maintained MDC. As evidence of the impact of double dipping, MDC presented analysis showing that from January 2000 through April 2001, the Order 30 statistical uniform price per hundredweight averaged $10.8850, with a pool draw of 84.5 cents. Over the same 16-month period, said MDC, the California overbase price averaged about 21.5 cents higher than the blend price in Order 30. Not only is the California overbase price higher than in Order 30, noted MDC, but a California dairyman pooled on Order 30 will also draw the 84.5 cents by being able to simultaneously pool the same milk on Order 30.

The MDC witness testified that the California milk pooling plan places high importance on providing equity to producers and to handlers regulated by the state. The witness noted that establishing producer equity is a basic cornerstone of both the California and Federal milk order programs and that both accomplish this through marketwide pooling. If the Federal order program does not eliminate double dipping, there cannot be equity in prices received by producers in the Midwest or California, said the witness. Eliminating double dipping is desirable, said MDC, because it would not change the movement or the marketing of milk in any significant fashion. Milk would continue to be picked up at the farm and taken to the same plants as is currently done. According to the MDC witness, the only difference would be that no financial benefit would accrue to some producers who currently are able to double dip.

A dairy farmer from Minnesota, who is also the Chairman of the First District Association, President of the Nelson Creamery Association, and serves on the board of the Minnesota Milk Producer's Association (First District), testified in support of amending the Upper Midwest order to prohibit double dipping. The First District witness testified that it is unfair and wrong for dairy farmers pooled on Order 30 to have their milk price intentionally diluted as a result of California milk being pooled on the order. This witness estimated that the impact on the price received by dairy farmers in the Upper Midwest was about 15 to 17 cents per hundredweight. The First District witness also thought it important to indicate that California, with its State-wide milk regulatory system, had chosen not to be a part of the Federal milk order system.

A consultant witness with extensive experience in milk marketing regulations appeared on behalf of the supporters of Proposal 1. The witness provided detailed analysis regarding California milk movements and offered modified wording from that published in the hearing notice to end double dipping. This witness testified that Federal order provisions have always been tailored to prevent producers from pooling the same milk twice and enjoying the benefits of marketwide pooling from more than one order. To this end, according to the witness, a handler regulated on the Upper Midwest order should not be permitted to pool diverted milk if that milk is pooled and priced under either a Federal order or State order that provides for marketwide pooling.

Important to the new consolidated orders was the rejection of ''open pooling'' where milk from anywhere can be pooled on any marketing order, said the witness. The witness indicated that, in his opinion, the Department rejected open pooling because it did not provide an assurance of milk being made available for the fluid market. The witness also expressed the opinion that in markets with 20 percent or less milk used for fluid purposes, the notion of assuring an adequate supply of milk for fluid use becomes of questionable importance.

The witness testified that the statutory requirements for milk marketing orders require the uniform treatment of producers and that uniform treatment is fundamentally the same as the equitable treatment of producers. The witness said that equitable treatment includes the equal sharing of the proceeds of the pool among all producers pooled on the order. However, the witness thought the notion of equitable treatment would not include producers who are sharing in the proceeds of other marketwide pools on the same milk. To this end, the witness maintained that pooling milk on both the California and Order 30 marketwide pools has resulted in the nonuniform distribution of proceeds to those producers who pool the same milk twice.

The witness also presented an analysis of data from the California Department of Food and Agriculture as well as relying on his knowledge of milk receipts at plants located in the western States of Oregon, Nevada, and Arizona. This analysis shows, said the witness, that almost all of the California milk pooled on the Upper Midwest order is not physically received within the Order 30 area, but is instead being received at California plants. Because the milk is received at a California plant, it is pooled under the California marketwide system.

The Secretary of the Wisconsin Department of Agriculture, Trade, and Consumer Protection (WDATCP), accompanied by the Director of Value Added Agricultural Development of the WDATCP, testified in support of amending the Upper Midwest order to stop and prevent the double dipping of milk. The witnesses testified that increasing volumes of California milk was diluting the Class I utilization of the market and was also lowering the

benefit to dairy farmers in Minnesota and Wisconsin who are pooled on Order 30.

These Wisconsin officials were of the opinion that artificial regulations, not market forces, allow California milk to simultaneously pool under California's State order program and Order 30. The witnesses found this to be patently unfair and noted that it only serves to lower the income to Wisconsin and Minnesota dairy farmers.

With regard to milk produced far from the order and pooled on Order 30, these witnesses expressed minimal concern about such milk being able to pool on the order provided the same milk could not and would not enjoy the benefit of two marketwide pools. While the impact of pooling distant milk which cannot double dip was acknowledged to have the same impact in lowering returns to Minnesota and Wisconsin dairy farmers, these witnesses took no issue with such distant milk being able to pool on the Upper Midwest order. They expressed the view that adopting more restrictive pooling standards for the purpose of preventing double dipping would interfere with and supplant market forces, such as the economics of transportation and distribution, with artificial regulations.

The President and Chief Executive Officer of Hilmar Cheese, located in Hilmar, California, also testified in favor of preventing California milk from being pooled simultaneously on the California State order and the Upper Midwest order. Hilmar Cheese (Hilmar) produces a variety of cheeses which are marketed throughout the United States. The Hilmar witness testified that the California milk order system employs marketwide pooling.

The Hilmar witness stated that dairymen in California participate in a marketwide pool through a regulated milk pricing and pooling system that includes quota milk and that is operated by the State of California. The Hilmar witness confirmed the testimony of the California State government witnesses that all Grade A milk sold to a pool plant in California is associated with the pool and shares in the revenue generated from the use of milk in all classes of use. While all plants that manufacture milk into manufactured products such as cheese, frozen products, butter, and milk powder need not be pool plants, said the witness, most plants opt to participate in the pool so that their dairy farmers can reap the benefits of marketwide pooling. Manufacturing plants become pool plants, said Hilmar, by making some of their milk receipts available for Class I and Class II uses. Producers are paid for their milk on the basis of the milk components they ship and on the proportion of their milk sales that are covered by their quota holdings, said this witness. Fat and solids-not-fat, said Hilmar, have their own separate pools, and all producers share equally in the revenue generated by sales in the various milk classes. The total revenue from solids-not-fat in all classes, including revenue from the Class I fluid carrier value, is first adjusted to pay for transportation allowances and credits, and the remaining revenue is reduced by the total value of milk that is quota milk, said the witness. The quota milk pool is determined, said Hilmar, primarily by the pounds of solids-not-fat quota shipped multiplied by the quota premium of $0.195 per pound of solids-not-fat, which is also equal to $1.70 per hundredweight. After deducting the value of quota milk from the adjusted solids-not-fat revenue in the pool, the remaining revenue is divided by the total pounds of solids-not-fat to obtain the overbase (product in excess of quota) and the base solids-not-fat price, said the witness. The quota solids-not-fat price, said Hilmar, is equal to the overbase price plus $0.195 per pound. Under the California milk pooling system, testified Hilmar, all dairy farmers in the pool receive a portion of the revenue from milk sales in all milk classes, even though some dairy farmers will receive more as quota holders than those who hold less quota or no quota.

Because of this revenue sharing with all producers pooled under the California system, testified the Hilmar witness, the same dairy farmers should not also have the opportunity to pool the same milk on a Federal milk order. The witness found it odd that some producers would seek to capture pool revenue from other parts of the country and, at the same time, collect pool revenue from the California pool. Engaging in this sort of behavior, said the Hilmar witness, results in some undesirable consequences. The witness presented an analysis of a 17-month period (beginning with the implementation of order reform) that compared California milk prices with Federal order milk prices. This analysis revealed, according to the witness, that during the 17-month time period, the California overbase price averaged $11.21 per hundredweight (cwt), or $1.03 per cwt over the California Class 4–B (milk used in cheese) milk price. In the Upper Midwest order at Hennepin County (Minneapolis), noted the witness, milk value was only 73 cents higher than the order's Class III price at the reference test. The witness drew attention to the California overbase price averaging nearly 22 cents above the Upper Midwest statistical blend price despite the use of a quota system by California. California overbase dairy farmers, said the witness, already benefit significantly from its diverse product pool, and quota holders benefit in prices received by an additional $1.70 per cwt of milk.

There is an inequity to Upper Midwest producers, said Hilmar, when California overbase milk is pooled in both California and on the Upper Midwest order. Hilmar compared the producer price differential (PPD) for two different locations in the Upper Midwest marketing area (Chicago and Minneapolis) with a plant located in Glenn County, California (some 90 minutes north of Sacramento), where milk pooled under the Upper Midwest order is received. Hilmar testified that comparison of both the California overbase price and the Federal order PPD on the California milk that is pooled but not delivered to the Upper Midwest, results in a 95-cent net higher price for the ''double-pooled'' California milk than from California milk not pooled on Order 30. According to the Hilmar witness, the double pooling only serves to augment California prices received by producers by drawing money from the Upper Midwest market which already has milk prices lower than California's.

In light of their analysis, said Hilmar, double dipping is not the type of innovation that creates real value, and that double dipping only moves money and distorts and discourages, and ultimately damages the dairy industry. Hilmar chose not to engage in this behavior.

Additional support for eliminating double dipping was offered by a representative of Marigold Foods. Marigold Foods (Marigold) is a handler which has five regulated distributing plants located within the Upper Midwest order. Marigold is concerned, the witness indicated, about California milk being pooled on the order and reducing dollars paid to their local dairy farmers. According to the Marigold witness, California milk is not leaving the state of California and is not available to serve the fluid market in Order 30. Marigold indicated that they pay a $1.70 Class I differential on most of their milk purchases as well as over-order premiums to assure a supply of milk. However competitive the over-order premiums, Marigold indicated, they are not enough to assure themselves a supply of milk, noting that several of their suppliers have indicated a financial need to reduce shipments to

Marigold's distributing plants. The witness attributed this situation to the ability of California milk to be pooled simultaneously on the California State order and on Order 30.

The Marigold witness testified that the Order 30 PPD was being reduced by 10 to 15 cents per cwt by the pooling of California milk. Marigold indicated that this money was funded by the market's Class I fluid milk processors and that these funds should be going to the dairy farmers who serve, or are available to serve as needed, the Order 30 fluid market. Marigold stressed that they already compete for a supply of milk with handlers who are regulated by another Federal order and with entities who have obtained funds from Order 30 from the pooling of California milk. Competing with California only intensifies an inequitable situation in Marigold's ability to compete for a supply of milk, said the witness.

Marigold stated that it is through a regulatory loophole that producer milk which is not available to serve the fluid market is permitted to receive money from the Order 30 pool when the same milk is already receiving a benefit from marketwide pooling in a State-operated order. The witness said that this situation is unjust and contrary to the purposes of the legislation which authorizes Federal milk marketing orders for bringing forth an adequate supply of milk to meet fluid needs. Accordingly, the Marigold witness urged a prompt end of the ability of milk to double dip. By closing this regulatory loophole, said the Marigold witness, equity would be restored to Upper Midwest dairy farmers because the action would ensure that the money paid for milk by a regulated handler is shared among farmers who serve or are available to serve the fluid market.

Land O' Lakes is of the opinion that California does not have marketwide pooling. In support of their proposal, LOL pointed to other State dairy programs. They noted that the North Dakota State Order and the Pennsylvania Milk Marketing Board are currently considering the adoption of marketwide pooling. Other pricing programs, said LOL, such as the Northeast Compact and various over-order pricing agencies such as the Upper Midwest Marketing Agency would appear threatened if Proposal 1 were adopted. Other LOL views and proposals are discussed later in this decision.

Other opposition took the form of describing the general inadequacy of the Upper Midwest's pooling provisions and not the elimination of double dipping per se. While Dairy Farmers of America (DFA) testified that it opposes the ability of the same milk to simultaneously pool on two Federal milk orders, they did not oppose simultaneous pooling occurring on both a Federal and State-operated milk order such as California's. DFA indicated their ability to derive monetary benefits from both the Federal and California State milk order program has been of assistance in meeting their desired business objectives. DFA did submit their own proposal, published in the hearing notice as Proposal 4, which addressed broader pooling standards and concerns. DFA's proposal is discussed later in this decision.

For over 60 years, the Federal government has operated the milk marketing order program. The law authorizing the use of milk marketing orders, the Agricultural Marketing Agreement Act of 1937 (AMAA), as amended, provides authority for milk marketing orders as an instrument which dairy farmers may voluntarily opt to use to achieve objectives consistent with the AMAA and that are in the public interest. An objective of AMAA, as it relates to milk, was the stabilization of market conditions in the dairy industry. The declaration of the AMAA is specific: ''the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.'' The AMAA provides authority for employing several methods to achieve more stable marketing conditions. Among these is classified pricing, which entails pricing milk according to its use by charging processors differing milk prices on the basis of form and use. In addition, the AMAA provides for specifying when and how processors are to account for and make payments to dairy farmers. Plus, the AMAA requires that milk prices established by an order be uniform to all processors and that the price charged can be adjusted by, among other things, the location at which milk is delivered by producers (Section 608(c)(5)). As these features and constraints were employed in establishing prices under Federal milk orders, some important market stabilization goals were achieved. The most often recognized goal was the near elimination of ruinous pricing practices of handlers competing with each other on the basis of the price they paid dairy farmers for milk and in price concessions made by dairy farmers. The need for processors to compete with each other on the price they paid for milk was significantly reduced because all processors are charged the same minimum amount for milk, and processors had assurance that their competitors were paying the same value adjusted minimum price.

The AMAA also authorizes the establishment of uniform prices to producers as a method to achieve stable marketing conditions. Although some hearing participants are of the opinion that marketwide pooling cannot solve disorderly marketing conditions, marketwide pooling has been adopted in all Federal orders because of its superior features of providing equity to both processors and producers. A marketwide pool, using the mechanism of a producer settlement fund to equalize on the use-value of milk pooled on an order, speaks directly to the objective of the AMAA of ensuring uniform prices to producers supplying a market. The Federal order program purposefully moved away from individual handler pooling—a pooling method not uncommon when many milk marketing orders represented much smaller and much more local milk marketing areas. Through marketwide pooling, the equalization of prices paid to dairy farmers did have implications that affected the competitive relationship between processors along with uniform prices received by dairy farmers. Under individual handler pooling, the use-values of milk by a handler are averaged, or blended, and distributed separately to only those producers who had supplied the handler. With marketwide pooling, a handler regulated by an order with high Class I use was no longer able to exercise control over producers through the higher blend prices they were able to pay to producers who were, for example, more favorably located to the plant. Similarly, handlers with lower Class I use, unable to pay as large a blend price, found that marketwide pooling greatly improved their position in competing for a supply of milk. Prices paid by handlers were equalized across the entire market where handlers competed with each other for fluid sales and producers received a more uniform price for their milk.

Under the California State milk order program, similar objectives to that of the AMAA are clear. The record evidence indicates the California State order program as having a long history in the development and evolution of a classified pricing plan and in providing

equity in pricing to handlers and producers. Important as classified pricing has been in setting minimum prices, the issue of equitable returns to producers for milk could not be satisfied by only the use of a classified pricing plan. Some California plants had higher Class I fluid milk use than did others and some plants processed little or no fluid milk products. As with the Federal order system, producers who were fortunate enough to be located nearer Class I processors received a much larger return for their milk than producers shipping to plants with lower Class I use or to plants whose main business was the manufacturing of dairy products. Over time, disparate price differences grew between producers located in the same production area of the state which, in turn, led to disorderly marketing conditions and practices. These included producers who became increasingly willing to make price concessions with handlers by accepting lower prices and in paying higher charges for services such as hauling. Contracts between producers and handlers were the norm, but the contracts were not long-term (rarely more than a single month) and could not provide a stable marketing relationship from which the dairy farmers could plan their operations.

In 1967, the California State legislature passed and enacted the Gonsalves Milk Pooling Act. The law provided the authority for the California Agriculture Secretary to develop and implement a pooling plan, which was implemented in 1968. The California pooling plan provides for the operation of a Statewide pool for all milk that is produced in the State and delivered to California pool plants. It uses an equalization fund that equalizes prices among all handlers and sets minimum prices to be paid to all producers pooled on the State order. While the pooling plan details vary somewhat from pooling details under the Federal order program, the California pooling objectives are, for all intents and purposes, identical to those of the Federal program.

It is clear from this review of the Federal and the California State programs that the orderly marketing of milk is intended. Both provide a stable marketing relationship between handlers and dairy farmers and both serve the public interest. It would be incorrect to conclude that the Federal and California milk order programs have differing purposes when the means, mechanisms, and goals are so nearly identical. In fact, and as indicated in brief by the supporters for Proposal 1, the Federal order program has precedent in recognizing that the California State milk order program has marketwide pooling. Under milk order provisions in effect prior to milk order reform, and under § 1000.76(c), a provision currently applicable to all Federal milk marketing orders, the Department has consistently recognized California as a State government with marketwide pooling.

Since the 1960's, the Federal milk order program recognized the harm and disorder that resulted to both producers and handlers when the same milk of a producer was simultaneously pooled on more than one Federal order. As noted above, producers do not receive uniform minimum prices, and handlers receive unfair competitive advantages. The need to prevent ''double pooling'' became critically important as distribution areas expanded and orders merged. The issue of California milk, already pooled under its State-operated program and able to simultaneously pool under a Federal order, has, for all intents and purposes, the same undesirable outcomes that Federal orders once experienced and subsequently corrected. It is clear that the Upper Midwest order should be amended to prevent the ability to pool on more than one order when both orders employ marketwide pooling.

There are other State-operated milk order programs that provide for marketwide pooling. For example, New York, as indicated in record testimony, operates a milk order program for the western region of that State. A key feature explaining why this State-operated program has operated for years alongside the Federal milk order program is the exclusion of milk from the State pool when the same milk is already pooled under a Federal order. Because of the impossibility of the same milk being pooled simultaneously, the Federal order program has had no reason to specifically address double dipping or double pooling issues, the disorderly marketing conditions that arise from such practice, or the primacy of one regulatory program over another. The other states with marketwide pooling similarly do not double pool Federal order milk.

The record contains various opinions offered to explain why the practice of double dipping has occurred. Some offered that the Class I price structure changes implemented with Federal order reform resulted in a much higher PPD than existed under the old Upper Midwest and Chicago orders, providing a financial incentive. Some cited the change in how orders, including Order 30, zoned Class I prices and producer blend prices, suggesting if these zoning methods had been retained, the incentive for California milk to double dip on Order 30 may never have been an issue. Others noted that the Federal order location value of fluid milk in much of California is actually higher than in Order 30 and thus implied that tighter pooling provisions would most likely prevent California milk from being pooled on Order 30.

These are all interesting and valid observations that can lead to reasonably concluding that California milk would not seek to be pooled on Order 30 if not for the regulatory amendments. However, determining that double dipping and its impacts are a result of the reformed Class I pricing structure does not lead to the conclusion that the price structure needs to be abandoned or severely altered. Rather the issues here are whether the double dipping is a pooling problem that needs to be solved, and whether the first proposal, with or without various modifications, is an effective solution to that problem. As noted above, the Department believes the pooling problem needs a pooling solution and a modification of the first proposal will effectively solve the problem. When equity is not provided for, the disorderly marketing conditions that have arisen in Order 30 become the same as those existing prior to Federal orders adopting provisions preventing the double pooling of milk.

California milk should only be eligible for pooling on Order 30 when it is not pooled on the California State order, and meets the Upper Midwest's pooling standards. A distinction needs to be made here between a producer and the milk of a producer. While much of the record testimony speaks of producers in the same vein as the milk of producers, it is necessary to clarify the obvious intent of all hearing participants that it is the milk of a producer that becomes pooled. It is clear from the context of the record testimony that this was intended.

The Federal milk order program, including Order 30, does not regulate producers. Rather, the program regulates handlers, those entities that are the first buyers of milk from producers and who incur the minimum payment obligations to producers. The Federal milk order program has no authority to regulate producers in their capacity as producers, and cannot, for example, preclude a producer from being pooled anywhere, provided the milk of the producer meets the pooling standards of an order. For this reason, Federal milk orders, including Order 30, provide separate definitions for a producer in the Producer definition and for the milk of a producer in the Producer milk definition. This distinction is also

important because the record evidence indicates California milk delivered directly from farms to plants located outside the State is not pooled on the State order. If a California producer delivers milk directly from the farm to pool plants regulated by the Upper Midwest order, and if that milk satisfies the pooling standards of the Upper Midwest order, that milk will be pooled on the Upper Midwest order.

The amendatory wording provided below, intended to eliminate double dipping, is at some variance from that proposed by the proponents of Proposal 1. The wording is different because the proposed modified wording of Proposal 1 would prevent double dipping on only diverted milk. The wording presented below would apply to any milk that participates in a State-operated milk order that provides for the marketwide pooling of milk and, would not prohibit the ability of milk to participate in the Order 30 pool when not part of a State-operated order milk order program providing for marketwide pooling.

2. California Overbase Milk and Pooling

A proposal, published in the hearing notice as Proposal 3, that sought to exclude California quota milk from being pooled on the Upper Midwest order should not be adopted. As California has quota and overbase prices for milk, this proposal would allow overbase milk from California to be eligible for pooling on Order 30.

Two proposals were offered by Land O'Lakes (LOL) that sought to permit the continued pooling of California milk on the Upper Midwest Order. Specifically, a proposal published in the hearing notice as Proposal 2, would ''grandfather'' or exempt any California milk previously qualified for pooling on the Upper Midwest order from any amendment to the order which would thereafter exclude the pooling of such milk. This proposal was abandoned and is not discussed further in this decision. Another proposal, published in the hearing notice as Proposal 3, sought to exclude only California quota milk from being pooled on the Upper Midwest order. LOL is a cooperative association that has member producers whose milk is pooled under both the California State and Upper Midwest milk orders.

The witness testifying on behalf of LOL indicated that his organization supports the concept of efficient and orderly marketing and, that the pooling of milk under an order should be based on performance. However, LOL indicated they were not in favor of restricting access to pooling to benefit a select few. LOL was of the opinion that fewer restrictions to pooling provides for market efficiencies resulting in lower costs in serving the Class I needs of a market. The witness testified that LOL engages in double dipping. They indicated they engage in this practice to gain additional revenue to subsidize the losses incurred in servicing the fluid market in Order 30. They did not think marketing conditions warrant the Department of Agriculture treating the issue as an emergency.

The real issue facing the industry, said the LOL witness, is not California milk. The impact of pooling reserve supplies of milk is the same regardless of where the milk is located, said LOL. The witness argued that regardless of location, performance criteria must be met to provide for pooling eligibility, and therefore, performance requirements rather than the artificial restrictions offered by Proposal 1 should be addressed. According to the witness, increasing shipping requirements would provide all the equity necessary as handlers shipping the minimum requirements will be forced to ship more milk or reduce the volume of milk pooled. LOL contends that producers have the right to pool milk based on performance, stressing that where the milk originates is irrelevant.

The LOL witness testified that the Class I pricing surface adopted as a result of Federal milk order reform has allowed for more liberalized pooling, thereby allowing access to higher levels of Class I revenues. The witness said the net impact of Federal order reform has been positive for Upper Midwest dairy farmers. LOL did stress that access to additional Class I revenues should only be gained through performance, with market participants demonstrating a willingness to service the fluid needs of the market. According to the LOL witness, the utilization of milk for Class I fluid uses will tend to equilibrate as the needs of milk order areas beyond Order 30 are met based on performance. The witness said that the milk of producers should be allowed to move freely to meet the needs of the markets. In this regard, testified LOL, Upper Midwest entities must be willing to share the local proceeds from Class I use if they expect to share other markets' Class I proceeds or risk the loss of credibility when participating in deciding how milk orders should function.

According to the LOL witness, California does not have a marketwide pool. The witness noted that proceeds from fluid and soft dairy product use are paid to producers on the basis of quota, while non-quota milk is priced based on manufacturing values. The returns on quota equity, said LOL, are not distributed marketwide, noting that it has been only recently that the State of California instituted a value difference between quota and overbase milk. It is LOL's assertion that California's lack of marketwide pooling should not prohibit the ability of overbase milk to be pooled on Order 30.

The LOL proposal for allowing the pooling of overbase milk from California on Order 30 should not be adopted for the same reasons discussed in finding that Proposal 1 should be adopted immediately. Regardless of LOL opinions, the only reasonable conclusion that can be reached is that the California State order program does have marketwide pooling and that overbase milk received at a California plant is pooled on the State order and thereby shares in the benefits that accrue to producers under the State's marketwide pooling plan. This conclusion is substantiated by the testimony and participation by California State officials who operate the California State milk order program. Additionally, it seems contrary to the argument advanced by LOL that milk, regardless of where it is located, should be pooled on the basis of performance. California milk, other than a one-time shipment of a days' production of a producer, does not actually leave the State to consistently service the Order 30's Class I needs.

3. Performance Standards and Diversion Limits

A proposal offered by the Dairy Farmers of America (DFA) and the National Farmers Organization (NFO), published in the hearing notice as Proposal 4, addressed two separate issues: establishing performance standards for milk not traditionally associated with the Upper Midwest marketing area and, the ability of pool distributing plants to divert an unlimited volume of milk to nonpool plants. The portion of the proposal seeking to establish diversion limits for pool distributing plants should be adopted immediately. The record does not support adoption of performance standards for milk based on the location of the producer or the milk of a producer. DFA is a member-owned cooperative of nearly 17,000 farms that produce and market milk across a significant portion of the United States. NFO is also a member-owned cooperative that produces and markets milk in Order 30, the State of California, and in other Federal milk orders.

Specifically, the Upper Midwest order should be immediately amended to provide a diversion limit of 90 percent of producer receipts, including

diversions, for pool distributing plants regulated under the order. In addition, the market administrator may adjust the diversion limit for pool distributing plants as marketing conditions warrant. Since supply plants pooling milk on the Upper Midwest order must ship 10 percent of receipts, including milk diverted, to a pool distributing plant and certain other types of plants, there is no reason to impose a diversion limit on supply plants.

DFA testified that two primary benefits of the Federal order program include allowing producers to benefit from the orderly marketing of milk and to share in the marketwide distribution of revenue that results mostly from Class I milk sales. Orderly marketing influences milk to move to the highest value use when needed and, for milk to clear the market when not used in Class I, said DFA. The witness insisted that the pooling of distant milk that does not show a service to the Class I market is inconsistent with Federal order policy and such milk should not be eligible to share in the revenue that accrues from Class I use.

Pooling standards are universal in their intention, said DFA, requiring a measure of commitment to a market marked by the ability and willingness to supply the Class I needs of that market. The witness also noted that pooling standards are individualized in their application and each market requires standards that work for the conditions that apply in that individual market. The witness quoted the Final Decision of milk order reform: ''the pooling provisions for the consolidated orders provide a reasonable balance between encouraging handlers to supply milk for fluid use and ensuring orderly marketing by providing a reasonable means for producers with a common marketing area to establish an association with the fluid market.''

The DFA witness drew from the history of milk marketing and commented on the problems of producers in their attempts at improving their economic circumstances. The witness identified shortcomings of the marketplace resulting in the difficulty of the milk supply being able to service the market's fluid needs in a manner that treats all producers equitably. The superior negotiating position of milk buyers and the variations in supply and demand were examples provided by the witness that have always ''tripped up'' dairy farmers in their marketing efforts. The witness added that farmers' attempts to improve on past efforts always seemed to fail when one or more suppliers would find a way to opt out of the added cost of serving the market to obtain a higher return for themselves. Marketwide pooling, said the DFA witness, eliminated the differences in prices paid to suppliers within the same market and, in turn, eliminated the non-productive competitive drive for higher returns since everyone faced the same terms of trade. The witness also noted the absence of any action recommending any change to these fundamental features of milk orders and, that every Federal order shares returns to all producers marketwide.

The DFA witness was of the opinion that the new Class I pricing structure, together with the interface of the pricing surface and the pooling provisions found in each order, resulted in significant changes in the marketplace for milk. The link between performance and pooling, said the witness, was altered by these reforms and needs review. DFA noted that many entities, including themselves, moved quickly to take advantage of these changes in order rules. The witness indicated that when in a competitive dairy economy, an entity must make pooling decisions that aim to increase returns, competitors must attempt to do the same or risk their competitive position.

Pooling provisions of the Order 30 order work well for milk produced in the marketing area, said DFA, but do not work well for milk produced out of the area. Producers need only deliver a days' production a single time to a pool plant to have their milk eligible for pooling. This, combined with no loss of producer eligibility provided a producer does not deliver to another Federal order plant, makes Order 30 an attractive market in which to pool milk, the witness stated.

The witness also relied on, and drew heavily from, the order reform Final Decision (64 FR 16026) which explained the marketing area boundaries of the consolidated Upper Midwest marketing area. Although the prior marketing order areas of the Chicago Regional and Upper Midwest orders did not have a considerable degree of overlapping fluid milk disposition, they did have an extensive overlapping procurement area, according to the witness. In light of this, the witness noted that the reform Final Decision could therefore find no justification on the basis of overlapping sales for increasing the consolidated marketing area beyond what was adopted. Rather, it is the extensive overlapping of a common procurement area, or milkshed, that is the most compelling reason for explaining the boundaries of the consolidated Upper Midwest marketing area.

The witness noted, too, that there was extensive discussion early in the construct of the 1996 Farm Bill concerning the merits of having a single national Federal order. Such an outcome would have resulted in a single blend price across the entire country. Noting that Congress debated several proposals and several economic studies over this issue, Congress rejected the idea of a single marketing order with the premise of one blend price. According to the witness, open pooling, which may result in blend prices being equalized across a large territory, is counter to the intent of Congress and the legislative directive of the Farm Bill—to consolidate the orders into no fewer than 10 and not more than 14.

The DFA witness expressed alarm about milk from distant areas sharing in the blend price when that milk neither serves the fluid market, nor balances the market when extra milk is needed by fluid processors. The witness referenced the rejection of the concept of open pooling discussed in the reform Final Decision and indicated that the decision rejected this because open pooling provides no reasonable assurance that milk will be made available to satisfy the fluid needs of the market. The witness also noted further that proposals to create and fund ''stand-by'' pools were also rejected.

DFA was of the opinion that open pooling is not appropriate for Order 30. Additionally, because of the distance and cost involved in moving milk to the market, milk needed in the fall months to accommodate increased demand because of increased school milk sales, or to provide a manufacturing outlet for milk produced in excess of fluid needs would not be provided. It is irrelevant, said the witness, if the milk in question originates from California or any other place because such milk is no more burdensome than distant milk produced in Idaho or any other area. Under the open-pooling concept, said DFA, ''distant'' milk able to pool alongside ''local'' deliveries only serves to pyramid the volume pooled.

Prohibiting the simultaneous pooling of milk on a State-operated marketwide pool and the Order 30 pool, the focus of Proposal 1, said DFA, does not fully address the pooling problems at hand. The witness provided evidence and testimony that showed an increasing amount of ''distant'' milk pooled on the Upper Midwest order which, they maintain, is not serving the Class I needs of the market. The witness submitted analysis demonstrating that when milk is pooled without being available for Class I use, or ''paper pooled'' on Order 30, returns to local producers who are consistently serving the fluid market are decreased.

Analysis was provided by DFA to illustrate how the pooling of milk on Order 30 has changed by examining the amount of milk pooled on the order and where the milk was produced. Using October 1997 as a reference time period prior to the consolidation of the orders, 2.4 billion pounds of milk were associated with the Chicago Regional and Upper Midwest markets, but only 1.6 billion pounds of milk were pooled because of class—price relationships, provided the witness. The 2.4 billion pounds were produced by 27,250 producers located in 13 States from Tennessee to Minnesota, and from New Mexico to Michigan. The witness noted that over 93 percent of the producer milk was produced within the consolidated marketing area, and 91.4 percent of the milk pooled was produced within the States of Wisconsin and Minnesota. In comparison, the witness provided data subsequent to the implementation of order reform; during June 2001, 12,748 producers pooled 1.5 billion pounds of milk on consolidated Order 30, with a total of 84 percent of the milk pooled produced within the consolidated marketing area, and 79 percent originating from Minnesota and Wisconsin. The other 16 percent of the total milk pooled on Order 30 during June 2001 was from California.

The witness testified that DFA considers it important to end the near open pooling of large volumes of milk that never serve the fluid market by modifying the order's pooling standards and establishing diversion limits for pool plants. To this end, DFA offered a proposal requiring milk produced outside the States that comprise the Upper Midwest milk marketing area be grouped into, and reported as, individual State ''units''. Each unit would be subject to the same shipping standards for pool supply plants, said DFA.

Additionally, DFA was of the opinion that the order lacks the means to define the potential size of the pool. In this regard, DFA thought it appropriate to establish a limit on the amount of producer milk that a pool plant can divert. Because a producer need only deliver one days' production to an Order 30 pool plant to qualify and thereafter remain qualified to pool their milk on the order, DFA noted, a pool plant may subsequently divert all of the producer's milk to any plant without any of that milk being required to serve the fluid market. It is this shortcoming of the Order 30 producer milk definition which provides the means by which milk from distant areas is able to pool on Order 30, stated DFA.

Stressing the costs associated with transporting milk long distances, DFA was of the opinion that no economic basis exists for such milk to actually make itself available to consistently serve the fluid market. Therefore, the witness concluded, milk located far from the order should be required to meet performance standards equal to the performance standards for milk originating within the order. The ease of qualifying for pooling on Order 30, said DFA, has attracted and caused to be pooled increasing volumes of milk which have only served to lower the order's blend price. The economic burden of the cost of delivering milk to a pool plant becomes a one-time event, said DFA. Thereafter the milk need never perform in servicing the fluid market while reducing returns to producers whose milk is actually serving the market's Class I needs, the witness concluded.

DFA was of the opinion that their proposal provides reasonable standards for demonstrating consistent performance in supplying the fluid market by milk from outside the States comprising Order 30. This would result in milk from distant areas performing on the same basis as local milk, said the witness, while not discriminating, penalizing, or establishing any barriers to the pooling of milk from any area on Order 30. The witness also stated this feature of their proposal is an adequate and reasonable standard for requiring all market participants to share in the responsibility of serving the fluid market.

DFA presented an analysis of data depicting mileages from California and Idaho to locations in Order 30 with the performance standards they proposed. This was offered to illustrate DFA's opinion that distant milk would not rationally seek to be pooled on Order 30 when required to perform in the same way as milk from within the States that comprise the marketing area. The witness presented a review of the relationship between the order's blend price return versus the cost of delivering milk to the Order 30 market. The witness claimed that a daily delivery of milk from California would yield a net loss of $71,647, while a daily delivery from Idaho would yield a net loss of $48,576 in the month of January 2000. On the basis of such losses, DFA concluded that such distant milk would not seek to be pooled on Order 30.

DFA then presented a comparison of blend price return versus hauling costs with no performance standards. After absorbing the one-time hauling cost, both the California and Idaho milk supplies would have generated a positive return in the first month, growing to much higher returns in the second month, concluded the witness. Stressing that once the cost of the initial haul to qualify a producer for pooling is incurred, the subsequent pooling of milk would continually enjoy monetary benefits of being pooled on Order 30 without servicing the fluid market.

The DFA witness was of the opinion that their proposal has a measurable economic consequence that is in line with existing Federal milk order principles. If the economic returns are positive, said DFA, regulation would not prohibit pooling of distant milk and thus would provide a reasonable and defendable standard. The witness also said that each State unit must be treated individually and perform as a stand-alone entity under the same performance standards as currently applicable to supply plants. The witness stressed that this feature of their proposal provides a reasonable economic test of whether or not the market needs such milk for Class I use, and that economic returns must be earned in the market place and not by what is provided in pooling reports.

DFA was of the opinion that Order 30 should not be amended on an emergency basis prior to proceedings to consider amending other orders. The distant pooling of milk on Order 30 has been occurring for a long time—since January 2000, DFA stated. While the volume of distant milk pooled has increased, the negative impact on Order 30 blend prices has been reduced by the fact that Order 30 handlers have, in a not dissimilar fashion, pooled large volumes of milk on the Central and Mideast Federal milk orders, stated the witness, adding that California milk under their control was also being double pooled on the Central Order, Order 32. DFA was also of the opinion that if the Upper Midwest order is amended prior to consideration of appropriate amendments to the Central and Mideast orders, the pooling problems exhibited in the Upper Midwest would only ''migrate'' to these other marketing areas, resulting in even more disorderly marketing conditions.

A witness from the Northwest Milk Marketing Federation testified in support of DFA's proposals. The Northwest Milk Marketing Federation (NMMF) is a cooperative representing over 97 percent of dairy farmers whose milk is pooled on the Pacific Northwest Federal milk order.

The NMMF witness stated that Federal orders should have performance requirements which reasonably require all volumes of milk associated with the pool to proportionately service the fluid

needs of the market. The witness was of the opinion that Idaho milk could pose a threat to producers in the Pacific Northwest if that milk can be pooled without meeting performance standards. The proposals offered by DFA adequately address such pooling issues and should be adopted in Order 30, said the witness. This would not only alleviate the issue of pooling distant milk, but would serve as a model for other Federal order hearings, namely the Pacific Northwest, where similar pooling problems exist, said the witness.

Opponents of DFA's proposals stressed that marketing conditions prevailing in the Upper Midwest require only the elimination of double dipping. Associated Milk Producers, Inc., First District Association, and Lakeshore Federated Dairy Cooperative, expressed concern that DFA's proposal does not thoroughly address the need to end double dipping. They claimed that DFA's analysis of hauling costs only serves to exclude and target Idaho and California milk, and the value of such analysis of the Order 30 marketing conditions is misplaced. Similarly, they noted that back-hauling, where a lower shipping rate can be obtained from a hauler who has the ability to back-haul or return with other freight instead of returning empty, leaves open the possibility that double pooled California milk could, in fact, have positive returns even if required to perform.

The opponents also claimed that other loopholes in DFA's proposal might allow California milk to continue double pooling on Order 30. Class I fluid milk products, including concentrated milk which California plants routinely process in meeting the fluid milk standards of California, could be pooled on Order 30, noted the witness. For example, concentrated milk could be delivered to Order 30 and subsequently returned to California for use in that State's Class 4a or 4b uses of milk, the witness added.

Opponents were also of the opinion that illegal trade barriers to the movement of milk in Federal orders would be erected if DFA's proposal were adopted. Idaho milk that performs in the same manner as Minnesota milk should be eligible for pooling in the same way the order now provides for Minnesota milk, provided the same milk is not pooled more than once, stated opponents. Similarly, said the opponents, eligibility requirements in other Federal milk orders should not exclude milk based on its point of origin. They also stressed that trying to differentiate ''historical'' milk supplies with other ''distant'' milk for pooling purposes would be difficult and an unreliable test for determining pooling eligibility. In this regard, they noted the pooling of milk received from Montana dairy farmers on the old Upper Midwest order, Order 68. Also, their review of historical data revealed that Missouri milk, for example, was long associated with the Texas order, but is now associated with the Southeast order. Changes in milk association can and do occur, opponents noted, and USDA should not create rigid rules as to when, where, and how such association may be permitted.

A witness representing Kraft Foods (Kraft) also testified in opposition to DFA's proposal, depicting it as being designed to create a severe, detrimental, and economic disincentive to pool milk on the Upper Midwest market because the performance standards called for would increase the transportation burden borne by distant producers. They were of the opinion that if this proposal were adopted, it would be nothing more than Government imposing a discriminatory transportation burden on distant producers and hindering a producer's free marketing choices.

Along the theme of transportation burdens, the Kraft witness also expressed the opinion that when producers incur disproportionately large transportation costs in supplying the fluid needs of the market, those producers would not be receiving uniform prices as required by law. Kraft was of the opinion that DFA's proposal is inconsistent with what the witness described as the AMAA's prohibition against consideration of a handler's use of milk as a condition of blend price receipt, adding also that it would create an unlawful and unauthorized exception in providing for uniform prices to producers. In effect, detailed Kraft, the DFA proposal would require selected groups of distant producers to incur transportation costs and other regulatory burdens not required of nearby producers under the order, said the witness. Participation in the Upper Midwest market would only guarantee that distant farms would incur monetary losses, Kraft asserts. Additionally, said Kraft, DFA's proposal is unlawful because it conditions the pooling of distant producers upon utilization of their milk by a Class I distributing plant. In this regard, Kraft questioned the legality of requiring designated groups of dairy farmers to incur extraordinary expenses of shipping milk to Class I plants while other pooled farmers would be able to share in the Class I revenue without the same burden.

Finally, Kraft expressed the opinion that DFA's proposal would, if adopted, violate the law because it would be erecting illegal trade barriers by limiting the marketing of milk products in Order 30 depending on where the milk is located. The performance requirements placed on producers within Order 30, said Kraft, would be different than requirements for producers outside the order.

The proposal by DFA should be adopted in part but limited to the establishment of diversion limits for pool distributing plants. The record does not support the adoption of performance standards for pooling milk on the order on the basis of its location. Establishing a limit on the amount of milk that a pool distributing plant may divert provides for a complete set of provisions for identifying which producers, which producer milk, and which handlers should share in the benefits that accrue from the marketwide pooling of milk on the Upper Midwest order. By setting a limit, the integrity of the performance standards of the order will be improved. If Order 30 does not limit the amount of milk that may be diverted by pool distributing plants, the pool is effectively undefined.

Diversions are needed to accommodate the movement of milk properly associated with the market when not needed for Class I use. A diversion limit will also establish the amount of producer milk that may be associated with the integral milk supply of a pool plant. As discussed earlier, the diversions being considered are shipments of milk directly from the farm to a nonpool plant pursuant to the Producer milk definition provided for in § 1030.13(d). The Upper Midwest order also allows for supply plants to deliver producer milk directly from the farm to another pool plant. However, since the intent of allowing a supply plant to ship producer milk directly from the farm to pool plants is to provide for maximizing the efficient movement of milk to pool distributing plants, milk shipments such as these are not included in the context of diversions as it relates to pool distributing plants and are, therefore, not limited in the quantity of milk a supply plant can direct ship to another pool plant.

The marketing conditions of the Upper Midwest order are unique, and this uniqueness should be reflected in the pooling standards of this order. As indicated in testimony and in briefs, the Upper Midwest market area has about a 20 percent use of milk for fluid use, with the remainder of the milk used in lower-valued classes. In light of this

relatively low share of milk volume that is needed to supply the Class I needs of the market, this decision finds basic agreement with those who expressed opposition to DFA's proposal. Specifically, the marketing conditions of Order 30 do not exhibit the need to require additional performance standards for milk located outside of the marketing area or, as DFA describes, milk located outside of the States that currently comprise the consolidated Upper Midwest Milk Marketing Area. Accordingly, all pool plants, regardless of location, may become eligible to have the milk of producers pooled on Order 30 by meeting the performance standards specified for the various types of pool plants.

In several instances in testimony and in their post-hearing brief, DFA was of the opinion that ''distant'' milk does not have, and is not required to meet, the same performance standards as ''local'' milk. Any supply plant or a cooperative acting as a handler (as provided for and described in § 1000.9(c)) would need to ship ten (10) percent of their reported producer receipts to pool distributing plants and certain other plants each month in order to qualify for being pooled. Therefore, producer milk included in reports by handlers described in § 1000.9(c) is included in determining whether or not the handler has qualified for being pooled on the order. No distinction is made by the order whether the milk pooled is ''local'' or ''distant.'' Thus all of the producer milk of the handler meets the same qualification standards regardless of the physical location of the producer or the milk of a producer.

DFA maintains that the proposal (Proposal 1) seeking only to eliminate double dipping does not go far enough in addressing their general concerns about performance standards for the system of orders, including the Upper Midwest order. The argument is troublesome. On one hand, DFA fundamentally asserts that performance standards are critical to the orderly marketing of milk and for determining those participants who are actually serving the fluid market, including the Order 30 market, stressing that only these participants should share in the benefits of the pool. At the same time, by their own testimony, DFA engages in the practice of double dipping, yet does not find double dipping disruptive to the orderly marketing of milk, even when such ''distant'' milk from California will rarely, if ever, again be shipped to pool plants, including distributing plants regulated by the order. This decision finds little logic in asking for a finding that no disorder results from allowing the simultaneous pooling of distant milk under California's State operated system and on Order 30, while at the same time asking for a finding that alternative performance standards are needed because of the disruptive effects to orderly marketing by pooling ''distant'' milk which does not consistently service the fluid market.

Pooling standards of milk orders, including Order 30, are intended to ensure that an adequate supply of milk is supplied to meet the Class I needs of the market and to provide the criteria for identifying those who are reasonably associated with the market for sharing in the Class I proceeds. Pooling standards of the order are represented in the Pool plant, Producer, and the Producer milk definitions of the order. Taken as a whole, these definitions set forth the criteria for pooling. Pooling standards should continue to be performance based in Order 30. This is the only basis viable for determining those eligible to share in the pool. It is primarily the additional revenue from the Class I use of milk that adds additional revenue, and it is reasonable to expect that only those producers who consistently supply the market's fluid needs should be the ones to share in the distribution of pool proceeds.

With regard to the Final Decision for the reform of the Federal milk order program, it is true that the common procurement area was the most compelling basis in forming the consolidated Upper Midwest marketing area. However, it is not the procurement area that provides the additional revenue to the pool. Rather, the revenue is derived largely from the Class I use of milk by regulated handlers that have Class I sales in the marketing area. In this regard, it is not important who provides the milk for Class I use or from where this milk originates. The order boundaries of the Upper Midwest order were not intended to limit or define which producers, which milk of those producers, or which handlers could enjoy in the benefits of being pooled on Order 30. What is important and fundamental to all Federal orders, including Order 30, is the proper identification of producers, the milk of those producers, and handlers that should share in the market's pool proceeds.

Pooling of ''distant'' milk on the Upper Midwest order is neither new nor without precedent. The record testimony and evidence show milk pooled on Order 30 from nearly all corners of the country. However, this decision acknowledges that with the advent of the economic incentives for California milk to pool on Order 30 and, at the same time, enjoy the benefits of being pooled under California's State-operated milk order program, significantly more milk has come to be pooled on the order that has no legitimate association with the integral milk supplies of Order 30 pool plants. The association at present has been made possible only through what some market participants describe as a regulatory loophole. The Upper Midwest order also provides a significant degree of pooling flexibility in the form of provisions allowing system and unit pooling. These provisions promote the orderly marketing of milk by minimizing the inefficient movement of milk for the sole purpose of meeting pooling standards.

This decision finds basic agreement with some of the reasons offered in testimony and reiterated in briefs by opponents to DFA's proposal for organizing ''distant'' milk into State units. Requiring each State unit to ship at least 10 percent of the quantity of milk to a distributing plant regulated under the order effectively sets a performance standard different from the States that comprise Order 30. For example, of the milk received from Idaho, the DFA proposal would establish a standard for at least 10 percent of such milk to be shipped to a distributing plant in order for this milk to be producer milk pooled on the order. However, the same would not be required, for example, that 10 percent of all Wisconsin milk be shipped to distributing plants regulated under the order. It is the ability of milk from California to double dip that is the primary source of disorderly marketing conditions and for much more milk being pooled on Order 30. By eliminating the ability to double dip, it is reasonable to conclude that California milk is unlikely to be pooled on Order 30 for economic reasons illustrated in DFA's testimony and analysis contained in the record of this proceeding. The remaining issue is establishing appropriate diversion limits for all pool plants, including limits for distributing plants which currently do not exist in the Upper Midwest milk order provisions.

In addition to describing what a dairy farmer must do to become a producer under the order, the producer definition of the order provides that a full days' production of the milk of a dairy farmer be physically received at a pool plant anytime during the first month a producer is associated with the market before the milk of a producer can be diverted. Provisions for diverting milk

are a desirable and needed feature of an order because they facilitate the orderly and efficient disposition of the market's milk not used in Class I uses. When producer milk is not needed in the market for Class I use, its movement to nonpool plants for manufacturing without loss of producer milk status should be provided for. Provision should also be provided to minimize the inefficient movement of milk solely for pooling purposes. However, it is just as necessary to safeguard against excessive milk supplies becoming associated with the market through the diversion process.

Diverted milk is milk not physically received at a pool plant. However, it is included as a part of the total producer milk receipts of the pool plant causing the milk to be diverted. While diverted milk is not physically received at the pool plant that causes the milk to be diverted, such milk is nevertheless an integral part of the milk supply of the diverting pool plant. If such milk is not part of the integral supply of the diverting plant, then that milk should not, and is not, properly associated with the diverting plant. Therefore, such milk should not be pooled.

Associating more milk than is actually part of the diverting plant's milk supply only serves to reduce the potential blend price paid to dairy farmers. Allowing the pooling of milk far in excess of reasonable needs by the absence of diversion limits only provides for association with the market through ''paper-reporting'' and not by service to the Class I needs of the market. Without a diversion limit, the order's ability to provide for effective performance standards and orderly marketing is weakened.

On the basis of the record, the lack of a diversion limit for producer milk by distributing plants has opened the door for pooling much more milk, and, in theory, an infinite amount of milk on the market. In the specific marketing conditions of Order 30 evidenced by the record of this proceeding, the lack of a diversion limit for producer milk at distributing plants has caused more milk to be pooled on the order than can be considered reasonably associated with the market.

The diversion limits for pool distributing plants offered by DFA are reasonable, and, in fact, are needed for upholding the purpose of providing for performance requirements in serving the Class I needs of the market. The order already effectively sets a diversion limit on pool supply plants by requiring these plants to ship 10 percent of their receipts, including diversions, to distributing plants regulated under the order. Therefore, an effective 90 percent limit on the amount of milk that could be diverted has already been established. Accordingly, the specific amendatory wording offered by DFA with respect to pool supply plants is not necessary. However, in the case of pool distributing plants, the order does need specific amendatory language to carry out this intent.

The amendatory language provided by DFA would add other order distributing plants that cooperative handlers (as described in § 1000.9(c)) may divert milk to. DFA claims that this matches the pool supply plant provisions for shipments to a distributing plant. It does do this. However, the amount of milk for which a pool supply plant is able to qualify for pooling is limited to the amount of shipments that are not made on the basis of agreed-upon Class II, Class III and, Class IV utilization. Milk that moves directly from the farm to another order pool distributing plant that is allocated to Class I becomes producer milk in the receiving order. This milk cannot be used for qualification, and the cooperative handler (as described in § 1000.9(c)) does not receive a qualification credit on direct shipped milk for Class I. A cooperative handler should not receive qualification for milk it ships to distributing plants if such milk is only to be used for pool qualification purposes and is delivered on an agreed upon Class II, Class III, or Class IV use of milk.

4. Changing the Rate of Partial Payment

A proposal that would change the rate of the partial payment to producers and cooperatives for milk delivered during the first 15 days of the month to the lowest class price for the prior month times 103 percent, published in the hearing notice as Proposal 5, is not recommended for adoption. Therefore, the partial payment rate should remain as currently provided for by the order—at the lowest class price for the prior month.

Both DFA and NFO were among those who supported increasing the minimum partial or advance payment due producers and cooperatives from the prior month's lowest class price to 103 percent of the prior month's lowest class price. A representative of DFA testified that since the inception of Federal order reform, the percentage of a producer's pay price, as measured by dividing the statistical uniform price by the prior month's Class III price, has declined from 95 percent to 91 percent in comparison to this relationship prior to reform. The witness presented detailed analysis supporting their position that the relative reduction in the partial payment is a trend that is having a significant negative impact on dairy farmers' cash flow. According to analysis presented, DFA concluded that using 103 percent of the lowest class price of the previous month would return the balance between the partial payment and final payment to the same relative level as prior to Federal order reform. The change should not have significant impact on handlers required to make minimum payments, said the witness.

A witness for the Wisconsin Cheese Makers Association (WCMA) testified in opposition to changing the rate of the minimum partial payment provision. The witness testified that the WCMA represents 25 supply plants supplying milk to the Upper Midwest order and that increasing the required minimum payment would be a burden to their member plants because they would need to borrow money to meet the partial payment. Requiring a larger partial payment, testified the WCMA witness, would require increased borrowing and thus increased costs for the plants. The witness explained that since the partial payment is only a minimum payment, plants may pay more if they desire to, but not all plants pay more than the minimum partial payment. According to the witness, the reduction in the percent of the prior month's Class III price as a percent of the statistical uniform price is a short-term phenomena and, that over time, the relationship would move back to the higher percentage that occurred prior to Federal order reform.

There is no compelling reason for changing the payment rate of the partial payment to producers. In the data presented by proponents at the hearing, the partial payment required by the order exceeded the final payment during numerous months. In most cases, the months in which the partial payment exceeded the final payment occurred prior to the implementation of Federal order reform.

It is difficult to determine whether or not there is a trend occurring, as DFA maintains, that would be corrected or mitigated by changing the rate of the partial payment. Milk prices are an outcome of supply and demand conditions for milk. Prices tend to increase during tighter supplies and fall when milk is plentiful relative to demand. The up and down fluctuations of milk prices does not in itself indicate a trend, nor does it suggest a structural flaw in how the order prices milk since price fluctuations are a response to changes in the quantity of milk supplied and in the quantity of milk demanded.

Since Federal order reform, a 17-month period at the time of the hearing, the data shows two months in which the partial payment and the final payment were equal. However, if the partial payment rate were increased to 103 percent of the lowest class price, as proposed, four months (about 24 percent of the 17-month period) would have had a partial payment greater than or equal to the final payment.

The opponents of this proposal noted that Federal order reform and its newer pricing system have only been in place for a short time—17 months—suggesting that there has not been adequate time to observe various pricing scenarios that might occur over a more lengthy evaluation period. For example, there has been no significant price decline since the implementation of Federal order reform that would serve to aid in evaluating the effect of declining prices on the difference between the partial and final payment obligations. Class III and Class IV prices have been relatively stable during the beginning two thirds of the 17-month period, with prices beginning to show consistent increases during the last third of the period (December 2000 through May 2001).

The record testimony and post-hearing briefs supporting a change in the rate of partial payment asserts that payments to producers and cooperatives, particularly by a cheese plant, is a ''pass through'' from the Federal order pool. A cheese plant/Class III handler receives the PPD from the pool (a ''pool draw''), in order to pay the order's minimum prices to producers. However, the majority of the payment to producers and cooperatives in the Upper Midwest is derived from cheese sales. The statistical uniform or blend price is received by producers in the form of a PPD calculated from the marketwide pooling of all milk on the order at classified prices. In a market like the Upper Midwest, which has a relatively low Class I differential ($1.80) and low Class I utilization (15–20 percent), the resulting PPD is less than in markets with higher Class I use and higher Class I differential values. Over the 17-month period of January 2000 through May 2001, the Upper Midwest PPD ranged from 43 cents to $1.43, and averaged $0.83 per cwt. Handlers did not know what the PPD would be until several days before payment was due to its dairy farmers. In light of this, it is not reasonable to establish a partial payment rate at a level that may increase the likelihood of requiring handlers to pay out part or all of the PPD prior to receiving payments from the producer settlement fund. This caution seems especially important in the Upper Midwest market where the PPD is relatively low and can be completely offset by the price difference between the prior month's lowest class price and the current month's Class III price.

5. Emergency Marketing Conditions

Evidence presented at the hearing establishes that California milk pooled simultaneously on the California State-operated order and the Upper Midwest Federal order is resulting in a lowering of milk prices to Upper Midwest producers. The lack of diversion limits on the order's pool distributing plants could allow excessive milk supplies from California or elsewhere to be pooled on the order. Additionally, the practice of double dipping renders the Upper Midwest Federal milk order unable to establish prices that are uniform to producers and to handlers. Finally, the amount of milk pooled on the order as a result of double dipping has greatly increased over the past year. Consequently, the issuance of a recommended decision is being omitted.

The opportunity to file written exceptions to the interim rule amending the order remains.

In view of this situation, the interim final rule amending the order will be issued as soon as the approval of producers is determined.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the Upper Midwest order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

The following findings are hereby made with respect to the aforesaid marketing agreement and order:

(a) The interim marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices specified in the tentative marketing agreement and the order, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The interim marketing agreement and the order, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, a marketing agreement upon which a hearing has been held.

Interim Marketing Agreement and Interim Order Amending the Order

Annexed hereto and made a part hereof are two documents; an Interim Marketing Agreement regulating the handling of milk, and an Interim Order amending the order regulating the handling of milk in the Upper Midwest Marketing Area, which has been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered, that this entire tentative decision and the interim order and the interim marketing agreement annexed hereto be published in the **Federal Register**.

Determination of Producer Approval and Representative Period

June 2001 is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the order, as amended and as hereby proposed to be amended, regulating the handling of milk in the Upper Midwest marketing area is approved or favored by producers, as defined under the terms of the order as hereby proposed to be amended, who during such representative period were engaged in the production of milk for sale within the aforesaid marketing area.

List of Subjects in 7 CFR Part 1030

Milk marketing orders.

Dated: February 8, 2002.

A.J. Yates,

Administrator, Agricultural Marketing Service.

Interim Order Amending the Order Regulating the Handling of Milk in the Upper Midwest Marketing Area

This interim order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) *Findings.* A public hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Upper Midwest marketing area. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure (7 CFR part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said order as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the aforesaid marketing area. The minimum prices specified in the order as hereby amended are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The said order as hereby amended regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held.

Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, the handling of milk in the Upper Midwest marketing area shall be in conformity to and in compliance with the terms and conditions of the order, as amended, and as hereby amended, as follows:

The authority citation for 7 CFR Part 1030 continues to read as follows:

Authority: 7 U.S.C. 601–674

PART 1030—MILK IN THE UPPER MIDWEST MARKETING AREA

1. Section 1030.7 paragraph (g) is amended by revising the first sentence to read as follows:

§ 1030.7 Pool plant.

* * * * *

(g) The applicable shipping percentages of paragraphs (c) and (f) of this section and § 1030.13(d)(2), and (d)(3) may be increased or decreased, for all or part of the marketing area, by the market administrator if the market administrator finds that such adjustment is necessary to encourage needed shipments or to prevent uneconomic shipments. * * *

2. Section 1030.13 is amended by revising the introductory text, redesignating paragraph (d)(3) as paragraph (d)(4), and adding new paragraphs (d)(3), and (e) to read as follows:

§ 1030.13 Producer milk.

Except as provided for in paragraph (e) of this section, *Producer milk* means the skim milk (or the skim equivalent of components of skim milk), including nonfat components, and butterfat in milk of a producer that is:

* * * * *

(d) * * *

(3) The quantity of milk diverted to nonpool plants by the operator of a pool plant described in § 1030.7(a) or (b) may not exceed 90 percent of the Grade A milk received from dairy farmers (except dairy farmers described in § 1030.12(b)) including milk diverted pursuant to § 1030.13; and

* * * * *

(e) Producer milk shall not include milk of a producer that is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing program imposed under the authority of a State government maintaining marketwide pooling of returns.

Marketing Agreement Regulating the Handling of Milk in Certain Marketing Areas

The parties hereto, in order to effectuate the declared policy of the Act, and in accordance with the rules of practice and procedure effective thereunder (7 CFR Part 900), desire to enter into this marketing agreement and do hereby agree that the provisions referred to in paragraph I hereof as augmented by the provisions specified in paragraph II hereof, shall be and are the provisions of this marketing agreement as if set out in full herein.

I. The findings and determinations, order relative to handling, and the provisions of §§ 1030.1 to 1030.86 all inclusive, of the order regulating the handling of milk in the Upper Midwest marketing area (7 CFR Part 1030) which is annexed hereto; and

II. The following provisions: Record of milk handled and authorization to correct typographical errors.

(a) Record of milk handled. The undersigned certifies that he/she handled during the month of June 2001, _____ hundredweight of milk covered by this marketing agreement.

(b) Authorization to correct typographical errors. The undersigned hereby authorizes the Deputy Administrator, or Acting Deputy Administrator, Dairy Programs, Agricultural Marketing Service, to correct any typographical errors which may have been made in this marketing agreement.

Effective date. This marketing agreement shall become effective upon the execution of a counterpart hereof by the Department in accordance with Section 900.14(a) of the aforesaid rules of practice and procedure.

In Witness Whereof, The contracting handlers, acting under the provisions of the Act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

Signature By (Name)
(Title) _____
(Address) _____
(Seal)
Attest

[FR Doc. 02–3634 Filed 2–13–02; 8:45 am]

BILLING CODE 3410–22–P

Federal Register

Thursday,
February 14, 2002

Part V

Department of Agriculture

Agricultural Marketing Service

7 CFR Part 1030

Milk in the Upper Midwest Marketing Area; Tentative Decision on Proposed Amendments and Opportunity To File Written Exceptions to Tentative Marketing Agreement and To Order; Proposed Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1030

[Docket No. AO–361–A35; DA–01–03]

Milk in the Upper Midwest Marketing Area; Tentative Decision on Proposed Amendments and Opportunity To File Written Exceptions to Tentative Marketing Agreement and To Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This tentative decision proposes to adopt, on an interim final and emergency basis, provisions that would eliminate the ability to simultaneously pool milk on the Upper Midwest Federal milk order and a State-operated milk order that has marketwide pooling. Additionally, the order would be amended by establishing a limit on the amount of milk that can be diverted to nonpool plants from pool distributing plants regulated under the order. Public comments on these actions and the other pooling and payment issues are requested. In addition, this decision requires determining if producers approve the issuance of the amended order on an interim basis.

DATES: Comments should be submitted on or before April 15, 2002.

ADDRESSES: Comments (6 copies) should be filed with the Hearing Clerk, Room 1083, South Building, United States Department of Agriculture, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Gino M. Tosi, Marketing Specialist, USDA/AMS/Dairy Programs, Order Formulation Branch, Room 2968, South Building, PO Box 96456, Washington, DC 20090–6456, (202) 690–1366, e-mail address: *gino.tosi@usda.gov.*

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

The amendments to the rules proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have a retroactive effect. If adopted, the proposed amendments would not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), 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 request modification or exemption from such order by filing 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 the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Department 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 its principal place of business, has jurisdiction in equity to review the Department's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Analysis Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a ''small business'' if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a ''small business'' if it has fewer than 500 employees. For the purposes of determining which dairy farms are ''small businesses,'' the $750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most ''small'' dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees. In June 2001, there were 12,748 producers pooled on, and 57 handlers regulated by the Upper Midwest order. Based on these criteria, the vast majority of the producers and handlers would be considered as small businesses. The adoption of the proposed pooling standards serve to revise established criteria that determine those producers, producer milk, and plants that have a reasonable association with, and, are consistently serving the fluid needs of, the Upper Midwest milk marketing area, and are not associated with other marketwide pools concerning the same milk. Criteria for pooling are established on the basis of performance levels that are considered adequate to meet the Class I fluid needs and, by doing so, determine those that are eligible to share in the revenue that arises from the classified pricing of milk. Criteria for pooling are established without regard to the size of any dairy industry organization or entity. The criteria established are applied in an identical fashion to both large and small businesses and do not have any different economic impact on a substantial number of small entities. The proposed amendments will engender a small change, relative to the total price paid to producers, and no substantial number of entities will change pool status as a result of the proposed amendments. Therefore, the proposed amendments will not have a significant economic impact on a substantial number of small entities.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). It was determined that these proposed amendments would have little or no impact on reporting, recordkeeping, or other compliance requirements because they would remain identical to the current requirements. No new forms are proposed and no additional reporting requirements would be necessary.

This notice does not require additional information collection that requires clearance by the Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the forms are routinely used in most business transactions. Forms require only a minimal amount of information which can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

No other burdens are expected to fall on the dairy industry as a result of overlapping Federal rules. This proposed rulemaking does not duplicate, overlap, or conflict with any existing Federal rules.

Interested parties are invited to submit comments on the probable regulatory and informational impact of this proposed rule on small entities. Also, parties may suggest modifications of this proposal for the purpose of tailoring their applicability to small businesses.

Prior documents in this proceeding

Notice of Hearing: Issued June 5, 2001; published June 11, 2001 (66 FR 31185).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this tentative final decision with respect to proposed amendments to the tentative marketing agreement and the order regulating the handling of milk in the Upper Midwest marketing area. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

Interested parties may file written exceptions to this decision with the Hearing Clerk, U.S. Department of Agriculture, Washington, DC 20250, by the 60th day after publication of this decision in the **Federal Register**. Six (6) copies of the exceptions should be filed. All written submissions made pursuant to this notice will be made available for public inspection at the office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)).

The Hearing notice specifically invited interested persons to present evidence concerning the probable regulatory and informational impact of the proposals on small businesses. While no evidence was received that specifically addressed these issues, some of the evidence encompassed entities of various sizes. The materials are addressed in the discussion below of the particular issues considered.

The proposed amendments set forth below are based on the record of a public hearing held at Bloomington, Minnesota, on June 26–27, 2001, pursuant to a notice of hearing issued June 5, 2001 and published June 11, 2001 (66 FR 31185).

The material issues on the record of hearing relate to:

1. Eliminating the simultaneous pooling of milk on the order when already pooled on a State-operated milk order that has marketwide pooling.

2. Allowing overbase milk from California to remain as eligible for pooling on the Upper Midwest Federal milk order.

3. Changing certain pooling provisions of the order regarding performance standards and diversion limits.

4. Changing the rate of partial payments to producers.

5. Determining whether emergency marketing conditions exist that would warrant the omission of a recommended decision and the opportunity to file written exceptions.

Findings and Conclusions

Preliminary Statement: Representatives from the California Department of Food and Agriculture, Dairy Marketing Branch, appeared at the hearing to provide information and to answer factual questions about the California State milk order program. Their appearance was at the request of the USDA and their participation was provided as a courtesy to the public. The participation of the California officials was neither in support of nor in opposition to any of the proposals or issues that were heard. The California officials provided publications that detailed and explained the history and operations of the California milk order program which included how milk is pooled and priced under that State order.

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. Simultaneous Pooling on a Federal and State-Operated Milk Order

A proposal, published in the hearing notice as Proposal 1, seeking to prevent the simultaneous pooling of milk on the Upper Midwest order and on a State-operated order with marketwide pooling, should be adopted immediately. The practice of pooling milk on a Federal milk order and simultaneously pooling the same milk on a State-operated milk order has also come to be referred to as ''double dipping.'' Currently, the Upper Midwest order (Order 30) only provides prohibitions for the simultaneous pooling of the same milk on more than one Federal order. The record provides evidence and support for eliminating the ability of milk already receiving the benefits of marketwide pooling through a State-operated milk order from simultaneously being pooled on Order 30.

Proposal 1, which sought to end the practice of double dipping, was proposed by Associated Milk Producers, Inc. et.al., First District Association, and Lakeshore Federated Cooperative. These entities are dairy farmer cooperatives who supply a significant portion of the milk needs of the Upper Midwest marketing area. Other entities who joined in support of this proposal included: Foremost Farms USA; Mid-West Dairymen's Company; Bongards' Creameries; Cady Cheese; Cass-Clay Creamery; Ellsworth Cooperative Creamery; Family Dairies USA; Hastings Cooperative Creamery; Kraft Foods; Lynn Dairy; Manitowoc Milk Producers Cooperative; Milwaukee Cooperative Milk Producers; Muller Pinehurst Dairy; Mullins Cheese; Plainview Milk Products; Swiss Valley Farms; Valley Queen; Weyauwega Milk Products; White Clover Dairy, Inc.; and Hilmar Cheese of Hilmar, California.

A witness appearing on behalf of Associated Milk Producers, Inc.(AMPI), a supporter for the direct elimination of double-dipping, provided evidence and testimony that showed an increasing amount of California milk being pooled on Order 30. For the time period of October 2000 through May 2001, said the AMPI witness, there was an estimated $11.4 million negative effect on the pool, the equivalent of about a ten-cent ($0.10) reduction for each hundredweight of milk pooled on the order, as a result of pooling California milk on Order 30. According to the AMPI witness, this estimate was calculated by factoring the amount of milk from California that had been pooled on the Upper Midwest pool from the Order's actual Producer Price Differential (PPD) and applying the difference to the volume of milk pooled on the order.

The AMPI witness indicated the reform of the Federal milk marketing order system, implemented in January 2000, provided economic incentives for California milk to pool on Order 30. Specifically, said AMPI, the use of the higher of either the Class III or Class IV milk price in setting and moving Class I milk prices had yielded generally higher PPDs than existed in the Upper Midwest region prior to reform.

The AMPI witness surmised that Order 30's pooling of California milk, already pooled under the State-operated milk order of California, resulted in obvious inequities. The witness provided estimates of extent and impact on Upper Midwest dairy farmers and was of the opinion that this situation is severe enough to conclude that the Department should move directly to a final decision and avoid the more lengthy procedure of first issuing a recommended decision and then issuing a final decision.

These views and conclusions by the AMPI witness were supported in testimony by a witness appearing on behalf of Foremost Farms USA (Foremost). The Foremost witness testified that California milk pooled on Order 30 grew from about 10 million pounds to an average of 260 million pounds during the 3-month period of March through May 2001. According to calculations by Foremost, an estimated $6 million reduction in value for all milk pooled on the order occurred due

to the pooling of California milk on Order 30. This revenue, said Foremost, comes from Upper Midwest dairy farmers who already have the lowest PPD in the Federal order system. Acknowledging that tighter pooling provisions may serve to eliminate the double dipping issue, Foremost was of the opinion that tightening pooling standards would not be the best way to accomplish that end.

A witness representing the Mid-West Dairymen's Company/Lakeshore Federated Dairy Cooperative (MDC), a dairy farmer cooperative located in northern Illinois and southern Wisconsin, testified in support of ending double dipping. This witness also spoke on behalf of Lakeshore Federated Dairy Cooperative, which represents over 4,000 dairy farmers located in Illinois, Iowa, and Wisconsin, and whose milk is pooled mostly on the Upper Midwest order and to a lesser extent on the Central and Mideast Federal milk orders. This witness indicated that Mid-West Dairymen's Company milk supplies the fluid market.

The MDC witness expressed concern about equity among producers and equity among handlers. In this regard, the witness maintained that this issue should be handled on an expedited basis. The MDC witness indicated that the Federal order program has a long history of promoting equity to both producers and handlers. According to MDC, classified pricing contributes to equity among handlers, and the marketwide pooling of revenue generated from classified pricing provides for equity among producers. Specifically noted by the MDC witness was the purposeful elimination of individual handler pooling as milk marketing orders have consolidated in larger geographic areas.

Federal orders prohibit the pooling of the same milk of a producer on more than one Federal order, noted the MDC witness. Drawing money from one Federal order pool equitably shares revenue with those producers who supply the market, but drawing additional revenue from a second Federal order pool destroys the goal of equity among producers, a reason why the Federal order program prohibits double pooling, maintained MDC. As evidence of the impact of double dipping, MDC presented analysis showing that from January 2000 through April 2001, the Order 30 statistical uniform price per hundredweight averaged $10.8850, with a pool draw of 84.5 cents. Over the same 16-month period, said MDC, the California overbase price averaged about 21.5 cents higher than the blend price in Order 30. Not only is the California overbase price higher than in Order 30, noted MDC, but a California dairyman pooled on Order 30 will also draw the 84.5 cents by being able to simultaneously pool the same milk on Order 30.

The MDC witness testified that the California milk pooling plan places high importance on providing equity to producers and to handlers regulated by the state. The witness noted that establishing producer equity is a basic cornerstone of both the California and Federal milk order programs and that both accomplish this through marketwide pooling. If the Federal order program does not eliminate double dipping, there cannot be equity in prices received by producers in the Midwest or California, said the witness. Eliminating double dipping is desirable, said MDC, because it would not change the movement or the marketing of milk in any significant fashion. Milk would continue to be picked up at the farm and taken to the same plants as is currently done. According to the MDC witness, the only difference would be that no financial benefit would accrue to some producers who currently are able to double dip.

A dairy farmer from Minnesota, who is also the Chairman of the First District Association, President of the Nelson Creamery Association, and serves on the board of the Minnesota Milk Producer's Association (First District), testified in support of amending the Upper Midwest order to prohibit double dipping. The First District witness testified that it is unfair and wrong for dairy farmers pooled on Order 30 to have their milk price intentionally diluted as a result of California milk being pooled on the order. This witness estimated that the impact on the price received by dairy farmers in the Upper Midwest was about 15 to 17 cents per hundredweight. The First District witness also thought it important to indicate that California, with its State-wide milk regulatory system, had chosen not to be a part of the Federal milk order system.

A consultant witness with extensive experience in milk marketing regulations appeared on behalf of the supporters of Proposal 1. The witness provided detailed analysis regarding California milk movements and offered modified wording from that published in the hearing notice to end double dipping. This witness testified that Federal order provisions have always been tailored to prevent producers from pooling the same milk twice and enjoying the benefits of marketwide pooling from more than one order. To this end, according to the witness, a handler regulated on the Upper Midwest order should not be permitted to pool diverted milk if that milk is pooled and priced under either a Federal order or State order that provides for marketwide pooling.

Important to the new consolidated orders was the rejection of ''open pooling'' where milk from anywhere can be pooled on any marketing order, said the witness. The witness indicated that, in his opinion, the Department rejected open pooling because it did not provide an assurance of milk being made available for the fluid market. The witness also expressed the opinion that in markets with 20 percent or less milk used for fluid purposes, the notion of assuring an adequate supply of milk for fluid use becomes of questionable importance.

The witness testified that the statutory requirements for milk marketing orders require the uniform treatment of producers and that uniform treatment is fundamentally the same as the equitable treatment of producers. The witness said that equitable treatment includes the equal sharing of the proceeds of the pool among all producers pooled on the order. However, the witness thought the notion of equitable treatment would not include producers who are sharing in the proceeds of other marketwide pools on the same milk. To this end, the witness maintained that pooling milk on both the California and Order 30 marketwide pools has resulted in the nonuniform distribution of proceeds to those producers who pool the same milk twice.

The witness also presented an analysis of data from the California Department of Food and Agriculture as well as relying on his knowledge of milk receipts at plants located in the western States of Oregon, Nevada, and Arizona. This analysis shows, said the witness, that almost all of the California milk pooled on the Upper Midwest order is not physically received within the Order 30 area, but is instead being received at California plants. Because the milk is received at a California plant, it is pooled under the California marketwide system.

The Secretary of the Wisconsin Department of Agriculture, Trade, and Consumer Protection (WDATCP), accompanied by the Director of Value Added Agricultural Development of the WDATCP, testified in support of amending the Upper Midwest order to stop and prevent the double dipping of milk. The witnesses testified that increasing volumes of California milk was diluting the Class I utilization of the market and was also lowering the

benefit to dairy farmers in Minnesota and Wisconsin who are pooled on Order 30.

These Wisconsin officials were of the opinion that artificial regulations, not market forces, allow California milk to simultaneously pool under California's State order program and Order 30. The witnesses found this to be patently unfair and noted that it only serves to lower the income to Wisconsin and Minnesota dairy farmers.

With regard to milk produced far from the order and pooled on Order 30, these witnesses expressed minimal concern about such milk being able to pool on the order provided the same milk could not and would not enjoy the benefit of two marketwide pools. While the impact of pooling distant milk which cannot double dip was acknowledged to have the same impact in lowering returns to Minnesota and Wisconsin dairy farmers, these witnesses took no issue with such distant milk being able to pool on the Upper Midwest order. They expressed the view that adopting more restrictive pooling standards for the purpose of preventing double dipping would interfere with and supplant market forces, such as the economics of transportation and distribution, with artificial regulations.

The President and Chief Executive Officer of Hilmar Cheese, located in Hilmar, California, also testified in favor of preventing California milk from being pooled simultaneously on the California State order and the Upper Midwest order. Hilmar Cheese (Hilmar) produces a variety of cheeses which are marketed throughout the United States. The Hilmar witness testified that the California milk order system employs marketwide pooling.

The Hilmar witness stated that dairymen in California participate in a marketwide pool through a regulated milk pricing and pooling system that includes quota milk and that is operated by the State of California. The Hilmar witness confirmed the testimony of the California State government witnesses that all Grade A milk sold to a pool plant in California is associated with the pool and shares in the revenue generated from the use of milk in all classes of use. While all plants that manufacture milk into manufactured products such as cheese, frozen products, butter, and milk powder need not be pool plants, said the witness, most plants opt to participate in the pool so that their dairy farmers can reap the benefits of marketwide pooling. Manufacturing plants become pool plants, said Hilmar, by making some of their milk receipts available for Class I and Class II uses. Producers are paid for their milk on the basis of the milk components they ship and on the proportion of their milk sales that are covered by their quota holdings, said this witness. Fat and solids-not-fat, said Hilmar, have their own separate pools, and all producers share equally in the revenue generated by sales in the various milk classes. The total revenue from solids-not-fat in all classes, including revenue from the Class I fluid carrier value, is first adjusted to pay for transportation allowances and credits, and the remaining revenue is reduced by the total value of milk that is quota milk, said the witness. The quota milk pool is determined, said Hilmar, primarily by the pounds of solids-not-fat quota shipped multiplied by the quota premium of $0.195 per pound of solids-not-fat, which is also equal to $1.70 per hundredweight. After deducting the value of quota milk from the adjusted solids-not-fat revenue in the pool, the remaining revenue is divided by the total pounds of solids-not-fat to obtain the overbase (product in excess of quota) and the base solids-not-fat price, said the witness. The quota solids-not-fat price, said Hilmar, is equal to the overbase price plus $0.195 per pound. Under the California milk pooling system, testified Hilmar, all dairy farmers in the pool receive a portion of the revenue from milk sales in all milk classes, even though some dairy farmers will receive more as quota holders than those who hold less quota or no quota.

Because of this revenue sharing with all producers pooled under the California system, testified the Hilmar witness, the same dairy farmers should not also have the opportunity to pool the same milk on a Federal milk order. The witness found it odd that some producers would seek to capture pool revenue from other parts of the country and, at the same time, collect pool revenue from the California pool. Engaging in this sort of behavior, said the Hilmar witness, results in some undesirable consequences. The witness presented an analysis of a 17-month period (beginning with the implementation of order reform) that compared California milk prices with Federal order milk prices. This analysis revealed, according to the witness, that during the 17-month time period, the California overbase price averaged $11.21 per hundredweight (cwt), or $1.03 per cwt over the California Class 4–B (milk used in cheese) milk price. In the Upper Midwest order at Hennepin County (Minneapolis), noted the witness, milk value was only 73 cents higher than the order's Class III price at the reference test. The witness drew attention to the California overbase price averaging nearly 22 cents above the Upper Midwest statistical blend price despite the use of a quota system by California. California overbase dairy farmers, said the witness, already benefit significantly from its diverse product pool, and quota holders benefit in prices received by an additional $1.70 per cwt of milk.

There is an inequity to Upper Midwest producers, said Hilmar, when California overbase milk is pooled in both California and on the Upper Midwest order. Hilmar compared the producer price differential (PPD) for two different locations in the Upper Midwest marketing area (Chicago and Minneapolis) with a plant located in Glenn County, California (some 90 minutes north of Sacramento), where milk pooled under the Upper Midwest order is received. Hilmar testified that comparison of both the California overbase price and the Federal order PPD on the California milk that is pooled but not delivered to the Upper Midwest, results in a 95-cent net higher price for the ''double-pooled'' California milk than from California milk not pooled on Order 30. According to the Hilmar witness, the double pooling only serves to augment California prices received by producers by drawing money from the Upper Midwest market which already has milk prices lower than California's.

In light of their analysis, said Hilmar, double dipping is not the type of innovation that creates real value, and that double dipping only moves money and distorts and discourages, and ultimately damages the dairy industry. Hilmar chose not to engage in this behavior.

Additional support for eliminating double dipping was offered by a representative of Marigold Foods. Marigold Foods (Marigold) is a handler which has five regulated distributing plants located within the Upper Midwest order. Marigold is concerned, the witness indicated, about California milk being pooled on the order and reducing dollars paid to their local dairy farmers. According to the Marigold witness, California milk is not leaving the state of California and is not available to serve the fluid market in Order 30. Marigold indicated that they pay a $1.70 Class I differential on most of their milk purchases as well as over-order premiums to assure a supply of milk. However competitive the over-order premiums, Marigold indicated, they are not enough to assure themselves a supply of milk, noting that several of their suppliers have indicated a financial need to reduce shipments to

Marigold's distributing plants. The witness attributed this situation to the ability of California milk to be pooled simultaneously on the California State order and on Order 30.

The Marigold witness testified that the Order 30 PPD was being reduced by 10 to 15 cents per cwt by the pooling of California milk. Marigold indicated that this money was funded by the market's Class I fluid milk processors and that these funds should be going to the dairy farmers who serve, or are available to serve as needed, the Order 30 fluid market. Marigold stressed that they already compete for a supply of milk with handlers who are regulated by another Federal order and with entities who have obtained funds from Order 30 from the pooling of California milk. Competing with California only intensifies an inequitable situation in Marigold's ability to compete for a supply of milk, said the witness.

Marigold stated that it is through a regulatory loophole that producer milk which is not available to serve the fluid market is permitted to receive money from the Order 30 pool when the same milk is already receiving a benefit from marketwide pooling in a State-operated order. The witness said that this situation is unjust and contrary to the purposes of the legislation which authorizes Federal milk marketing orders for bringing forth an adequate supply of milk to meet fluid needs. Accordingly, the Marigold witness urged a prompt end of the ability of milk to double dip. By closing this regulatory loophole, said the Marigold witness, equity would be restored to Upper Midwest dairy farmers because the action would ensure that the money paid for milk by a regulated handler is shared among farmers who serve or are available to serve the fluid market.

Land O' Lakes is of the opinion that California does not have marketwide pooling. In support of their proposal, LOL pointed to other State dairy programs. They noted that the North Dakota State Order and the Pennsylvania Milk Marketing Board are currently considering the adoption of marketwide pooling. Other pricing programs, said LOL, such as the Northeast Compact and various over-order pricing agencies such as the Upper Midwest Marketing Agency would appear threatened if Proposal 1 were adopted. Other LOL views and proposals are discussed later in this decision.

Other opposition took the form of describing the general inadequacy of the Upper Midwest's pooling provisions and not the elimination of double dipping per se. While Dairy Farmers of America (DFA) testified that it opposes the ability of the same milk to simultaneously pool on two Federal milk orders, they did not oppose simultaneous pooling occurring on both a Federal and State-operated milk order such as California's. DFA indicated their ability to derive monetary benefits from both the Federal and California State milk order program has been of assistance in meeting their desired business objectives. DFA did submit their own proposal, published in the hearing notice as Proposal 4, which addressed broader pooling standards and concerns. DFA's proposal is discussed later in this decision.

For over 60 years, the Federal government has operated the milk marketing order program. The law authorizing the use of milk marketing orders, the Agricultural Marketing Agreement Act of 1937 (AMAA), as amended, provides authority for milk marketing orders as an instrument which dairy farmers may voluntarily opt to use to achieve objectives consistent with the AMAA and that are in the public interest. An objective of AMAA, as it relates to milk, was the stabilization of market conditions in the dairy industry. The declaration of the AMAA is specific: ''the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.'' The AMAA provides authority for employing several methods to achieve more stable marketing conditions. Among these is classified pricing, which entails pricing milk according to its use by charging processors differing milk prices on the basis of form and use. In addition, the AMAA provides for specifying when and how processors are to account for and make payments to dairy farmers. Plus, the AMAA requires that milk prices established by an order be uniform to all processors and that the price charged can be adjusted by, among other things, the location at which milk is delivered by producers (Section 608(c)(5)). As these features and constraints were employed in establishing prices under Federal milk orders, some important market stabilization goals were achieved. The most often recognized goal was the near elimination of ruinous pricing practices of handlers competing with each other on the basis of the price they paid dairy farmers for milk and in price concessions made by dairy farmers. The need for processors to compete with each other on the price they paid for milk was significantly reduced because all processors are charged the same minimum amount for milk, and processors had assurance that their competitors were paying the same value adjusted minimum price.

The AMAA also authorizes the establishment of uniform prices to producers as a method to achieve stable marketing conditions. Although some hearing participants are of the opinion that marketwide pooling cannot solve disorderly marketing conditions, marketwide pooling has been adopted in all Federal orders because of its superior features of providing equity to both processors and producers. A marketwide pool, using the mechanism of a producer settlement fund to equalize on the use-value of milk pooled on an order, speaks directly to the objective of the AMAA of ensuring uniform prices to producers supplying a market. The Federal order program purposefully moved away from individual handler pooling—a pooling method not uncommon when many milk marketing orders represented much smaller and much more local milk marketing areas. Through marketwide pooling, the equalization of prices paid to dairy farmers did have implications that affected the competitive relationship between processors along with uniform prices received by dairy farmers. Under individual handler pooling, the use-values of milk by a handler are averaged, or blended, and distributed separately to only those producers who had supplied the handler. With marketwide pooling, a handler regulated by an order with high Class I use was no longer able to exercise control over producers through the higher blend prices they were able to pay to producers who were, for example, more favorably located to the plant. Similarly, handlers with lower Class I use, unable to pay as large a blend price, found that marketwide pooling greatly improved their position in competing for a supply of milk. Prices paid by handlers were equalized across the entire market where handlers competed with each other for fluid sales and producers received a more uniform price for their milk.

Under the California State milk order program, similar objectives to that of the AMAA are clear. The record evidence indicates the California State order program as having a long history in the development and evolution of a classified pricing plan and in providing

equity in pricing to handlers and producers. Important as classified pricing has been in setting minimum prices, the issue of equitable returns to producers for milk could not be satisfied by only the use of a classified pricing plan. Some California plants had higher Class I fluid milk use than did others and some plants processed little or no fluid milk products. As with the Federal order system, producers who were fortunate enough to be located nearer Class I processors received a much larger return for their milk than producers shipping to plants with lower Class I use or to plants whose main business was the manufacturing of dairy products. Over time, disparate price differences grew between producers located in the same production area of the state which, in turn, led to disorderly marketing conditions and practices. These included producers who became increasingly willing to make price concessions with handlers by accepting lower prices and in paying higher charges for services such as hauling. Contracts between producers and handlers were the norm, but the contracts were not long-term (rarely more than a single month) and could not provide a stable marketing relationship from which the dairy farmers could plan their operations.

In 1967, the California State legislature passed and enacted the Gonsalves Milk Pooling Act. The law provided the authority for the California Agriculture Secretary to develop and implement a pooling plan, which was implemented in 1968. The California pooling plan provides for the operation of a Statewide pool for all milk that is produced in the State and delivered to California pool plants. It uses an equalization fund that equalizes prices among all handlers and sets minimum prices to be paid to all producers pooled on the State order. While the pooling plan details vary somewhat from pooling details under the Federal order program, the California pooling objectives are, for all intents and purposes, identical to those of the Federal program.

It is clear from this review of the Federal and the California State programs that the orderly marketing of milk is intended. Both provide a stable marketing relationship between handlers and dairy farmers and both serve the public interest. It would be incorrect to conclude that the Federal and California milk order programs have differing purposes when the means, mechanisms, and goals are so nearly identical. In fact, and as indicated in brief by the supporters for Proposal 1, the Federal order program has precedent in recognizing that the California State milk order program has marketwide pooling. Under milk order provisions in effect prior to milk order reform, and under § 1000.76(c), a provision currently applicable to all Federal milk marketing orders, the Department has consistently recognized California as a State government with marketwide pooling.

Since the 1960's, the Federal milk order program recognized the harm and disorder that resulted to both producers and handlers when the same milk of a producer was simultaneously pooled on more than one Federal order. As noted above, producers do not receive uniform minimum prices, and handlers receive unfair competitive advantages. The need to prevent ''double pooling'' became critically important as distribution areas expanded and orders merged. The issue of California milk, already pooled under its State-operated program and able to simultaneously pool under a Federal order, has, for all intents and purposes, the same undesirable outcomes that Federal orders once experienced and subsequently corrected. It is clear that the Upper Midwest order should be amended to prevent the ability to pool on more than one order when both orders employ marketwide pooling.

There are other State-operated milk order programs that provide for marketwide pooling. For example, New York, as indicated in record testimony, operates a milk order program for the western region of that State. A key feature explaining why this State-operated program has operated for years alongside the Federal milk order program is the exclusion of milk from the State pool when the same milk is already pooled under a Federal order. Because of the impossibility of the same milk being pooled simultaneously, the Federal order program has had no reason to specifically address double dipping or double pooling issues, the disorderly marketing conditions that arise from such practice, or the primacy of one regulatory program over another. The other states with marketwide pooling similarly do not double pool Federal order milk.

The record contains various opinions offered to explain why the practice of double dipping has occurred. Some offered that the Class I price structure changes implemented with Federal order reform resulted in a much higher PPD than existed under the old Upper Midwest and Chicago orders, providing a financial incentive. Some cited the change in how orders, including Order 30, zoned Class I prices and producer blend prices, suggesting if these zoning methods had been retained, the incentive for California milk to double dip on Order 30 may never have been an issue. Others noted that the Federal order location value of fluid milk in much of California is actually higher than in Order 30 and thus implied that tighter pooling provisions would most likely prevent California milk from being pooled on Order 30.

These are all interesting and valid observations that can lead to reasonably concluding that California milk would not seek to be pooled on Order 30 if not for the regulatory amendments. However, determining that double dipping and its impacts are a result of the reformed Class I pricing structure does not lead to the conclusion that the price structure needs to be abandoned or severely altered. Rather the issues here are whether the double dipping is a pooling problem that needs to be solved, and whether the first proposal, with or without various modifications, is an effective solution to that problem. As noted above, the Department believes the pooling problem needs a pooling solution and a modification of the first proposal will effectively solve the problem. When equity is not provided for, the disorderly marketing conditions that have arisen in Order 30 become the same as those existing prior to Federal orders adopting provisions preventing the double pooling of milk.

California milk should only be eligible for pooling on Order 30 when it is not pooled on the California State order, and meets the Upper Midwest's pooling standards. A distinction needs to be made here between a producer and the milk of a producer. While much of the record testimony speaks of producers in the same vein as the milk of producers, it is necessary to clarify the obvious intent of all hearing participants that it is the milk of a producer that becomes pooled. It is clear from the context of the record testimony that this was intended.

The Federal milk order program, including Order 30, does not regulate producers. Rather, the program regulates handlers, those entities that are the first buyers of milk from producers and who incur the minimum payment obligations to producers. The Federal milk order program has no authority to regulate producers in their capacity as producers, and cannot, for example, preclude a producer from being pooled anywhere, provided the milk of the producer meets the pooling standards of an order. For this reason, Federal milk orders, including Order 30, provide separate definitions for a producer in the Producer definition and for the milk of a producer in the Producer milk definition. This distinction is also

important because the record evidence indicates California milk delivered directly from farms to plants located outside the State is not pooled on the State order. If a California producer delivers milk directly from the farm to pool plants regulated by the Upper Midwest order, and if that milk satisfies the pooling standards of the Upper Midwest order, that milk will be pooled on the Upper Midwest order.

The amendatory wording provided below, intended to eliminate double dipping, is at some variance from that proposed by the proponents of Proposal 1. The wording is different because the proposed modified wording of Proposal 1 would prevent double dipping on only diverted milk. The wording presented below would apply to any milk that participates in a State-operated milk order that provides for the marketwide pooling of milk and, would not prohibit the ability of milk to participate in the Order 30 pool when not part of a State-operated order milk order program providing for marketwide pooling.

2. California Overbase Milk and Pooling

A proposal, published in the hearing notice as Proposal 3, that sought to exclude California quota milk from being pooled on the Upper Midwest order should not be adopted. As California has quota and overbase prices for milk, this proposal would allow overbase milk from California to be eligible for pooling on Order 30.

Two proposals were offered by Land O'Lakes (LOL) that sought to permit the continued pooling of California milk on the Upper Midwest Order. Specifically, a proposal published in the hearing notice as Proposal 2, would ''grandfather'' or exempt any California milk previously qualified for pooling on the Upper Midwest order from any amendment to the order which would thereafter exclude the pooling of such milk. This proposal was abandoned and is not discussed further in this decision. Another proposal, published in the hearing notice as Proposal 3, sought to exclude only California quota milk from being pooled on the Upper Midwest order. LOL is a cooperative association that has member producers whose milk is pooled under both the California State and Upper Midwest milk orders.

The witness testifying on behalf of LOL indicated that his organization supports the concept of efficient and orderly marketing and, that the pooling of milk under an order should be based on performance. However, LOL indicated they were not in favor of restricting access to pooling to benefit a select few. LOL was of the opinion that fewer restrictions to pooling provides for market efficiencies resulting in lower costs in serving the Class I needs of a market. The witness testified that LOL engages in double dipping. They indicated they engage in this practice to gain additional revenue to subsidize the losses incurred in servicing the fluid market in Order 30. They did not think marketing conditions warrant the Department of Agriculture treating the issue as an emergency.

The real issue facing the industry, said the LOL witness, is not California milk. The impact of pooling reserve supplies of milk is the same regardless of where the milk is located, said LOL. The witness argued that regardless of location, performance criteria must be met to provide for pooling eligibility, and therefore, performance requirements rather than the artificial restrictions offered by Proposal 1 should be addressed. According to the witness, increasing shipping requirements would provide all the equity necessary as handlers shipping the minimum requirements will be forced to ship more milk or reduce the volume of milk pooled. LOL contends that producers have the right to pool milk based on performance, stressing that where the milk originates is irrelevant.

The LOL witness testified that the Class I pricing surface adopted as a result of Federal milk order reform has allowed for more liberalized pooling, thereby allowing access to higher levels of Class I revenues. The witness said the net impact of Federal order reform has been positive for Upper Midwest dairy farmers. LOL did stress that access to additional Class I revenues should only be gained through performance, with market participants demonstrating a willingness to service the fluid needs of the market. According to the LOL witness, the utilization of milk for Class I fluid uses will tend to equilibrate as the needs of milk order areas beyond Order 30 are met based on performance. The witness said that the milk of producers should be allowed to move freely to meet the needs of the markets. In this regard, testified LOL, Upper Midwest entities must be willing to share the local proceeds from Class I use if they expect to share other markets' Class I proceeds or risk the loss of credibility when participating in deciding how milk orders should function.

According to the LOL witness, California does not have a marketwide pool. The witness noted that proceeds from fluid and soft dairy product use are paid to producers on the basis of quota, while non-quota milk is priced based on manufacturing values. The returns on quota equity, said LOL, are not distributed marketwide, noting that it has been only recently that the State of California instituted a value difference between quota and overbase milk. It is LOL's assertion that California's lack of marketwide pooling should not prohibit the ability of overbase milk to be pooled on Order 30.

The LOL proposal for allowing the pooling of overbase milk from California on Order 30 should not be adopted for the same reasons discussed in finding that Proposal 1 should be adopted immediately. Regardless of LOL opinions, the only reasonable conclusion that can be reached is that the California State order program does have marketwide pooling and that overbase milk received at a California plant is pooled on the State order and thereby shares in the benefits that accrue to producers under the State's marketwide pooling plan. This conclusion is substantiated by the testimony and participation by California State officials who operate the California State milk order program. Additionally, it seems contrary to the argument advanced by LOL that milk, regardless of where it is located, should be pooled on the basis of performance. California milk, other than a one-time shipment of a days' production of a producer, does not actually leave the State to consistently service the Order 30's Class I needs.

3. Performance Standards and Diversion Limits

A proposal offered by the Dairy Farmers of America (DFA) and the National Farmers Organization (NFO), published in the hearing notice as Proposal 4, addressed two separate issues: establishing performance standards for milk not traditionally associated with the Upper Midwest marketing area and, the ability of pool distributing plants to divert an unlimited volume of milk to nonpool plants. The portion of the proposal seeking to establish diversion limits for pool distributing plants should be adopted immediately. The record does not support adoption of performance standards for milk based on the location of the producer or the milk of a producer. DFA is a member-owned cooperative of nearly 17,000 farms that produce and market milk across a significant portion of the United States. NFO is also a member-owned cooperative that produces and markets milk in Order 30, the State of California, and in other Federal milk orders.

Specifically, the Upper Midwest order should be immediately amended to provide a diversion limit of 90 percent of producer receipts, including

diversions, for pool distributing plants regulated under the order. In addition, the market administrator may adjust the diversion limit for pool distributing plants as marketing conditions warrant. Since supply plants pooling milk on the Upper Midwest order must ship 10 percent of receipts, including milk diverted, to a pool distributing plant and certain other types of plants, there is no reason to impose a diversion limit on supply plants.

DFA testified that two primary benefits of the Federal order program include allowing producers to benefit from the orderly marketing of milk and to share in the marketwide distribution of revenue that results mostly from Class I milk sales. Orderly marketing influences milk to move to the highest value use when needed and, for milk to clear the market when not used in Class I, said DFA. The witness insisted that the pooling of distant milk that does not show a service to the Class I market is inconsistent with Federal order policy and such milk should not be eligible to share in the revenue that accrues from Class I use.

Pooling standards are universal in their intention, said DFA, requiring a measure of commitment to a market marked by the ability and willingness to supply the Class I needs of that market. The witness also noted that pooling standards are individualized in their application and each market requires standards that work for the conditions that apply in that individual market. The witness quoted the Final Decision of milk order reform: ''the pooling provisions for the consolidated orders provide a reasonable balance between encouraging handlers to supply milk for fluid use and ensuring orderly marketing by providing a reasonable means for producers with a common marketing area to establish an association with the fluid market.''

The DFA witness drew from the history of milk marketing and commented on the problems of producers in their attempts at improving their economic circumstances. The witness identified shortcomings of the marketplace resulting in the difficulty of the milk supply being able to service the market's fluid needs in a manner that treats all producers equitably. The superior negotiating position of milk buyers and the variations in supply and demand were examples provided by the witness that have always ''tripped up'' dairy farmers in their marketing efforts. The witness added that farmers' attempts to improve on past efforts always seemed to fail when one or more suppliers would find a way to opt out of the added cost of serving the market to obtain a higher return for themselves. Marketwide pooling, said the DFA witness, eliminated the differences in prices paid to suppliers within the same market and, in turn, eliminated the non-productive competitive drive for higher returns since everyone faced the same terms of trade. The witness also noted the absence of any action recommending any change to these fundamental features of milk orders and, that every Federal order shares returns to all producers marketwide.

The DFA witness was of the opinion that the new Class I pricing structure, together with the interface of the pricing surface and the pooling provisions found in each order, resulted in significant changes in the marketplace for milk. The link between performance and pooling, said the witness, was altered by these reforms and needs review. DFA noted that many entities, including themselves, moved quickly to take advantage of these changes in order rules. The witness indicated that when in a competitive dairy economy, an entity must make pooling decisions that aim to increase returns, competitors must attempt to do the same or risk their competitive position.

Pooling provisions of the Order 30 order work well for milk produced in the marketing area, said DFA, but do not work well for milk produced out of the area. Producers need only deliver a days' production a single time to a pool plant to have their milk eligible for pooling. This, combined with no loss of producer eligibility provided a producer does not deliver to another Federal order plant, makes Order 30 an attractive market in which to pool milk, the witness stated.

The witness also relied on, and drew heavily from, the order reform Final Decision (64 FR 16026) which explained the marketing area boundaries of the consolidated Upper Midwest marketing area. Although the prior marketing order areas of the Chicago Regional and Upper Midwest orders did not have a considerable degree of overlapping fluid milk disposition, they did have an extensive overlapping procurement area, according to the witness. In light of this, the witness noted that the reform Final Decision could therefore find no justification on the basis of overlapping sales for increasing the consolidated marketing area beyond what was adopted. Rather, it is the extensive overlapping of a common procurement area, or milkshed, that is the most compelling reason for explaining the boundaries of the consolidated Upper Midwest marketing area.

The witness noted, too, that there was extensive discussion early in the construct of the 1996 Farm Bill concerning the merits of having a single national Federal order. Such an outcome would have resulted in a single blend price across the entire country. Noting that Congress debated several proposals and several economic studies over this issue, Congress rejected the idea of a single marketing order with the premise of one blend price. According to the witness, open pooling, which may result in blend prices being equalized across a large territory, is counter to the intent of Congress and the legislative directive of the Farm Bill—to consolidate the orders into no fewer than 10 and not more than 14.

The DFA witness expressed alarm about milk from distant areas sharing in the blend price when that milk neither serves the fluid market, nor balances the market when extra milk is needed by fluid processors. The witness referenced the rejection of the concept of open pooling discussed in the reform Final Decision and indicated that the decision rejected this because open pooling provides no reasonable assurance that milk will be made available to satisfy the fluid needs of the market. The witness also noted further that proposals to create and fund ''stand-by'' pools were also rejected.

DFA was of the opinion that open pooling is not appropriate for Order 30. Additionally, because of the distance and cost involved in moving milk to the market, milk needed in the fall months to accommodate increased demand because of increased school milk sales, or to provide a manufacturing outlet for milk produced in excess of fluid needs would not be provided. It is irrelevant, said the witness, if the milk in question originates from California or any other place because such milk is no more burdensome than distant milk produced in Idaho or any other area. Under the open-pooling concept, said DFA, ''distant'' milk able to pool alongside ''local'' deliveries only serves to pyramid the volume pooled.

Prohibiting the simultaneous pooling of milk on a State-operated marketwide pool and the Order 30 pool, the focus of Proposal 1, said DFA, does not fully address the pooling problems at hand. The witness provided evidence and testimony that showed an increasing amount of ''distant'' milk pooled on the Upper Midwest order which, they maintain, is not serving the Class I needs of the market. The witness submitted analysis demonstrating that when milk is pooled without being available for Class I use, or ''paper pooled'' on Order 30, returns to local producers who are consistently serving the fluid market are decreased.

Analysis was provided by DFA to illustrate how the pooling of milk on Order 30 has changed by examining the amount of milk pooled on the order and where the milk was produced. Using October 1997 as a reference time period prior to the consolidation of the orders, 2.4 billion pounds of milk were associated with the Chicago Regional and Upper Midwest markets, but only 1.6 billion pounds of milk were pooled because of class—price relationships, provided the witness. The 2.4 billion pounds were produced by 27,250 producers located in 13 States from Tennessee to Minnesota, and from New Mexico to Michigan. The witness noted that over 93 percent of the producer milk was produced within the consolidated marketing area, and 91.4 percent of the milk pooled was produced within the States of Wisconsin and Minnesota. In comparison, the witness provided data subsequent to the implementation of order reform; during June 2001, 12,748 producers pooled 1.5 billion pounds of milk on consolidated Order 30, with a total of 84 percent of the milk pooled produced within the consolidated marketing area, and 79 percent originating from Minnesota and Wisconsin. The other 16 percent of the total milk pooled on Order 30 during June 2001 was from California.

The witness testified that DFA considers it important to end the near open pooling of large volumes of milk that never serve the fluid market by modifying the order's pooling standards and establishing diversion limits for pool plants. To this end, DFA offered a proposal requiring milk produced outside the States that comprise the Upper Midwest milk marketing area be grouped into, and reported as, individual State ''units''. Each unit would be subject to the same shipping standards for pool supply plants, said DFA.

Additionally, DFA was of the opinion that the order lacks the means to define the potential size of the pool. In this regard, DFA thought it appropriate to establish a limit on the amount of producer milk that a pool plant can divert. Because a producer need only deliver one days' production to an Order 30 pool plant to qualify and thereafter remain qualified to pool their milk on the order, DFA noted, a pool plant may subsequently divert all of the producer's milk to any plant without any of that milk being required to serve the fluid market. It is this shortcoming of the Order 30 producer milk definition which provides the means by which milk from distant areas is able to pool on Order 30, stated DFA.

Stressing the costs associated with transporting milk long distances, DFA was of the opinion that no economic basis exists for such milk to actually make itself available to consistently serve the fluid market. Therefore, the witness concluded, milk located far from the order should be required to meet performance standards equal to the performance standards for milk originating within the order. The ease of qualifying for pooling on Order 30, said DFA, has attracted and caused to be pooled increasing volumes of milk which have only served to lower the order's blend price. The economic burden of the cost of delivering milk to a pool plant becomes a one-time event, said DFA. Thereafter the milk need never perform in servicing the fluid market while reducing returns to producers whose milk is actually serving the market's Class I needs, the witness concluded.

DFA was of the opinion that their proposal provides reasonable standards for demonstrating consistent performance in supplying the fluid market by milk from outside the States comprising Order 30. This would result in milk from distant areas performing on the same basis as local milk, said the witness, while not discriminating, penalizing, or establishing any barriers to the pooling of milk from any area on Order 30. The witness also stated this feature of their proposal is an adequate and reasonable standard for requiring all market participants to share in the responsibility of serving the fluid market.

DFA presented an analysis of data depicting mileages from California and Idaho to locations in Order 30 with the performance standards they proposed. This was offered to illustrate DFA's opinion that distant milk would not rationally seek to be pooled on Order 30 when required to perform in the same way as milk from within the States that comprise the marketing area. The witness presented a review of the relationship between the order's blend price return versus the cost of delivering milk to the Order 30 market. The witness claimed that a daily delivery of milk from California would yield a net loss of $71,647, while a daily delivery from Idaho would yield a net loss of $48,576 in the month of January 2000. On the basis of such losses, DFA concluded that such distant milk would not seek to be pooled on Order 30.

DFA then presented a comparison of blend price return versus hauling costs with no performance standards. After absorbing the one-time hauling cost, both the California and Idaho milk supplies would have generated a positive return in the first month, growing to much higher returns in the second month, concluded the witness. Stressing that once the cost of the initial haul to qualify a producer for pooling is incurred, the subsequent pooling of milk would continually enjoy monetary benefits of being pooled on Order 30 without servicing the fluid market.

The DFA witness was of the opinion that their proposal has a measurable economic consequence that is in line with existing Federal milk order principles. If the economic returns are positive, said DFA, regulation would not prohibit pooling of distant milk and thus would provide a reasonable and defendable standard. The witness also said that each State unit must be treated individually and perform as a stand-alone entity under the same performance standards as currently applicable to supply plants. The witness stressed that this feature of their proposal provides a reasonable economic test of whether or not the market needs such milk for Class I use, and that economic returns must be earned in the market place and not by what is provided in pooling reports.

DFA was of the opinion that Order 30 should not be amended on an emergency basis prior to proceedings to consider amending other orders. The distant pooling of milk on Order 30 has been occurring for a long time—since January 2000, DFA stated. While the volume of distant milk pooled has increased, the negative impact on Order 30 blend prices has been reduced by the fact that Order 30 handlers have, in a not dissimilar fashion, pooled large volumes of milk on the Central and Mideast Federal milk orders, stated the witness, adding that California milk under their control was also being double pooled on the Central Order, Order 32. DFA was also of the opinion that if the Upper Midwest order is amended prior to consideration of appropriate amendments to the Central and Mideast orders, the pooling problems exhibited in the Upper Midwest would only ''migrate'' to these other marketing areas, resulting in even more disorderly marketing conditions.

A witness from the Northwest Milk Marketing Federation testified in support of DFA's proposals. The Northwest Milk Marketing Federation (NMMF) is a cooperative representing over 97 percent of dairy farmers whose milk is pooled on the Pacific Northwest Federal milk order.

The NMMF witness stated that Federal orders should have performance requirements which reasonably require all volumes of milk associated with the pool to proportionately service the fluid

needs of the market. The witness was of the opinion that Idaho milk could pose a threat to producers in the Pacific Northwest if that milk can be pooled without meeting performance standards. The proposals offered by DFA adequately address such pooling issues and should be adopted in Order 30, said the witness. This would not only alleviate the issue of pooling distant milk, but would serve as a model for other Federal order hearings, namely the Pacific Northwest, where similar pooling problems exist, said the witness.

Opponents of DFA's proposals stressed that marketing conditions prevailing in the Upper Midwest require only the elimination of double dipping. Associated Milk Producers, Inc., First District Association, and Lakeshore Federated Dairy Cooperative, expressed concern that DFA's proposal does not thoroughly address the need to end double dipping. They claimed that DFA's analysis of hauling costs only serves to exclude and target Idaho and California milk, and the value of such analysis of the Order 30 marketing conditions is misplaced. Similarly, they noted that back-hauling, where a lower shipping rate can be obtained from a hauler who has the ability to back-haul or return with other freight instead of returning empty, leaves open the possibility that double pooled California milk could, in fact, have positive returns even if required to perform.

The opponents also claimed that other loopholes in DFA's proposal might allow California milk to continue double pooling on Order 30. Class I fluid milk products, including concentrated milk which California plants routinely process in meeting the fluid milk standards of California, could be pooled on Order 30, noted the witness. For example, concentrated milk could be delivered to Order 30 and subsequently returned to California for use in that State's Class 4a or 4b uses of milk, the witness added.

Opponents were also of the opinion that illegal trade barriers to the movement of milk in Federal orders would be erected if DFA's proposal were adopted. Idaho milk that performs in the same manner as Minnesota milk should be eligible for pooling in the same way the order now provides for Minnesota milk, provided the same milk is not pooled more than once, stated opponents. Similarly, said the opponents, eligibility requirements in other Federal milk orders should not exclude milk based on its point of origin. They also stressed that trying to differentiate ''historical'' milk supplies with other ''distant'' milk for pooling purposes would be difficult and an unreliable test for determining pooling eligibility. In this regard, they noted the pooling of milk received from Montana dairy farmers on the old Upper Midwest order, Order 68. Also, their review of historical data revealed that Missouri milk, for example, was long associated with the Texas order, but is now associated with the Southeast order. Changes in milk association can and do occur, opponents noted, and USDA should not create rigid rules as to when, where, and how such association may be permitted.

A witness representing Kraft Foods (Kraft) also testified in opposition to DFA's proposal, depicting it as being designed to create a severe, detrimental, and economic disincentive to pool milk on the Upper Midwest market because the performance standards called for would increase the transportation burden borne by distant producers. They were of the opinion that if this proposal were adopted, it would be nothing more than Government imposing a discriminatory transportation burden on distant producers and hindering a producer's free marketing choices.

Along the theme of transportation burdens, the Kraft witness also expressed the opinion that when producers incur disproportionately large transportation costs in supplying the fluid needs of the market, those producers would not be receiving uniform prices as required by law. Kraft was of the opinion that DFA's proposal is inconsistent with what the witness described as the AMAA's prohibition against consideration of a handler's use of milk as a condition of blend price receipt, adding also that it would create an unlawful and unauthorized exception in providing for uniform prices to producers. In effect, detailed Kraft, the DFA proposal would require selected groups of distant producers to incur transportation costs and other regulatory burdens not required of nearby producers under the order, said the witness. Participation in the Upper Midwest market would only guarantee that distant farms would incur monetary losses, Kraft asserts. Additionally, said Kraft, DFA's proposal is unlawful because it conditions the pooling of distant producers upon utilization of their milk by a Class I distributing plant. In this regard, Kraft questioned the legality of requiring designated groups of dairy farmers to incur extraordinary expenses of shipping milk to Class I plants while other pooled farmers would be able to share in the Class I revenue without the same burden.

Finally, Kraft expressed the opinion that DFA's proposal would, if adopted, violate the law because it would be erecting illegal trade barriers by limiting the marketing of milk products in Order 30 depending on where the milk is located. The performance requirements placed on producers within Order 30, said Kraft, would be different than requirements for producers outside the order.

The proposal by DFA should be adopted in part but limited to the establishment of diversion limits for pool distributing plants. The record does not support the adoption of performance standards for pooling milk on the order on the basis of its location. Establishing a limit on the amount of milk that a pool distributing plant may divert provides for a complete set of provisions for identifying which producers, which producer milk, and which handlers should share in the benefits that accrue from the marketwide pooling of milk on the Upper Midwest order. By setting a limit, the integrity of the performance standards of the order will be improved. If Order 30 does not limit the amount of milk that may be diverted by pool distributing plants, the pool is effectively undefined.

Diversions are needed to accommodate the movement of milk properly associated with the market when not needed for Class I use. A diversion limit will also establish the amount of producer milk that may be associated with the integral milk supply of a pool plant. As discussed earlier, the diversions being considered are shipments of milk directly from the farm to a nonpool plant pursuant to the Producer milk definition provided for in § 1030.13(d). The Upper Midwest order also allows for supply plants to deliver producer milk directly from the farm to another pool plant. However, since the intent of allowing a supply plant to ship producer milk directly from the farm to pool plants is to provide for maximizing the efficient movement of milk to pool distributing plants, milk shipments such as these are not included in the context of diversions as it relates to pool distributing plants and are, therefore, not limited in the quantity of milk a supply plant can direct ship to another pool plant.

The marketing conditions of the Upper Midwest order are unique, and this uniqueness should be reflected in the pooling standards of this order. As indicated in testimony and in briefs, the Upper Midwest market area has about a 20 percent use of milk for fluid use, with the remainder of the milk used in lower-valued classes. In light of this

relatively low share of milk volume that is needed to supply the Class I needs of the market, this decision finds basic agreement with those who expressed opposition to DFA's proposal. Specifically, the marketing conditions of Order 30 do not exhibit the need to require additional performance standards for milk located outside of the marketing area or, as DFA describes, milk located outside of the States that currently comprise the consolidated Upper Midwest Milk Marketing Area. Accordingly, all pool plants, regardless of location, may become eligible to have the milk of producers pooled on Order 30 by meeting the performance standards specified for the various types of pool plants.

In several instances in testimony and in their post-hearing brief, DFA was of the opinion that ''distant'' milk does not have, and is not required to meet, the same performance standards as ''local'' milk. Any supply plant or a cooperative acting as a handler (as provided for and described in § 1000.9(c)) would need to ship ten (10) percent of their reported producer receipts to pool distributing plants and certain other plants each month in order to qualify for being pooled. Therefore, producer milk included in reports by handlers described in § 1000.9(c) is included in determining whether or not the handler has qualified for being pooled on the order. No distinction is made by the order whether the milk pooled is ''local'' or ''distant.'' Thus all of the producer milk of the handler meets the same qualification standards regardless of the physical location of the producer or the milk of a producer.

DFA maintains that the proposal (Proposal 1) seeking only to eliminate double dipping does not go far enough in addressing their general concerns about performance standards for the system of orders, including the Upper Midwest order. The argument is troublesome. On one hand, DFA fundamentally asserts that performance standards are critical to the orderly marketing of milk and for determining those participants who are actually serving the fluid market, including the Order 30 market, stressing that only these participants should share in the benefits of the pool. At the same time, by their own testimony, DFA engages in the practice of double dipping, yet does not find double dipping disruptive to the orderly marketing of milk, even when such ''distant'' milk from California will rarely, if ever, again be shipped to pool plants, including distributing plants regulated by the order. This decision finds little logic in asking for a finding that no disorder results from allowing the simultaneous pooling of distant milk under California's State operated system and on Order 30, while at the same time asking for a finding that alternative performance standards are needed because of the disruptive effects to orderly marketing by pooling ''distant'' milk which does not consistently service the fluid market.

Pooling standards of milk orders, including Order 30, are intended to ensure that an adequate supply of milk is supplied to meet the Class I needs of the market and to provide the criteria for identifying those who are reasonably associated with the market for sharing in the Class I proceeds. Pooling standards of the order are represented in the Pool plant, Producer, and the Producer milk definitions of the order. Taken as a whole, these definitions set forth the criteria for pooling. Pooling standards should continue to be performance based in Order 30. This is the only basis viable for determining those eligible to share in the pool. It is primarily the additional revenue from the Class I use of milk that adds additional revenue, and it is reasonable to expect that only those producers who consistently supply the market's fluid needs should be the ones to share in the distribution of pool proceeds.

With regard to the Final Decision for the reform of the Federal milk order program, it is true that the common procurement area was the most compelling basis in forming the consolidated Upper Midwest marketing area. However, it is not the procurement area that provides the additional revenue to the pool. Rather, the revenue is derived largely from the Class I use of milk by regulated handlers that have Class I sales in the marketing area. In this regard, it is not important who provides the milk for Class I use or from where this milk originates. The order boundaries of the Upper Midwest order were not intended to limit or define which producers, which milk of those producers, or which handlers could enjoy in the benefits of being pooled on Order 30. What is important and fundamental to all Federal orders, including Order 30, is the proper identification of producers, the milk of those producers, and handlers that should share in the market's pool proceeds.

Pooling of ''distant'' milk on the Upper Midwest order is neither new nor without precedent. The record testimony and evidence show milk pooled on Order 30 from nearly all corners of the country. However, this decision acknowledges that with the advent of the economic incentives for California milk to pool on Order 30 and, at the same time, enjoy the benefits of being pooled under California's State-operated milk order program, significantly more milk has come to be pooled on the order that has no legitimate association with the integral milk supplies of Order 30 pool plants. The association at present has been made possible only through what some market participants describe as a regulatory loophole. The Upper Midwest order also provides a significant degree of pooling flexibility in the form of provisions allowing system and unit pooling. These provisions promote the orderly marketing of milk by minimizing the inefficient movement of milk for the sole purpose of meeting pooling standards.

This decision finds basic agreement with some of the reasons offered in testimony and reiterated in briefs by opponents to DFA's proposal for organizing ''distant'' milk into State units. Requiring each State unit to ship at least 10 percent of the quantity of milk to a distributing plant regulated under the order effectively sets a performance standard different from the States that comprise Order 30. For example, of the milk received from Idaho, the DFA proposal would establish a standard for at least 10 percent of such milk to be shipped to a distributing plant in order for this milk to be producer milk pooled on the order. However, the same would not be required, for example, that 10 percent of all Wisconsin milk be shipped to distributing plants regulated under the order. It is the ability of milk from California to double dip that is the primary source of disorderly marketing conditions and for much more milk being pooled on Order 30. By eliminating the ability to double dip, it is reasonable to conclude that California milk is unlikely to be pooled on Order 30 for economic reasons illustrated in DFA's testimony and analysis contained in the record of this proceeding. The remaining issue is establishing appropriate diversion limits for all pool plants, including limits for distributing plants which currently do not exist in the Upper Midwest milk order provisions.

In addition to describing what a dairy farmer must do to become a producer under the order, the producer definition of the order provides that a full days' production of the milk of a dairy farmer be physically received at a pool plant anytime during the first month a producer is associated with the market before the milk of a producer can be diverted. Provisions for diverting milk

are a desirable and needed feature of an order because they facilitate the orderly and efficient disposition of the market's milk not used in Class I uses. When producer milk is not needed in the market for Class I use, its movement to nonpool plants for manufacturing without loss of producer milk status should be provided for. Provision should also be provided to minimize the inefficient movement of milk solely for pooling purposes. However, it is just as necessary to safeguard against excessive milk supplies becoming associated with the market through the diversion process.

Diverted milk is milk not physically received at a pool plant. However, it is included as a part of the total producer milk receipts of the pool plant causing the milk to be diverted. While diverted milk is not physically received at the pool plant that causes the milk to be diverted, such milk is nevertheless an integral part of the milk supply of the diverting pool plant. If such milk is not part of the integral supply of the diverting plant, then that milk should not, and is not, properly associated with the diverting plant. Therefore, such milk should not be pooled.

Associating more milk than is actually part of the diverting plant's milk supply only serves to reduce the potential blend price paid to dairy farmers. Allowing the pooling of milk far in excess of reasonable needs by the absence of diversion limits only provides for association with the market through ''paper-reporting'' and not by service to the Class I needs of the market. Without a diversion limit, the order's ability to provide for effective performance standards and orderly marketing is weakened.

On the basis of the record, the lack of a diversion limit for producer milk by distributing plants has opened the door for pooling much more milk, and, in theory, an infinite amount of milk on the market. In the specific marketing conditions of Order 30 evidenced by the record of this proceeding, the lack of a diversion limit for producer milk at distributing plants has caused more milk to be pooled on the order than can be considered reasonably associated with the market.

The diversion limits for pool distributing plants offered by DFA are reasonable, and, in fact, are needed for upholding the purpose of providing for performance requirements in serving the Class I needs of the market. The order already effectively sets a diversion limit on pool supply plants by requiring these plants to ship 10 percent of their receipts, including diversions, to distributing plants regulated under the order. Therefore, an effective 90 percent limit on the amount of milk that could be diverted has already been established. Accordingly, the specific amendatory wording offered by DFA with respect to pool supply plants is not necessary. However, in the case of pool distributing plants, the order does need specific amendatory language to carry out this intent.

The amendatory language provided by DFA would add other order distributing plants that cooperative handlers (as described in § 1000.9(c)) may divert milk to. DFA claims that this matches the pool supply plant provisions for shipments to a distributing plant. It does do this. However, the amount of milk for which a pool supply plant is able to qualify for pooling is limited to the amount of shipments that are not made on the basis of agreed-upon Class II, Class III and, Class IV utilization. Milk that moves directly from the farm to another order pool distributing plant that is allocated to Class I becomes producer milk in the receiving order. This milk cannot be used for qualification, and the cooperative handler (as described in § 1000.9(c)) does not receive a qualification credit on direct shipped milk for Class I. A cooperative handler should not receive qualification for milk it ships to distributing plants if such milk is only to be used for pool qualification purposes and is delivered on an agreed upon Class II, Class III, or Class IV use of milk.

4. Changing the Rate of Partial Payment

A proposal that would change the rate of the partial payment to producers and cooperatives for milk delivered during the first 15 days of the month to the lowest class price for the prior month times 103 percent, published in the hearing notice as Proposal 5, is not recommended for adoption. Therefore, the partial payment rate should remain as currently provided for by the order—at the lowest class price for the prior month.

Both DFA and NFO were among those who supported increasing the minimum partial or advance payment due producers and cooperatives from the prior month's lowest class price to 103 percent of the prior month's lowest class price. A representative of DFA testified that since the inception of Federal order reform, the percentage of a producer's pay price, as measured by dividing the statistical uniform price by the prior month's Class III price, has declined from 95 percent to 91 percent in comparison to this relationship prior to reform. The witness presented detailed analysis supporting their position that the relative reduction in the partial payment is a trend that is having a significant negative impact on dairy farmers' cash flow. According to analysis presented, DFA concluded that using 103 percent of the lowest class price of the previous month would return the balance between the partial payment and final payment to the same relative level as prior to Federal order reform. The change should not have significant impact on handlers required to make minimum payments, said the witness.

A witness for the Wisconsin Cheese Makers Association (WCMA) testified in opposition to changing the rate of the minimum partial payment provision. The witness testified that the WCMA represents 25 supply plants supplying milk to the Upper Midwest order and that increasing the required minimum payment would be a burden to their member plants because they would need to borrow money to meet the partial payment. Requiring a larger partial payment, testified the WCMA witness, would require increased borrowing and thus increased costs for the plants. The witness explained that since the partial payment is only a minimum payment, plants may pay more if they desire to, but not all plants pay more than the minimum partial payment. According to the witness, the reduction in the percent of the prior month's Class III price as a percent of the statistical uniform price is a short-term phenomena and, that over time, the relationship would move back to the higher percentage that occurred prior to Federal order reform.

There is no compelling reason for changing the payment rate of the partial payment to producers. In the data presented by proponents at the hearing, the partial payment required by the order exceeded the final payment during numerous months. In most cases, the months in which the partial payment exceeded the final payment occurred prior to the implementation of Federal order reform.

It is difficult to determine whether or not there is a trend occurring, as DFA maintains, that would be corrected or mitigated by changing the rate of the partial payment. Milk prices are an outcome of supply and demand conditions for milk. Prices tend to increase during tighter supplies and fall when milk is plentiful relative to demand. The up and down fluctuations of milk prices does not in itself indicate a trend, nor does it suggest a structural flaw in how the order prices milk since price fluctuations are a response to changes in the quantity of milk supplied and in the quantity of milk demanded.

Since Federal order reform, a 17-month period at the time of the hearing, the data shows two months in which the partial payment and the final payment were equal. However, if the partial payment rate were increased to 103 percent of the lowest class price, as proposed, four months (about 24 percent of the 17-month period) would have had a partial payment greater than or equal to the final payment.

The opponents of this proposal noted that Federal order reform and its newer pricing system have only been in place for a short time—17 months—suggesting that there has not been adequate time to observe various pricing scenarios that might occur over a more lengthy evaluation period. For example, there has been no significant price decline since the implementation of Federal order reform that would serve to aid in evaluating the effect of declining prices on the difference between the partial and final payment obligations. Class III and Class IV prices have been relatively stable during the beginning two thirds of the 17-month period, with prices beginning to show consistent increases during the last third of the period (December 2000 through May 2001).

The record testimony and post-hearing briefs supporting a change in the rate of partial payment asserts that payments to producers and cooperatives, particularly by a cheese plant, is a ''pass through'' from the Federal order pool. A cheese plant/Class III handler receives the PPD from the pool (a ''pool draw''), in order to pay the order's minimum prices to producers. However, the majority of the payment to producers and cooperatives in the Upper Midwest is derived from cheese sales. The statistical uniform or blend price is received by producers in the form of a PPD calculated from the marketwide pooling of all milk on the order at classified prices. In a market like the Upper Midwest, which has a relatively low Class I differential ($1.80) and low Class I utilization (15–20 percent), the resulting PPD is less than in markets with higher Class I use and higher Class I differential values. Over the 17-month period of January 2000 through May 2001, the Upper Midwest PPD ranged from 43 cents to $1.43, and averaged $0.83 per cwt. Handlers did not know what the PPD would be until several days before payment was due to its dairy farmers. In light of this, it is not reasonable to establish a partial payment rate at a level that may increase the likelihood of requiring handlers to pay out part or all of the PPD prior to receiving payments from the producer settlement fund. This caution seems especially important in the Upper Midwest market where the PPD is relatively low and can be completely offset by the price difference between the prior month's lowest class price and the current month's Class III price.

5. Emergency Marketing Conditions

Evidence presented at the hearing establishes that California milk pooled simultaneously on the California State-operated order and the Upper Midwest Federal order is resulting in a lowering of milk prices to Upper Midwest producers. The lack of diversion limits on the order's pool distributing plants could allow excessive milk supplies from California or elsewhere to be pooled on the order. Additionally, the practice of double dipping renders the Upper Midwest Federal milk order unable to establish prices that are uniform to producers and to handlers. Finally, the amount of milk pooled on the order as a result of double dipping has greatly increased over the past year. Consequently, the issuance of a recommended decision is being omitted.

The opportunity to file written exceptions to the interim rule amending the order remains.

In view of this situation, the interim final rule amending the order will be issued as soon as the approval of producers is determined.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the Upper Midwest order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

The following findings are hereby made with respect to the aforesaid marketing agreement and order:

(a) The interim marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices specified in the tentative marketing agreement and the order, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The interim marketing agreement and the order, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, a marketing agreement upon which a hearing has been held.

Interim Marketing Agreement and Interim Order Amending the Order

Annexed hereto and made a part hereof are two documents; an Interim Marketing Agreement regulating the handling of milk, and an Interim Order amending the order regulating the handling of milk in the Upper Midwest Marketing Area, which has been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered, that this entire tentative decision and the interim order and the interim marketing agreement annexed hereto be published in the **Federal Register**.

Determination of Producer Approval and Representative Period

June 2001 is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the order, as amended and as hereby proposed to be amended, regulating the handling of milk in the Upper Midwest marketing area is approved or favored by producers, as defined under the terms of the order as hereby proposed to be amended, who during such representative period were engaged in the production of milk for sale within the aforesaid marketing area.

List of Subjects in 7 CFR Part 1030

Milk marketing orders.

Dated: February 8, 2002.

A.J. Yates,

Administrator, Agricultural Marketing Service.

Interim Order Amending the Order Regulating the Handling of Milk in the Upper Midwest Marketing Area

This interim order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) *Findings.* A public hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Upper Midwest marketing area. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure (7 CFR part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said order as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the aforesaid marketing area. The minimum prices specified in the order as hereby amended are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The said order as hereby amended regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held.

Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, the handling of milk in the Upper Midwest marketing area shall be in conformity to and in compliance with the terms and conditions of the order, as amended, and as hereby amended, as follows:

The authority citation for 7 CFR Part 1030 continues to read as follows:

Authority: 7 U.S.C. 601–674

PART 1030—MILK IN THE UPPER MIDWEST MARKETING AREA

1. Section 1030.7 paragraph (g) is amended by revising the first sentence to read as follows:

§ 1030.7 Pool plant.

* * * * *

(g) The applicable shipping percentages of paragraphs (c) and (f) of this section and § 1030.13(d)(2), and (d)(3) may be increased or decreased, for all or part of the marketing area, by the market administrator if the market administrator finds that such adjustment is necessary to encourage needed shipments or to prevent uneconomic shipments. * * *

2. Section 1030.13 is amended by revising the introductory text, redesignating paragraph (d)(3) as paragraph (d)(4), and adding new paragraphs (d)(3), and (e) to read as follows:

§ 1030.13 Producer milk.

Except as provided for in paragraph (e) of this section, *Producer milk* means the skim milk (or the skim equivalent of components of skim milk), including nonfat components, and butterfat in milk of a producer that is:

* * * * *

(d) * * *

(3) The quantity of milk diverted to nonpool plants by the operator of a pool plant described in § 1030.7(a) or (b) may not exceed 90 percent of the Grade A milk received from dairy farmers (except dairy farmers described in § 1030.12(b)) including milk diverted pursuant to § 1030.13; and

* * * * *

(e) Producer milk shall not include milk of a producer that is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing program imposed under the authority of a State government maintaining marketwide pooling of returns.

Marketing Agreement Regulating the Handling of Milk in Certain Marketing Areas

The parties hereto, in order to effectuate the declared policy of the Act, and in accordance with the rules of practice and procedure effective thereunder (7 CFR Part 900), desire to enter into this marketing agreement and do hereby agree that the provisions referred to in paragraph I hereof as augmented by the provisions specified in paragraph II hereof, shall be and are the provisions of this marketing agreement as if set out in full herein.

I. The findings and determinations, order relative to handling, and the provisions of §§ 1030.1 to 1030.86 all inclusive, of the order regulating the handling of milk in the Upper Midwest marketing area (7 CFR Part 1030) which is annexed hereto; and

II. The following provisions: Record of milk handled and authorization to correct typographical errors.

(a) Record of milk handled. The undersigned certifies that he/she handled during the month of June 2001, _____ hundredweight of milk covered by this marketing agreement.

(b) Authorization to correct typographical errors. The undersigned hereby authorizes the Deputy Administrator, or Acting Deputy Administrator, Dairy Programs, Agricultural Marketing Service, to correct any typographical errors which may have been made in this marketing agreement.

Effective date. This marketing agreement shall become effective upon the execution of a counterpart hereof by the Department in accordance with Section 900.14(a) of the aforesaid rules of practice and procedure.

In Witness Whereof, The contracting handlers, acting under the provisions of the Act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

Signature By (Name)
(Title) _____
(Address) _____
(Seal)
Attest

[FR Doc. 02–3634 Filed 2–13–02; 8:45 am]

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